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Doing Business In... 2024

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Contributing Editor
Philip Tully
Mathesons LLP

Chambers

Global Practice Guides

Doing Business In...

Contributing Editor

Philip Tully

Matheson LLP

2024

Chambers Global Practice Guides

For more than 20 years, Chambers Global Guides have ranked lawyers and law firms across the world. Chambers now offer clients a new series of Global Practice Guides, which contain practical guidance on doing legal business in key jurisdictions. We use our knowledge of the world's best lawyers to select leading law firms in each jurisdiction to write the 'Law & Practice' sections. In addition, the 'Trends & Developments' sections analyse trends and developments in local legal markets.

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INTRODUCTION

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Matheson LLP is the law firm of choice for internationally focused companies and financial institutions doing business in and from Ireland. Established in 1825 in Dublin, Ireland, and with offices in Cork, London, New York, Palo Alto and San Francisco, 860 people work across the firm's six offices, including 122 partners and tax principals and over 560 legal, tax and digital services professionals. The firm's expertise is spread across more than 30 practice groups. Its clients include over half of the world's 50 largest banks, seven of the world's ten largest asset managers and seven of the top ten global technology brands, and it has advised the majority of the Fortune 100 companies.

Contributing Editor

Philip Tully is a partner in Matheson's tax department and is a member of the firm's international business group and US business group. He advises multinational corporations doing business in and from Ireland on all aspects of corporate tax. His main focus is on cross-border reorganisations, inward investment projects and cross-border tax transactions, as well as transfer pricing matters and tax disputes. He is a member of the Law Society of Ireland, the Irish Tax Institute and the International Bar Association.

Co-author

Trevor Glavey is a senior associate in Matheson's tax department and is both an Irish qualified lawyer and chartered tax adviser. He advises leading companies across all industries with respect to all aspects of Irish corporate and international tax. In particular, he advises on the taxation and structuring of complex international arrangements and on tax authority audits, tax risk management and multi-jurisdictional tax controversies. He is a member of the Law Society of Ireland and the Irish Taxation Institute, and currently sits on the global committee of the Young International Fiscal Association Network (YIN).

Matheson LLP

70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2000
Fax: +353 1 232 3333
Email: dublin@matheson.com
Web: www.matheson.com

INTRODUCTION

Contributed by: Philip Tully and Trevor Glavey, **Matheson LLP**

Introduction

The sixth edition of Chambers Global Practice Guides: Doing Business In... is issued with the world's economy still facing many uncertainties in light of different economic and political crises.

The global economy is in a stronger position than it was a year ago with the risk of a global recession having receded and the robustness of the US economy a key driver in this respect. However, inflation and high interest rates in many jurisdictions still present challenges in terms of the global outlook. Geopolitical tensions are also creating potential hazards for the world economy. Global growth is projected to decrease slightly in 2024 as a result of these factors, including the war in Ukraine and high borrowing costs in emerging and developing economies.

2024 will also be a landmark year politically with more than two billion voters in 50 different countries heading to the polls for national elections. With the potential for a change of leadership in the United States, the EU, the United Kingdom and India as well as numerous other countries, this could lead to global socio-economic changes which could impact doing business in certain regions around the world.

A number of these elections will see a rise in populist policies and increasing divergence between far-left and far-right viewpoints.

What is evident again this year is that businesses and investors, who are increasingly interconnected globally, must keep up to date with the many changes in laws and regulations taking place around the world, with the pace of change from governments and regulators seemingly ever increasing.

In terms of the legal and regulatory framework in 2024, the EU is once again driving legislative developments in Europe with significant initiatives envisaged in the sphere of employment law as well as significant initiatives in the financial services sector related to sustainable finance and progressing the capital markets union plan.

The OECD is continuing its influence on global policies through multilateral discussions, particularly in the context of tax matters with the implementation of the OECD's Two-Pillar solution. Developments will continue in this area in 2024 with a particular focus on reaching agreement on the framework for Pillar One. Whether or not these negotiations can be successfully concluded will impact the international tax agenda for the remainder of 2024.

If these negotiations fail to receive approval, the international tax framework is likely to be destabilised as certain jurisdictions consider revisiting proposals for digital services taxes and other unilateral tax measures.

Another notable trend is the strengthening of foreign investment screening rules to protect national companies and their technology in sensitive industries. In Europe, for example, the Foreign Subsidies Regulation gives the European Commission the power to investigate financial contributions granted by non-EU countries to companies engaging in such activities in the EU and to redress their distortive effects, if necessary.

Looking ahead at key trends in the business environment, the speed of technological change and the rise of generative AI offers hope of generating opportunities for businesses but may also create legal challenges and require adaptation in many areas of business and law. Cli-

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mate change also looks set to dominate policy discussions as governments continue to adapt policies and introduce new laws to incentivise a transition towards greener economies.

In the context of this global macro environment, the 2024 edition of the Doing Business In... guide provides a concise summary of the key legal and tax considerations for doing business in countries around the world. It serves as an essential reference point for both lawyers and investors looking to understand the basic principles and legal frameworks of the relevant jurisdictions.

The contributing experts for each jurisdiction have followed a common template, allowing readers to easily compare and contrast different jurisdictions.

The guide also summarises recent developments and updates that are of particular importance for those doing business in 2024.

We would like to thank all of the participating contributors for their efforts in making this Doing Business In... guide such a vital resource and an essential component of the Chambers Global Practice Guides series.

ARMENIA

Law and Practice

Contributed by:
Aram Orbelyan, Narine Beglaryan, Artur Hovhannisyan, Lilit Karapetyan, Sarkis Knyazyan and Shushanik Stepanyan
Concern Dialog

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Concern Dialog is a top-tier, full-service law firm, headquartered in Yerevan, Armenia. It has been a trusted partner for businesses and individuals seeking legal counsel and representation since 1998. The firm is renowned for its work in the areas of corporate law, labour law, competition law, tax law, contract law, family law (including child abduction cases), and regulatory issues. Concern Dialog has extensive experience in regulatory matters in TMT, mining, energy, utilities, banking and finance, medical services, real estate, and not-for-profit sectors. In addition to its renowned consulting and transaction practice, the firm's litigation practice is regarded as one of the leaders in Armenia for landmark litigation and arbitration cases. Concern Dialog's membership of TagLaw and Nextlaw networks, as well as its co-operation with individual law firms from various jurisdictions, allow the firm to provide services to its Armenian clients virtually worldwide. Team members of law firm are identified as "top tier" by Chambers and Partners.

Authors

Aram Orbelyan is a managing partner at Concern Dialog, leading the firm's dispute resolution practice. He represents clients' interests in civil and administrative proceedings, as well as commercial and investment arbitrations, provides advice and performs representation in proceedings related to international law. Aram is also involved in deal-signing projects. His internationally recognised expertise has consistently earned him rankings in Chambers and Partners guides and other esteemed legal directories. Previously, he served as the Deputy Minister of Justice of the Republic of Armenia and worked with the International Committee of the Red Cross. In addition to his legal practice, Aram has taught at the RA Advocate Academy and the French University in Armenia for many years. He is a board member of the Arbitrators' Association of the Republic of Armenia, and is included in the lists of arbitrators of several arbitration centres in Armenia and abroad.

Narine Beglaryan is a senior partner at Concern Dialog, leading the firm's corporate law and M&A practice areas, as well as banking law, capital markets, data protection, and privacy practices. Her role encompasses providing expert legal advice and litigating on behalf of clients. Narine is an attorney with over ten years of experience. She joined the Concern Dialog team in 2013. Her internationally recognised expertise has consistently earned her rankings in Chambers and Partners guides and other esteemed legal directories. Prior to joining the Concern Dialog team, she worked for seven years in a bank and in the telecommunication sector (as in-house counsel).

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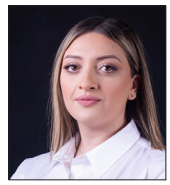
Artur Hovhannisyan is a partner at Concern Dialog. He leads the general administrative law, administrative law litigation, tax law, and governmental relations (legislation drafting and concept development) practices of the firm. His work encompasses consulting in these areas, alongside representation in judicial and administrative bodies. He obtained his attorney's license in 2013 and joined Concern Dialog in 2019. Before joining the firm, Artur worked for 14 years at the Ministry of Justice, where he held several positions, including First Deputy Minister of Justice of the Republic of Armenia. Additionally, he served as First Deputy President of the RA Chamber of Advocates for three years.



Lilit Karapetyan is a partner at Concern Dialog. She leads the firm's business establishment and competition practices in Armenia, and also ensures compliance with environmental legislation. She possesses five years of experience practising as an attorney. She joined Concern Dialog in 2017. Previously, she worked in the Institute of the Mediator of the Financial System. Lilit received a master's degree (LLM) from the University of Exeter, England, specialising in international commercial law. She also shares her expertise by teaching at the French University in Armenia.

Sarkis Knyazyan is a non equity partner, and licensed patent and trademark agent at Concern Dialog. He leads the firm's IP practice, specialising in trademarks, industrial designs, geographical indications and copyright. He joined Concern Dialog in 2024. Prior to joining Concern Dialog, Sarkis was a partner at Arluys CJSC, Armenian IP Law Firm (formerly Knyazyan & Partners CJSC IP Law Firm). He also worked at Arlex International Law Office and the American University of Armenia, was an adviser to the Ministry of Economy of Armenia, and served as an IP expert for the Council of Europe, as well as the World Intellectual Property Organization. Sarkis received his master's degree in IP from the University of New Hampshire, Franklin Pierce School of Law, in the United States. He is a board member of Armenia's Intellectual Property Rights Center Foundation. He has played a key role in drafting Armenia's national Intellectual Property Strategy.

Shushanik Stepanyan is a senior associate at Concern Dialog. She leads the labour law practice. Shushanik provides advice on labour law and representation in labour disputes (representing both employers and employees). Additionally, she offers judicial representation in other civil cases. She joined Concern Dialog in 2019. Previously, Shushanik worked for over five years as a judge's assistant in the RA Civil Court of Appeal, gaining valuable insights into civil law procedures and practices.

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Concern Dialog Law Firm

1 Charents St
Office 207
Yerevan, 0025
Armenia

Tel: +374 60 278888
Email: info@dialog.am
Web: www.dialog.am

1. Legal System

1.1 Legal System and Judicial Order

Armenia is a unitary parliamentary republic (based on the Constitution, as amended in 2015). Armenia belongs to the (continental) civil law system. The Civil Code is based on the Napoleonic Code, while administrative law was developed based on the German model.

In Armenia, only courts are authorised to administer justice. The following courts operate in Armenia:

- the Constitutional Court (responsible for constitutional justice);
- the Court of Cassation (the highest court outside of constitutional justice; it ensures the uniform application of legislation and eliminates the fundamental violations of human rights and freedoms);
- the criminal, civil, administrative and anti-corruption courts of appeal (these are responsible for reviewing the judicial acts of the courts of the first instance; they mostly act as courts of law, with a limited capacity to act as courts of fact – mostly in administrative and criminal proceedings);
- the courts of the first instance of general jurisdiction;
- the Administrative Court;
- the Court of Bankruptcy (with jurisdiction to manage bankruptcy cases); and
- the Anti-corruption Court.

The Administrative Court has jurisdiction over all cases arising from public relations (both those between public bodies and those between public bodies and individuals), including disputes relating to public or alternative service and disputes between administrative bodies not subject to settlement by order of precedence. The Administrative Court is the body empowered to review fines and other administrative acts.

The Court of Bankruptcy is responsible for managing bankruptcy cases.

The Anti-corruption Court has criminal and civil jurisdiction. The criminal jurisdiction covers criminal cases with corruption-related charges. Within the civil jurisdiction, the court deals with civil forfeiture cases and recovery of damages to state and other public entities caused by crimes.

The courts of the first instance of general jurisdiction have jurisdiction over all other cases which are not subject to other courts.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

The Law on Foreign Investments defines a foreign investor as a foreign state, a foreign legal entity, a foreign citizen, a stateless person, a citizen of Armenia permanently residing outside of Armenia, or any international organisation that engages in investment in Armenia according to the legislation in force. Foreign investment is further defined as any property, including financial resources and intellectual values, directly invested by a foreign investor as defined above in commercial or other activities in Armenia to gain profit, revenue or any other benefit.

Based on the practice established by Armenian courts, only those assets which are invested in the company's equity (via relevant corporate decisions) shall be considered as investments.

As a general remark, Armenian law in this area does not determine requirements for pre-approval or approval of such foreign investment by any state body. Accordingly, besides the generally applicable processes for carrying out business in Armenia, the law does not determine any such pre-approval requirements.

That being said, in specific sectors, approval of the investment plan assures incentives and other benefits to the investor.

For example, according to the Land Code of the Republic of Armenia (RA), property owned by the state or community can be donated for social or charitable purposes or for implementing investment plans approved by the government of the RA. Such a decision of the government and the donation agreement indicate the sole purposes for which the donated land can be used.

Furthermore, investors can be entitled to specific tax or customs incentives in specific cases if the government approves the granting of incentives per a submitted investment plan under the particular decree of government specifying the incentives. For example, investors might apply for a five-year exemption from customs duties during the implementation of their investment plan.

Furthermore, investments in public service sectors can be considered by the Public Services Regulatory Commission (PSRC) when determining tariffs for public services. However, obtaining an operational permit in these sectors is not contingent on the submission of an investment plan.

In general, the stated cases concern benefits to and incentives for the investor rather than a pre-approval process to protect the investment or for the investment to be qualified as a foreign investment.

2.2 Procedure and Sanctions in the Event of Non-compliance

As described in **2.1 Approval of Foreign Investments**, there is no mandatory regulation of pre-approval mechanisms for investment plans; ie, there is no requirement to invest with prior approval of state bodies. As a general rule, there is no procedure or sanction regarding the supervision or fulfilment of an investment plan as well. However, once incentives are granted under a government-approved investment plan, the investment plan will be subject to reporting to the government, and failure in fulfilment thereof

may cause or will cause liabilities depending on the type of incentive granted and the conditions of the government decree on approval of the investment plan under which the incentives are granted. For instance, in the case of incentives for land purchase, the consequence may be the judicial cessation of ownership rights over the land plot should the land plot be used for purposes other than those granted.

2.3 Commitments Required From Foreign Investors

The applicable legislation indicates no such specific commitments. However, under the law on public-private partnerships, the government may agree with the investor on specific commitments on a case-by-case basis. As a matter of practice, such commitments can be imposed under the government decree on approval of the investment plan.

2.4 Right to Appeal

There is no specific process applicable to the appeal of government decisions concerning failure to approve an investor's investment plan. Theoretically, however, the generally applicable administrative litigation processes concerning the appeal of administrative bodies' decisions would apply. The recipient of a decision not to grant consent to the investment plan can bring a claim to challenge the decision before the Administrative Court. Such a claim must be brought within two months of receipt of the decision.

However, the grounds and scope for potential arguments are limited. The government enjoys considerable discretion in approving investment plans, with no specific criteria for rejection outlined. Technically, an appeal can be filed for procedural violations or breaches of equality requirements, where administrative bodies are required by law to treat similar cases consistently.

In any case, it is important to reiterate that no prior authorisation for foreign investment is required, and the involvement of the government (and other state bodies) is necessary only for additional incentives or where there is a general licensing or permission procedure (not linked to the specific status as a foreign investor).

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The most common business vehicles are limited liability companies (LLCs) and joint-stock companies (JSCs).

In both cases, the liability of shareholders (or, in the case of LLCs, participants) is limited. Furthermore, no requirements for the minimum share capital or a minimum number of shareholders are determined. However, minimum capital requirements are envisaged in several sectors (mainly for financial institutions).

Both LLCs and JSCs are governed by the meeting of shareholders (participants), which is the highest governing body. The sole director, in the case of LLCs or, in the case of JSCs, a sole director (CEO) or a collegial executive board (directorate), carries out the company's ongoing management. The establishment of a board (board of directors) is possible in either type, with the Law on JSCs regulating specific requirements and the scope of authorities of such a board. In contrast, the Law on LLCs is silent on most of these issues, allowing the companies to determine the scope at their discretion.

The main differences between the two types of entities are as follows.

LLCs are preferred when the shareholding and management structures are straightforward and less complex. For JSCs, it is possible to have multi-layered, complex management structures (including the collegial executive body) and regulate the relationships between the shareholders, including through shareholders' agreements, etc.

Furthermore, in LLCs, the participant has a right to exit from the company without the consent of the other participants and request the company to pay the market value of its share. The majority of participants also have a right to remove a minority participant from the company without its consent by bringing a claim against the minority participant before the court if the minority participant hinders the company's activities.

Finally, a significant difference to consider is that the information on the participants of LLCs is open to the public; however, in the case of JSCs, the information on shareholders is maintained by private registry keepers and is not provided to third persons without the company's consent. At the same time, since 2023 all the companies are obliged to disclose their UBOs, and that information on UBOs is publicly and freely available on the webpage of the State Registry of Legal Entities. Therefore, irrespective of the corporate type, the information on the UBOs of any company is publicly available.

3.2 Incorporation Process

The process of incorporation of both LLCs and JSCs is fairly straightforward and simple. The registration of both types of entities before the Agency for State Register of Legal Entities of the Republic of Armenia (the "Agency") is free of charge. However, JSCs must engage private entities (account operators) licensed by the Central Depository for share registry keeping, incurring additional expenses compared to LLCs.

The process of registration itself takes no more than two working days after submitting the necessary package of documents. For JSCs, the registry keeping process may be longer, as account operators conduct KYC and due diligence procedures before entering into registry keeping agreements. Foreign investors should consider the following nuances in the incorporation process.

Template (Pre-approved) Package-Based Registration of LLCs

If the founder(s) of an LLC is an individual, and both the director and the founder(s) are in Armenia, the establishment process is relatively quick. They can simply visit the Agency with their passports (and verified translations if applicable) and answer basic questions from an Agency employee. The employee will provide a standard, pre-approved template package (in Armenian), and the company can be registered in under half an hour, free of charge.

The Standard Process of Establishment and Registration of LLCs

As an alternative, the founding and governing documents of the LLC (founding decision, charter) can be drafted to meet the specific needs and requirements of the founders, including preparing multilingual versions (the Armenian version shall still prevail), establishing specific governing mechanisms, and thus not following pre-approved standard documents.

It must be noted that although the founding package (founding decision, charter) does not need any verification by a notary under Armenian

law, the documents or copies thereof related to a foreign founder (in the case of a legal entity – charter and excerpt from the register or equivalent; in the case of an individual – passport) and a foreign director (passport) must be verified by a notary and legalised (consular or by an apostille) and subsequently translated into Armenian with the verification of an Armenian notary.

Establishment of a JSC

The process of establishment of a JSC consists of two stages. The first stage is the preparation of the founding documents and submission thereof to the Agency (similar to the registration of an LLC). The second stage is the registration of the company's shares with the Central Depository through one of the account operators (to ensure the quality of services and competition, the Central Depository does not provide services to the public directly, only through the account operators who are acting based on the agreement signed with the Central Depository).

In either case, within 40 days of registration, the companies shall submit declarations on their ultimate beneficial owners (UBOs), disclosing the full ownership structure up to the beneficial owner. Such declaration shall also include the notarially verified translations of the UBOs' passports.

3.3 Ongoing Reporting and Disclosure Obligations

Changes of Management

According to the general rules of Armenian legislation, only the head of the executive body is subject to registration with the Agency. Hence, the company needs to disclose a change in the executive body (CEO, general manager, general director, etc).

Depending on the company's business activity, there may be exceptions to the general rules described above. For example, the executive body of a bank, including the chief accountant, deputy directors, chief compliance officers and compliance officers, chief auditor and auditors, as well as the board of directors, is subject to certification and registration by the regulator, in this case, the Central Bank of Armenia. Thus, practically any change in the bank's management needs to be filed and approved by the regulator.

Amendments to Articles of Incorporation (Charter)

In case of amendment of articles of incorporation in part or in whole (new edition of articles of incorporation/charter), the amendments must be filed for registration with the Agency. The company needs to change its articles of incorporation when, for instance, it changes its firm name, address, charter capital or corporate governance process.

The process and requirement for registration of amendments to the articles of incorporation/charter may have some peculiarities depending on the reasons for and the content of such amendments. For example, in the case of amendments to the articles of incorporation/charter due to investment into the company (ie, an increase of the company's charter capital), the company needs to submit proof of payment of the investment for registration. There may be some differences, depending on the company's business activity, when the Central Bank, instead of the Agency, is responsible for registration (mostly typical for legal entities that provide financial, insurance and investment services, and investment funds).

Change of Shareholder

Participation in the share capital of an LLC needs to be registered with the Agency (open to the public). In contrast, participation in a JSC (ownership of shares) is recorded by the Central Depository, while the proceeding is carried out through account operators). Information on the participation of commercial co-operatives is not recorded by the Agency or in any outsourced registers.

While changing the participation in an LLC, the articles of incorporation must be changed as far as it is mandatory to include that data in the articles of incorporation and keep them up to date. Hence, a change of shareholder of an LLC is performed together with a change of the articles of incorporation.

Information about shareholders of a JSC is not required to be included in its articles of incorporation except at the stage of incorporation of the company (ie, the initial registration of the articles of incorporation). Thus, a shareholder change must only be recorded in the company's shareholders register by the account operators.

UBO

There is an obligation to submit a declaration to the Agency in the case of a change of UBO.

The legal entity shall submit the following report/information to the Agency by 20 February of each year:

- confirmation that the information on the UBOs submitted to the Agency in the last declaration was still accurate as of 31 December of the previous year; or
- changes in the information on the legal entity's UBOs.

In the case of a change of data regarding real beneficiaries, the change must be declared immediately after the disclosure to the legal entity but not later than 40 days after the change.

The declaration on the UBOs and further changes in the declaration are submitted to the Agency through the website bo.e-register.am (see the procedure for filling out the application below). In this case, the declaration shall be signed via electronic signature accepted by the government. Completion of the declaration is possible through an authorised person, in which case a power of attorney is required.

The liability for the failure to submit a declaration on UBOs within the period prescribed by law by an entity obliged to submit such a declaration, as well as for presenting it in violation of the law or inadvertently presenting incorrect or incomplete data in the declaration, according to the RA Law on Administrative Offences, can be a warning or a fine of up to AMD100,000. In addition, if the declaration on the UBOs contains false information or lacks information which should have been included, and the person submitted the false information wilfully, they can be held criminally liable.

In addition, if the obligation to submit confirmation or amended information on UBOs is violated each year for three years in a row, as well as in cases of repeated or gross violation of the rules regarding submitting a declaration, the Agency may apply to the court to dissolve the legal entity.

Approval of Financial Statements

Companies need to submit financial statements to the State Revenue Service:

- annually for profit taxes;

- monthly for VAT and taxes on the income of individuals (if income is reported by an individual themselves, then the reporting is done annually);
- quarterly for turnover tax (if the company operating within a turnover tax regime /simplified system for small businesses); and
- annually for micro-taxes (if the company pays taxes under this special regime).

As a general rule, there is no requirement for companies to disclose their financial statements. Depending on the type of business activity, the law may specifically mandate companies to publish financial statements and financial audit reports. For instance, banks, insurance companies, and investment fund managers must meet this requirement.

Starting from the year 2024, resident individuals of Armenia (in the beginning, only certain groups of individuals, and from the year 2026, all resident individuals) will be obliged to submit a simplified income tax calculation to the State Revenue Service.

3.4 Management Structures

General Notes on Management Structure

The highest governing body of the company is its general meeting of shareholders (participants). All companies need to have at least one executive body.

There are specific cases defined in the law when the company must have a board of directors. Open JSCs or companies with activities in specific areas, such as banking and insurance, must have a board of directors. The board of directors of an open JSC must have an audit committee under it.

Under its articles of incorporation, the company may declare and set forth the collective executive body.

The Powers of the General Meeting

The general meeting approves the amendments to the articles of incorporation, decides on reorganisation and liquidation of the company, approves final, interim and liquidation balance sheets, and appoints the liquidation committee. The general meeting approves the number of board members, elects board members, terminates their powers and appoints and dismisses the executive body (unless these authorities are delegated to the board of directors). Increasing and reducing charter capital, approving the company's annual report, distributing dividends, and approving significant transactions and transactions with conflict of interests are powers of the general meeting as well.

The Board of Directors

The Law on LLCs does not explicitly define the powers of the board of directors, allowing flexibility for these powers to be outlined in the articles of incorporation or charter. However, the board cannot exercise powers exclusively reserved for the general meeting or executive body. Conversely, the Law on JSCs provides a specific list of exclusive powers for the board of directors. It stipulates that if a company has no board of directors, the general meeting exercises those powers.

The board of directors of a JSC determines and approves the strategy of the company, decides on using the reserve fund and other funds of the company, and approves (i) internal documents regulating the activities of the company's governance bodies; (ii) the administrative and organisational structure of the company; and (iii) a list of the company's staff positions. It also

establishes branches and representative offices and exercises the powers related to convening the general meeting and other powers defined in the law.

The Executive Body

The single-person executive body or head of the collegial executive body is responsible for the company's day-to-day activities and has the authority to represent the company without requiring a letter of authorisation. The director is entitled to issue letters of authorisation, conclude agreements and contracts, perform banking operations, issue orders, directives, and binding instructions, supervise their implementation, decide on employment and dismissal, apply incentives, and impose disciplinary action on employees.

3.5 Directors', Officers' and Shareholders' Liability

Liability of Board Members and Executive Body

Both the Law on LLCs and the Law on JSCs (the latter consists of more detailed regulation on the matter) determine the liability of board members and the executive body.

The rules are the following: the board members and executive body must act for the benefit (in the interest) of a company in good faith and reasonable manner and avoid actual and possible conflicts of interest while exercising their rights and performing their obligations (fiduciary duty). The Law on JSCs also forbids a person who may, by virtue of participation in the charter capital of the company or other circumstances, have a material impact on the decisions of the company from inducing board members or the executive body to make decisions that contradict the interests of the company or the legitimate interests of shareholders who cannot have a material impact on the decisions of the board.

The board members and executive body may be released from liability if (i) there is no damage caused by their fault (applicable only to LLCs), (ii) they voted against the decision, (iii) they did not participate in the meeting, or (iv) they acted in good faith – ie, did not know or could not have known that the company would incur losses as a result of their actions or omissions (applicable only to JSCs). The resignation, recall or dismissal of a board member or the executive body does not exempt them from liability for the damage caused to the company.

If the damage was caused to the LLC by one of its board members or the executive body, any shareholder (participant) of the company and the company may apply to court on behalf of the company against that board member or executive body and claim damages. If the damage was caused to the JSC by one of its board members or the executive body, the claim for compensation of damages against that board member or executive body might be brought against the company or its shareholder(s) (jointly) owning 1% or more of the placed common (ordinary) stocks of the company. A breach of fiduciary duty might cause criminal liability for a board member or executive body if their actions or omissions cause essential damages.

Shareholders' Liability

Under Armenian law, the separation of liability of a legal entity from its shareholders' liability is determined.

That being said, Armenian legislation allows for the "piercing of the corporate veil" in specific cases of activities between parent and daughter or dependent companies (subsidiaries). The

daughter company must not be liable for the obligations of the parent company, but the parent company must bear joint and several liabilities with the daughter company if the parent company (i) has the right to give binding instructions to the daughter company and (ii) transactions are concluded in pursuance of that instruction.

Other shareholders of a daughter company also have a right to claim from the parent company compensation for any damages caused to the daughter company by the fault of the parent company – ie, when the damage is caused by the execution of binding instructions given by the parent company.

The parent company must bear subsidiary liability for the debt of the daughter company in the case of bankruptcy of the latter if the bankruptcy is caused by the fault of the parent company – ie, when the damage is caused as the result of execution of binding instructions given by the parent company.

4. Employment Law

4.1 Nature of Applicable Regulations

The primary sources regulating labour relations in Armenia are the Labour Code and relevant international treaties. Specific regulations of the Civil Code and legislation regulating different types of state service (civil service, military and diplomatic service, etc) regulate particular types of labour relations. Finally, specific aspects of labour relations are regulated by the Law on Foreigners, the Law on Labour and Collective Agreements, and internal and individual legal acts of the employer.

4.2 Characteristics of Employment Contracts

The Labour Code mandates that employment contracts should be concluded or issued in writing and should contain specific terms, such as:

- the date, month, year and location of adopting an individual legal act or concluding an employment contract;
- the employee's first and last name, and optionally, their patronymic name upon request;
- the name of the organisation or, if applicable, the first and last name of the employer as an individual, and optionally, their patronymic name upon request;
- the organisational unit within the company, if applicable;
- the date, month and year when the employment begins;
- the job title and/or job responsibilities;
- the base salary amount and/or the method used to determine it;
- additional allowances, bonuses, subsidies, etc, which are/shall be provided to employees according to established procedures;
- the duration of validity for the individual legal act or employment contract if required;
- the duration and conditions of the probationary period (where applicable);
- the normal working hours, part-time arrangement, reduced working hours, or the overall method for calculating working hours;
- the type and duration of annual leave, including minimum, additional or extended vacation; and
- the position, first name and last name of the person signing the legal act on behalf of the organisation.

Parties to the contract can agree to include additional conditions in the employment contract or

individual legal act, but these conditions must be no less favourable than what is established by law.

It should be noted that the Labour Code has undergone amendments (effective from 31 July 2023, hereinafter referred to as the Amendments), which now require the employment contract to include specific details regarding the employee's place of work, as well as the employer's structural or separate subdivision, office or institution (if applicable) in which the employee will work. Additionally, the contract should outline the methods for mutual notification between the employer and employee in relation to their employment relationship.

Fixed-Term Contracts

Generally, an employment contract is intended to be of indefinite duration. However, it is also possible to conclude an employment contract with a fixed term if labour relations cannot be defined for an indefinite period, considering the conditions or the nature of the work to be done. The Labour Code specifies certain circumstances in which an employment contract may be concluded for a fixed term. These include the following cases:

- with employees holding elected positions for the specified term;
- with employees appointed for a duration prescribed by law;
- with employees performing seasonal work;
- with individuals engaged in temporary work lasting up to two months;
- With an employee who is filling in for a temporarily absent employee;
- with foreigners for the duration of validity of a work permit, in cases when a work permit is required for employment by RA legislation; and
- with individuals who are eligible for an old-age pension and have reached the age of 63 or individuals who are not eligible for an old-age pension and have reached the age of 65, based on an assessment of their professional capabilities for a position or job offered by an employer.

The Amendments stipulate that employers are no longer allowed to terminate an employment contract solely based on an individual reaching retirement age. Additionally, the Amendments provide employers with the right to offer retirees indefinite employment contracts.

4.3 Working Time

Under Armenian legislation, the regular working hours must not exceed 40 hours per week and eight hours per day (exceptions are specified by the Labour Code, other laws or legal acts).

Certain categories of employees, such as those working in healthcare organisations with continuous duty, guardianship organisations, children's educational institutions, specialised energy, gas and heat supply organisations, specialised communication and emergency response services, etc, may have 24-hour continuous work shifts. The specific list of such occupations is determined by the government of the Republic of Armenia.

Any work performed beyond the specified limits shall be classified as overtime work and must be compensated according to the following rate: for each hour of overtime, in addition to the regular hourly rate, a supplement of no less than 50% of the hourly rate must be provided.

The total working hours, including overtime, must not exceed 12 hours per day (including

breaks for rest and meals) and 48 hours per week.

4.4 Termination of Employment Contracts

An employment contract can be terminated through various means. The most common cases are:

- termination at the employee's initiative;
- mutual agreement;
- expiration of the contract; or
- termination at the employer's initiative.

The Amendments provide that the employment contract can be terminated by the force of law. For example, when the employer fails to notify the employee of the termination of an employment contract that was originally agreed upon for a specific period, and the parties also do not sign the appropriate individual legal act to terminate such a contract, and the employment relationship does not continue in practice, then in such cases, the law can intervene to legally terminate the contract.

The Labour Code provides an exhaustive list of reasons that entitle an employer to terminate an employment contract. This implies that an employee cannot be dismissed by the employer for any arbitrary reason. The grounds for termination specified in the Labour Code are as follows:

- in the case of:
  - (a) the liquidation of a company (termination of the activity of an individual entrepreneur);
  - (b) non-compliance of the employee with the position held or the work performed;
  - (c) reinstatement of the employee at their previous job;
  - (d) periodic non-fulfilment by an employee (without a valid reason) of the duties assigned to them by an employment contract or internal regulations;
  - (e) loss of trust in the employee;
  - (f) an employee's refusal or evasion of mandatory medical examinations; and
  - (g) the residence status of a foreign worker being recognised as invalid;
- if the employee:
  - (a) is in the workplace under the influence of alcohol, narcotic drugs or psychotropic substances;
  - (b) fails to show up for work for no valid reason during the entire working day;
  - (c) is entitled to a pension and reaches the age of 63;
  - (d) is not entitled to a pension and reaches the age of 65 if the relevant basis is provided in the employment contract; and
  - (e) is excluded from work for more than ten consecutive working days or more than 20 working days during the previous three months because of their failure to submit the necessary documents required to attend work during isolation declared in relation to the COVID-19 pandemic;
- when the number of employees is reduced, which is preconditioned by changes in the volume of production, economic and technological conditions, and conditions of organisation of work as well as production needs; and
- due to the employee's long-term disability.

According to the Labour Code, the employer is obliged to give notification prior to dismissal to employees in cases specified by the Labour Code. For example, when the employment contract is terminated due to the liquidation of the company or a reduction in the staff, the employ-

er must provide employees with two months of prior notice.

According to the Labour Code, it is possible for an employer to provide pay in lieu of notice, which is calculated by multiplying the employee's average daily salary by each day of notice.

4.5 Employee Representations

The Labour Code allows the establishment of employees' representatives, such as a trade union or works council elected by the assembly (conference) of workers. Apart from that, the Law on Trade Unions regulates and guarantees the activities of trade unions.

Moreover, a works council is elected if the organisation does not have a trade union (or any trade unions) or if any existing trade unions do not unite more than half of the organisation's employees. At the same time, the presence in the organisation of works councils elected by employees should not interfere with the exercise of the trade unions' functions.

Employees' representatives have the power to develop charters, conduct negotiations, propose organisational improvements and participate in decision-making processes. They also oversee labour law implementation, have access to employee information, and can propose measures for better working conditions and fair compensation. They can organise lawful strikes and appeal to the court against violations. Employees' representatives play a crucial role in protecting workers' rights and promoting collaboration between employees and employers.

If an employee's representative violates the rights of the employer or breaches legislation or agreement norms, the employer has the option to seek legal action through the appropriate procedures defined by the legislation, requesting the cessation of the representative's unlawful activities.

Employee representation is not a widespread practice in Armenia. There are some single cases of the practice, and it is expected to develop in the future.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

Employees pay income tax on their employment remuneration.

Employers act as tax agents for their employees. They calculate their employees' income tax due every month and pay it by the 20th day of the following month. So effectively, employers bear liability for any wrong calculation or late payment of those taxes and payments.

According to the Tax Code of Armenia, the income tax rate for employees has been 20% since 1 January 2023.

Besides income tax, employees must also pay a mandatory social security (pension) payment with the following rates:

- 5% on salary up to AMD500,000; and
- AMD25,000 plus 10% on salary above AMD500,000, but not more than AMD87,500 (total cap).

5.2 Taxes Applicable to Businesses

The following tax regimes apply in the RA.

- General taxation – in this case, taxpayers generally calculate and pay VAT and profit tax.
- Special taxation regimes:
  (a) Turnover tax – taxpayers calculate and pay turnover tax, which replaces VAT and/or profit tax; and
  (b) Micro-enterprise taxation system – the taxpayer, by carrying out the relevant activities defined by law, is exempt from all types of state taxes related to the enterprise.
- Profit tax – the object of taxation is the taxable profit, which is the gross income less expenses, and the profit tax rate is:
  (a) 18% for residents and non-residents that have a permanent establishment in Armenia (including a branch); and
  (b) 20% for non-residents who do not have a permanent establishment in Armenia.
- VAT – the VAT rate in Armenia is 20%.
- Turnover tax – only resident entities and individual entrepreneurs can pay turnover tax, which is 5% of income received from trade activities or rendering services; the entity can become a turnover taxpayer only if its turnover last year did not exceed AMD115 million.
- Micro-enterprise – resident entities and individual entrepreneurs whose sales turnover for all types of activities without VAT during the previous calendar year did not exceed AMD24 million can be considered micro-enterprises, which do not pay any taxes.
- Dividends – dividends received by natural persons are taxable at 5%; dividends received by entities are added to the taxpayer's tax base.
- Interest paid – interest paid to shareholders is taxed at 10%.
- IP royalties – royalties paid to shareholders are taxed at 10%.

5.3 Available Tax Credits/Incentives

All taxpayers involved in agricultural production are exempt from income tax until the end of the year 2024.

Taxpayers who are dealing with hand-made carpet production are also exempt from paying income tax.

5.4 Tax Consolidation

There is no tax consolidation prescribed in Armenian tax legislation.

5.5 Thin Capitalisation Rules and Other Limitations

There are no thin capitalisation rules in Armenia. At the same time, there are some limitations on the deductibility of interest expenses. The following are not deductible from gross income:

- interest on loans and credit exceeds twice the settlement rate set by the Central Bank of Armenia (currently, the deductible interest rate is capped at 24%); and
- annual interest on loans received from non-bank and non-credit entities that, according to fiscal year results, is above:
  (a) the two-fold positive amount of the equity of the taxpayer (excluding banks and credit organisations) on the last day of the fiscal year; and
  (b) the nine-fold positive amount of the equity of a taxpayer that is a bank or credit organisation on the last day of the fiscal year.

5.6 Transfer Pricing

Under the Tax Code, transfer pricing rules are applicable for a taxpayer if the amount of all supervised transactions of the taxpayer exceeds AMD200 million for the current year.

According to the Tax Code, there are several transfer pricing methods allowed:

- the comparable uncontrolled price method – where the price of the object of a controlled transaction is compared with the price of the object of a comparable uncontrolled transaction;
- the resale price method – where the mark-up derived from the resale of an object of a controlled transaction is compared with the mark-up derived from the resale of an object of a comparable uncontrolled transaction;
- the cost-plus method – where the mark-up on the direct and indirect costs incurred during the supply of an object of a controlled transaction is compared with the mark-up on the direct and indirect costs incurred during the supply of an object of a comparable uncontrolled transaction;
- the transactional net margin method – where the net profit realised from a controlled transaction relative to an appropriate base – in particular, costs, sales and assets – is compared with the net profit realised from a comparable uncontrolled transaction relative to the same base; and
- the profit split method – where each of the related taxpayers participating in a controlled transaction receives the share of the profit generated or loss incurred from the transaction in question, which a person not considered as related would anticipate when participating in a comparable uncontrolled transaction (within the meaning of this point, the profit generated from the transaction shall mean the positive difference between the income generated and the costs incurred within the scope of the transaction in question).

5.7 Anti-evasion Rules

The Armenian legislation envisages liabilities provided by the Code on Administrative Offences of the Republic of Armenia, Tax Code of the Republic of Armenia and Criminal Code of the Republic of Armenia.

- The Code on Administrative Offences of the Republic of Armenia provides an administrative liability for failure to register with the tax authorities within the specified period (Article 170.4) and failure to report information to tax authorities within the specified period or reporting incorrect information (Article 170.6). For these offences, the Code envisages liability for the taxpayer in the form of a fine.
- The Tax Code of the Republic of Armenia envisages tax liability for the taxpayer for tax evasion, which can be expressed by delaying the payment of tax beyond the prescribed time limits, by submitting or not submitting the tax calculation after the prescribed time limit, by understating the amount of tax, by overstating the tax loss, by not keeping the accounting records in the prescribed order or by not submitting the accounting data to the officials who check the accounting data.
- Apart from the liability for the taxpayer legal entities, during 2023-2025, the income declaration system will be implemented in a phased manner, as a result of which natural persons (individuals) will also be obliged to declare their income, from which the relevant income tax should be calculated. The Tax Code provides tax liability in the form of fines, penalties and interests for taxpayers who have committed the abovementioned tax offences.
- Concerning criminal liability, it should be mentioned that since the new Criminal Code of the Republic of Armenia entered into force (1 July 2022), a criminal liability for tax eva-

sion will be applied if the amount of unpaid taxes is more than AMD10 million (approximately USD26,000) (Article 290 of the Criminal Code). The envisaged punishment for this crime is fine or even imprisonment for up to eight years. With the new Criminal Code, criminal liability is envisaged also for the legal entities. The criminal liability of the natural person does not exclude the criminal liability of the legal entities. The applicable coercive measures are a fine, temporary suspension of the right to engage in a certain type of activity, compulsory liquidation, and a ban on carrying out activities in the territory of the Republic of Armenia (for non-resident legal entities only).

6. Competition Law

6.1 Merger Control Notification

Concentrations

Mergers and acquisitions are subject to notification to the Competition Protection Commission (the Commission) if they are notifiable concentrations under the Law on the Protection of Economic Competition. According to the Law, the following actions are considered concentrations:

- acquisition and merger of business entities registered in the RA;
- acquisition of assets of an economic entity registered in the RA by another economic entity if the value of those assets solely or together with the assets already acquired from that economic entity during the last three years equals or exceeds 20% of the value of the total assets of the selling economic entity at the moment of submitting the declaration of concentration;
- acquisition of shares of an economic entity registered in the RA by another economic entity if the amount of those shares solely or together with the shares already owned by that economic entity equals or exceeds 20% of the total shares of the first economic entity;
- acquisition of the right to use an object of intellectual property, including the means of individualisation, as a result of which the economic entity can gain influence on the competitive situation in any product market in the RA;
- any transaction, action, reorganisation or behaviour of economic entities through which an economic entity can directly or indirectly influence the decision-making or competitiveness of another economic entity, or can directly or indirectly influence the decision-making or competitiveness of another person, or can influence the competitive situation in any product market in the RA; and
- establishing a legal entity in the RA by more than one economic entity, which shall act independently/separately.

Notification

A concentration is subject to notification if:

- the total value of the assets of the participants of the concentration, or the value of the assets of at least one of the participants, at the time of filing the declaration of concentration or in the last financial year preceding it, exceeds the value of the assets defined by the decision of the Commission;
- the total amount of income of the participants of the concentration, or the amount of income of at least one of the participants, during the last financial year preceding the moment of submission of the declaration of concentration, exceeded the amount of income defined by the decision of the Commission;
- the total amount of income of the participants of the concentration not active in the finan-

cial year preceding the year of submitting the declaration of concentration or having been active for less than 12 months, or the amount of income of at least one of the participants, exceeded the amount established by the decision of the Commission; and/or
- one of the participants in the concentration has a dominant position in any product market in Armenia.

The thresholds established by the applicable decision of the Commission are set out below.

- Income test (previous financial year):
  (a) the combined income of the parties was at least AMD4 billion; or
  (b) the income of one party was at least AMD3 billion.
- Asset test (previous financial year):
  (a) the combined asset value of the parties was at least AMD4 billion; or
  (b) the asset value of one party was at least AMD3 billion.

6.2 Merger Control Procedure

The concentration of economic entities is subject to notification before it takes effect. For the assessment of a concentration, the participants submit an application and declaration. The declaration should contain the following information: (i) the purpose of the concentration and (ii) information about the participants (name, address, annual financial statements of the activity, volumes of goods sold during the previous year, etc).

Duration of Assessment

The Commission's concentration assessment process lasts three months. Based on the Commission's reasoned decision, the three-month period may be extended to another three months.

In addition, there is a simplified assessment procedure for mixed concentration and concentration within a group of persons. In this case, the assessment procedure lasts one month.

Liability

Failure to declare the concentration as stipulated by the Law on the Protection of Economic Competition shall lead to the imposition of a fine of up to AMD5 million.

The fine imposed for enacting a prohibited concentration shall be up to 10% of the turnover of the preceding financial year.

Also, enacted prohibited concentrations shall be subject to liquidation (annulment, cessation) according to the procedure defined by the legislation.

6.3 Cartels

The Law on the Protection of Economic Competition prohibits restrictive agreements and practices. According to this Law, anti-competitive agreements are those transactions concluded between economic entities; their oral or written agreements; direct or indirectly agreed actions or behaviour; and decisions made by business associations that lead to or may lead to restriction, prevention or prohibition of competition.

Restrictive agreements and practices can be:

- between economic entities that are potential or actual competitors operating in the same product market if the agreement relates to the given product market (horizontal agreement);
- between economic entities that are not competitors and act as acquirers and sellers in the same product market if the agreement relates to the given commodity market (vertical agreement); and/or

- between economic entities operating in related or different product markets, which directly or indirectly lead to or may lead to the prevention, restriction or prohibition of competition (other agreement).

Restrictive agreements and practices, among other things, relate to the following:

- distribution or division of markets or supply sources;
- setting unfair prices; and
- restricting other economic entities from entering the market.

The actions or behaviour of economic entities in foreign countries, when such actions or behaviour may prevent, restrict or prohibit economic competition or harm the interests of consumers in the RA, may also be considered as restrictive agreements within the meaning of the Law.

6.4 Abuse of Dominant Position

The Law on the Protection of Economic Competition prohibits the abuse of a dominant or monopoly position, including:

- charging unreasonably high or low prices;
- obstructing competitors in the market;
- refusing to deal with certain customers or offering special discounts to customers who buy all or most of their supplies from the dominant company;
- not authorising the use of transmission networks, other distribution networks or other infrastructure for a reasonable fee or condition; and
- imposing conditions for membership or participation in professional or other unions.

7. Intellectual Property

7.1 Patents

Patents can be granted for technical solutions that concern a product or a method. There are three conditions for the patentability of an invention:

- novelty;
- inventive step (non-obviousness); and
- industrial applicability (utility).

Patents are registered by the Intellectual Property Office of Armenia. The Office's website has guidance on the procedure and samples of the necessary forms.

If the object of the protection is a product, the right-holder has an exclusive right to prohibit any third party from manufacturing the product, using it, introducing it to the market, offering it for sale, or importing or obtaining the product for any of those purposes. Similar prohibitions can be imposed if the object is a method. The infringement of a patent can result in civil and criminal liability.

Patents are protected for 20 years from the filing date or ten years in case of short-term patents.

7.2 Trade Marks

A trade mark is a mark that is used to distinguish the products and/or services of one person from the products and/or services of another. There are very detailed regulations on the absolute and relative grounds of refusal of trademark registration, such as:

- non-distinctiveness;
- descriptiveness or genericism; or
- being against public order or morals, etc.

Trade marks are registered by the Intellectual Property Office of Armenia. The Office's website has guidance on the procedure and samples of the necessary forms.

The right-holder of a registered trade mark has the right to prohibit:

- the use of a mark that is identical to its trade mark for the same products and/or services;
- the use of an identical or similar mark for identical or similar goods and/or services if there is a likelihood of consumer confusion; and
- the use of an identical or similar mark for different goods and/or services if the trade mark is declared as well known in Armenia and the use of the mark may cause damage to the interests of the owner of the well-known trademark.

The length of protection is ten years from the filing date and can be renewed indefinitely every ten years.

7.3 Industrial Design

An industrial design protects the unique and new appearance of an object.

In the RA, the following are protected by the law:

- a licensed (registered) industrial design, the right to which is approved by a patent;
- an industrial design with international registration in accordance with the law; and
- an unregistered industrial design if it has become public, in accordance with the law.

Designs are registered with the Intellectual Property Office of Armenia. The Office's website has guidance on the procedure and samples of the necessary forms.

A right-holder has the right to prohibit use of a design without permission. Infringement can result in civil liability.

The length of protection is five years from the filing date, and may be renewed every five years, but for no more than 25 years, in total.

7.4 Copyright

Copyright protects the unique outcome of a creative activity in the domain of science, literature and art created individually or jointly with other authors, which are expressed in spoken, written or any other objectively perceivable manner, including permanently or temporarily storage in electronic form, regardless of the scope, significance, merits and purpose of creation. Subject matters of copyright are:

- literary, scientific works, as well as computer programs;
- works of painting, sculpture, graphics, design and other works of fine arts;
- dramatic and dramatico-musical works, scenarios, scenario sketches, librettos, and other works created for staging;
- choreographic and pantomimic works;
- musical works with or without words;
- audiovisual works (cinematographic, television films, animation films and cartoon films, musical clips, advertisement, documentary and fact-documentary, and other films);
- works of applied decorative art and stage graphics;
- photographic works and works created by analogous modes, which comply with the provisions of the law;
- works of urban planning, architecture, landscaping and their solutions both in whole and separate parts thereof;
- maps, plans, sketches and plastic works related to geography, topography, geology,

urban planning, architecture and other sciences;
- derivative works (translations, adaptations of works, changes, arrangements and rearrangements, stage versions, audiovisual adaptations and other transformations of works in the scientific, literary and art domain, which are in compliance with the law; collections of works (encyclopedias, anthologies), databases and other composite works, which are, by the reason of the selection and (or) arrangement of their contents, results of a creative work; parts (titles, personages, etc) of a work, which are in compliance with the law and can be used separately);
- fonts; and
- other works in compliance with the law.

Copyright does not require registration.

Authors haves the exclusive right to use their creations as they wish and to prohibit or authorise their use by third parties. The infringement of copyright can result in civil and/or criminal liability.

Authors' economic rights are protected during the authors' lifetime, plus 70 years after their death. The intangible (moral) rights are inalienable and nontransferable and are not subject to exhaustion with the exception of the right to withdrawal, which runs for the life of the author.

7.5 Others

There are no specific regulations for the protection of software; software is subject to copyright protection under general rules.

According to the Law on Copyright and Related Rights, a "database" means a collection of works, data or other independent materials arranged in a systematic or methodical way, the individual elements of which shall be separately accessible by electronic or other means, and the acquisition, verification or presentation thereof shall require a substantial qualitative and/or quantitative contribution.

The maker of a database shall be deemed any person by whose initiative and on whose own responsibility a substantial qualitative and/or quantitative contribution is made for the acquisition, verification or presentation of the content of the database.

The rights of a database developer shall arise from the moment of completing the development of the database and shall have effect for 15 years.

Trade Secrets

There is no specific definition of "trade secret" in the Armenian legislation. Article 141 of the RA Civil Code provides a definition and protection for "Information Constituting an Employment, Commercial, or Banking Secret".

Information constitutes an employment, commercial, or banking secret, when such information has an actual or potential commercial value by virtue of it being unknown to third persons when there is no free access thereto on a legal basis, and when the holder of the information takes measures for the protection of its confidentiality.

Persons having illegally obtained information that constitutes a trade secret shall be obliged to compensate the damages caused. This obligation shall also be imposed on parties to a contract that has disclosed and/or used a trade secret in violation of a civil law or employment contract.

8. Data Protection

8.1 Applicable Regulations

The Regulation of Data Protection

Under the Armenian Constitution, the right to the inviolability of private and family life and the right to protection of personal data are declared as basic human rights, which may only be legally suspended or restricted during a state of emergency or under martial law.

Armenia has ratified the Convention for the Protection of Human Rights and Fundamental Freedoms 1950. This means that Armenia applies personal data protection in its jurisdiction as it is stipulated under Article 8 of this Convention. Armenia has also ratified the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 28 January 1981), including the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 10 October 2018).

The main internal legal act related to data protection in Armenia is the Law on Protection of Personal Data, which was adopted in 2015 (Data Protection Law). The Data Protection Law stipulates that the following separate laws indicate specific rules for processing the defined particular personal data:

- bank secrecy regulated by the Law on Banking Secrecy;
- notarial secrecy regulated by the Law on the Notarial System;
- insurance secrecy regulated by the Law on Insurance and Insurance Activities;
- legal professional privilege regulated by the Law on the Profession of Advocate;
- personal data use during operations concerning national security and defence regulated by a number of legal acts relating to the national security service and military forces;
- personal data use in preventing and detecting money laundering and terrorism financing regulated by the Law on Combating Money Laundering and Terrorism Financing;
- operational intelligence activities regulated by the Law on Operational Intelligence; and
- proceedings regulated by the Criminal Procedural Code of Armenia, the Civil Procedural Code of Armenia, the Administrative Procedural Code of Armenia, and the Law on Compulsory Enforcement.

There are some other laws that regulate personal data protection in specific areas, such as the Labour Code.

Principles of Data Protection

The Data Protection Law specifies the principles of personal data protection, which are as follows:

- principle of lawfulness;
- principle of proportionality;
- principle of reliability; and
- principle of minimum engagement of data subjects.

The principle of lawfulness requires the processing of personal data to be in compliance with the law as well as with the data subject's consent. Under the principle of proportionality, the law mandates that:

- the processing must pursue a legitimate purpose, and the measures to achieve it must be suitable, necessary and moderate;
- the volume of personal data processed needs to be the minimum necessary for achieving a legitimate purpose;

- processing needs to comply with its purpose or be compatible with it; and
- processing should be depersonalised if the purpose of processing may be achieved without personalisation of the data subject.

Compliance with the principle of reliability means that personal data being processed needs to be complete, accurate, simple and, where necessary, kept up to date. The principle of minimum engagement of a data subject is mostly applicable to the public authorities when the latter must collect data necessary for exercising their powers from the official sources available rather than request that a data subject regularly provide the same information.

Data Processing Framework

Data processing should be performed with the data subject's consent unless the law allows the processing without it – eg, in the case of a court order to disclose personal data. The data subject has basic rights such as the right to access personal data, the right to erasure, the right to rectification, and the right to object.

The data processor should notify the data subject prior to the processing of their personal data by indicating the purpose of processing, the list of data processing, the category of processors and other information defined under the law. There is no mandatory requirement to approve a privacy policy.

The transfer of personal data to third parties needs to be performed with the data subject's consent, as well as the transfer of personal data abroad. The transfer of personal data abroad is subject to the preliminary approval of the Personal Data Protection Agency of the Republic of Armenia if the data needs to be transferred to a state without a sufficient level of data protection.

8.2 Geographical Scope

The Data Protection Law and the powers of the Personal Data Protection Agency of the Republic of Armenia are limited to the territory of Armenia.

If the personal data is collected (stored) by a legal entity – or a branch or representative office of a legal entity – established in Armenia, the collection and further processing will have to be performed under the Data Protection Law, and the Personal Data Protection Agency of the Republic of Armenia will be entitled to enforce its powers over this data processing.

8.3 Role and Authority of the Data Protection Agency

The Personal Data Protection Agency of the Republic of Armenia is part of the Ministry of Justice of Armenia. However, the Data Protection Law declares that the Agency operates independently.

Among other authorities listed under the law, the Agency is entitled to do the following:

- apply administrative sanctions prescribed by law in the case of violation of the requirements of the Data Protection Law;
- require the blocking, suspension or termination of the processing of personal data violating the requirements of the Data Protection Law;
- require the rectification, modification, blocking or destruction of personal data;
- prohibit completely or partially the processing of personal data;
- recognise electronic systems for processing the personal data of legal persons as having an adequate level of protection and include them in the register;
- ensure the protection of rights of the data subject; and

- consider applications of natural persons regarding the processing of personal data and deliver decisions within the scope of its powers.

9. Looking Forward

9.1 Upcoming Legal Reforms

Amendments of Corporate Legislation

The RA Law on Limited Liability Companies and Joint Stock Companies, as well as other acts related thereto are being actively updated and revised. Particularly, a novelty in the JSCs is the addition of Simple Agreement of Future Equity (SAFE) agreements. While investors could technically enter into similar agreements before due to contractual freedom and the absence of any legal prohibition, this addition provides further clarity and mitigates potential enforcement risks in court. Furthermore, a number of drafts changes are currently being discussed with different governmental and non-governmental (particularly by the Investment Council of Armenia of the EBRD), including:

- changes to the Law on Limited Liability Companies, addressing a number of technical problems identified by specialists in the legal sector, regulating agreements between LLC participants (in a similar manner as shareholder agreements), and introducing other changes;
- regulations on option agreements, tackling practical obstacles and enforceability issues of option agreements; and
- subsequently, a new Corporate Governance Code, introducing new measures related to ESG and sustainability, and further regulations on facilitating and enhancing the effectiveness of governance of companies, is being developed by the Corporate Governance Center and the Ministry of Economy of Armenia.

BAHAMAS

Law and Practice

Contributed by:
Judith Whitehead
Graham Thompson

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Graham Thompson has been one of the pre-eminent law firms in The Bahamas since 1950. The firm operates four offices conveniently located throughout The Bahamas. It is well regarded for its work with high-net-worth private clients. The firm's key practice areas include: private clients, trusts and estates (estate and trust structuring, foundations, trust company licensing, and private trust companies); banking and finance (real estate financing, asset leasing and financing, corporate finance, restructuring, financial services law and regulation, loans, debentures and mortgages, and receivership); corporate, commercial, and securities (capital markets, M&A, pension schemes, private equity funds, unit trusts, investment funds, and IPOs); property and development (hotels, resorts and mixed-use developments, condominiums and timeshares, government approvals and exchange control, private and commercial mortgages, real property taxes, subdivision planning and structuring, second-home acquisitions and sales, and title insurance and opinions); and insurance (captive insurance, and domestic and external insurance).

Author

Judith Whitehead is the managing partner of Graham Thompson. Formerly a litigation partner concentrating on family law, she focuses on high-net-worth private clients, and negotiations with the government on large investment projects. Her practice areas include private clients, trusts and estates, property and development, and immigration and naturalisation. Judith is a member of The Bahamas Bar Association, the International Bar Association, and the board of directors of The Lyford Cay Foundations Inc, and a director of Bahamas First Holdings Limited. She has served in corporate governance capacities in the financial services industry and in the role of Acting Supreme Court Justice, and is a former director of the World Services Group.

Graham Thompson

Sassoon House
Shirley Street & Victoria Avenue
PO Box N-272
Nassau
The Bahamas

Tel: +1 242 322 4130
Fax: +1 242 328 1069
Email: info@gtclaw.com
Web: www.grahamthompson.com

1. Legal System

1.1 Legal System and Judicial Order

As a former colony under British rule, the foundation of Bahamian law and the legal system of The Bahamas is the common law of England.

The Bahamas is a parliamentary democracy based on the Westminster system of government consisting of three branches: the executive, a bicameral parliament, and the judiciary. The relationship between each branch is governed by the principle of separation of powers and the operation of each branch is enunciated in a written constitution.

The judiciary of The Bahamas comprises the Magistrates' Court, the Supreme Court, the Court of Appeal, and the Judicial Committee of His Majesty's Privy Council.

The Magistrates' Court is presided over by stipendiary and circuit magistrates who exercise summary jurisdiction in criminal matters and civil matters involving amounts not exceeding BSD20,000. Currently, there are 17 Magistrates' Courts throughout The Bahamas, with most located in New Providence (the most populous island in The Bahamas).

The Supreme Court bench consists of a Chief Justice and not more than 20 additional justices. The Supreme Court has unlimited original jurisdiction in civil and criminal matters and such appellate jurisdiction as may be conferred upon it by law.

The Court of Appeal, the highest resident court within The Bahamas, is made up of not more than six justices of appeal, inclusive of its president and has jurisdiction in criminal, constitutional, and civil matters.

The Judicial Committee of His Majesty's Privy Council is the highest court for The Bahamas, which sits in England to hear appeals from the Court of Appeal.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

The prior approval of the government of The Bahamas is required before a foreign investor invests in The Bahamas. All non-Bahamians are required to submit a formal investment proposal to the Bahamas Investment Authority (BIA), which serves as the secretariat of the National Economic Council and The Bahamas Investments Board.

Investment in Bahamian Business

The current investment policy reserves certain sectors of the Bahamian economy for investment by Bahamians, as follows:

- wholesale and retail operations;
- commission agencies engaged in the import/export trade;
- real estate and domestic property management agencies;
- domestic newspapers and magazine publications;
- domestic advertising and public relations firms;
- security services;
- domestic distribution of building supplies;
- construction companies, except for special structures for which international expertise is required;
- personal cosmetic/beauty establishments;
- commercial fishing within the exclusive economic zone of The Bahamas;
- auto and appliance service operations;

- public transportation inclusive of locally solicited charter boat tours;
- landscaping; and
- commercial motorised watercraft/commercial leisure boating activity.

(International investors may engage in the wholesale distribution of any product the investor produces locally.)

The following sectors are open to foreign investment; the list is non-exhaustive, and investors are encouraged to communicate their intended investment activity to the BIA:

- touristic resorts;
- upscale condominium, timeshare, and second-home development;
- information and data processing services;
- assembly industries;
- hi-tech services;
- ship repair and other services;
- light manufacturing for export;
- agro-industries;
- food processing;
- mariculture (the salt-water farming of fish, other animals, and plants, with the purpose of human consumption);
- banking and other financial services;
- captive insurance;
- aircraft services;
- pharmaceutical manufacture; and
- offshore medical centres.

In addition to BIA approval, Exchange Control Regulations and policies may bear upon a particular transaction and in certain instances may require that foreign investment inflows are granted approval, that entities wholly or partially owned by foreign investors are appropriately designated, and that "Approved Investment Status" is granted to foreign investors or lenders with respect to their investment or loans. Over recent years (including in early 2024), the Central Bank of The Bahamas has taken various steps to simplify or "relax" the Exchange Control regime and administrative arrangements, or to delegate authority for certain matters to local financial institutions, and a prudent investor or lender would want to obtain advice regarding what approvals may be required (or now dispensed with or delegated to local banks) in respect of their transaction.

Investments in Property

Subject to any exceptions in the International Person's Landholding Act, non-Bahamians acquiring real property or having an interest in real property must first apply for a permit from the Investment Board. Eligibility for a permit includes a due diligence review of the intended purchaser.

2.2 Procedure and Sanctions in the Event of Non-compliance

Steps to Obtain Approval

A foreign investor interested in undertaking a significant development project or commercial enterprise would, as a first step be required to obtain BIA approval to invest in a business within The Bahamas. Such application must be supported, in addition to routine due diligence materials on the applicant, by a detailed investment proposal to the BIA. The proposal should include explicit details regarding the nature of the investment, the island on which the investment/business would take place, due diligence and financial details regarding the beneficial owners, employment projections for Bahamians and non-Bahamians, whether work permits or any concessions under the relevant legislation are required, and whether the investment will include the acquisition of land.

The proposal is reviewed by the BIA and, where required, based on internal administrative policies, referred to the National Economic Council for a decision. This process may take between one and six months, depending on the nature and complexity of the investment.

Following approval from the BIA, the investor will be directed to:

- comply with any other relevant legislation;
- make applications to the relevant ministries and departments to obtain the relevant approvals to undertake the proposed venture; and
- apply for a business licence under the Business Licence Act.

A business licence may be approved within 10 to 12 business days of receipt of an application with supporting information, though longer timelines are common for more complicated applications.

In addition to BIA approval, the investor must obtain the approval of the Central Bank of The Bahamas (the "Bank"), pursuant to the Exchange Control Regulations, to make the required investment for recognition of the beneficial owners of the enterprise and to be granted Approved Investment Status in relation to their foreign currency investment. The timeframe for this process is between two and eight weeks.

Consequences of Investing Without Approval

In as much as the prior approval of the BIA and the Bank are respectively required before a foreign investor makes a capital investment within The Bahamas, a major consequence of investing without the requisite approvals is that the investor cannot receive returns on capital.

The Bank, via the Exchange Control Regulations Act and the Exchange Control Regulations, has wide powers to make orders to prevent capital transactions involving the movement of funds to and from The Bahamas. The Bank also regulates and may restrict the conversion of Bahamian dollars to a foreign currency to make capital returns to non-Bahamians, where the underlying transaction/investment did not receive required approvals.

A failure to obtain from the Investments Board a Landholding Permit or Certificate, where such approval is required pursuant to the International Persons Landholding Act, may also result in the relevant transfer instrument or deed being null and void for all purposes of law.

Sanctions

Sanctions under the Exchange Control Regulations Act for non-compliance with the Exchange Control Regulations include:

- imprisonment for one year upon summary conviction; and/or
- a fine ranging from BSD4,000 to a fine not exceeding three times the amount or value of the currency, security, payment, property, etc, in question.

Where a foreign investor fails to obtain a business licence under the Business Licence Act, they may be liable upon summary conviction to a fine of BSD5,000 and a sum of BSD100 for each day the offence continues subsequent to the date to which the conviction relates.

2.3 Commitments Required From Foreign Investors

Generally, the conditions attached to the approval of foreign investors are found within a Heads of Agreement (setting out key terms that form

the basis on which two parties intend to form a contract) executed between the government of The Bahamas and the foreign investor. In this regard, certain factors such as the sector of the economy being considered for foreign investment, the environment or infrastructure of the area or island being considered, the nature and scope of the foreign investment, the number of jobs expected to be created and any applicable government concessions will help to determine the type of conditions for a particular foreign investment project.

For example, it is often the case that the government of The Bahamas will require within a Heads of Agreement that a certain number of jobs be filled by Bahamians, continuing education and training be made available to employees, suitable infrastructure and essential services be put in place, and safety measures implemented to protect a particular area or environment, just to name a few.

2.4 Right to Appeal

There is no specific legislative framework in place that gives investors the ability to challenge decisions if a particular investment is not authorised by the government of The Bahamas.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The most common forms of legal entities within The Bahamas are companies incorporated under the Companies Act and the International Business Companies Act.

Some of the main characteristics of each type of company are outlined below.

Companies Incorporated Under the Companies Act

- minimum number of persons required to incorporate – two;
- minimum number of shareholders – two;
- minimum number of directors – two for private companies, three for public companies;
- minimum share capital – no;
- liability of members – limited by shares, limited by guarantee, limited by both shares and guarantee, or unlimited;
- share classes – multiple classes allowed;
- uses – local businesses, landholding, non-profits, and private trust companies;
- registered office – yes;
- registered agent – no;
- management and governance – outlined in the constitutional documents but otherwise subject to any unanimous shareholder agreement and legislative framework; and
- filing with the public registry – amongst other requirements pursuant to the legislation, an annual return that includes a list of the shareholders and a list of the directors and officers of the company is filed.

Companies Incorporated Under the International Business Companies Act

- minimum number of persons required to incorporate – two;
- minimum number of shareholders – one;
- minimum number of directors – one;
- minimum share capital – no;
- liability of members – limited by shares, limited by guarantee, limited by both shares and guarantee, or unlimited;
- share classes – multiple classes allowed;
- uses – local businesses, landholding, non-profits, and private trust companies;
- registered office – yes;
- registered agent – no;

- management and governance – outlined in the constitutional documents but otherwise subject to any unanimous shareholder agreement and legislative framework; and
- filing with the public registry – amongst other requirements pursuant to the legislation, a register of directors and officers is filed.

3.2 Incorporation Process

Within 48 hours from receipt of the relevant documents, a company may be incorporated under the Companies Act and the International Business Companies Act. The main steps under both Acts are:

- reservation of the company name with the Registrar of Companies;
- filing of a memorandum of association with the Registrar of Companies;
- filing of the articles of association with the Registrar of Companies;
- filing of a statutory declaration with the Registrar of Companies; and
- payment of requisite stamp duty and incorporation fees.

3.3 Ongoing Reporting and Disclosure Obligations

Companies Incorporated Under the Companies Act

Companies incorporated under the Companies Act are subject to annual reporting and disclosure requirements. The following lists must be submitted to the Registrar of Companies.

- A register of the managers and directors, and amendments thereto, along with their addresses and occupations.
- A listing of the shareholders of the company, their names and addresses, and the number of shares held by each person must be submitted to the Registrar following the annual ordinary general meeting of the company. A separate register containing the names and addresses of each shareholder as well as the names and addresses of persons who hold shares in a nominee capacity must be filed with the Registrar.
- A declaration of whether 60% of the shares of a company are beneficially owned by Bahamians must be made to the Registrar of Companies on an annual basis.
- A copy of a resolution of the members altering a company's memorandum or articles of association must be submitted to the Registrar.
- A written notice of the execution or termination of a Unanimous Shareholder Agreement must be filed with the Registrar of Companies within 15 days of the execution or termination of the agreement.

Companies Incorporated Under the International Business Companies Act

Companies incorporated under the International Business Companies Act are subject to the following reporting and disclosure requirements.

- A written notice of the execution or termination of a Unanimous Shareholder Agreement must be filed with the Registrar of Companies within 15 days of the execution or termination of the agreement.
- A copy of the register of directors and officers of the company and a notice of a change in officers must be filed with the Registrar within 12 months of such change.
- The requisite resolutions amending the memorandum or articles of association of an international business company must be submitted to the Registrar within 28 days after such amendment.

3.4 Management Structures

The directors of companies incorporated under the Companies Act and the International Business Companies Act are charged with the responsibility of managing the company. Generally, this rule is subject to any limitation as provided for in any unanimous shareholder agreement and the constitutional documents of the company.

Companies Act

The typical management structure of a company is based on a single-tier system and consists of a board of directors responsible for appointing officers. However, subject to any limitation in the company's articles of association or a unanimous shareholder agreement, the directors may delegate their powers to a single director, a committee of directors, or officers, and specify their duties to manage the business and affairs of the company to them.

The officers are, however, restricted from issuing shares, declaring dividends, purchasing or redeeming shares, approving financial statements, or amending the company's articles of association.

The International Business Companies Act

The usual management structure of an international business company is also based on a single-tier system and consists of a board of directors responsible for the appointment of officers. Subject to any limitations in the memorandum or articles of association or in a unanimous shareholder agreement, each officer or agent has similar powers and authority to the directors, except the power to fix emoluments of directors with respect to services provided to the company.

Directors of an international business company are also permitted to designate one or more committees, each consisting of one or more directors. The only limitations of such committees are the powers to fill a vacancy in the board of directors and appoint and remove officers or agents of the company.

3.5 Directors', Officers' and Shareholders' Liability

The directors owe a fiduciary duty to their companies and should avoid situations where their duty conflicts with their personal interests. In accordance with the Companies Act and the International Business Companies Act, directors, officers and agents must act honestly and in good faith with a view to the best interest of the company and exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances in performing their functions.

Where a current or former director or officer has acted in good faith with a view to the best interest of the company and, in certain cases, had reasonable grounds to believe that their conduct was lawful, the company may indemnify such person.

Section 58 of the International Business Companies Act provides that subject to any limitations in its memorandum or articles of association or any unanimous shareholder agreement, a company may indemnify against all expenses, including legal fees, and against all judgments, fines and amounts paid in settlement and reasonably incurred in connection with legal or administrative proceedings, any person who:

- is or was a party, or is threatened to be made a party, to any threatened, pending, or completed proceedings, whether civil or administrative, by reason of the fact that the

person is or was a director or an officer of a company; or
- is or was, at the request of the company, serving as a director or officer, or in any other capacity is or was acting for another company or a partnership, joint venture, trust, or other enterprises, provided that such person acted honestly and in good faith with a view to the best interests of the company.

Also, under the common law of The Bahamas, there is the concept of piercing the corporate veil based on English common law principles.

4. Employment Law

4.1 Nature of Applicable Regulations

Employment relationships are governed principally by the implied and expressed terms of the employment relationship. In The Bahamas, these terms (where applicable) may be gleaned from the following sources:

- the employment contract;
- industrial agreements;
- common law (case law);
- the Employment Act and the Employment (Amendment) Act;
- the Health and Safety at Work Act;
- the Minimum Wages Act; and
- relevant provisions of the following pieces of legislation:
  (a) the Industrial Relations Act; and
  (b) the National Insurance Act.

In particular, where an employment relationship has been created by oral agreement, the terms of the employment relationship are espoused principally from English common law (as applicable), local common law, and local statute (in particular, the Employment Act and the Employment (Amendment) Act).

The privileges associated with the freedom to contract exist in The Bahamas. This freedom, however, is subject to the relatively inalienable rights of the parties created under the Employment Act. These basic rights represent and dictate the minimum standard of behaviour and expectations between an employer and employee.

4.2 Characteristics of Employment Contracts

The termination of employment relations is governed by Sections 26 to 28E of Part VI (redundancy, lay-offs, and short-time) of the Employment Act as amended, Sections 29 and 30 of Part VII (termination of employment with notice), Sections 31 to 32 of Part VIII (summary dismissal) and Sections 34 to 48 of Part X (unfair dismissal) of the Employment Act.

Although there are no minimum requirements for the duration of an employment relationship, the employer's duty upon the termination of a contract without cause varies depending upon the employee's tenure of service with the employer.

Generally, when terminating the employee without cause, the employer is required to give the employee reasonable notice of the termination. The Employment Act establishes the minimum notice requirements and provides the employer with the power to elect whether to give notice or to give a payment in lieu of such notice. For example, an employee who has been employed at least six months but less than 12 months is entitled to one week's notice or pay in lieu thereof, and an employee who was employed for 12 months or more is entitled to two weeks' notice or pay in lieu thereof if such employee does not

hold a managerial or supervisorial position, or one month's notice or pay in lieu thereof if such employee does hold such a position.

In addition to this notice period (or payment in lieu thereof), the Employment Act places an obligation on the part of the employer to pay to the employee a sum representing the product of the dismissed employee's bi-weekly or monthly salary (depending on their role) and the number of years of such employee's service. This additional sum is usually referred to as "severance pay". Severance pay acknowledges the dismissed employee's years of service and is capped at six years for a non-managerial/non-supervisorial employee and 12 years for a managerial/supervisorial employee.

It is significant to note that the Employment Act does not confer an obligation on the part of the employer to give notice to an employee of less than six months' tenure.

Notice of termination can be given verbally. However, the employer must ensure that the notice of termination was properly and unequivocally communicated to the employee and that they exercised their complete obligations upon termination. Thus, the parties' conduct immediately after termination has been made orally may be evidence of the nature of the notice given.

Where notice is not properly given or is insufficient, an employee is entitled to claim damages for wrongful dismissal.

Where the employment contract confers a greater benefit on the employee regarding the duration of the notice period or the value of the pay in lieu of notice, then such provisions and/or benefits will apply. Where no notice period is provided for under the contract of employment, the calculation set out in the Employment Act will apply.

The Employment Act also mandates that employees have a right not to be unfairly dismissed. Whilst the question of whether the dismissal of an employee was fair or unfair is to be determined in accordance with the substantial merits of each case the Employment Act provides instances in which a dismissal will be deemed to be unfair which include dismissal:

- due to trade union membership, involvement in trade union activities or the refusal to become involved in a trade union/engage in trade union activities;
- due to pregnancy; and
- due to redundancy, but other employees were not similarly dismissed.

These categories are not closed and it is important to note that the rules of natural justice should be applied when seeking to terminate an employee.

4.3 Working Time

Under the Employment Act, the maximum number of daily work hours is eight, and weekly work hours is 40, except for employees who hold managerial or supervisorial positions or work in any industrial, construction, manufacturing or transhipment enterprise, or essential service. Employees are also entitled to 48 hours of rest, with at least 24 of such hours being consecutive.

Where the relevant employee is required or is permitted to work in excess of their daily work hours, they are entitled to overtime pay, which is calculated at 1.5 times their regular rate of wages and two times the regular rate of wages if the overtime is performed on a holiday.

4.4 Termination of Employment Contracts

Contracts of employment may be terminated by either party upon giving the other party reasonable notice of the termination, by the employer without notice as detailed previously or by the employer "for cause" when an employee commits a fundamental breach of the contract such that the nature of the breach is repugnant to the interests of the employer.

An employment contract may also be terminated on the grounds of redundancy. An employee's position is lawfully made redundant in the following circumstances:

- where the employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed;
- where the employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed in the place where the employee was employed; and
- where the requirements of the business for employees to carry out work of a particular kind, whether in the same place where they were employed or at all, have ceased or diminished or are expected to cease or diminish.

Except where an employee is terminated for cause, the employer is required to either give notice or pay in lieu of notice (see **4.2 Characteristics of Employment Contracts**).

Before the employer can lawfully terminate an employee or employees on the grounds of redundancy, the employer must:

- inform the relevant trade union, if applicable, or the employees' representative of the grounds for the redundancy and provide a written statement containing the reasons for the dismissal, the number and category of persons likely to be affected, and the period over which such dismissals are likely to be carried out;
- consult with the trade union, if applicable, or the employees' representative on the prescribed matters concerning the dismissal and the particulars of the grounds for the redundancy; and
- consult with the Minister of Labour in writing and provide the Minister with the information contained in the said written statement.

4.5 Employee Representations

Generally speaking, the role of an employee representative is not required by law.

Where the workforce is unionised, industrial agreements provide for the appointment of a representative, which would include, at a minimum, the purpose and functions as prescribed in the Industrial Relations Act. However, the extent of the rules and practices regarding employee representation depends on the terms negotiated between the relevant parties and thus may vary.

For those employment relationships to which an industrial agreement applies, a workplace representative is appointed who shall generally safeguard the interests of the employees and hear the collective views of the staff with a view of forwarding the same to the employer for their/its attention.

Trade unions are required by law to co-operate in ensuring effective communication and consultation with the employer regarding the employees' views and the problems they face in meeting the employer's objectives. The trade union is also obligated to keep all employees adequately

informed of the main terms and conditions of the employment, job requirements, reporting requirements, disciplinary and grievance procedures, safety and health rules, and the conclusions reached through negotiations and consultation with the employer.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Contributions to the National Insurance Board (the Bahamian equivalent to social security) are the only taxes that must be paid on behalf of employees. Employees currently contribute the equivalent of 3.9%, and employers contribute the equivalent of 5.9% of an employee's salary up to the employable wage ceiling. With effect from 1 July 2024 the contribution rate will increase. Employees will contribute the equivalent of 4.65% and employers will contribute the equivalent of 6.65%. The employable wage ceiling is BSD740 per week, from a previous ceiling of BSD710 per week.

5.2 Taxes Applicable to Businesses

Business Licence Tax

All persons (inclusive of companies) conducting business within The Bahamas must be granted a business licence. Although certain activities are exempt from the licence requirements under the Business Licence Act, generally, there is a modest business licence tax (calculated based on a percentage of the turnover for the preceding year) for companies conducting business within The Bahamas. The Business Licence Act has been amended to reflect that financial service entities, international business companies, proprietary trading entities and family offices with a turnover of BSD100,000 or less are not exempt from paying business licence taxes.

Additionally, the government has signalled additional amendments to the Business Licence Act which are discussed further in the Trends and Developments article of the **Chambers 2024 Global Practice Guide to Doing Business In... The Bahamas**.

Value Added Tax (VAT)

All goods and most services supplied by a VAT-registered business in The Bahamas that are neither subject to the zero rate nor exempt from VAT are subject to VAT at the standard rate (presently 10%) or such other rate as prescribed by law for certain goods and services (eg, real estate transactions). VAT is also charged on goods and some services that are imported from outside The Bahamas.

Stamp Duty

Stamp duty is payable in respect of certain transactions (namely transfers of personal property). A Stamp Duty may also arise on the conversion of funds from Bahamian dollars to United States dollars where such funds are to be used for remittance or transferred out of The Bahamas.

Qualified Domestic Minimum Tax Top-Up

See the Trends and Developments article of the **Chambers 2024 Global Practice Guide to Doing Business In... The Bahamas**.

5.3 Available Tax Credits/Incentives

The following is a non-exhaustive list of various pieces of legislation that provide tax concessions to persons who engage in business in The Bahamas.

The Hotels Encouragement Act

The Hotels Encouragement Act allows duty-free entry within The Bahamas of approved materials for, inter alia, the construction, rehabilitation, remodelling, equipping, and furnishing of a new

or existing hotel or resort (taking into account both large and small-scale projects) together with a concession from real property taxes for a prescribed period.

Moreover, any entertainment facility, nightclub, restaurant, and shop within a designated area (described by an order of the responsible minister) is also afforded the same concessions.

The concessions under the Hotels Encouragement Act are geared towards any person or company or any group of persons or companies who are (acting in conjunction) prepared to undertake the construction or remodelling of a new or existing hotel or resort.

The Family Island Development Encouragement Act

The Family Island Development Encouragement Act allows persons to receive duty concessions on the importation of building materials (inclusive of plumbing, electrical, mechanical, and construction materials of all kinds) for residential and/or commercial development on certain islands within The Bahamas.

The Industries Encouragement Act

The Industries Encouragement Act allows for duty-free concessions for the importation of machinery, building, and other materials or appliances for an approved manufacturer who is manufacturing an approved product together with an exemption from real property tax for 15 years concerning any relevant factory premises.

The concessions under the Industries Encouragement Act are geared towards such manufacturers and products approved by the responsible minister to encourage the establishment and development of certain industries within The Bahamas.

Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) Act

The Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) Act allows for the Port Area known as Freeport, a free trade zone, to be free from certain taxes (eg, excise tax, stamp duties, and most customs duties) until 2054.

The City of Nassau Revitalisation Act

The City of Nassau Revitalisation Act allows incentives and duty concessions for owners of property situated in the city of Nassau (located on the island of New Providence) who are desirous of restoring, repairing, and upgrading the buildings, both commercial and residential.

The Bahamas Vacation Plan and Time-Sharing Act

The Bahamas Vacation Plan and Time-sharing Act allows duty-free concessions for persons who have been granted a developing owner's licence with respect to building supplies for the construction of timeshare facilities.

5.4 Tax Consolidation

This is not applicable in The Bahamas as there are no laws governing the same.

5.5 Thin Capitalisation Rules and Other Limitations

In The Bahamas this is not applicable as there are no laws governing the same.

5.6 Transfer Pricing

Transfer pricing is not applicable in The Bahamas as there are no laws governing the same.

5.7 Anti-evasion Rules

There are no anti-evasion rules in The Bahamas as there are no relevant laws.

6. Competition Law

6.1 Merger Control Notification

Merger control notification is not applicable in The Bahamas as there are no laws governing the same.

6.2 Merger Control Procedure

There is no merger control procedure in The Bahamas.

6.3 Cartels

The topic of cartels is not applicable in The Bahamas as there are no relevant laws.

6.4 Abuse of Dominant Position

Abuse of dominant position is not relevant in The Bahamas.

7. Intellectual Property

7.1 Patents

For the most part, the legal regime applicable to IP rights as outlined below includes:

- the Industrial Property Act and related rules;
- the Trade Marks Act and related regulations; and
- the Copyright Act and related amendments/regulations.

A patent for an invention is the title granted by the government to protect an invention. The right conferred by a patent excludes others from making, using, or selling the invention.

A patent is granted by the Bahamian government through the Intellectual Properties Section of the Registrar General's Department through the following process:

- complete the relevant forms with the necessary supporting documents;
- file the completed forms at the Intellectual Properties Section of the Registrar General's Department; and
- pay the applicable fees.

The entire process, from the date of submission to obtaining the Letters of Patent, could take up to one year.

Generally, the term of every patent shall be 16 years from the date of the patent as entered on the register of patents except as otherwise provided within the Industrial Property Act. However, renewals are possible under the Industrial Property Act.

Unless provided for to the contrary, a holder of an exclusive licence under a patent (as similarly a patentee; ie, a person entered on the register of patents) has a right to take proceedings in respect of any infringement of the patent committed after the date of the licence and, in awarding damages or granting any other relief in such proceedings, the Supreme Court shall take into consideration any loss suffered or likely to be suffered by the exclusive licensee as such or, as the case may be, the profits earned by means of the infringement so far as it constitutes an infringement of the rights of the exclusive licensee as such.

7.2 Trade Marks

A trade mark is a mark, symbol or picture, or a combination used to distinguish goods to indicate that they are goods of the proprietor separate from the goods of others in the marketplace. A registered trade mark gives a proprietor exclusive rights to use the mark for the designated services of the mark.

The registration of the trade mark is governed by the Trade Mark Regulations and the policies set by the Registrar General's Department.

To register a trade mark, the process is as follows:

- complete the relevant forms with the necessary supporting documents;
- file the completed forms at the Intellectual Properties Section of the Registrar General's Department; and
- pay the applicable fees.

The entire application process – inclusive of the publishing of the mark in the official gazette, and the final approval and registration of the mark – can take up to 18 months.

The registration of a trade mark is for 14 years but may be renewed from time to time in accordance with the provisions of the Trade Marks Act.

Under the Trade Marks Act, persons shall only be entitled to institute proceedings to prevent or recover damages for the infringement of a registered trade mark.

In any legal proceeding in which the validity of the registration of a registered trade mark comes into question and is decided in favour of the proprietor of such trade mark, the Supreme Court may certify the same, and if it so certifies, then in any subsequent legal proceeding in which such validity comes into question, the proprietor of the said trade mark, on obtaining a final order or judgment in their favour, shall have their full costs, charges, and expenses as between attorney and client, unless in such subsequent proceedings the court certifies that they ought not to have the same.

Similarly, in addition to the statutory penalties of a monetary fine or the forfeiture of all goods in respect of which an offence was committed, the Supreme Court can make such order as it sees fit with respect to suitable remedies.

7.3 Industrial Design

The definition of "design" for the purposes of the Industrial Property Act means features of shape, configuration, pattern or ornament of an article, or features of a pattern or ornament applicable to articles in so far as such features appeal to and are judged solely by the eye.

Generally, design copyright in a design exists for five years from the date of deposit. However, applications for extensions can be made under the Industrial Property Act.

Every claim for design copyright in a design must be accompanied by a representation or, at the Registrar General's option, a specimen of the design, and must include certain information as specified by the Industrial Property Act.

Similarly, there are various remedies available through the Supreme Court and applicable to patents under the legislation.

7.4 Copyright

A copyright is a property right that, unless specifically excluded by the Copyright Act, may subsist in the following categories of work of authorship:

- literary works;
- musical works inclusive of any accompanying words;
- dramatic works inclusive of any accompanying music;
- artistic works;
- motion pictures and other audio-visual works;

- choreographic works; and
- sound recordings.

Generally, copyright in any work expires after 70 years from the end of the calendar year in which the author dies, save for those limited exceptions outlined in the Copyright Act when the period varies.

Although there is no formal system for copyright registration, this is usually made by the owner of the copyright or of any exclusive right in the work, together with the application and the applicable fee for examination and consideration.

An infringement of copyright shall be actionable at the suit of the copyright owner, and, subject to the Copyright Act, any action for such infringement includes all such relief by way of damages, injunctions, accounts, or otherwise.

7.5 Others

Although not yet fully brought into force to date, the government of The Bahamas has introduced the following pieces of legislation via parliament whereby it intends to ultimately provide a better legal framework to protect IP rights:

- the Copyright (Amendment) Act 2015;
- the False Trade Descriptions Act 2015;
- the Geographic Indications Act 2015;
- the Integrated Circuits Act 2015;
- the Patents Act 2015; and
- the Trade Marks Act 2015.

8. Data Protection

8.1 Applicable Regulations

The Data Protection (Privacy of Personal Information) Act (DPA) governs the protection of a living individual's personal data in The Bahamas. The Act applies to data controllers, defined as persons that determine the purpose for which and the manner in which any personal data is used or is to be used.

The Minister with responsibility for information privacy and data protection may make regulations to:

- provide additional safeguards to protect sensitive personal data;
- prescribe offences or penalties with respect to contravention or non-compliance with the DPA;
- modify the application of an individual's right of access to personal data; and
- prescribe circumstances in which prohibition, restriction or authorisation ought to prevail over listed exceptions to the right of access to personal data.

8.2 Geographical Scope

A foreign company targeting customers within The Bahamas will be governed by the provisions of the DPA where it is deemed a data controller and establishes a legal presence within The Bahamas for the purpose of processing personal data in the context of that establishment or, where no legal presence is established within The Bahamas, such data controller uses equipment in The Bahamas for processing data otherwise for the purpose of transit through The Bahamas.

8.3 Role and Authority of the Data Protection Agency

The office of the Data Protection Commissioner (DPC) is established by the DPA as a corporation solely to enforce data protection rules as enacted by the DPA. Its function is to regulate data controllers and processors and provide internationally accepted rules to ensure that

the personal information of citizens is collected, kept up to date, stored, used, disclosed, and disposed of lawfully.

The DPC is also empowered to encourage trade associations and other bodies to prepare codes of practice for dealing with personal data and to approve such codes of practice.

Under the DPA, the DPC has the authority to do the following:

- receive complaints of possible contraventions to the Act;
- investigate contraventions to the Act;
- issue enforcement notices to data controllers;
- issue prohibition notices to prevent the transfer of personal data from The Bahamas to a place outside The Bahamas;
- issue notices to third parties to provide information to it that would assist it in performing its functions;
- upon receipt of a warrant from the Magistrates' Court, empower authorised persons to:
  - (a) enter the premises of data controllers and data processors to inspect the premises and any data therein and to inspect, examine, operate, and test any data equipment therein;
  - (b) require any person on the premises of a data controller or a data processor to disclose and produce data or data material under their control;
  - (c) inspect and copy or extract information from data, or inspect and copy or take extracts from data material; and
  - (d) require persons to give any of its authorised officers information regarding the procedures employed for complying with the provisions of the Act; and
- prosecute summary offences committed under the DPA.

9. Looking Forward

9.1 Upcoming Legal Reforms

See the information set out in the Trends and Developments article of the **Chambers 2024 Global Practice Guide to Doing Business In... The Bahamas**.

Trends and Developments

Contributed by:
Aliya Allen, Alistair Chisnall and Michaela Sumner-Budhi
Graham Thompson

Graham Thompson has been one of the pre-eminent law firms in The Bahamas since 1950. The firm operates four offices conveniently located throughout The Bahamas. It is well regarded for its work with high-net-worth private clients. The firm's key practice areas include: private clients, trusts and estates (estate and trust structuring, foundations, trust company licensing, and private trust companies); banking and finance (real estate financing, asset leasing and financing, corporate finance, restructuring, financial services law and regulation, loans, debentures and mortgages, and receivership); corporate, commercial, and securities (capital markets, M&A, pension schemes, private equity funds, unit trusts, investment funds, and IPOs); property and development (hotels, resorts and mixed-use developments, condominiums and timeshares, government approvals and exchange control, private and commercial mortgages, real property taxes, subdivision planning and structuring, second-home acquisitions and sales, and title insurance and opinions); and insurance (captive insurance, and domestic and external insurance).

Authors

Aliya Allen is a partner in Graham Thompson's financial services, private client, and trusts and estates practice groups. She focuses primarily on banking, investment funds, securities, securitisation and capital markets, technology, fintech, blockchain and digital assets, and regulatory matters such as FATCA, CRS, and AML/CFT. She has played a leading role in the development and revision of industry-defining legislation including the Investment Funds Act 2019 and the Investment Condominium (ICON) Act, and in crafting and promoting policy initiatives concerning fintech, blockchain, and digital assets. A recognised thought-leader in the digital assets business sector in The Bahamas, Aliya was appointed by The Bahamas government to the country's Digital Asset Advisory Panel.

Alistair Chisnall is a partner in Graham Thompson's commercial and property practice group, and specialises in real estate, sales, and structuring for high-end private client matters and large commercial transactions. His practice covers mortgage-backed financing and loans, title due diligence and opinions, title insurance, subdivision and development planning, resort development and operation, commercial and residential leases, and related tax and regulatory matters. He represents owners and operators, ranging from family businesses and boutique resorts to the largest commercial enterprises, local banks, and hotel and casino operators in The Bahamas, including Atlantis Resort Paradise Island and Baha Mar Resort & Casino. Alistair is a government-appointed member of the National Land Reform Committee.

Michaela Sumner-Budhi is a partner at Graham Thompson, with extensive experience in transactional and litigation practices. Her work for Graham Thompson has spanned the firm's litigation, employment & labour, property, commercial, and financial services practice areas. Her specialisations include risk management, medical ethics, medical, medical malpractice, commercial, and labour law. She has served on the Hospitals and Health Care Facilities Licensing Board as Chairman, the Compliance Sub-Committee of the National Stem Cell Ethics Committee, and the National Medical Ethics Committee for the COVID-19 pandemic.

Graham Thompson

Sassoon House
Shirley Street & Victoria Avenue
PO Box N 272
Nassau
The Bahamas

Tel: +1 242 322 4130
Fax: +1 242 328 1069
Email: info@gtclaw.com
Web: www.grahamthompson.com

Moving The Bahamas Forward in 2024

The Bahamas has been a well-established destination from the 1950s and continues to enjoy a stable government and a parliamentary democracy based on the Westminster model. Investors rely on a seasoned and experienced legal infrastructure underpinned by a well-regarded court system with ultimate appeal to the Privy Council in the UK. World-class housing, internationally accredited education and medical facilities, and easy accessibility to the United States make it an attractive destination for ultra-high-net-worth (UHNW) homeowners and investors. Immigration and residency options include permanent residence and annual residence. For business owners, the Commercial Enterprises Act facilitates expedited approvals for a variety of entrepreneurial ventures that can be operated both within and outside of The Bahamas.

The economy of The Bahamas has been remarkably resilient in the wake of the COVID-19 pandemic. The volume of visitor arrivals has continued to increase along with greater spending in the economy.

On 29 May 2024 the Prime Minister of The Bahamas, the Honourable Philip Davis KC, tabled "Budget 2024: Changing the Status Quo, Changing Lives Communication to Parliament" in the House of Assembly. The government's Budget Communication has made it clear that the government continues to strengthen national security, economic security and the livelihoods of the people of The Bahamas by seeking to reduce the cost of living, create safer communities, support entrepreneurs, strengthen the borders and build a more inclusive economy by challenging the status quo.

The government seeks to achieve these results by:

- adjusting tax rates in some instances;
- increasing fees (primarily fees related to immigration applications);
- placing greater emphasis on collecting the taxes that are owed and enforcing collections against individuals and entities deemed to be avoiding and/or delinquent in the payment of the same; and
- introducing the Qualified Domestic Minimum Tax Top-Up for in-scope Pillar Two multinational entities operating within The Bahamas.

The government's prioritisation of enhancing collection and enforcement systems was evident from the previous budget cycle. Considerable efforts have been and continue to be undertaken with the certain tax assessment and collection initiatives. Current and potential investors should be aware of the rate changes and enhanced scrutiny and collection.

Real property investments

Property investment/development is a particularly robust pillar of foreign direct investment in The Bahamas. All non-Bahamians acquiring an interest (directly or indirectly) are required to be approved by the Investments Board or to register their purchase with that department pursuant to the International Persons Landholding Act. The government has taken some significant steps to improve the ease with which such applications are made (now through online applications and fee payment processing) and to improve the efficiency of handling such matters – roughly halving the previous timelines typically experienced.

Similarly, all real property is (unless specially exempted) subject to annual Real Property Tax and the government has carried out various initiatives (primarily the adoption of electronic portals and payment methods) and improved the options and methods by which property own-

ers may monitor their property's annual tax and remit payment, with the former system of hard-copy mailing and "over-the-counter" payment largely falling away.

Property transactions valued under BSD1 million are currently subject to the payment of VAT on an ascending scale up to 10% of the assessed value of the property. In an effort to shore up the country's finances, all real property purchases by non-Bahamians are now charged VAT at 10% of the assessed value of the property. Whilst this rate change was expected to impact investors who traditionally sought to acquire properties worth less than BSD1 million, the market has not shown a significant decrease in activity or a slowdown attributable to the rate change.

The government has announced a policy change with respect to the requirement to qualify for economic permanent residency status. Currently, real estate investments of a minimum of BSD750,000 qualified the investor for economic permanent residency status. The government has indicated that the minimum investment will increase to BSD1 million and the route to obtain such status will include either an investment in real estate or the purchase of Zero Coupon Bonds from the Central Bank of The Bahamas. In both cases the investment must be held for a minimum of ten years. The legislative amendments to effect the policy change have yet to be implemented; however, the government has indicated that the changes are to take effect on 1 January 2025.

Condo-Hotel Tax

Previously, properties not owned by a hotel that form a part of a hotel's bedroom inventory (condo-hotels) were exempt from paying Real Property Taxes, as they enjoyed the same benefit of various concessions and exemptions granted to the hotel or resort developer pursuant to the Hotels Encouragement Act. Effective as of 1 January 2023, a Condo-Hotel Tax at the rate of 75% of the residential property rate set under the Real Property Tax Act is payable on a unit if it does not report net VAT in excess of the Condo-Hotel Tax. The maximum annual Condo-Hotel Tax payable is currently BSD150,000 per annum.

Corporate income tax

There are currently no corporate, withholding, payroll, or transfer taxes paid by companies incorporated and/or doing business within The Bahamas. Rather, a business operator requires a business licence to operate a business within The Bahamas. Business licence fees are, generally, calculated based on gross turnover. Small businesses – ie, those whose turnover is less than BSD50,000 – pay a flat rate of BSD100 per annum. A rate of 0.50% is charged on turnovers of BSD500,000 to BSD5 million and a rate of 1.25% is charged on each turnover in excess of BSD5 million.

The government has signalled that the implementation of an International Business Income Tax (QDMTT) for large multinational corporations will take effect this year and this will necessitate changes to the current Business Licence and Stamp Tax regimes. It is not intended for a business to be subject to both taxes and the Stamp Tax will be amended to convert the 5% tax on dividends into withholding tax to avoid a potential double taxation.

The government also intends to amend the Business Licence Act, and such amendments will focus on/impact companies with revenues of BSD5 million or more per annum.

The Business Licence Act has been amended to reflect that financial services entities, inter-

national business companies, proprietary trading entities and family offices with turnover of BSD100,000 and less are not exempt from paying business licence fees.

Enforcement

The implementation of a corporate income tax will represent a sea-change in tax law in The Bahamas and will depend on effective tax collection (of new and current taxes) to ensure that the government's objectives can be met. The government has stated that it will be particularly focused on improving tax compliance and enforcement by:

- establishing a unit which will be responsible for improving compliance and revenue collection from businesses;
- using technology to identify anomalies in revenue reporting;
- improving revenue collection in the Bahamian Family Islands (where many investment properties are located); and
- implementing updated fees for the registration of pleasure crafts.

BAHRAIN

Law and Practice

Contributed by:
David Walker, Simone Del Nevo, Amal Lari and Sherif Saad Eldin
ASAR – Al Ruwayeh & Partners

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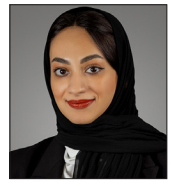
ASAR – Al Ruwayeh & Partners is among Bahrain's leading law firms, with a strong network of contacts throughout the MENA region. Its work cuts across various sectors and includes mergers and acquisitions, banking and finance, real estate, securities, employment, corporate and commercial matters, franchising, commercial litigation and arbitration. The firm has capabilities to provide services in English and Arabic. Its clients include a number of significant clients based in Bahrain and elsewhere in the world (including in the United States, Europe and elsewhere in the GCC). ASAR is also regularly retained by leading international law firms and has won numerous awards for legal services rendered.

Authors

David Walker is a partner at ASAR, having practised in Kuwait and Bahrain since 2004. David is a generalist but has particular expertise in the corporate field. He has broad knowledge and experience, particularly in respect to mergers and acquisitions and corporate law, including direct foreign investment, deal structuring and corporate commercial strategy. He holds a Juris Doctorate from the University of Detroit and an LLM from University College London. David was called to the Michigan Bar Association in 2001.

Simone Del Nevo is a partner based in Bahrain, having initially joined ASAR in 2014. Simone has over 20 years' experience in the fields of financial services, banking, M&A and securities laws. Prior to joining ASAR, Simone worked for several years at leading international law firms in Europe and Japan, and as General Counsel to a major GCC bank, where he garnered a unique affinity for the needs and expectations of major regional business.



Amal Lari is a partner at ASAR based in Bahrain and has been with the firm since 2018. Amal has over 14 years of legal experience. She was admitted to the Bahrain Bar Association in 2010 and is licensed to practise law before the Bahrain Cassation Court. She has an LLM in international business law from the University of Leeds, UK and she has been a certified arbitrator before the GCC Commercial Arbitration Centre since 2015. Amal has extensive experience in litigation and arbitration, including the representation of local and international corporate and individual clients in employment, criminal and agency/distributorship-related matters.

Sherif Saad Eldin is a senior associate at ASAR and has multi-jurisdictional experience of working in Egypt and Bahrain. Sherif joined the firm in 2016; prior to joining ASAR he worked in Egypt for over ten years. He has broad knowledge and extensive experience across domestic and cross-border M&A and foreign direct investment. He has particular expertise in structuring joint venture arrangements, commercial and international trade practices, as well as his advisory work on corporate, restructuring and insolvency, agency and distributorship, healthcare and technology law. He has been a member of the Egyptian Bar Association since 2002.

ASAR – Al Ruwayeh & Partners

Building No 283,
Road No 1704
Diplomatic Area 317
P.O. Box 20517
Manama, Kingdom of Bahrain

Tel: +973 17 533 182
Fax: +973 17 533 185
Email: asarbh@asarlegal.com
Web: www.asarlegal.com

1. Legal System

1.1 Legal System and Judicial Order

Bahrain operates a civil law legal system which mostly derives from codified laws and provisions. The legal system in Bahrain respects the judgments issued by higher courts; however, there is no system for binding judicial precedents.

The judicial system is divided into three branches: Sharia courts, civil courts and criminal courts.

Sharia Courts

Sharia courts are subdivided into Sunni and Ja'fari branches and review issues of personal status relating to Muslims in accordance with the rules of laws of the particular branch of Islam to which the concerned individual belongs. Sharia courts are also subdivided into two classes:

- courts of first instance, which include minor Sharia courts and high Sharia courts depending on the subject of each dispute; and
- appeal courts, which review the appealed judgments issued by the court of first instance.

The Cassation Court will only accept the appeal against a judgment issued by an appeal court if the judgment was based on violation or misapplication of the law or it was based on invalid procedures.

Civil Courts

Civil courts have jurisdiction over civil and commercial matters and those relating to the personal status of non-Muslims. There is no administrative court; however, a division of the civil court rules on administrative issues.

The civil courts operate under a two-tier judicial system in which the judgments issued by the courts of first instance are appealable before appeal courts. The appeal courts are authorised to study both the legal and factual evidence of a case and issue a final judgment. The appeal courts' judgments are appealable before the Cassation Court. The Cassation Court is the supreme court and it will only review the legal-based defences to confirm compliance with the law.

Criminal Courts

Criminal courts have the jurisdiction to deal with criminal matters. Criminal courts also operate under a two-tier judicial system in which the judgments issued by the courts of first instance are appealable before appeal courts. The appeal courts' judgments are appealable before the Cassation Court.

Bahrain Chamber for Dispute Resolution (BCDR)

The BCDR has a mandatory jurisdiction to review cases with value of BHD500,000 or more if:

- the dispute relates to international business disputes (ie, if the headquarters of one of the parties to thee dispute or the place of enforcement is located outside of Bahrain);
- at least one of the litigant parties is licensed by the Central Bank of Bahrain (ie, banks, insurance companies, financial entities, etc); or
- the dispute is a commercial one between companies.

The judgments issued by the BCDR are subject to appeal directly to the Cassation Court.

Constitutional Court

Further, Bahrain established the Constitutional Court in 2002. The Constitutional Court examines the conformity of the laws with the constitu-

tion as requested by the substantive court, the National Assembly or the Chamber of Deputies. The King may also ask the Constitutional Court to review a law before it is passed.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Approval of Foreign Investments

In order to engage in commercial activities in Bahrain, a foreign or domestic company must operate through a legal entity registered in Bahrain. The registration of various legal entities in Bahrain is governed by Law No 21 of 2001 and the Implementing Regulations thereto (as amended) (the "Commercial Companies Law"). The Commercial Companies Law outlines the governance requirements applying to the various types of entities as well as the statutory protections associated with such entities.

In addition to the requirement to maintain an entity in Bahrain, such entity must be registered with certain commercial objectives which dictate the breadth of its permissible activities.

Business Activities/Objectives

In order to engage in commercial activities in Bahrain, a foreign or domestic company must be registered with the Bahrain Ministry of Industry and Commerce (MOIC). The type of licence or company registration that must be obtained is generally driven by the nature of the business activities that will be undertaken in Bahrain.

Foreign Ownership Restriction

Most of the commercial activities undertaken by companies and/or branches of foreign companies in Bahrain do not trigger a foreign ownership restriction, and companies undertaking such commercial activities can be 100% owned by foreign shareholders. While reasons of state security may preclude a particular person from holding shares, and licensing requirements (for banks, telecoms companies, schools, engineering companies, etc) might limit certain individuals from operating these otherwise 100% FDI companies, requirements for a certain level of local shareholding are removed.

Bahrain's Prime Minister issued a resolution in 2021 determining the commercial activities that may be undertaken by companies owned by foreign investors (the "FDI Resolution"). The FDI Resolution represents a bedrock principle for attracting foreign investment into Bahrain and places Bahrain in an advantageous position within the Cooperation Council for the Arab States of the Gulf (GCC).

FDI and Free Trade Agreements

The FDI Resolution outlines the level of foreign ownership permitted for each commercial activity in Bahrain, to which the listed activities subject to any foreign ownership restrictions are limited. Moreover, certain trade agreements and treaties exempt limitations under other lists from application to persons from participating states. These include the following:

- The GCC Unified Economic Treaty adopted by the GCC Supreme Council on 31 December 2001, whereby GCC natural and legal persons shall be accorded, in any member state, the same treatment accorded to the member state's own citizens, without differentiation or discrimination, in all economic and investment activities.
- The Bahrain–US Free Trade Agreement was signed on 14 September 2004 and entered into force on 1 August 2006, whereby US nationals and US operational companies are

enabled to conduct nearly all commercial activities in Bahrain, other than a few activities restricted to ownership only by Bahraini nationals.
- Bahrain entered into a bilateral Investment Promotion and Protection Agreement with the Republic of Singapore on 27 October 2003, which was ratified by Law No 21 of 2004, which affords benefits to Singaporean individuals and Singapore companies which are wholly Singaporean-owned.
- Bahrain together with the other GCC countries entered into a free trade agreement with Iceland, Liechtenstein, Norway and Switzerland on 22 June 2009, which was ratified by Law No 7 of 2012, affording special rights to nationals of those countries.

The free trade agreements provide for varying special rights in respect of permissible commercial activities, but notably derogate from the requirements for local ownership otherwise applying to those commercial activities.

2.2 Procedure and Sanctions in the Event of Non-compliance

Consequences of Investing Without Approval

Doing business in Bahrain without having a registered legal presence alongside the relevant licence(s) will result in being considered to be doing business without a licence, which is penalised under Bahrain law. Article 27 of the Commercial Register Law No 27 of 2015 provides that a penalty of imprisonment for a period not exceeding one year and/or a fine of no less than BHD1,000 and no more than BHD100,000 shall be imposed on anyone who engages in a commercial activity without obtaining a licence from the competent authorities.

In addition, foreigners engaged in employment activities, who are not registered with the Labour Market Regulatory Authority (LMRA) and do not hold a work permit, may be subject to penalties and deportation (for violating work restrictions associated with business visitor or tourist visas) and to the risk that subsequent attempts to register an entity in Bahrain may be restricted. There are also prohibitions in relation to prior violations of "doing business" limitations. It should also be noted that liability for such actions could pass through the entity to directors, officers and shareholders of the foreign entity impermissibly "doing business" without a licence.

2.3 Commitments Required From Foreign Investors

There are no special requirements that foreign investors must comply with in order to do business in Bahrain other than the requirements mentioned in **2.1 Approval of Foreign Investments** (ie, registering a legal presence in Bahrain, which must be registered with certain commercial objectives which dictate the breadth of its permissible activities). To clarify, the only obstacle that may exist is that the proposed activities to be undertaken by the foreign investor are subject to a foreign ownership restriction; other than that, there is no difference between the treatment of a foreign and a local investor by the Bahraini authorities.

2.4 Right to Appeal

Where an application for registration of a legal entity in Bahrain is rejected by the MOIC or disregarded by it for a period of more than 30 days (whether by the MOIC refusing to accept such application through the online portal or through a physical bypassing of such system, or by such application being expressly rejected – rather than being marked as defective – within such portal), the rejection is capable of being objected to by means of the filing of a ministerial grievance and, in the case of an unfavourable

ruling on such grievance, by application to the Bahrain courts. Upon a decision (or silence) as to the grievance, an appeal would be eligible to the Bahrain High Court (Administrative Division) within 60 days. The High Court judgment could be provided within three to six months and may be appealed before the Appeal Court within 45 days from the date of its issuance. The Appeal Court judgment could be provided within three to six months. Further, such Appeal Court judgment may be appealed to the Cassation Court within 45 days from the date of its issuance. The proceedings before the Cassation Court could take between 12 and 18 months until a final judgment is issued. The timelines mentioned above for the procedures before the Bahraini courts are merely rough estimates, as the process is in the hands of the relevant authorities and numerous factors may affect the progress of the matter (eg, caseload at the relevant department and the court, change of judges, notification process, etc).

Notably, interpretation of some free trade agreements is subject to special processes, which may be required to occur in tandem with, or in advance of, the Bahrain administrative law procedures.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The Commercial Companies Law outlines the types of legal entities which may be established in Bahrain. These include forms with pass-through liability, partial pass-through liability or effective liability limitations.

The Commercial Companies Law also dictates rules on registration of interests in Bahraini entities, statutory obligations and entitlements of various stakeholders in Bahraini entities and provisions for enforcement of those obligations and entitlements. Entities incorporated in Bahrain must take one of the following forms:

- general partnership;
- limited partnership;
- association in participation;
- joint-stock company (public or closed); or
- company with limited liability.

Foreign entities may operate in Bahrain by registering a foreign branch, which is generally seen as legally indistinct from the parent undertaking. In addition, a natural person who is a GCC or United States national may obtain an "individual commercial registration", which is a form of sole proprietorship where the individual owner's assets are not protected by a liability shield.

For the purpose of undertaking commercial activities in Bahrain, there is a strong preference among most investors to utilise a corporate form which benefits from a limitation on liability. Accordingly, joint-stock companies (BSCs) and companies with limited liability (WLLs) are strongly preferred by investors rather than partnerships and associations in participation. The Commercial Companies Law outlines the governance requirements applying to the various types of entities as well as the statutory protections associated with such entities.

A Bahraini joint-stock company may take either a public or closely held (closed) form. It faces the most heightened formalities on governance but also provides for issuance of bonds and different classes of equity, trading on a registered stock exchange (in the case of a public joint-stock company), sale of shares without existing shareholder pre-emptive rights, and lower quorum and voting requirements for shareholder actions than

those that apply to other corporate forms. In light of the foregoing, closed joint-stock companies are a favoured vehicle for investment in Bahrain, particularly among non-affiliated shareholders.

Certain commercial activities, such as banking, insurance underwriting and investment, are restricted to joint-stock companies among locally incorporated entities. Moreover, joint-stock companies face no limitation on the number of shareholders, but it should be noted that a minimum of two shareholders are required except in relation to companies established by Amiri Decree.

A joint-stock company is required to maintain a board of directors (having three-year appointments) with a minimum of three members. For public joint-stock companies, the minimum number of directors increases to five members. A limited number of proxies are permitted for board of director meetings, but it should be noted that financial regulated entities are prohibited from board proxies and that other types of entity may similarly restrict board proxies in their constitutive documents. The board of directors is responsible for ensuring that no action is taken involving a personal interest by a director unless the director acknowledges their personal interest and abstains from deliberations and voting on the matter or is permitted to participate by a resolution of the shareholders of the company.

A joint-stock company provides a number of minority shareholder protections. For example, any holder of a minimum of 10% of the company's capital is entitled to appoint a director. In addition, such shareholder may unilaterally call for a meeting of the general assembly. Shareholders also have statutory pre-emptive rights to any equity issuance and to any convertible bond issuance.

Finally, shareholders have access rights to the company's records including the right to obtain a copy of such records. Nevertheless, shareholders of a joint-stock company do not have statutory rights of first refusal in respect of share transfers to third parties, although it should be noted that such rights may be included in the constitutive documents of a closely held joint-stock company and/or board approval rights in respect of new shareholders may be included (in the event of non-approval, the company would be obliged to purchase the transferor's shares into treasury stock).

Public joint-stock companies must have capital of BHD1 million, although listing on the Bahrain Bourse would require compliance with its listing rules, which require that certain annual turnover thresholds are exceeded and that the net worth of the entity exceeds its nominal share capital by 20%. By comparison, a closely held joint-stock company may have issued capital as low as BHD250,000, although it should be noted that the Commercial Companies Law includes a broad obligation that "the company's capital… must be sufficient to achieve its objectives". This provision of the Commercial Companies Law has been read as authorising the Minister of Industry and Commerce to dictate heightened minimum capital requirements both in respect of all companies undertaking a certain commercial objective and in respect of specific companies based on their commercial activities. Capital in a joint-stock company is not required to be fully paid at the time of issuance.

In light of the foregoing, closed joint-stock companies may provide a preferable structure with a balance between minority shareholder protections and the use of corporate governance best practices among varied arm's length shareholders operating in Bahrain. These benefits should

be weighed against the high capital requirements for such entities.

Bahrain recognises companies with limited liability (similar to limited liability companies in other jurisdictions), which provide substantially more flexibility for operations and governance. A company with limited liability does not require a board of directors, though this is permissible, and may be managed either by the shareholders or by one or more designated managers.

Moreover, resolutions of the shareholders may be passed unanimously by circulation without a requirement to hold a formal partners' meeting (eg, notice or invitation of government authorities) or to provide prior notification to the MOIC except for an annual general meeting. A statutory right of first refusal in respect of share transfers applies with mandatory application to WLLs; priority rights also apply to any capital increase.

The duties and rights of directors of a joint-stock company apply equally to managers of a WLL, including rules on announcing and abstaining in the case of personal interests. Shareholders in a WLL have greater powers to remove managers, including a mandatory requirement that shareholders holding a majority of the capital in a WLL may remove any or all managers. Nevertheless, manager appointments are not required to arise by a vote if the constitutive documents of the WLL provide for appointment in another manner (eg, allocation of appointments among the shareholders). Additional variations from standard operations and governance are available, including dividends varying from pro rata with shareholding and fair market valuation for exercise of statutory rights of first refusal.

Other than decisions concerning amendment to the constitutive documents, increase or reduction of capital, or liquidation of the company (including in the context of a merger), corporate decisions may pass by the majority of partners in attendance at a duly convened shareholder meeting. In case of the above-mentioned exceptions, approval of 75% of the capital of the company would be required (rather than the approval threshold applying only in respect of shareholder meeting attendees).

Based upon amendments to the Commercial Companies Law in 2014 and 2020, minimum capital requirements have been removed from WLLs. According to a recent amendment in 2020 to the Commercial Companies Law, a WLL can now be owned by one owner (previously there was a minimum of two shareholders). Nevertheless, the Commercial Companies Law includes a broad obligation that "the company's capital… must be sufficient to achieve its objectives". This provision of the Commercial Companies Law has been read as authorising the Minister of Industry and Commerce to dictate heightened minimum capital requirements both in respect of all companies undertaking a certain commercial objective and in respect of specific companies based on their commercial activities. Capital in a WLL is required to be fully paid upon issuance and its shares must be of equal value.

In light of the foregoing, companies with limited liability may provide a preferable structure for closely held subsidiaries and/or related party entities. In addition, where parties wish to avoid heavy capital investment or lock-in, a WLL structure may be preferred. These benefits should be weighed against restrictions on transfer of shares to a designated third party without risk of other shareholders exercising rights of first refusal.

3.2 Incorporation Process

As a high-level summary, in order to incorporate a BSC/WLL an application must be filed on the MOIC electronic portal (named Sijilat) together with all required documents. The application should include the partners' names and their percentages of ownership; the commercial activities to be undertaken; the proposed name of the company to be formed; the company's capital, number and value of shares, etc. Once the application has been vetted by the MOIC officials and approved, a non-operational commercial registration certificate will be issued. The application should thereafter be transferred to all other implicated ministries for their approvals; during such period (or at an earlier stage), the partners must secure a lease agreement for the business premises and file it on the MOIC portal in order to obtain municipality approval of the place of business. Additionally, a draft of the constitutive documents must be filed for MOIC approval, and once they are approved, an appointment must be booked with a Bahraini notary for execution and notarisation of those constitutive documents. In parallel, a bank account must be opened with one of the licensed banks in Bahrain and a capital deposit certificate must be issued by that bank. Once the notarised constitutive documents and the capital deposit certificate have been uploaded on Sijilat and incorporation fees have been paid, the MOIC will issue an operational commercial registration certificate and commercial registration extract, and the company will be active and permitted to start its activities, unless in limited circumstances one or more of its registered activities requires a special licence following completion of the incorporation process.

Timing

The entity should be capable of being formed in as little as three to six weeks from submission of all required documentation (depending on the ministerial "no objections" or licensing approvals).

3.3 Ongoing Reporting and Disclosure Obligations

Companies are subject to various ongoing reporting/disclosure obligations after incorporation. While the particular obligations will depend on the company itself and the activities it undertakes, examples of what may be required include the following:

- the registration of changes of management or partners with the MOIC, as well as any amendments to a company's constitutional documents;
- financial statements must be submitted to the MOIC annually for review/approval within six months as of the end of the financial year;
- any changes to the ultimate beneficial owner information must be immediately reported and registered with the MOIC;
- for certain commercial activities an Economic Substance Report must be submitted annually to the National Bureau for Revenue; and
- in the case of a BSC, a corporate governance report must be submitted annually to the MOIC.

3.4 Management Structures

A joint-stock company is required to maintain a board of directors (appointed for three years) with a minimum of three members. In the case of public joint-stock companies, the minimum number of directors increases to five members.

A company with limited liability is not required to have a board of directors, though this is permissible, and it may be managed either by the shareholders or by one or more designated managers.

Management of both these types of legal entities could be foreign nationals and non-resident in Bahrain.

Management Powers

The board's powers in the case of a BSC or the managers' powers in case of a WLL are set out in the memorandum and articles of association in the case of a BSC or in the deed of association in the case of a WLL. In the absence of any provisions regarding the powers of the board/managers, the board/managers have the full power to act on the company's behalf except for those powers which if they are not specified in the constitutive documents could not be undertaken by the management, such as executing loans for more than a three-year term, selling the company's property or business, mortgaging the same, providing guarantees for third parties, etc.

3.5 Directors', Officers' and Shareholders' Liability

Civil Liability

A partner, an owner of the capital, a director or a member of the board of directors of a joint-stock company or closed joint-stock company or limited liability company – as the case may be – shall be responsible in all their money for any damages to the company or partners or shareholders or third parties for any breach of the law or of the company's constitutive documents and for the actions set out in Article 18 (Bis) of the Commercial Companies Law.

Criminal Liability

The Commercial Companies Law prescribes criminal/administrative penalties under Articles 361 and 362.

Penalties under Article 361 (which includes violations under Article 18 (Bis) and other improprieties) include a fine of no less than BHD10,000 and no more than BHD100,000 and/or imprisonment. Penalties under Article 362 include a fine not exceeding BHD50,000.

Each of the foregoing is without prejudice to punishment under the Bahrain Penal Code. Criminal actions applicable to directors/shareholders include fraud, embezzlement and public and private bribery. Furthermore, Article 405 of the Bahrain Penal Code identifies specific additional penalties on directors in connection with bankruptcy, particularly for the following acts:

- concealing, destroying or altering the company's books;
- embezzling or concealing part of the company's funds to the detriment of its creditors;
- knowingly admitting liability for debts which are not debts of the company; or
- contributing to the inability of the company to pay its debts, whether by making incorrect statements about the paid-up capital, publishing incorrect balance sheets, distributing fictitious dividends or fraudulently receiving remuneration in excess of that stipulated in the company's constitutive documents.

4. Employment Law

4.1 Nature of Applicable Regulations

Employment relationships in the private sector are governed by Law No 36 of 2012 (the "Labour Law"). The Labour Law sets out the minimum rights in the employees' favour, and any condition or agreement that prejudices the rights of the employees will be deemed null and void. Any additional benefits which are agreed in the employment agreements or the employer's policies and internal regulations, or which exist by virtue of custom, will remain applicable.

The Labour Law also recognises unions and collective bargaining between one or more union association(s) and the employer/s or employers' associations for the purposes of improving the working conditions and terms of employment and of settling collective labour disputes. The collective bargaining can be held at the level of the company, the business activity or relevant industry or at national level. However, collective bargaining is not a common practice in Bahrain.

4.2 Characteristics of Employment Contracts

An employment agreement is required to be (i) executed and concluded in writing in Arabic or (ii) attached to an Arabic translation if the agreement was drafted in a foreign language. Any referenced internal regulations or policies should be attached to the agreement and signed by the parties. Concluding the employment agreement verbally would not invalidate it; however, it may hinder the registration of the employment agreement by the LMRA if it was entered into between an employer and an expatriate employee. The LMRA would require the employment agreement to be in written in order to finalise the registration and to obtain the employee's work permit and residence visa.

Further, if the employment agreement was concluded verbally, the employee would bear the burden of proving their claimed rights if those rights are more beneficial than the minimum rights as specified in the Labour Law.

According to Article 20 of the Labour Law, the employment agreement must include the following essential data:

- the employer's name, the address of the workplace and the commercial registration number;
- the worker's name, date of birth, qualifications, job or occupation, residential address, nationality and the necessary personal identification documents;
- the nature, type and duration of the contract; and
- the agreed wage, method and time of payment, and all of the agreed benefits in cash or in kind.

The duration of the employment agreement will be for a definite or indefinite term. This will determine the calculation of the compensation for unlawful termination.

4.3 Working Time

An employee must not be effectively working for more than eight hours per day, unless otherwise agreed upon, provided that the effective working hours do not exceed ten hours per day and 48 hours per week. The employee is entitled to receive at least one day of rest each week.

The employee may work for additional hours if so required by the circumstances of the work. The employee will receive for each additional working hour a wage equivalent to their normal wage plus at least 25% for hours worked during the day and at least 50% for hours worked during the night. If the employee had to work on their weekly day of rest, the employee will have the choice between receiving an additional wage equivalent to 150% of their normal wage or another day for rest.

4.4 Termination of Employment Contracts

Bahrain is not an employment-at-will jurisdiction. Article 101 of the Labour Law provides that an employee will be entitled to receive compensation for termination if arising without a lawful cause.

Termination by Employer

Termination for lawful reasons

Article 107 of the Labour Law provides that an employer may terminate an employment agreement without notice or compensation in any of the following circumstances:

- if the employee has used a false identity or submitted false certificates or recommendations;
- if the employee has committed any fault which caused serious material loss to the employer provided that such employer must report the matter to the competent authorities within two working days as of the date on which the occurrence of this serious material loss was brought to its knowledge;
- if the employee, despite a written warning, fails to comply with written instructions which are required to be observed for the safety of employees and the establishment, provided that such instructions are written and posted up in a clear location at the workplace;
- if the employee is absent without reasonable cause for more than 20 non-consecutive days or for more than ten consecutive days in one year, provided that such termination shall be preceded by a written warning by the employer to the employee after an absence of ten days in the former instance and an absence of five days in the latter instance;
- if the employee fails to perform their essential obligations by virtue of the employment agreement;
- if the employee discloses secrets related to their work without written authorisation from the employer;
- if a final judgment was rendered against the employee for an offence or a misdemeanour prejudicing honour, trust or public ethics;
- if the employee is found during the working hours to be under the apparent influence of alcohol or drugs, or if they have committed an immoral act at the workplace;
- if the employee assaults their employer or their responsible official or commits a serious assault upon any of the employees or clients at the establishment during or as a result of the work;
- if the employee fails to abide by the controls set by virtue of the law on the exercise of the right to strike; and
- if the employee is incapable of performing the work for reasons related to that employee, such as the cancellation of their work permit or the loss of the qualifications authorising them to exercise the work agreed upon.

Arbitrary dismissal

Article 104 of the Labour Law provides that the termination of the employment agreement by the employer will be unlawful and deemed as an arbitrary dismissal if the termination is due to any of the following causes:

- the employee's sex, colour, religion, ideology, marital status, family responsibilities, or their pregnancy, delivery of a child or breastfeeding in the case of a female employee;
- if the employee is affiliated to any employee trade union or participates legitimately in any of its activities in accordance with the laws and by-laws;
- if the employee represents employees in a trade union association, has already enjoyed said capacity or seeks to do so;
- if the employee submits a complaint or an action against the employer, unless the same is of a vexatious nature;
- if the employee exercises their right to take leave in accordance with the Labour Law; and
- freezing the employee's entitlements with the employer.

Termination for poor performance

According to Article 109 of the Labour Law, the employer may terminate the employment agreement as a result of the employee's inadequate performance following notification of the inadequate aspects of their performance and giving them an appropriate chance with a time limit of not less than 60 days to improve their performance and reach the required level. In the case of failure by the employee, the employer may terminate the employment agreement without compensation following one month's notice.

Redundancies

According to Article 110 of the Labour Law, the employer may terminate the employment agreement as a result of the total or partial closure of the establishment, the downsizing of its activities, or the replacement of the production system by another in a way that affects the number of the workforce, provided the employment is only terminated following the notification of the Ministry of Labour of the reason for termination 30 days before the date of notification of the employee of the termination.

Termination by Employee

Employees may resign upon 30 days' notice in all cases – the existence of a fixed-duration employment contract does not exclude such resignation. If the employee fails to provide full notice, an employer may recover the level of wages associated with the incomplete portion of the notice period and may also claim damages. The employee would also not be paid for the uncompleted portion of the notice period.

In addition to ordinary resignation, Bahrain recognises certain instances of constructive dismissal. The employee has the right to terminate the employment agreement without notice if the employer assaults the employee during or as a result of the work or if the employer commits an act prejudicing ethics against the employee or any of their family members. The termination of the employment agreement in these cases will be deemed an arbitrary dismissal by the employer (Article 105 of the Labour Law).

Further, the employee may terminate the employment agreement following the employer's notification in either of the following two events:

- the violation by the employer of an essential obligation specified by virtue of the law, the employment agreement or the work regulations at the establishment; or
- if the employer deceives the employee as to the working conditions or circumstances, when said deception is so serious that the employment agreement would not otherwise have been concluded.

The employee, before sending the notice of termination, must request the employer in writing to remedy the violation or deception within a time limit not exceeding 30 days. If said time limit elapses without any response from the employer, the employee will have the right to terminate the employment agreement. This will be deemed as an unlawful termination by the employer.

Compensation for Unlawful Termination

If the employer terminates an indefinite-term employment agreement for no reason or for an illegitimate reason following the expiry of three months as of the date of start of work, the employer will be obliged to compensate the employee with compensation equivalent to the wage of two working days per each month of service, with a minimum of one month's wages and a maximum of 12 months' wages.

If the employer terminates a definite-term employment agreement for no reason or for an illegitimate reason, the employer will be obliged to compensate the employee with a compensation equivalent to the wages of the remaining period of the employment agreement, unless the parties agree on lesser compensation provided the compensation agreed upon does not fall below three months' wages or the wages for the remaining period, whichever is lesser.

In the case of redundancies, the employee will be entitled to compensation equivalent to half the compensation as mentioned in the last two paragraphs.

If the termination is deemed an arbitrary dismissal in accordance with the provisions of Articles 104 and 105 of the Labour Law, the employee will be entitled to an additional compensation equivalent to half the compensation, unless the contract provides for a higher compensation.

As for termination by the employee, the employee will not be obliged to pay compensation to the employer except in the following cases:

- if termination was made without abiding by the notice period obligation and it occurs at a time not suitable to the work circumstances and the employer would be incapable of finding a qualified replacement employee;
- if termination was intended to cause the employer damage; and
- if termination caused the employer serious damage.

4.5 Employee Representations

Employees are not mandatorily represented by the management. However, employees of any institution or involved in a particular industry or activity are entitled to establish a trade union in accordance with Law No 33 of 2002 with respect to the issuance of Trade Unions Law. Trade unions have the right to attend member employees' investigations and have the right to strike.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

Bahrain does not impose income tax on individuals; therefore, no tax is levied on the income earned by an employee.

The social insurance monthly contributions including workplace injury and unemployment coverage vary for expatriates and Bahrainis. Currently, for Bahrainis, the contribution rate is 21% of the monthly wage (ie, 14% from employers and 7% from employees). For expatriates, the contribution rate is 4% of the monthly wage (ie, 3% from the employer and 1% from the employee).

The Social Insurance Law was amended recently and, as per the amendment, the percentage payable for Bahrainis will increase annually until the combined total monthly contribution will reach 28% of the monthly wage (by January 2028).

5.2 Taxes Applicable to Businesses

Currently, there are no direct taxes on income or capital gains, or withholding tax on dividends/interest in Bahrain, except for companies engaged in the exploration, production and refining of oil, gas and petroleum, which are subject to 46% corporate income tax.

Indirect tax in the form of VAT is levied on consumer spending. It is collected on supplies of goods and services as well as on imports of

goods and services into Bahrain. A standard rate of 10% VAT is applied on the supply of goods and services, as well as on imports of goods and services into Bahrain. Certain goods and services are subject to zero-rate (0%) VAT, including exported goods and services, and a few goods and services are exempt from VAT.

It should be noted that Bahrain imposes a real estate registration fee upon transfer of ownership on real estate property. The rate is 2% of the property value; however, it can be reduced to 1.7% if the duty is paid within 60 days following the transaction date.

Other government fees are generally charged on a fixed-rate basis, including stamp/authentication fees and commercial registration fees. A municipal fee on rented property applies with minor differences in different municipal areas; this is usually around 10% of the monthly rental rate and is collected along with utilities bills.

5.3 Available Tax Credits/Incentives

Bahrain does not impose income tax on resident individuals or corporates, except for companies engaged in the exploration, production and refining of oil, gas and petroleum. Therefore, tax incentives do not have relevance for Bahrain. All operating companies other than the companies mentioned above benefit from a 0% tax rate for corporate income tax.

5.4 Tax Consolidation

This is not relevant for Bahrain as the effective rate for the levy of direct taxes on corporate and personal income is 0%.

5.5 Thin Capitalisation Rules and Other Limitations

Thin capitalisation and required actions associated with the same differ for different types of companies and may be subject to increased obligations vis-à-vis regulatory licensing.

Companies incorporated in Bahrain (including Central Bank of Bahrain licensees) are subject to special annual financial reporting requirements including (other than for public joint-stock companies) confirmation of the adequacy of the financial position of the company.

The MOIC takes a general view that losses of 50% or more of capital require special consideration of the financial position. In the absence of loss of capital to the extent that the capital falls below the minimum permissible capital associated with the form of entity and the commercial activities undertaken, an entity may persist. Furthermore, Bahrain's Insolvency Law involves a debtor-in-possession structure whereby continued management during an insolvent restructuring is permissible. As such, thin capitalisation is not generally restricted in the absence of other wrongful actions by companies or their management, although filings may be required.

For publicly listed companies, Bahrain Bourse regulations involve suspension of trading upon a loss of 75% of capital, among other circumstances which are outlined in the Bourse's resolution "Procedures Related to Listed Companies with Accumulated Losses of 20% or more of their Share Capital" issued on 2 September 2020.

5.6 Transfer Pricing

Transfer pricing rules are not relevant for Bahrain.

5.7 Anti-evasion Rules

In order to meet European Union criterion 2.2 and the OECD's base erosion and profit shifting (BEPS) Action 5 minimum standard, the King-

dom of Bahrain has imposed economic substance requirements on entities that carry out geographically mobile business activities. As per the applicable laws, all registered entities that qualify under the economic substance requirements are required to file an annual return with the MOIC. This only applies to the registered entities in Bahrain.

6. Competition Law

6.1 Merger Control Notification

Competition and antitrust in Bahrain are regulated under Law No 31 of 2018 (the "Competition Law"). The Competition Law provides for various practices which are deemed to be anti-competitive and unlawful as well as issues regarding particular transactions requiring reporting to and/or approval by the Competition Authority (CPA).

Although, the permanent regulator will be the CPA, which will be a directorate of the MOIC, the interim regulator is the Consumer Protection Department (CPD), also a directorate of the MOIC. The final CPA is not yet formed; accordingly, the CPD presently undertakes the CPA's responsibilities on an interim basis. Each further reference to the CPA below shall include its interim incarnation.

All "economic concentrations" resulting in a shift in market control require prior approval from the CPA – where "economic concentration" is defined as any act that results in the whole or partial transfer (merger or acquisition) of assets, stocks, shares, uses, rights or obligations from a business to another, that would enable a business or a group of businesses to control, directly or indirectly, another business or group of businesses.

A shift in market control would arise where a transaction involves or results in a person/entity being in a dominant position. A dominant position is defined as existing when a position of economic strength enjoyed by an undertaking enables it to prevent effective competition and to act in a manner significantly independent from its clients and competitors, and hence from its consumers (Article 8 of the Competition Law). This can be further clarified as follows:

Unless the contrary is proven, a business is in a dominant position if its share in the relevant product market in Bahrain exceeds 40%. A group of businesses, consisting of two or more businesses, are in a dominant position if their market share in a relevant product market is more than 60%. However, a business may have a dominant position in the market even if its share does not meet the aforementioned ratios.

Accordingly, if a merger would result in a market concentration, prior approval from the CPA would be required.

The authors would generally advise for a short letter to be submitted to the CPA where an acquisition/merger could theoretically result in concentration or dominance. Such letter would seek confirmation that (based upon facts stated in the letter) no formal application for approval would be required. The competition authority has been forthcoming with responses to such letters.

6.2 Merger Control Procedure

See **6.1 Merger Control Notification**.

6.3 Cartels

See **6.4 Abuse of Dominant Position**.

6.4 Abuse of Dominant Position

The Competition Law does not prohibit an establishment from being in a dominant position. However, it prohibits an establishment from abusing its dominant position, specifically in the following cases, which are outlined in Article 9 of the Competition Law as abuse of the dominant position:

- imposing prices for sale or purchase or any other terms of trade, whether directly or indirectly;
- limiting production, markets or technical development, in a way affecting the consumers;
- discrimination in agreements or contracts, of any kind, that are concluded with suppliers or with customers whenever their contractual positions are similar, whether this distinction is in prices, in product quality or in other terms of engagement;
- making the conclusion of a contract with respect to a certain product subject to accepting obligations or products which, by their nature or commercial usage, have no link to the subject of the original contract, agreement, or transaction; and
- refraining, without any legitimate justification, from concluding any business transactions for the sale or purchase of a product, the sale of products with an artificially low cost, or terminating dealing with a competing business resulting in excluding it from the market or causing it losses which make the continuation of its activities difficult.

Moreover, the MOIC may, after taking the opinion of the CPA and the approval of the Council of Ministers, issue a decision whereby the Minister exempts a specific behaviour from the prohibition stipulated above for exceptional considerations related to the public interest (Article 10 of the Competition Law).

making the conclusion of a contract with respect to a certain product subject to accepting obligations or products which, by their nature or commercial usage, have no link to the subject of the original contract, agreement, or transaction; and

7. Intellectual Property

7.1 Patents

Law No 1 of 2004 with respect to Patents and Forms of Benefits and its amendments (the "Patent Law") provides that a patent will be awarded for every new invention that comprises a creative step and is capable of being applied industrially in agriculture, fishing, services, handicraft or any type of industry in its broadest sense, as well as for a use of or a manner of using a known product including products that are used for certain medical cases. Further, the patent must not have been announced to the public in Bahrain or abroad before the date of application.

The Patent Law does not consider the following as patentable:

- an invention for which a ban on its commercial exploitation in Bahrain is necessary to preserve the public order or morals, or where allowing the patent would be detrimental to the protection of human life or animal or plant health or would cause considerable damage to the environment;
- animals; and
- the necessary methods of diagnosis, treatment and surgery for treatment of humans and animals except for the products that are used in any of these methods.

According to Article 14 of the Patent Law, a patent's protection period is 20 years commencing from the date of filing a patent application in Bahrain.

The patent application is submitted to the Bahrain Patent Office if the applicant is a national, or resident in Bahrain if they are a national of a member state of the Paris Convention for the Protection of Industrial Property or of other countries if their nationals enjoy national treatment according to any conventions enforced in Bahrain; or if such person has a current industrial or commercial entity in such country.

Bahrain is a member of the Patent Regulation of the GCC, and therefore, a successful applicant who applied through the Bahrain Patent Office can enjoy patent protection within the GCC countries. Further, the applicant can enjoy wider protection across other countries if they choose to file a patent application through a direct Paris Convention application or to file a "national phase" application using the Patent Cooperation Treaty, including a priority claim back to the priority application.

In principle, the patent owner has the exclusive right to prevent or stop others from commercially exploiting the patented invention. According to Article 40 of the Patent Law, the patent owner may seek the issue of a judicial writ from the competent court to take precautionary measures upon infringement or to avoid any imminent infringement of the patent right.

The court mightorder the claimant (ie, the patent holder) to provide a security or guarantee to protect the defendant and prevent abuse of the right. The patent owner must file a substantive case on the merits within 20 days from the date on which the decision to adopt the precautionary measures is issued, otherwise the precautionary order will be cancelled upon the defendant's request.

Further, a patent owner who suffers damage due to infringement of the patent right may claim for compensation which would cover the damage caused and the profits generated by the offender from such infringement.

Moreover, Article 41 of the Patent Law provides for a criminal punishment of imprisonment for a period of no less than three months and no more than one year and/or a fine of no less than BHD500 and not exceeding BHD2,000, against anyone who knowingly commits any of the following unlawful acts:

- manufacture, using the manufacturing method, selling, exhibiting for sale, trade, import or possession with the intention of trading of goods that involves infringement upon patents; or
- displaying on products, advertisements, marks, packing materials, wrappings or any similar items, details that give the impression that they have obtained a patent or form of benefit.

7.2 Trade Marks

Trade marks are regulated by Law No 6 of 2014 on Approval of the Trade Marks Law (Regulation) of the GCC (the "TM Law"). Article 2 of the TM Law defines trade marks as "anything with a distinctive form such as names, words, signatures, letters, symbols, figures, titles, seals, drawings, images, engravings, packaging, pictorial elements, shapes, colours or groups of colours or a mixture of them, any mark or group of marks if used or intended to be used either to distinguish goods, services of a facility or other facilities or

to indicate the rendering of a service or the control of inspection of goods or services."

A trade mark application is submitted to the Trade Mark Office at the Industrial Property Directorate by the applicant if they are a national of or resident in the Kingdom of Bahrain. Trade marks cannot be registered if they are free of any distinctive feature, contrary to public order or morals, geographical names, copies or imitations of a famous trade mark or likely to mislead the public.

The protection period of a trade mark is ten years from the date of application in Bahrain.

Trade Mark Enforcement and Remedies

If the trade mark owner has a justifiable reason to believe that others are importing goods bearing a similar mark in a way that may confuse the public, the trade mark owner may submit a written application to the Customs Directorate to stop customs releasing these goods. The trade mark owner has to file a case on the merits before the competent court within ten working days from the date of notification of the decision to stop the customs release for these goods, otherwise the decisions will be deemed as of no effect.

In the case of an infringement or to prevent an imminent infringement, the trade mark owner may obtain an order from the court to take precautionary measures to stop such infringement. The court might order the claimant (ie, trade mark owner) to provide a suitable bail or a guarantee that is sufficient to protect the defendant and to prevent abuse of the right. The trade mark owner must file a substantive case on the merits within 20 days from the date of issuing the decision to adopt the precautionary measures, otherwise the precautionary order will be cancelled upon the defendant's request.

Further, a trade mark owner who suffers damage due to infringement of the trade mark rights may claim for compensation which would cover the damage caused and the profits generated by the offender from such infringement.

Moreover, Article 42 of the TM Law provides for a criminal punishment of imprisonment and/or a fine on any person convicted of misrepresenting or imitating a registered mark to mislead or confuse the public, knowingly selling or possessing with the intention of trading any goods bearing false or imitated marks, or unlawfully using such marks or offering services under this mark.

7.3 Industrial Design

Industrial designs are protected by Law No 6 of 2006 on Industrial Drawings and Models (the "ID Law"). An industrial drawing or model is defined as any arrangement of lines and colours and any coloured or non-coloured three-dimensional shape.

The industrial drawing and design application is submitted to the Patent Office by the applicant if they are a national of or resident in Bahrain. The industrial drawing or model will be registered if it is novel and usable in industry or handcrafts, and must not be disclosed to the public whether in Bahrain or abroad in any way preceding the date of filing the registration application.

The industrial drawing and design is protected for ten years from the date of filing, and this period can be renewed for a further five years.

In the case of infringement or to prevent an imminent infringement, the industrial design owner may obtain an order from the competent

court to take precautionary measures to stop such infringement. The court might order the claimant (ie, industrial design owner) to provide a suitable bail or a guarantee that is sufficient to protect the defendant and to prevent abuse of the right. The industrial design owner must file a substantive case on the merits within 15 days from the date of issuing the decision to adopt the precautionary measures, otherwise the precautionary order will have no effect.

Moreover, Article 30 of the ID Law provides for a criminal punishment of imprisonment for a period of no less than three months and no more than one year and/or a fine of no less than BHD500 and not exceeding BHD2,000, against anyone who knowingly commits any of the following unlawful acts:

- exploiting, for a commercial purpose, an industrial drawing or model, which has been registered, or which is not fundamentally different from it; or
- selling, displaying for sale, importing from abroad or acquiring for commercial purposes, products that infringe on another's registered industrial drawing or model or which are not fundamentally different from it.

7.4 Copyright

Copyright in Bahrain is regulated pursuant to Law No 22 of 2006 with respect to the Protection of Authors' Rights and Attendant Rights Law and its amendments (the "Copyrights Law").

The Copyrights Law provides protection to authors of literary, artistic and scientific works which can be registered at the Copyrights Protection Office at the Ministry of Information; however, it is not common to register works for copyright in Bahrain because the Copyrights Law provides for an automatic copyright protection without the need for any formal registration regardless of the value of such works, their type, the purpose of creating them, and the method or form of their expression. Copyright protection lasts throughout the lifetime of a work's author plus 70 years after their death.

The owner of copyrighted work has the exclusive rights over the reproduction, translation, distribution, broadcasting and transmission of their work to the public and the transfer of its ownership.

In the case of infringement or to prevent an imminent infringement, the copyright owner may obtain an order from the competent court to take precautionary measures to stop such infringement. The court might order the claimant (ie, the copyright owner) to provide a suitable bail or a guarantee that is sufficient to protect the defendant and to prevent abuse of the right. The copyright owner must file a substantive case on the merits within 20 days from the date on which the decision to adopt the precautionary measures was adopted, otherwise the precautionary order will be cancelled upon the defendant's request.

Further, a copyright owner who has suffered damage due to infringement of their trade mark rights may claim for compensation which would cover the damage caused and the profits generated by the offender from such infringement.

Moreover, Article 65 of the Copyrights Law provides for imprisonment for a period of no less than three months and no more than one year and/or a fine of no less than BHD500 and no more than BHD4,000 for anyone who infringes upon any copyright whether for material gain or to achieve a commercial purpose or special material gain.

7.5 Others

Databases enjoy protection in accordance with the Copyrights Law. As for computer software, the protection of the Copyrights Law is applicable. Article 2 of the Copyrights Law includes computer software within its protection. Also, the protection of the Patent Law can apply to computer software if it is classified as a novel invention which is capable of being applied industrially.

Trade secrets are protected by Law No 7 of 2003 on Trade Secrets (the "Trade Secrets Law"), which prohibits disclosure of confidential information if it is of commercial value and its legal holder has taken effective measures to preserve it.

In the case of infringement or to prevent an imminent infringement, the trade secret owner may obtain an order from the competent court to take precautionary measures to stop such infringement. The court might order the claimant (ie, the trade secret owner) to provide a suitable bail or a guarantee that is sufficient to protect the defendant and to prevent abuse of the right. The trade secret owner must file a substantive case on the merits within 15 days from the date of issuing the decision to adopt the precautionary measures, otherwise the precautionary order will be of no effect.

Moreover, Article 7 of the Trade Secrets Law provides for a criminal punishment of imprisonment for a period of no less than three months and not more than one year and/or a fine of not less than BHD500 and not more than BHD2,000 for any person who unlawfully discloses, acquires or uses trade secrets and was aware of their confidentiality or that they were acquired by unlawful methods.

8. Data Protection

8.1 Applicable Regulations

Law No 30 of 2018 on the issuance of the Personal Data Protection Law (PDPL) provides the statutory framework for personal data protection in Bahrain.

The PDPL is modelled after the EU's General Data Protection Regulation (GDPR) and regulates the processing (broadly defined to include collection, storing and revealing) of data (ie, personal data and sensitive personal data) using means located in Bahrain. The PDPL defines two main roles with regard to data, that of:

- data manager – a person who decides (solely or in conjunction with others) the purposes and means of processing; and
- data processor – a person who processes data for and on behalf of a data manager.

8.2 Geographical Scope

The PDPL applies to (i) individuals or natural persons residing in Bahrain; (ii) organisations with a place of business in Bahrain; and (iii) people and organisations that are not present in Bahrain but that process data using means (independently or through third parties) available in Bahrain, unless such processing is solely for the purpose of passing data through Bahrain.

The provisions of the PDPL become applicable for foreign entities (ie, entities which do not have a presence in Bahrain) if such entities process personal data or sensitive personal data using means located in Bahrain. The PDPL does not provide a definition of the term "means". Taking a clue from the definition of "personal data" (as defined in the PDPL), the authors believe that the term "means located in Bahrain" is to be interpreted subjectively, taking into consideration all

means, including physical and intangible means at the disposal of the data manager.

8.3 Role and Authority of the Data Protection Agency

The Ministry of Justice and Islamic Affairs has been notified as an interim administrative body that is assuming responsibility for the duties and powers prescribed for the personal data protection authority (PDPA) until the establishment of the PDPA in accordance with the provisions of the PDPL. The Minister of Justice and Islamic Affairs assumed the role of the PDPA's chairman, and the Ministry's undersecretary will assume the role of the PDPA's executive chairman.

The interim PDPA is vested with the powers to issue resolutions to implement various provisions of the PDPL and discharge the functions of the PDPA in the interim. The interim PDPA has issued multiple draft resolutions for implementing various provisions of the PDPL. Also, the PDPA is vested with the powers under the PDPL to investigate violations on its own, at the request of the responsible minister, or pursuant to a complaint by a data owner.

The PDPA is also entrusted with the function of maintaining a register of data protection supervisors and issuing directions to certain data managers to appoint data protection supervisors.

9. Looking Forward

9.1 Upcoming Legal Reforms

There has been significant discussion surrounding the introduction of a corporate income tax in Bahrain. The details of the regime (eg, tax rates, deductions, applicability, etc) have not been determined yet, but the expectation is that a corporate income tax will be implemented in Bahrain.

BOSNIA AND HERZEGOVINA

Trends and Developments

Contributed by:
Bogdan Gecić and Hristina Kosec
Gecić Law

Gecić Law is the foremost innovative law firm in South-Eastern Europe. Committed to redefining the role of law firms in this burgeoning regional market, Gecić Law advises international and local clients from various industries and both the public and private sectors to help them navigate the region's complex legal landscape across multiple practice areas. Founded in 2015 by leading independent legal minds and industry professionals united by a shared vision, the firm's team comprises graduates from prestigious universities in the USA and Europe, each bringing a wealth of local and international professional experience. This diversity of backgrounds enables it to offer innovative, practical solutions even in the most intricate legal matters. Gecić Law is a proud member of two elite global alliances, expanding its reach worldwide. The firm is also the proud recipient of numerous awards and recognitions in different practice areas from reputable global industry committees.

Authors

Bogdan Gecić is the founding partner at Gecić Law. His practice focuses on competition law and state aid, EU law, international trade law, and administrative and regulatory. Bogdan is also active in emerging fields, including AI and ESG law. He is among the region's few practitioners who have advised before the European Commission and other institutions. He has represented private and public sector entities in high-profile cases and negotiations with the EU. Bogdan graduated from the University of Belgrade and earned his LLM from Harvard Law School. He is a member of the Belgrade Bar and fluent in English, Bosnian, Croatian, Montenegrin, and Serbian.

Hristina Kosec is a partner and the head of operations at Gecić Law. She is responsible for developing and implementing the firm's business development and operations strategies. Hristina leads the firm's business development, marketing, CSR, and client service activities. She also leads recruitment, team development, and professional empowerment activities. Hristina comes from a corporate background, with over 15 years of management experience in various industries, including banking and finance, and telecommunication. Hristina earned her LLB and LLM from the University of Belgrade, Faculty of Law. She is fluent in English and Serbian (Montenegrin, Bosnian, Croatian).

Gecić Law

Nikole Spasića 2
11000
Belgrade
Serbia

Tel: +381 11 4043 570
Email: office@geciclaw.com
Web: www.geciclaw.com

Introduction

Bosnia and Herzegovina is an emerging European market presenting a unique combination of business opportunities and challenges. It is located in the heart of the Balkans and is well positioned at the east-west crossroads. As it works towards accelerating its economic development and EU integration process, the country is increasingly becoming an attractive destination for foreign investors.

Political and Legal Landscape

Bosnia and Herzegovina comprises the Federation of Bosnia and Herzegovina and the Republika Srpska, while the Brčko District enjoys a special status. This political structure was agreed upon in the 1995 Dayton Peace Accord. This composition created a complex legal environment, affecting processes across various levels of government. Furthermore, representatives of the three main ethnic groups share rights, which often slows down decision-making processes, which may affect the overall business climate. However, Bosnia and Herzegovina aims to accelerate its EU accession and harmonise its legal framework with the EU's. The country received candidate status for membership in the EU and has implemented reforms to enhance governance and the rule of law, aiming to improve the investment climate. Bosnia and Herzegovina signed its Stabilisation and Association Agreement (SAA) with the EU in 2015, encouraging reforms.

On 21 March 2024, the European Council started accession negotiations with Bosnia and Herzegovina after granting the country candidate status on 12 October 2022. It invited the Commission to prepare the negotiating framework. The Council will adopt it once all relevant steps outlined in the Commission's recommendation are taken.

Economic Overview and Trends

Bosnia and Herzegovina's economy has developed unevenly in recent years. Although it has demonstrated significant resilience in global economic downturns, the economy has notable structural challenges, such as high unemployment, a significant informal sector, and inadequate infrastructure. Post-pandemic growth has been supported by international aid and increased domestic economic activity.

The average GDP growth rate has been around 3% in recent years. In 2023, the GDP growth rate was 1.6%, declining from 3.8% in 2022. This was primarily due to higher inflation on exter-

nal demand and domestic private consumption. Exports increased by 16.5% in 2022 but declined by 3.5% in 2023. Expectations are that local demand, especially private consumption, will become a significant surge factor, supported by better wages, declining inflation, and improved employment figures. However, the political stalemates may persist. The GDP is expected to rise moderately in 2024 and 2025.

Several critical sectors of the economy are showing significant development potential. The manufacturing sector is expanding and increasingly becoming integrated into global supply chains. Bosnia and Herzegovina benefits from its geographic position, ideally located as a manufacturing hub for exports to the EU and neighbouring markets. Efforts to enhance export capacities, especially in automotive parts, textiles, and furniture industries, open new avenues for growth and international trade.

Traditionally a significant contributor to the economy, agriculture remains an area of considerable potential, offering opportunities in value-added segments, including organic and sustainable farming. Supported by agricultural production, food processing offers substantial opportunities as part of reindustrialisation efforts, catering both to domestic and export markets.

New economic trends are also gaining momentum. As new technologies impact diverse sectors, the digital revolution is quickly gaining pace in Bosnia and Herzegovina. These changes are most visible in banking, retail, and public services. The country also boasts a vibrant ICT start-up scene, supported by a growing network of technology hubs and incubators, which attract entrepreneurship and innovation in the sector. Demand for information technology services, including software development, cybersecurity, and digital marketing, is rising. E-commerce has seen remarkable growth, especially during and after the COVID-19 pandemic.

Renewable energy is another area showing significant potential, as the country is set to meet its green objectives as part of the EU accession process. Investments in solar power and wind energy, driven by local and international stakeholders, are rapidly developing. However, the country's vast hydroelectric potential remains the most promising renewable energy source. Bosnia and Herzegovina's abundant natural resources also make it attractive for investments in mining.

Investments in infrastructure are becoming increasingly important to sustain future economic development. Plans for critical projects, which include vital transport and energy infrastructure, are a clear opportunity for foreign investors, potentially through public-private partnerships on critical projects.

The services sector also shows excellent potential. Bosnia and Herzegovina is already seen as an evolving tourist destination. The country's beautiful nature and intriguing cultural and historical heritage present opportunities in diverse niche offers, ranging from environmentally conscious to religious tourism.

Other niche financial services are on the rise. In recent years, Islamic financing in Bosnia and Herzegovina has emerged as an alternative, given the country's religious diversity and strong economic ties with the Islamic world. Sharia-compliant products are appearing, including Murabaha (cost-plus financing), Mudarabah (profit-sharing), Musharakah (joint venture), and Ijara (leasing) products. The Central Bank of Bosnia and Herzegovina and other regulatory

bodies are working on creating a favourable legal framework and business environment for expanding Islamic finance in Bosnia and Herzegovina.

Investment Environment

Bosnia and Herzegovina is an attractive investment destination, offering numerous opportunities for doing business. Its key advantages include well-educated and skilled employees, a long tradition in a rapidly reemerging secondary sector that benefits from abundant natural resources, and a growing services sector, mainly retail, transport, and tourism. Agriculture is also vital to the economy, as Bosnia and Herzegovina is a significant producer of wheat, corn, and fruits.

Bosnia and Herzegovina is keen on developing its economic co-operation with other countries, including trade and foreign investment. The Act on Foreign Direct Investments provides foreign investors with national treatment, ensuring they have the same rights and obligations as Bosnian residents. Many successful investments have shown that doing business in Bosnia and Herzegovina can be profitable.

Foreign direct investment in Bosnia and Herzegovina has grown despite recent challenges. According to UNCTAD's World Investment Report 2023, FDIs amounted to USD661 million in 2022, up 12.6% year-on-year and above the levels recorded before the pandemic.

The legal treatment of foreign investors in Bosnia and Herzegovina is the same as that of domestic investors. When foreign investors establish or participate in companies in the market, they acquire rights, take liability under the same conditions, and enjoy the same status as domestic ones.

Foreign legal entities may invest their capital in a company, bank, or insurance company, start an independent trader or artisan, and obtain a concession for using natural resources or other property of interest to Bosnia and Herzegovina. Foreign investors can acquire shares and stakes in existing public and private limited liability companies.

Moreover, Bosnia and Herzegovina recognises the importance of attracting foreign investors, managerial and commercial knowledge and capital inflow. Therefore, foreign investors are entitled to guarantees not extended to local investors. This includes rights acquired through capital investments that are not reduced by any law or other regulation.

The Foreign Direct Investments Policy Act of Bosnia and Herzegovina ensures the freedom of foreign investors to employ foreign nationals, subject to the labour and immigration laws, to freely transfer abroad profits from their investment in Bosnia and Herzegovina; own real estate in the country and enjoy the same property rights as domestic investors. With a few exceptions, foreign investors are protected from nationalisation, expropriation, and requisition measures. The rights and obligations set forth by the Foreign Direct Investment Policy Act cannot be terminated by any regulations brought in later. If a subsequent regulation is more favourable for the foreign investor, they can opt for the regulation by which they prefer to be governed.

Bosnia and Herzegovina also seeks to attract more foreign investment through Free Trade Zones, allowing foreign entities to invest capital in specific areas, transfer their profits, and re-transfer capital. According to the Free Trade Zones Act of Bosnia and Herzegovina, the users of free trade zones are exempt from VAT and

contributions, except those related to wages. Imports of manufacturing equipment are exempt from customs and tariffs in these zones. A Free Trade Zone may be established by one or more foreign and local natural or legal entities.

Bosnia and Herzegovina is also very interested in enhancing foreign trade relations and expanding its trade partnerships abroad. The country has a diversified trade portfolio, exporting goods like metals, machinery, and agricultural products. The European Union and other countries in the region are crucial trading partners.

In 2023, Croatia, Germany, and Serbia were the country's main export partners, accounting for 14.9%, 14.8%, and 13.9% of total exports, followed by Austria (9.5%). Top import partners were Serbia (10.8%), Germany (10.5%), Croatia (9.9%), and China (8.1%). The EU is the biggest trading partner, accounting for 65.8% of total foreign trade.

Bosnia and Herzegovina has ratified double taxation treaties with 38 countries, while it enjoys bilateral investment treaties with 40 countries. Bosnia and Herzegovina is part of the Central European Free Trade Agreement (CEFTA), which provides free access to markets across the Western Balkans region. The country is also in the process of negotiating to join the World Trade Organization.

Labour Market

Foreign investors in Bosnia and Herzegovina benefit from a highly qualified and well-educated workforce, which gives the country a competitive edge. The education system has traditionally been widely acclaimed, making Bosnia and Herzegovina workers acknowledged and sought after, especially in fields such as engineering, medicine, IT, construction, and agriculture.

Although unemployment rates remain high, the labour market is consistently improving. However, a significant outflow of people seeking opportunities abroad has resulted in a shrinking workforce. The unemployment rate dropped to 11.8% in 2023, compared to 12.66% a year earlier. The main job-creating sectors were trade and tourism.

This combination of specific labour market conditions allows foreign investors to hire a qualified workforce for a competitive compensation package. Due to economic pressures abroad, global inflation, and improving economic conditions in the country, there has been a noticeable trend of employees returning to Bosnia and Herzegovina over the past two years. Consequently, many young people are starting their businesses, contributing to a shift in the local labour market dynamics.

Taxation

Bosnia and Herzegovina boasts a competitive and structured tax regime that significantly influences business operations nationwide. The critical elements of this tax system include VAT, corporate income tax, and personal income tax, each designed to facilitate straightforward financial planning and compliance.

VAT is set at 17%. Corporate income tax is remarkably low, pegged at 10%, encouraging business ventures and investments.

Personal income tax rates vary slightly between the two entities within Bosnia and Herzegovina. The Federation's rate is 10%, while Republika Srpska is somewhat lower at 8%. This tax applies to all forms of income, including wages, business profits, capital gains, and other personal income. For residents, the personal income tax applies to income generated worldwide, while

non-residents are liable only for income within Bosnia and Herzegovina.

Conclusion

Despite a complex political and regulatory environment. Bosnia and Herzegovina has developed various incentives at all levels to encourage foreign direct investment. These include the rights guaranteed to foreign investors according to the aforementioned Foreign Direct Investment Policy Act at the state level, the opportunity to establish or be a part of Free Trade Zones with further benefits, and exemption from customs duties on imported capital equipment. At the entity level, foreign investors may qualify for tax benefits, sector-specific incentives, employment-related benefits, loans, and loan guarantees. Another increasingly attractive option for foreign investors is public-private partnerships to support investment and develop much-needed infrastructure projects.

Other reforms and alignment with EU standards aim to refine the business climate. For instance, streamlined business registration processes, improved corporate governance, and updates to the bankruptcy legislation are designed to provide more efficient and transparent procedures for firm incorporation, operations, insolvency, and restructuring. Changes in labour laws focus on improving market flexibility and reducing unemployment, particularly among youth. Efforts are underway to reform the social security system, including pensions and health insurance, to ensure sustainability and fairness. Furthermore, ongoing efforts to improve infrastructure, digitalise government services, enhance the rule of law, and safeguard legal certainty further enhance the business environment. By leveraging its key opportunities and tackling the main challenges, Bosnia and Herzegovina can position itself as a competitive and attractive destination for investors in the regional market, who should engage with local partners and utilise available incentives.

BULGARIA

Law and Practice

Contributed by:
Stoyan Surguchev, Mihail Vishanin, Stela Sabeva and Violeta Kirova
BOYANOV & Co

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BOYANOV & Co is widely recognised as a top law firm for doing business in Bulgaria and south-eastern Europe (SEE). It has advised on numerous landmark transactions since 1990 and has earned international and local recognition as a preferred law firm. It is ranked as a market leader for the excellence of its services, offered by professionals who can draw on years of experience. As the founder of the Legal Development Foundation, it strives to assist in the formation of a new generation of modern lawyers. The firm is strongly dedicated to supporting the rule of law, and the adoption and implementation of efficient business regulations. It is the initiator of the South East Europe Legal Group ("SEE Legal"), the largest and oldest integrated organisation of leading law firms across 12 countries in south-eastern Europe, and of the Three Seas Legal Alliance, aimed at supporting projects within the Three Seas Initiative.

Authors

Stoyan Surguchev is an associate at BOYANOV & Co and has been part of the competition and commercial team since 2019. His practice encompasses competition law, consumer protection, healthcare regulations and food and environmental law. He also provides legal assistance relating to foreign direct investment. In addition, he represents clients in unfair competition proceedings. In 2020, he successfully completed a course on competition and antitrust law at the Academy of European Law in Trier, Germany.

Mihail Vishanin is counsel at BOYANOV & Co and has more than 17 years of experience as a Bulgarian lawyer. He focuses on corporate law, M&A, PPP/concessions and commercial litigation. He has assisted in high-profile acquisitions, strategic joint ventures, cross-border transactions and divestitures, covering all key types of M&A projects across a range of industries, including IT, retail, confectionery, life sciences, healthcare, transportation, manufacturing, services and media. He regularly advises leading international and local corporations, credit institutions and public entities on commercial operations and investment projects.

Stela Sabeva is a partner and a head of the IP department at BOYANOV & Co. She has more than 17 years of experience in both contentious and non-contentious IP work. Her practice is predominantly focused on IP litigation and enforcement; unfair competition; trade marks, and design and copyright counselling and licensing. She has represented in court and provided strategic IP advice to a number of major right holders from a wide range of industries, including technology, fashion, entertainment, tobacco, automotive and pharma. She was appointed to the INTA Copyright Committee for the 2022–2023 period.

Violeta Kirova is a principal associate at BOYANOV & Co and has more than 25 years of experience as a Bulgarian lawyer focused on employment law. She regularly advises clients from different industry sectors on all labour law aspects of their activities, including in the Bulgarian employment legal system structuring employment relationships; drafting employment documentation, including internal rules and procedures, standard employment or management agreements; termination and mass redundancies. She provides interdisciplinary advice to clients, taking all possible effects of the employment structure, including social and medical security and reputation, into consideration.

BOYANOV & Co

82 Patriarch Evtimii Blvd
1463 Sofia
Bulgaria

Tel: +359 2 805 50 55
Fax: +359 2 805 50 00
Email: mail@boyanov.com
Web: www.boyanov.com

BOYANOV & Co.
Attorneys at Law

1. Legal System

1.1 Legal System and Judicial Order

Bulgaria has a typical civil law system and judicial decisions do not form binding case law except for certain decisions of the Supreme Courts.

The judicial system is based on a "three instances" model. In addition to the regular courts dealing with civil, commercial and criminal cases, there are separate systems for administrative and military justice.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

General Approval Regime of Foreign Investments

A general approval regime of foreign investments was introduced in Bulgaria in early March 2024. The regime requires prior review and approval on national security grounds for foreign direct investments (FDIs) in certain key areas of interest for national security purposes. The approval regime will come fully into force within six months of the Act coming into force (ie, September 2024), at which point, the secondary regulation is expected to be issued. Until then, the notification and suspension obligations will not apply to foreign investors.

An FDI is defined as an investment of any kind by a foreign investor (non-EU investor or EU entity controlled by non-EU entities) aiming to establish or maintain lasting and direct links between the foreign investor and the entrepreneur to whom, or the undertaking to which, the capital is made available, in order to carry on an economic activity in Bulgaria, including investments which enable effective participation in the management or control of a company carrying out an economic activity.

An FDI is also the expansion of an existing investment, including the expansion of the capacity of an existing enterprise, the diversification of an enterprise's production with products not previously produced, and the establishment of a new place of carrying out commercial activity; or the increase in the capital of the investment target, provided that the shares are acquired by the foreign investor. A portfolio (passive) investment is not an FDI.

The approval regime requires FDIs in the fields of activity listed in Article 4(1) of the EU FDI Screening Regulation 2019/452 that trigger the threshold of EUR2 million or target at least 10% of the share capital, to be notified and cleared in advance by a special Interdepartmental Council on FDI Screening. Investments by investors, having non-EU government (public) shareholding or participation are notifiable, even when below the investment thresholds, except for some low-risk countries enjoying preferential treatment (eg, the United States, the United Kingdom, Canada, Australia and others).

The preferential treatment of the low-risk countries is expected to be further regulated in the upcoming secondary legislation. A requirement for a minimum 5% non-EU government participation applies to a listed investor (a public company listed on a regulated market) for the application of this below-thresholds notification obligation.

The FDI must involve the fields of activity listed in Article 4(1) of the EU FDI Screening Regulation 2019/452 and/or be aimed at a target engaged in hi-tech activities. The specific sectors listed in Article 4(1) (energy, transport, water, health,

communications, media, etc) are indicative but not exhaustive, and the FDIs need to have a potential effect on the critical infrastructure; critical technologies and dual-use items; supply of critical inputs, including energy or raw materials; as well as food security; access to sensitive information; and the freedom and pluralism of the media. The sectors affected by the local approval regime are expected to be further specified in the anticipated secondary legislation.

In addition, FDIs by Russian and Belorussian investors, as well as investments in petroleum and petroleum-based products concerning critical infrastructure, are explicitly caught by the local approval regime, irrespective of the common thresholds. These investments are subject to mandatory prior notification and approval, when they trigger the common threshold of EUR2 million or 10% of the capital of the target. However, investments by Russian and Belorussian investors, as well as investments in petroleum and petroleum-based products, may still be subject to review at the initiative of the authorities (ex-officio review), including after completing the investment (ex-post review), even where they have not triggered the notification obligation, either because they are below the thresholds, or because they were completed before the notification obligation came into effect (the notification obligation will start to apply after the adoption of the secondary regulation on FDI screening).

In exceptional cases, the authority also has ex-post screening powers to review other FDIs on national security grounds, irrespective of their value and field of activity.

Sector-Specific Restrictions on Foreign Investments

In addition to the general approval regime, certain sector-specific restrictions apply to foreign investments of offshore companies from tax havens, as well as FDIs in the gambling industry and in the acquisition of farmland, but they are rather limited in scope and effect (see **2.2 Procedures and Sanctions in the Event of Non-compliance**).

2.2 Procedure and Sanctions in the Event of Non-compliance

General Approval Regime of Foreign Investments

Foreign investors are required to file an application for prior approval to the Interdepartmental Council on FDI Screening. The application must be submitted in Bulgarian, with an English translation, through the local Investment Promotion Agency, which is responsible for administering the application procedure. Once the application form has been filed and approved, it should be published on the Investment Promotion Agency's website. The Agency checks the compliance of the application and the documents submitted within three days of filing and must notify the foreign investor of any deficiencies so that these can be corrected within seven days.

The Interdepartmental Council on FDI Screening must adopt its decision within 45 days following the filing or the correction of any deficiencies in the application. This term may be extended once, for up to 30 days. The FDI screening authority may:

- issue approval if the FDI does not affect security or public order and is not likely to affect projects or programmes of interest to the EU; or

- issue approval conditional on the performance of the following restrictive measures:
  - (i) restriction of the right of the foreign investor to acquire up to 20% of the capital of a company or up to 10% in the case of a company engaged in hi-tech industries;
  - (ii) following instructions for personal data protection, or for safeguarding information security, etc, upon the proposal of a competent regulatory authority; and
  - (iii) the reservation of special rights in favour of the state in the decision-making of the general meeting and management bodies in the case of transactions carried out under the Privatisation and Post-Privatisation Control Act; or
- prohibit the FDI.

The absence of any decision in the initial or extended term will be considered tacit unconditional clearance, permitting the investment.

A foreign investor may incur a fine amounting to 5% of the value of the investment, but not less than BGN50,000 (approximately EUR25,000) for failure to comply with the approval regime. In addition to the fine, the authority may also impose the restrictive measures necessary to ensure security or public order, including change of control, change and/or suspension of activity, termination of the FDI, or other appropriate measures, on the foreign investor.

Restrictions on Investments by Offshore Companies

The 2014 Offshore Companies Act prohibits companies from certain tax havens and the entities under their control from directly or indirectly engaging in 27 different economic activities in Bulgaria (mostly in traditionally highly regulated sectors such as banking and finance, insurance, gambling, etc). The effective list of tax havens is limited to five jurisdictions: the US Virgin Islands, Guam, Christmas Island, Pitcairn and Palau.

There are eight groups of exceptions to the prohibitions, which are also subject to disclosure of the ultimate beneficial owners of the company and certain preliminary registrations in the Bulgarian commercial register.

The consequences of investing in violation of the Offshore Companies Act vary depending on the business activity and include measures such as refusal or revocation of a licence/registration, voting bans, exclusion from award procedures, termination of awarded contracts, and monetary fines.

Restrictions on Foreign Investments in the Gambling Industry

In line with the 2012 Gambling Act, gambling operations require a game-specific licence. Companies from Bulgaria, another member state of the European Economic Area (EEA) or Switzerland are generally deemed eligible to apply for these licences. However, the state-owned enterprise Bulgarian Sports Totalisator has a monopoly over all lottery products, except raffle, bingo and keno games.

Non-EEA/Swiss foreign persons need to invest at least EUR10 million in other activities in Bulgaria and create more than 500 jobs to hold an interest in a locally licensed company, or to own a four or five-star hotel and operate a casino in it. Non-compliance with the relevant requirements may lead to refusal or revocation of the respective licence.

Restrictions on Foreign Investments in Farmland

Non-EEA nationals and legal entities and companies held by them are generally not allowed to acquire farmland, unless this is expressly permitted by an international treaty. Companies held by offshore companies, political organisations or foreign states are also not allowed to acquire farmland.

Since 2014, EU/EEA citizens have enjoyed national treatment in respect of the acquisition of farmland in the country, but there is a general long-term residence requirement (five years), creating acquisition barriers even for these persons.

2.3 Commitments Required From Foreign Investors

An FDI approval may be issued, providing particular restrictive measures are followed. For more information, refer to **2.2 Procedure and Sanctions in the Event of Non-compliance**.

The local approval regime for foreign investments should become operational once the necessary secondary regulation is adopted. This must happen within six months of the Act coming into force in September 2024.

2.4 Right to Appeal

Decisions of the Interdepartmental Council on FDI Screening may be appealed by foreign investors in court in two instances, based on general administrative grounds. These grounds include, among others, material breach of administrative-specific and/or general procedural rules, contradiction of provisions of substantive law, and inconsistency with the purpose of the law.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

Bulgarian law allows for the incorporation of different types of companies. The most popular is the limited liability company (LLC) and the joint stock company (JSC). Both can be incorporated by one or more shareholders who, subject to certain exceptions, are not liable for the company's liabilities.

The minimum registered capital of LLCs is BGN2 (approximately EUR1) and the capital contributions may be monetary or in kind. The LLC's affairs are administered by its manager(s) and the general meeting of the shareholders. Shares, however, are not freely transferable and require approval by the other shareholders. In addition, there is a highly controversial shareholder expulsion procedure for LLCs, which allows a minority shareholder to expel a majority shareholder in certain cases.

JSCs are generally preferred by foreign investors because of their greater flexibility in management and decision-making. The minimum capital is BGN50,000 (approximately EUR25,000). There are two systems of management: the one-tier system (with a board of directors) and the two-tier system (with a supervisory board, and a management board appointed by the supervisory board). The ultimate managing body is the general shareholders. Share transfers are normally unrestricted (unless the articles of association provide otherwise).

The simplified corporate governance structure makes the LLC suitable for fully owned subsidiaries and for closely held companies, where it is unlikely that diverging interests among shareholders will arise. The more developed corporate governance structure makes the JSC suitable for

joint ventures and other structures where shareholders with potentially diverging interests may participate and where financial minority investors may need additional protections, without the need to be involved in day-to-day management.

3.2 Incorporation Process

Both LLCs and JSCs are established by registration in the commercial register. The incorporation process includes:

- preparing the documents (resolutions, articles of association, declarations, etc);
- opening a bank account in Bulgaria and transferring the share capital to it; and
- registering the company in the commercial register.

The whole procedure may take two to four months. The most time-consuming step is usually opening a bank account because of the extensive KYC checks banks carry out.

3.3 Ongoing Reporting and Disclosure Obligations

After their incorporation, companies must disclose details of their ultimate beneficial owner(s) to the commercial register. Approved annual financial statements must also be filed with the commercial register by 30 September.

Changes in the corporate details of the company (eg, management, seat and registered address), and in the announced corporate documents, must be filed for registration with the commercial register.

3.4 Management Structures

LLCs have a simple corporate governance structure, consisting of a shareholder meeting (single shareholder) with one or more registered managers whose representative powers cannot be restricted (except by joint signature rules). LLCs do not have boards of directors or other collective operational bodies. Key decisions require resolution by the shareholders.

In contrast, JSCs are governed by a shareholder meeting and either a board of directors (one-tier management system) or a managing board and supervisory board (two-tier management system). Super-majorities (two thirds or three quarters) are required by law for the usual or extended minority shareholder protections, but not unanimity. Minority shareholders enjoy certain enhanced protections, compared to in LLCs.

3.5 Directors', Officers' and Shareholders' Liability

Liability of shareholders in LLCs and JSCs is limited to the value of their shares in the company's capital, resulting in limited personal liability to the company's creditors. Certain exceptions apply in the case of tax evasion (which could also extend to the management), and for serious administrative infringements, such as antitrust infringements.

There are four main types of liability that are relevant for a director or officer of a company:

- civil liability – liability for damages towards the company or third parties;
- administrative liability – many laws contain sanctions (mainly fines) for the company or its management (eg, for breaches of employment and accounting legislation); in certain cases, representatives may also be held liable for tax evasion on the part of the company;
- criminal liability – there are various forms and types of criminal liability; and
- disciplinary liability – applicable only to persons under employment contracts.

4. Employment Law

4.1 Nature of Applicable Regulations

Employment relationships are regulated by laws, including the Bulgarian Labour Code (LC), collective labour agreements, and internal rules, policies and orders of employers. The LC sets minimum standards and most of its provisions are mandatory and may not be waived by the employee.

4.2 Characteristics of Employment Contracts

Employment contracts should be in writing and cover, among other things, the following particulars:

- place of work;
- position name and work description;
- employment term;
- duration of the basic and extended paid annual leave and additional paid annual leave;
- notice period for termination (should be equal for both parties);
- basic monthly salary and permanent additional labour remuneration, and frequency of payment; and
- duration of the working day or working week.

Employers must notify the National Revenue Agency of the employment contract within three days of its execution. The reporting procedure will change in June 2025 with the implementation of electronic labour books listing employees. Employment contracts are deemed concluded for an indefinite term unless expressly agreed otherwise. Employment contracts for a fixed term may be concluded only in exceptional cases.

The employment contract may be for full-time or part-time work.

4.3 Working Time

The normal working time is eight hours a day within a five-day working week. The maximum working week is 40 hours. There are special provisions for specific types of work such as night and shift work, for employees under 18 years old, etc.

The normal working time cannot be extended except as provided for by the law in the following cases.

- Prolongation of working time: for production reasons, the employer may extend the working time on some working days and compensate for it on other working days, subject to certain requirements.
- Open-ended working hours: due to the special nature of the work, the employer, after consultation with the trade union organisations and employees' representatives, may establish open-ended working hours for certain positions where, if necessary, employees may need to continue to perform their duties after normal working time.
- Overtime work: this is done, by order or with the knowledge of (and with no objection from) the employer or the respective superior, by an employee beyond the fixed working time. As a rule, overtime work is forbidden, except in certain cases exhaustively listed in the LC (eg, for emergency repair on working premises of machinery or other equipment, for completion of work that cannot be performed within normal working time, or for performance of intensive seasonal work). Overtime work is paid at a higher rate, may not exceed certain limits and is prohibited for certain categories of employees (eg, pregnant women). The employer keeps a special book to account for overtime work, and overtime

work must be notified to the labour inspectorate by 31 January of the following year.

4.4 Termination of Employment Contracts

The procedure and grounds for termination of employment contracts are not freely negotiable between the parties. Termination of employment is heavily regulated and is only permitted with cause and after procedural requirements specific to that cause have been followed. Failure to observe the applicable grounds and procedure may result in a court dispute whereby the termination is found unlawful, involving the reinstatement of the employee to their previous position and the obligation of the employer to pay compensation to the employee for the period of unemployment, but not for more than six months.

Permissible termination grounds are listed exhaustively in the LC and include but are not limited to the following.

- Termination by either party without notice: permissible upon expiry of the contractual term; in the case of inability of the employee to perform the assigned job because of illness resulting in permanent disability (invalidity); and in other cases.
- Termination by the employer with notice: permissible in the case of closure of the enterprise or staff cuts; reduction in the volume of work; work stoppage (for more than 15 days); lack of efficiency in the employee's performance at work; entitlement to old-age pension; and in other cases.
- Termination by the employer without notice: permissible in the case of prohibition from practising the profession or from occupying the position by virtue of a court or administrative decision; in cases where an employee refuses to take a medical examination prescribed for the job offered; in disciplinary dismissal cases; in cases of incompatibility (employee is unfit/unable to do the job); and in other cases.
- Termination by the employee with notice: an employee may terminate the employment contract at will without giving specific reasons.
- Termination by the employee without notice: permissible in the case of delay in payment of remuneration; illegal alteration of the employment contract by the employer; and in other cases.
- Termination by mutual consent – there are two main options: (i) termination without payment of termination compensation; or (ii) termination at the initiative of the employer against payment of compensation amounting to not less than four months' wages (based on the employee's wages for the last month).

Regardless of the grounds for termination, the employer must notify the National Revenue Agency within seven days of the effective termination date.

4.5 Employee Representations

All employees in a company form the employees' general meeting. Where a company (LLC or JSC) has more than 50 employees, their representatives are allowed to participate at the general meetings of shareholders without the right to vote.

The employees' representatives may be elected by the employees' general meeting. The LC recognises two types of employees' representatives: one of them may be elected regardless of the head count of the company (under Article 7 of the LC) and the other may be elected only in

enterprises meeting certain head count thresholds (under Article 7a of the LC).

Employers and employees' representatives may establish the procedures for consultation and information through a separate agreement, unless and as long as the consultation and information procedural rules are provided by law (eg, in the case of mass dismissals or transfer of undertaking).

Where there are elected employee representatives under Article 7a of the LC, the employer must provide them with information regarding:

- the recent and probable development of the enterprise's activities and economic situation;
- the situation, structure and probable development of employment within the enterprise and regarding any anticipatory measures envisaged, in particular where there is a threat to employment;
- the number of employees commissioned by an enterprise providing temporary work, or its intentions to make use of such employees; and
- possible substantial changes in work arrangements, including the introduction of work at home and remote work.

After providing this information, the employer must hold consultations on the situation, structure and probable development of employment within the enterprise and regarding any anticipatory measures envisaged, in particular where there is a threat to employment; the number of employees commissioned by an enterprise providing temporary work, or its intentions to make use of such employees; and possible substantial changes in work arrangements, including the introduction of work at home and remote work.

The employer may refuse to communicate information or undertake consultation when the nature of such information might seriously harm the functioning of the enterprise or the legitimate interests of the employer.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Tax Residence of Individuals

Irrespective of citizenship, an individual is considered a Bulgarian tax resident if they fulfil one or more of the following criteria:

- the individual has a permanent address in Bulgaria; or
- resides in Bulgaria for more than 183 days in any 12-month period; or
- the individual is assigned abroad by a Bulgarian company or the state; or
- the centre of their vital interests is in Bulgaria.

Any other individuals are foreign tax residents. While Bulgarian tax residents are taxed in Bulgaria on their global income, foreign tax residents are taxed only on income of Bulgarian origin as provided by law, subject to any applicable double taxation treaty (DTT).

Any income derived from employment and paid by an employer considered a tax resident in Bulgaria to Bulgarian tax residents or foreign tax residents for employment undertaken in the territory of Bulgaria is subject to personal income tax at the flat rate of 10%.

Social Charges

The total national insurance contribution rate (social security and health insurance) is 32.7% to 33.4% (of which 18.92% to 19.62% is pay-

able by the employer and 13.78% is payable by the employee).

The above rates are applicable to Bulgarian nationals, as well as to EU/EEA nationals who are subject to Bulgarian social security contributions. Non-EU/EEA nationals are also subject to these contributions under certain conditions, except for health insurance contributions (unless they have a permanent residence permit for Bulgaria).

The minimum insurance base varies. The maximum monthly insurance base is limited to BGN3,750 (approximately EUR1,900 per fixed exchange rate).

The above taxation and insurance contribution rules apply also to individuals working under management service contracts (managers or controllers of companies).

5.2 Taxes Applicable to Businesses

As a rule, a company is resident in Bulgaria for corporate tax purposes if it is incorporated in Bulgaria.

Permanent Establishment (PE)

PEs of foreign tax residents (eg, branches), although not separate legal entities, are treated as such for tax and accounting purposes as Bulgarian corporate tax residents. A PE represents a fixed place (owned, rented, or otherwise used) at which a foreign entity partly or wholly conducts business in Bulgaria (DTTs may apply different definitions for their purposes).

Taxation of Corporate Income

The worldwide profit of a Bulgarian resident company is subject to corporate income tax (CIT) at the rate of 10%. Other companies are taxed for income with a source in Bulgaria including if the income is derived through a PE. If not, the income may be subject to withholding tax (WHT). A branch (a PE) of a non-resident company will therefore be subject to CIT at the standard rate of 10% and, should such non-resident company receive other taxable incomes that are not related to its PE, these incomes may be subject to a separate WHT at the rates established by law or by the respective DTT.

From 1 January 2024, Bulgarian entities within the scope of the so-called global minimum tax will be subject to a minimum effective tax rate of 15%. The EU Global Minimum Tax Directive and implementation of Pillar Two of the OECD have been transposed into Bulgarian law through new and complex rules introduced in the Bulgarian CIT Act. The effective tax rate is calculated on an aggregate basis for all entities in each jurisdiction and top-up taxes are due where the effective tax rate for a jurisdiction is below 15%.

Alternative taxation regimes apply in the gambling industry and for the maritime merchant shipping industry.

One-Off Taxes

The following corporate expenses are subject to a one-off tax of 10%:

- representative expenses related to a company's business;
- social expenses provided to employees in kind; and
- expenses in kind related to the private use of company assets.

Withholding Taxes (WHT)

A company that is a Bulgarian tax resident must deduct WHT on payments made to non-residents of dividends; liquidation quotas; interest and royalties; fees for technical services; fees for

the use of properties, under operating leasing, franchising and factoring agreements; and management fees. The WHT rates are between 5% and 10% unless a DTT provides for a lower rate.

Value Added Tax (VAT)

The standard VAT rate for Bulgaria is 20%. A reduced VAT rate of 9% applies to:

- particular tourist services;
- baby foods and hygiene products; and
- books and physical or electronic periodicals such as newspapers and magazines.

Other reduced rates are applied for limited time periods (eg, 9% rate for general tourist and restaurant and catering services until the end of 2024).

0% VAT rate is also applied to intra-community supplies, exports of goods to countries outside the EU, the international transport of goods, and supplies of goods and services related to vessels and aircraft.

Certain supplies are VAT-exempt (eg, sale of land; leasing of residential property to individuals; and financial, insurance, gambling, educational and health services).

The mandatory VAT registration is triggered upon certain conditions (eg, reaching a statutory registration threshold of BGN100,000 per annum). From 1 January 2025 the VAT registration threshold will be increased to BGN166,000 (approximately EUR83,000). Voluntary VAT registration is also possible. VAT reporting is organised on a monthly basis.

Excise Duties

Excisable products comprise petrol and diesel fuel, liquefied petroleum gas, heavy oil, kerosene, beer and spirits, tobacco and tobacco products, and electricity. Excise duties are charged as a percentage of the sales price or customs value or as a flat amount in Bulgarian lev per unit (or per other quantity measures, depending on the type of excisable good).

Taxation of Real Property

Each municipal council determines an annual property tax rate in the range of 0.01% to 0.45% of the tax value of the immovable properties (land and buildings) in the municipality, payable by the owners of the property.

Transfer Tax

A transfer tax is due on the value of transferred real estate or motor vehicles. The rate of the tax is between 0.1% and 3% and is determined by each municipal council for the territory of the relevant municipality.

Insurance Premium Tax

A tax of 2% is levied on all insurance premiums paid under insurance agreements covering risks insured in Bulgaria. Certain premiums (eg, for life insurance, aircraft and international transport) are exempt. Insurance companies deduct the tax and remit it to the budget.

5.3 Available Tax Credits/Incentives

Tax incentives are provided for by law and include the following main incentives.

- Exemption from CIT: collective investment schemes admitted to public offering in Bulgaria, national investment funds and alternative investment funds set up for the implementation of financial instruments under funding agreements under Article 38(7) of Regulation (EC) No 1303/2013, and special purpose investment companies are exempt from CIT. Certain organisers of games of

chance are also exempt from CIT for this activity.
- Incentives for hiring unemployed personnel: companies employing unemployed individuals (eg, persons registered as unemployed for more than one year or unemployed persons who are at least 50 years old or have reduced working capacity) for at least 12 consecutive months are entitled to reduce their taxable profit by the amounts paid in remuneration and social and health security contributions during the first 12 months of employment.
- Social and health insurance funds: if established by law, these may be allowed to retain 50% of their corporate tax.
- Tax relief for manufacturing activities in municipalities with an unemployment rate above the national average: companies are entitled to retain up to 100% of their corporate tax in respect of taxable profit derived from manufacturing activity performed in municipalities with a rate of unemployment of 25% or more than the national average, subject to certain other conditions.

5.4 Tax Consolidation

Bulgarian law does not provide for tax consolidation. Companies pay tax on their individual profits on a standalone basis.

5.5 Thin Capitalisation Rules and Other Limitations

The CIT Act provides for thin capitalisation rules. Overall, thin capitalisation rules do not apply if the debt-to-equity ratio does not exceed 3:1. The tax deductibility for interest expenses that exceed interest income is restricted to 75% of the accounting result of the company, exclusive of interest income and expense. When the taxable result of a company before including interest income and expenses is a loss, none of the net interest expense will be deductible for tax purposes. The thin capitalisation regulations do not apply to interest on bank loans and interest under financial lease agreements, unless in the case of related parties.

Interest expenses which are not deductible in a particular year due to the thin capitalisation regulations, may be deducted from the taxable financial result within the following years.

5.6 Transfer Pricing

Under Bulgarian law, companies must apply the arm's length principle to prices at which they sell or buy goods, services and intangibles to and from related parties. Bulgarian transfer pricing rules follow the OECD Transfer Pricing Guidelines.

If prices for the supply of goods or services or interest over loans differ from the market standard, they would deviate from the arm's length principle. The market prices are determined by specific methods (eg, comparable uncontrolled price method; resale price method; cost-plus method; etc).

Companies should generally be able to demonstrate that the transactions with their related parties are in line with the arm's length principle.

5.7 Anti-evasion Rules

The general anti-evasion rules are stipulated under the CIT Act. One of them is that if related parties enter into commercial and financial relationships under terms affecting the tax base and differing from the terms between unrelated parties, the tax base is determined and taxed under the terms applicable between unrelated parties. Furthermore, if transactions (including between unrelated parties) are concluded under terms leading to tax evasion, the tax base is determined by ignoring the tax evasion aspects.

The CIT Act provides for certain examples of tax evasion (eg, substantial excess of production inputs and other production costs; gratuitous use of assets; interest-free loans; and charging for services not actually performed).

If a transaction is concealed by a fictitious transaction, the tax liability is assessed under the terms of the concealed transaction.

6. Competition Law

6.1 Merger Control Notification

The local merger control rules are triggered where a transaction constitutes a "concentration" within the meaning of the Bulgarian Protection of Competition Act (PCA) and the relevant domestic turnover thresholds are met.

As a rule, concentrations are notifiable to the Commission for the Protection of Competition (CPC), if they are not within the competence of the European Commission. "Concentration" under the PCA is in place in case of change of control on a lasting basis and specifically:

- in the case of the merger or amalgamation of two or more previously independent undertakings; or
- where one or more persons, already controlling at least one undertaking, acquire control, directly or indirectly, in respect of other undertakings or parts of them, via acquisition of shares or property, by contract or by any other means.

Joint ventures (JVs) performing on a lasting basis all the functions of an economically autonomous entity would also constitute a concentration.

A change of control assessment would require consideration of both the law and facts. Generally, the substantive test is whether the transaction will result in the ability to exercise decisive influence over an independent undertaking by means of the right of veto on one or more of the strategic decisions of the company (eg, approval of the budget and business plans, and appointment of senior management).

In Bulgaria, there is currently no market-share notification threshold. The quantitative criterion is based on domestic turnover thresholds and a transaction is subject to mandatory prior notification and clearance by the CPC where:

- the combined aggregate annual turnover of all the undertakings participating in the concentration in the territory of Bulgaria during the preceding financial year exceeds BGN25 million; and
- either the total annual turnover of each of at least two of the undertakings participating in the concentration in the territory of Bulgaria during the preceding financial year exceeds BGN3 million; or
- the total annual turnover in the territory of Bulgaria during the preceding financial year of the entity subject to acquisition (the target) exceeds BGN3 million.

6.2 Merger Control Procedure

The merger control assessment by the CPC is made upon notification from the party/parties acquiring control. Initially, the CPC conducts a preliminary review of the notification for completeness within five working days and, if necessary, requires additional information and documents. Once the notification is considered complete, the chairperson of the CPC initiates proceedings (a brief notice is published on the website of the CPC).

Phase I (Accelerated) Review Process

For most mergers, the CPC carries out an accelerated review process in the so-called "Phase 1" proceeding that is to be completed within 25 business days. At this stage, the CPC may send formal requests for information (RFIs) to the notifying party, as well as to its major competitors, suppliers and customers, which stop the clock. RFIs are normally sent to the parties' main competitors, suppliers and customers in cases of "significantly affected markets" arising out of the concentration, which are considered to be in place if there is: (i) a horizontal overlap resulting in a combined market share of 15% or more; or (ii) a vertical overlap or conglomerate effect resulting in an individual or combined share of 25% more in any affected product markets.

Usually, the overall process during Phase I takes six to eight weeks after submission of the notification.

After the Phase I review, the CPC is to issue a decision by which it:

- declares that the transaction is not a concentration or does not fall within the scope of the mandatory merger control regime (negative clearance); or
- clears the transaction unconditionally; or
- clears the transaction subject to commitments by the parties; or
- initiates in-depth (Phase II) proceedings on the case.

Phase II (In-Depth) Review Process

If during the Phase I proceedings, the CPC concludes that the concentration may significantly impede effective competition in the relevant market, it may initiate an in-depth (Phase II) investigation of the case.

The Phase II investigation should be completed within 90 business days. In certain cases, this period may be extended (eg, for more complex cases by an additional 25 business days, and in the case of remedies offered by the parties, automatically by another 15 business days).

The actions following the initiation of a Phase II investigation follow a similar path to those under the Phase I proceedings. Interested third parties may submit observations within 30 days following the Phase II opening decision.

At the end of the review, the CPC will either issue an unconditional clearance, or adopt a statement of objections to the notifying party. The parties will have a right to respond to the statement of objections and be heard in an open hearing.

At the end of the Phase II investigation, the CPC will issue a decision by which it:

- approves the transaction unconditionally; or
- approves the transaction subject to conditions and obligations; or
- prohibits the transaction.

6.3 Cartels

Bulgarian legislation on prohibited agreements, decisions and concerted practices is almost entirely based on EU legislation. EU competition law applies in parallel with Bulgarian competition law in this area, if a prohibited agreement, decision or concerted practice can affect trade among EU member states.

Agreements among independent undertakings, decisions of associations of undertakings, as well as concerted practices among two or more independent undertakings, which have as their object to effect the prevention, restriction or

distortion of competition, are prohibited and are deemed to be automatically void.

This prohibition covers cartels (agreements between competitors that eliminate or reduce competition by fixing prices, by allocating customers or suppliers, or by restricting output or innovation), as well as less critical agreements, among competitors (horizontal agreements) or non-competitors (such as agreements among various undertakings on the production and supply chain – vertical agreements), that are capable of reducing competition.

Cartels are the most critical and heavily penalised types of infringements in this category. They include infringements such as bid rigging, market partitioning and customer allocation among competitors, quota agreements and other forms of output or capacity limitation among competitors. Other anti-competitive agreements that are caught within the scope of prohibited activities include vertical price fixing, exclusive, selective distribution, territorial restrictions on resales, and others.

Both EU and Bulgarian law provide for exemptions to the prohibition. EU and Bulgarian law block exemptions, exempt whole classes of agreements, decisions and concerted practices, subject to certain conditions (eg, limits of market share and absence of hardcore restrictions).

Certain agreements, decisions or concerted practices may be exempt from the prohibition on an individual basis, subject to the fulfilment of specific criteria.

6.4 Abuse of Dominant Position

Dominance, under EU and Bulgarian law, is deemed to be the position of market power of an undertaking that is substantially independent from its competitors, suppliers and ultimately from consumers. A dominant company is not sufficiently competitively constrained in its market conduct by other players in the market. A monopoly is an extreme form of dominance, where there is only one player in the relevant market, and under Bulgarian law a monopoly can only be established by law.

Various factors may be used to assess whether an undertaking is dominant, but the primary one is market share. Other factors which may be relevant include holding a market advantage that cannot easily be replicated, market stability, technology change, entry barriers, and the strength of competitors.

Dominance is not in itself prohibited. Bulgarian and EU law prohibit the abuse of dominance, being any conduct by a dominant undertaking that is capable of restricting competition and thereby negatively affecting consumers.

Abuses are normally divided into two main categories:

- exclusionary abuses – conduct of the dominant undertaking that prevents other market players from entering or expanding into the market or excludes them from the market (eg, below-cost pricing, leveraging dominance from one market into another, and unjustified refusals to supply or purchase); and
- exploitative abuses – conduct that extracts an unfair advantage from the dominant position of the undertaking (eg, excessive pricing and price discrimination).

7. Intellectual Property

7.1 Patents

Patents are granted for inventions in any technical field which are new, involve an inventive step and are industrially applicable. Certain subject matter is not patentable (eg, discoveries, scientific theories and mathematical methods).

The duration of a patent is 20 years after filing, subject to payment of annual maintenance fees. Bulgarian law also envisages registration of utility models subject to a ten-year duration. The test of inventiveness for a utility model is lower than for a patent.

Patent applications are filed with the Bulgarian Patent Office (BPO) and must contain a description of the invention, drawings (if applicable), claims and an abstract of the invention. If the statutory requirements are met and the fees are paid, the BPO issues a decision granting the patent.

The patent owner may bring civil proceedings against any infringement of the patent, requesting the court to, among other things:

- issue injunctions prohibiting the continuation of the infringement;
- order the destruction of the infringing goods and, in certain cases, the means for committing the infringement; and
- award compensation for damages.

7.2 Trade Marks

A trade mark is defined as consisting of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that the signs are capable of:

- distinguishing the goods or services of one undertaking from those of another undertaking; and
- being represented on the register in a manner enabling the competent authorities and the public to determine the clear and precise subject matter that is being afforded protection.

The initial trade mark registration is granted for a period of ten years and may be renewed for a fee for consecutive ten-year terms indefinitely. If the trade mark is not used for a period of five years, the registration may be revoked.

To register a trade mark, an application has to be filed with the BPO describing the trade mark and listing the goods and/or services covered, in line with the Nice Classification. The BPO examines the application and publishes it in an official bulletin. After this, third parties are entitled to file opposition proceedings within three months. If no oppositions are filed or if the oppositions are rejected, the trade mark can be registered.

The registered trade mark confers on the proprietor exclusive rights of use. In cases of infringement, the proprietors may file civil claims before the Sofia City Court. The available remedies are the same as those described above for patents (see **7.1 Patents**). It is also possible to apply for an injunction against intermediaries. In addition, trade mark infringement may constitute a criminal offence punishable with a fine and imprisonment for up to six years.

7.3 Industrial Design

Industrial design is defined as every new external appearance of an article, which is distinguished by its shape, pattern, ornamentation, combination of colours or other elements, suitable for reproduction by industrial methods. A

design can be protected only to the extent that it is new and has individual character.

Designs are registered for a period of ten years after filing subject to renewals, for a fee, for up to 15 years in total. The industrial design rights arise by registration at the BPO as of the date of filing. Registration applications are examined for compliance with formal requirements but the BPO does not check the novelty and individual character of the design in substance.

The holder of a registered design may use it to stop third parties from copying or using it. The use of a design covers the making, offering for sale, placing on the market or use of a product in which a protected design is incorporated or to which it is applied, as well as the importing, exporting or stocking of the products for those purposes. Any commercial use without the consent of the holder is an infringement. Infringement actions may be brought before the Sofia City Court. The available remedies are the same as those for patents (see **7.1 Patents**).

7.4 Copyright

Bulgarian law recognises copyright protection for any literary, artistic and scientific work resulting from a creative endeavour and expressed by any mode and in any objective form. Copyright consists of economic rights and moral rights. Copyright holders may grant exclusive/non-exclusive licence for use for a period of time not exceeding ten years.

Copyright protection arises from the moment the work is created (no registration is required) and lasts for a period of 70 years after the death of the author, subject to certain exceptions (eg, computer programs are protected for 70 years following their publication).

In cases of infringement, the holder of the copyright may file a civil lawsuit before the competent district court and claim, among others, the following remedies:

- an injunction prohibiting the continuation of the infringement;
- the seizure and destruction of illegally produced copies of the work; and
- compensation for damages.

Copyright infringements may also constitute criminal or administrative offences subject to respective penalties and fines.

7.5 Others

The law also grants protection for databases, in particular for the individuals or entities who have taken the initiative and the risk of investing in the collection, verification or use of the content of a database if this investment is substantial. The database maker has a specific right to prohibit the extraction of the content of the database onto another medium and the reuse of the content of the database by disclosure (including by distribution of copies, renting or provision by digital means).

Trade secrets are protected under the Protection of Trade Secrets Act which transposes the provisions of Directive (EU) 2016/943 on trade secrets into Bulgarian law.

8. Data Protection

8.1 Applicable Regulations

The main legislative act governing personal data protection in Bulgaria is Regulation (EU) 2016/679 (also known as the “GDPR”). The GDPR is supplemented by the Bulgarian Personal Data Protection Act of 2002, which ensures

its effective enforcement, contains a few locally specific rules, and implements Directive (EU) 2016/680.

Directive (EU) 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (the "e-Privacy Directive") is transposed in Bulgaria in the Electronic Communications Act with respect to its rules on direct marketing, and in the Electronic Commerce Act regarding the rules on cookies, subject to certain transposition deficiencies.

Sector-specific legislation (eg, for employment, electronic communications, health, gambling and private security) also contain data protection rules.

8.2 Geographical Scope

The GDPR applies to the processing of personal data in the context of the activities of an establishment of a company in the EU, regardless of whether the processing takes place in the EU.

The GDPR also applies to companies not established in the EU where their respective processing activities are related to the offering of goods or services to data subjects in the EU, or where they monitor the behaviour of data subjects in the EU.

There are no locally specific regulations in that respect.

8.3 Role and Authority of the Data Protection Agency

The Commission on Personal Data Protection is the local authority enforcing the applicable data protection rules. Its main tasks are outlined in the GDPR and include, among other things, monitoring and enforcing the GDPR, promoting public awareness on issues related to personal data protection, advising other public bodies, providing information to data subjects, handling complaints, conducting investigations and imposing sanctions for non-compliance.

In addition, the Commission may adopt secondary legislation on data protection and issue guidelines on the application of the GDPR in light of the local legal framework.

The Commission on Personal Data Protection is also the competent national authority under the Whistleblowing Directive (EU) 2019/1937.

9. Looking Forward

9.1 Upcoming Legal Reforms

Due to political instability in Bulgaria in the last two years and the inability to elect a stable parliamentary majority and form a regular government, the state budget for 2023 was not adopted until the end of 2022. Therefore, if the current parliament manages to approve the state budget for 2023, certain tax laws are going to be amended.

Most changes (if any) in the tax legislation are expected to be focused on reducing the budget deficit for 2023 and keeping it within the framework needed for Bulgaria's accession to the Eurozone. Nevertheless, permanent tax increases are unlikely although an increase in the standard VAT rate from 20% to 22% cannot be ruled out.

The secondary regulation on the implementation of the approval regime for foreign investments is expected to be adopted in September 2024. However, there is uncertainty over the exact timing. The approval regime will come fully into

force once this secondary regulation is issued. Until then, the notification and suspension of obligations will not apply to foreign investors. For more information, see **2.1 Approval of Foreign Investments**.

Trends and Developments

Contributed by:
Yordan Naydenov, Deyan Terziev, Adriana Bakalova and Trayan Targov
BOYANOV & Co

BOYANOV & Co is widely recognised as a top law firm for doing business in Bulgaria and south-eastern Europe (SEE). It has advised on numerous landmark transactions since 1990 and has earned international and local recognition as a preferred law firm. It is ranked as a market leader for the excellence of its services, offered by professionals who can draw on years of experience. As the founder of the Legal Development Foundation, it strives to assist in the formation of a new generation of modern lawyers. The firm is strongly dedicated to supporting the rule of law, and the adoption and implementation of efficient business regulations. It is the initiator of the South East Europe Legal Group ("SEE Legal"), the largest and oldest integrated organisation of leading law firms across 12 countries in south-eastern Europe, and of the Three Seas Legal Alliance, aimed at supporting projects within the Three Seas Initiative.

Authors

Yordan Naydenov is a partner at BOYANOV & Co heading the M&A and corporate practice groups. He has nearly 30 years of experience and specialises in high-value M&A deals, corporate restructuring and reorganisation transactions as well as greenfield and brownfield investment projects and structuring of large joint ventures between Bulgarian and international partners. He is active in various sectors including banking, IT, FMCG and real estate. He is a member of the Sofia Bar Association and International Bar Association and is the author of numerous publications.

Deyan Terziev is a senior associate at BOYANOV & Co having more than ten years of experience as a lawyer in Bulgaria. His practice focuses on ensuring the regulatory compliance of clients in personal data protection, telecom regulations, e-identification and digital signatures, connected vehicles, cybersecurity, IT, employment, and whistleblowing, as well as advising on commercial matters and marketing. He has significant experience in carrying out extensive data protection compliance projects for local subsidiaries of international clients and has been recognised as a Certified Information Privacy Professional for Europe by the International Association of Privacy Professionals.

Contributed by: Yordan Naydenov, Deyan Terziev, Adriana Bakalova and Trayan Targov, **BOYANOV & Co**

Adriana Bakalova is an associate at BOYANOV & Co. She has seven years of experience in the Bulgarian competition sector. She regularly advises clients in the field of competition law, as well as in relation to general commercial, corporate and banking matters. Her extensive experience in many legal areas, working as outside legal counsel for a number of the firm's clients, is invaluable in her ability to serve the day-to-day needs of businesses in a timely and efficient way.

Trayan Targov is a senior associate at BOYANOV & Co having more than 11 years of experience. He specialises in aviation and transport law, information and communications technology law and food law. His other areas of expertise include banking and finance, travel and hospitality, and corporate and commercial law. In 2016, he completed an international secondment in Allen & Overy's global projects, energy and infrastructure group in Warsaw, Poland. In 2019, he won a scholarship from the European Regional Forum of the International Bar Association.

BOYANOV & Co

82, Patriarch Evtimii Blvd
1463 Sofia
Bulgaria

Tel: +359 2 805 50 55
Fax: +359 2 805 50 00
Email: mail@boyanov.com
Web: www.boyanov.com

BOYANOV & Co.
Attorneys at Law

A Snapshot of Bulgaria

Bulgaria is a medium-sized country located in South-Eastern Europe (SEE), with a population of approximately 6.7 million people. It has been a member of the European Union since 2007 and the North Atlantic Treaty Organisation (NATO) since 2004. The Bulgarian economy has shown remarkable resilience in the face of a series of challenges.

The outlook is clear: growth will resume and inflation will continue to decline. The country's gross domestic product (GDP) reached USD101 billion in 2023, representing an annual growth rate of 1.8% (down from 3.9% in 2022). The rate of inflation continues to decline, with an average of 8.6% in 2023 down to 3.1% in March 2024, with energy and food prices accounting for most of these falling inflation figures. Growth is expected to accelerate in 2024, and inflation is expected to continue falling.

The Bulgarian economy is generally sensitive to global trends and events, which means that external developments can have a notable impact on Bulgarian businesses. Over the coming months and years, a number of international factors are likely to influence the Bulgarian business landscape.

Entry into the Eurozone

One of the most significant developments on the horizon is Bulgaria's anticipated entry into the Eurozone in 2025. Bulgaria has already initiated preparations for this transition, including the enactment of legislation to facilitate the process. Joining the Eurozone could boost confidence in the Bulgarian economy, as well as result in a reduction in debt servicing costs for both the government and businesses, and the reallocation of funds to various social or investment programmes.

For example, it is estimated that Bulgaria is currently losing approximately EUR1 billion annually as a consequence of its economy not yet having fully transitioned to the euro.

Integration into the Schengen area

The ongoing integration of Bulgaria into the Schengen area represents another key factor influencing the business landscape, with potential benefits including increased trade and tourism. In 2011, in the Schengen evaluation reports, the European Commission confirmed that Bulgaria had met all the requirements to become a fully fledged member of the Schengen area. On 31 March 2024, Bulgaria became a Schengen member state in accordance with a political agreement within the EU, with the Schengen rules consequently applying to the country.

This entailed the issuance of Schengen visas. However, controls were only lifted at internal air and sea borders. In practical terms, this meant that Bulgaria had only joined the Schengen area by air and sea. The Council of the EU has yet to issue a decision regarding the establishment of a date for the lifting of checks at internal land borders between Bulgaria and the other Schengen countries.

It was anticipated that Bulgaria would join the Schengen area for land travel before the end of 2024, which would have resulted in the elimination of border controls on the country's roads and railways. However, recent political turmoil is likely to delay this.

The Russia-Ukraine conflict

The ongoing conflict in Ukraine continues to influence the region, and Bulgaria is not immune to its effects. While Bulgaria does not face the direct impacts of the war such as bombings or large influxes of refugees, the war's pres-

ence is felt in various other ways, including the increased dissemination of Russian propaganda and the influence of external actors in public life. The political landscape has experienced some instability, reflecting the broader regional tensions.

Initial optimism in 2023 that the war would come to an end has been tempered by a realistic assessment of the current situation. The forthcoming presidential elections in the USA in November 2024 are expected to significantly impact the global political landscape, as well as Bulgaria.

OECD membership and investment by the EU Recovery and Resilience Plan

Furthermore, it is anticipated that Bulgaria's business environment and growth potential will be enhanced by two key factors that will have a decisive impact on the country's future trajectory:

- OECD membership on the horizon – accession to the OECD is among Bulgaria's main foreign policy priorities. In 2007, Bulgaria officially expressed interest in membership for the first time, and since then, the request to become a member of the global organisation has been repeated (most recently, in 2017). In 2022, Bulgaria was granted a roadmap for OECD membership, following the Organisation's decision to open accession discussions with the country. It is anticipated that accession to the OECD will facilitate economic growth, attract investment, and enhance living standards. Additionally, it is expected to encourage investment by providing further recognition of the stability, potential and attractiveness of the Bulgarian economy. According to the latest information, Bulgaria is anticipated to join the OECD by the end of 2025.
- EU Recovery and Resilience Plan – this plan addresses not only the challenges brought on by the COVID-19 pandemic, but also aims to achieve long-term economic growth and job creation. It aligns with the EU focus on sustainable development and prioritising a green and digital transition. Investments will target areas such as energy efficiency, renewable energy and the digitalisation of education. The plan also strives to reduce regional and social disparities in Bulgaria. This includes targeted investments in education, healthcare and infrastructure in less developed areas. These endeavours are designed to enhance the overall competitiveness of the Bulgarian economy and improve its citizens' quality of life. The EU has allocated EUR6.3 billion to Bulgaria to support these goals.

Political and judicial developments

Domestically, parliamentary elections in 2024 were seen as a turning point for Bulgaria, which has experienced frequent changes in government in recent years. The establishment of a stable government could provide the continuity necessary for effective governance and the successful implementation of key policies. The outcomes of these elections will influence domestic progress and Bulgaria's global interactions. A stable parliament is crucial for filling leadership positions in independent regulatory bodies, and enhancing their operational effectiveness.

These bodies play a key role in enforcing regulations and maintaining transparency across various sectors. With the appointment of effective leaders, these institutions will be better positioned to drive reforms and attract investment, thereby significantly enhancing their overall performance and impact. Finally, the success-

ful implementation of judicial reforms following recent constitutional changes is critically important. These reforms are designed to enhance the judiciary's independence and efficiency, which are essential for a robust legal system.

The successful implementation of the reforms will be important in reinforcing the rule of law, which is fundamental for attracting investment and securing the public's trust in the country's ability to uphold justice and equity.

Financial update

In retrospect, Bulgaria's mergers and acquisitions (M&A) activity in 2023 maintained its typical pace with 70 to 80 deals, predominantly involving local buyers and focusing on small-to-medium transactions. The most notable transaction was the indirect acquisition of a major Bulgarian mobile operator by a United Arab Emirates state-owned telecommunication company. Noteworthy deals included transactions in various sectors such as clinical research, fintech, and recycling, alongside significant movements in the telecoms sector.

Despite being a normal year for M&A in terms of quantity, the context was challenging, shaped by high (although decreasing) inflation, rising interest rates, and geopolitical tensions as a result of Russia's conflict with Ukraine. These conditions influenced a drop in transaction volumes in Central and Eastern Europe (CEE) and SEE, especially towards the end of 2023. Last year also saw significant deals in the renewable energy and real estate sectors, with notable transactions involving large-scale renewable projects and landmark properties.

The technology sector also experienced a period of dynamic activity, with several acquisitions and minority investments, particularly in technology companies funded by private equity. The manufacturing sector also saw a number of significant deals.

Looking Ahead: 2024 and Beyond

Going forward, two major trends are expected to continue to influence Bulgaria's business landscape. These are digital transformation and the green transition. These trends present both challenges and opportunities for businesses, requiring adaptation and innovation. They have the potential to become not only the primary drivers of economic growth but also the catalysts for major business transactions.

The digital transformation and green transition

Bulgaria is well positioned to become a frontrunner in digital transformation. This is due to a combination of a highly skilled workforce, a dynamic start-up scene, and its favourable geographic location. Bulgaria's IT sector has undergone substantial expansion in recent years. This surge can be attributed to two primary factors: the widespread adoption of digital technologies by businesses; and the evolving digital landscape shaped by the pandemic and its aftermath.

Looking ahead, the IT sector is projected to maintain its strong growth trajectory, with an anticipated increase from 11 to 12% in 2024. This significantly outpaces the expected growth range of 2 to 3% for the broader Bulgarian economy, solidifying the IT industry as a leading force. Bulgaria's commitment to this is reflected in its digital transformation by 2030 plan.

This plan outlines the six key goals Bulgaria is pursuing. These are:

- deployment of secure digital infrastructure;

- provision of ample access to technical knowledge and digital skills;
- increasing research and innovation capabilities;
- unlocking the value of data;
- digitalisation for a low-carbon circular economy; and
- improvement of government efficacy and the calibre of public services.

Bulgaria has achieved notable success with the European Digital Innovation Hubs (EDIHs) initiative. Four of its proposals have been evaluated and approved for financing, while another eight have been awarded a Seal of Excellence, indicating a potential for financing in 2024. The EDIHs are support centres that help companies overcome challenges and enhance their competitiveness through digitalisation.

In terms of connectivity, the country is well above the EU average in its coverage by fixed, very high capacity networks, but still below the EU average on mobile broadband coverage and the assignment of 5G.

Bulgaria has made some progress in terms of the green transition, but there is still work to be done. According to the Environmental Performance Index (EPI) 2022, Bulgaria ranked 41 out of 180 countries (a notable improvement compared to its 55th place in 2020) in terms of environmental performance, but 27th in terms of environmental improvement. This suggests that the country has made some progress over the last decade, but there is still room for improvement compared to other countries. It would be beneficial for Bulgaria to align its efforts with the EU Green Deal, which is an ambitious comprehensive plan to make the EU climate neutral by 2050.

Both digital transformation and the green transition present significant opportunities for businesses in Bulgaria. However, these opportunities come with challenges, as businesses should aim to achieve the following.

- Build a strong digital presence: businesses need to enhance their digital capabilities and offer innovative, customer-focused online products and services.
- Invest in infrastructure and security: upgrading digital infrastructure and security measures is essential, while ensuring compliance with relevant EU regulations and standards.
- Developing a future-ready workforce: it is critical to reskill and upskill the workforce, fostering a culture of continuous learning and collaboration.
- Adopting sustainable practices: integrating the green transition requires businesses to embrace sustainable and circular business models.
- Investing in green technologies: aligning with EU regulations and norms necessitates investment in eco-friendly technologies and practices.

This will result in an increasing number of businesses in Bulgaria achieving growth and competitiveness in the region and beyond. They may also become attractive targets for potential M&A deals or joint ventures. Furthermore, they will seek suitable opportunities that will allow them to further expand and develop their activities.

The digital transformation and green transition will have the most significant impact on sectors designed to create and operate within these new environments. These include, but are not limited to the IT, fintech and renewable energy sectors. However, other sectors also present exciting possibilities. Real estate, which has tradition-

ally been strong in Bulgaria, is likely to continue its positive performance. The telecommunications, leisure and tourism sectors are also worth watching, as they adapt to changing consumer preferences.

Political, economic and legal factors

It is also worth noting the potential return of some European production capacity to Bulgaria. Recent deals in this area suggest this trend could continue, creating further opportunities.

Bulgaria's economic landscape in 2024 will be shaped by a complex interplay of political, economic and legal factors. To enhance its attractiveness to investors and boost competitiveness, the country will need to adapt and implement effective strategies.

Greater European integration remains a strategic imperative for Bulgaria, encompassing ambitions to join the Schengen area by land, the Eurozone, and the OECD, as well as to meet commitments to NATO allies. It is crucial to foster a favourable political and business environment to encourage positive developments across all sectors and to secure sustainable economic growth. Successfully achieving these goals will not only fulfil Bulgaria's European aspirations, but also enhance its role on the international stage.

BURKINA FASO

Law and Practice

Contributed by:
Bobson Coulibaly, Pierre Yanogo, Oumarou Cisse and Diana Woba
SCP Yanogo Bobson

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SCP Yanogo Bobson specialises in business law and is located in Ouagadougou in Burkina Faso in West Africa. With nearly 30 years of experience, it is able to serve its diverse client base ranging from start-ups to State-owned enterprises. The firm provides clients with comprehensive consultation services tailored to their needs. It places emphasis on corporate and business law matters particularly mergers, acquisitions and financing operations. The team consists of 15 dedicated and qualified individuals and is well-equipped to assist foreign and domestic investors in fully leveraging the Burkinabé economy.

Authors

Bobson Coulibaly heads SCP Yanogo Bobson's corporate, mining and financing departments. With nearly 20 years of experience, she has negotiated and assisted clients on commercial contracts in accordance with the OHADA regulation. She has acted as counsel for various multinational companies in relation to numerous global disposals and acquisitions. She also regularly advises clients on the legal framework for investing in Francophone Africa. She holds a Bachelor's degree in Commerce from McGill University in Canada, a Bachelor's degree in Law from the University of Montreal in Canada and a joint LLM from the Universities of Rotterdam in the Netherlands, Bologna in Italy and Vienna in Austria.

Pierre Yanogo is in charge of SCP Yanogo Bobson's labour and litigation departments. Over more than 20 years, he has acquired solid experience in carrying out tax and legal advice and defence mandates for institutional clients and large national and international companies. He has extensive practical experience of national and sub-regional laws regarding environment law, employment law and business law. He is a graduate of the law faculty of the University of Ouagadougou in Burkina Faso, received his DESS in business law from the same university and trained in private international law at the International Academy of Law in The Hague in the Netherlands.

Oumarou Cisse joined SCP Yanogo Bobson in 2017 as a legal adviser. He has advised clients on a variety of legal topics including corporate law, international private law, business law, competition law and anti-bribery laws. He holds a Master's in Public and Private Procurement from the Pan-African Research Centre in Management and Development (CERPAMAD) and a law degree from the University of Ouagadougou in Burkina Faso. He is an alumnus of The Hague Academy of International Law in international private law and was called to the Burkina Faso Bar Association in 2022.

Diana Woba acts as a legal advisor at SCP Yanogo Bobson where she assists companies in all aspects of corporate matters. She has expertise in OHADA law, notably in corporate aspects covering the incorporation, modification and de-registration of commercial companies and associations and the holding of general meetings and boards of directors. She holds a Master's in Law and Management from the Institut International de Management and a law degree from the University Saint Thomas d'Aquin in Burkina Faso.

SCP Yanogo Bobson

Avenue de l'Armée
Cité An 3, Secteur 10, Section BI,
Lot 39, Parcelle 02
Bureau I 25
01 BP 1889 Ouagadougou 01
Burkina Faso

Tel: +226 2533 0219
Email: info@yb-lawyers.com
Web: www.yb-lawyers.com

1. Legal System

1.1 Legal System and Judicial Order

Burkina Faso has a civil law legal system. The key courts are the *Cour de Cassation,* the courts of appeal, the first instance tribunals, commercial courts, labour courts and departmental or district courts.

Cases are heard by the courts of first instance, then the courts of appeal and then the *Cour de Cassation*.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Order 2019-0416/MCIA of 2 December 2019 on the procedures for obtaining authorisation for foreigners to exercise the profession of a trader requires all individual foreigners and foreign legal entities who want to exercise the profession of a trader to obtain prior authorisation from the ministry in charge of commerce.

Law 13-2013/AN of 7 May 2013 related to the regulation of the profession of a trader in Burkina Faso provides that the exercise of the profession of a trader in strategic economic fields is subject to prior authorisation by the minister in charge of commerce. A strategic economic sector is any economic sector deemed to be of national interest.

2.2 Procedure and Sanctions in the Event of Non-compliance

The steps for foreign investors to obtain approval vary for foreign individuals and foreign legal entities.

Foreign Individuals

Foreign individuals have to submit:

- a request stamped at XOF200 specifying the fields of activity envisaged and addressed to the minister in charge of trade;
- an information form duly completed by the applicant and stamped at XOF10,000;
- an extract from the criminal record issued by the country of residence, which is less than three months old. Applicants who are unable to provide their criminal record in Burkina Faso at first have 75 days in which to submit it; and
- a duly signed declaration of honour that the applicant is not under a trading ban and is aware legal proceedings may be taken against them in the event of a false declaration.

Foreign Legal Entities

Foreign legal entities have to submit:

- a request stamped at XOF200 specifying the fields of activity envisaged and addressed to the minister in charge of trade;
- an information form duly completed by the applicant and stamped at XOF20,000;
- a copy of the articles of association and minutes of general meetings appointing the manager, director or person primarily responsible for managing the company in Burkina Faso; and
- a declaration of honour duly signed by the manager, director or first person in charge of the management of the company on Burkinabè territory that they are not under a trading ban and understand legal proceedings will be taken against them in the event of a false declaration.

Non-compliance leads to cancellation of the registration in the trade register.

2.3 Commitments Required From Foreign Investors

Article 10 of Law 13-2013/AN states that no one may carry on a commercial activity, directly or through an intermediary, if they have been subject to:

- a final or temporary general ban imposed by a court, whether the prohibition has been issued as a principal or complementary penalty;
- a ban imposed by a professional court. In this case, the ban only applies to the commercial activity in question; or
- a ban resulting from a final sentence of deprivation of liberty for an ordinary individual of at least three months' unsuspended imprisonment for an offence against property or an economic or financial offence.

Any foreign investor must comply with the regulations applicable in Burkina Faso and the conventions the country is a party to.

2.4 Right to Appeal

An investor has two months from the date of a decision failing to authorise an investment to challenge the decision at the administrative courts.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The most common types of company in Burkina Faso are the limited liability company (*Société à Responsabilité Limitée* (SARL)), the public limited company (*Société Anonyme* (SA)), the simplified joint stock company (*Société par Actions Simplifiée* (SAS)) and a branch.

SA

The revised OHADA Uniform Act on the Law of Commercial Companies and Economic Interest Groups (the "AUDSCGIE") sets no minimum or maximum number of shareholders for the incorporation and continuity of the SA. An SA may have just one shareholder, which is known as a *Société anonyme unipersonnelle*.

The company must also have capital of at least XOF10 million. This must be divided into shares with a par value freely determined by the articles of association. Shareholders are liable for the company's debts only up to the amount of their contributions and their rights are represented by shares under Article 385 of the AUDSCGIE.

The AUDSCGIE provides for two types of SA. The first is a board of directors SA and the second is a managing director SA.

The main management body of an SA with a board of directors is the board of directors. This is a collegial body with a minimum of three and a maximum of 12 members.

SAs can be managed by a board of directors consisting of individuals or legal entities. If legal entities, they must appoint a permanent representative for the duration of their term of office, who will incur the same responsibilities as if they were a director themselves.

SAs are therefore an ideal legal form for big companies with big projects.

SARLs

Article 3 of Decree 2016-314/PRES /PM/MJDH-PC/MINEFID/MCIA amending Decree 2014-462/

PRES/PM/MJ/MEF/MICA of 26 May 2014 laying down national provisions applicable to the form of articles of association and share capital for SARLs in Burkina Faso states that the share capital of the SARL is freely set by the partners in the articles of association.

However, this amount can never be less than the nominal value of a share, which is XOF5,000.

The SARL is a company with a legal personality distinct from that of the shareholders. This means it has rights as well as obligations. It must have at least one shareholder and shareholders are entitled to a share of profits, as well as to information about the company. The liability of each shareholder is limited to the amount of their contributions (Article 309 of the AUSCGIE).

Setting up a company in the form of a SARL is attractive from a legal point of view, because of its flexibility and the relative simplicity of drafting the articles of association and operating procedures. A SARL is the best legal form for start-ups.

SAS

Under the terms of Article 853-1 of the AUDSCGIE, an SAS is a company set up by one or more shareholders. Their organisation and operation are freely provided for in the articles of association, subject to the mandatory rules set out in the same deed.

In the absence of legal provisions on a given point, the law refers shareholders to the operating rules applicable to an SAS.

Shareholders of an SAS are only liable for the company's debts up to the amount of their contributions.

In terms of an SAS, the quasi-freedom offered to shareholders and its flexibility are its main benefits and makes it one of the corporate forms that is growing in popularity. An SAS is best used for joint ventures (JVs).

Branch

A branch is a commercial, industrial or service establishment belonging to a company or an individual, with a degree of management autonomy in accordance with the provisions of Article 116 of AUDSCGIE. It does not have an autonomous legal personality distinct from that of the company or individual owner. The rights and obligations arising from its activities or resulting from its existence are included in the assets and liabilities of the company or individual owner.

A branch may be established by a foreign company or individual. It is subject to the law of the State in which it is located.

When owned by a foreign individual, the branch must be transferred to an existing or new company from the relevant State, within two years of its creation, unless it is exempted from this obligation by an order of the minister in charge of trade of the State in which the branch is located.

The rigidity of the operating rules, which are strictly governed by the AUDSCGIE, leave the founders very little freedom to manage the company.

The formalities involved in setting up a branch are easier than those for commercial companies, as no articles of association need to be drawn up. All that is required to set up a branch is a decision by the shareholders of the holding company. However, given its limited lifetime of two years, it is more suited to projects that can be carried out within a short timeframe.

3.2 Incorporation Process

The main steps in setting up a company are:

- reserving the trading name of the company;
- drawing up a subscription form, which records the subscription of shares representing cash contributions;
- depositing the company's share capital with a bank or the Bar Association Trust Fund (*Caisse Autonome de Règlement Pécunier des Avocats* – CARPA) and drawing up a notarial declaration of subscription and payment (DS) by a notary;
- obtaining an address for the company by signing a lease agreement for the head office or purchasing a property to be used as the head office;
- drafting the company's constitutional documents, such as the articles of association and how the general meeting is going to be held;
- registering the company's incorporation documents with the tax authorities;
- registering the company with the *Registre du Commerce et du Crédit mobilier* (RCCM). This is a publicity measure required for the company to acquire legal personality. To this end, additional documents will be appended to the articles of association and the minutes of the general meeting and the entire file will be submitted to the *Centre de Formalité des Entreprises* (CEFORE) for registration; and
- publishing a legal notice of incorporation of the company in a newspaper permitted by law.

The average time for incorporating a company is three weeks. This does not include registration and drafting formalities.

3.3 Ongoing Reporting and Disclosure Obligations

Under Article 52 of the Uniform Act on General Commercial Law (AUDCG), if the company's situation subsequently undergoes changes relating to the shareholders, or the corporate objective or the directors of the company, it must notify the RCCM of the amendment to its articles of association within 30 days.

Annual financial statements reflecting the company's financial position must be filed with the commercial court and the tax office the company is attached to each year.

Companies are also required to declare the identity of their ultimate beneficiaries to the commercial court and the tax office they are attached to. If the identity of the ultimate beneficiary changes, companies must file amending declarations.

3.4 Management Structures

Management structures depend on the legal form of each entity.

SA

An SA has a board of directors. It may be a one-tier management system with a single board of directors, headed by a chairman who also acts as chief executive officer and is responsible for managing and representing the company.

A dual management system may also exist in an SA with a board of directors, headed by a chairman of the board of directors and a managing director, who is responsible for the management of the company. The managing director has all of the powers to act on behalf of the company. The chairman of the board of directors represents the board, organises and directs the work of management, but does not represent the company in its relations with third parties.

In an SA with a general administrator, a one-tier management structure is usually adopted, with a general administrator managing the company and the shareholders exercising their control at general meetings.

SARLs

SARLs are generally managed by one or more managers, who may be shareholders or third parties. It offers a more flexible management structure which is more suited to smaller entities.

SAS

The management structure in an SAS is flexible and defined in the company's articles of association. It has considerable freedom in defining its management bodies. There must be at least a chairman who manages the company under the supervision of the shareholders.

3.5 Directors', Officers' and Shareholders' Liability

The main rules governing the liability of directors and officers are set out in the AUDSCGIE.

Directors are individually liable to the company and to third parties for faults committed in the performance of their duties (Article 161 et seq. of the AUDSCGIE).

Company directors may be liable for intentional criminal offences. The AUDSCGIE defines a number of offences, with penalties determined by the criminal law of Burkina Faso.

In SAs, SARLs and SAS's, the shareholders are only liable for the company's debts up to the amount of the value of their shares (Articles 309, 385 and 853-1 of the AUDSCGIE).

4. Employment Law

4.1 Nature of Applicable Regulations

In Burkina Faso, the employment relationship is governed by various different legal rules.

Laws, Decrees and Orders

Act 028 -2008-AN of 13 May 2008 on the Labour Code in Burkina Faso is the main law governing labour relations. There are also a number of decrees and orders which complement the Labour Code, such as Decree 2023-1586/PRES-TRANS/PM/MFPTPS/MEFB of 20 November 2023 setting guaranteed inter-professional minimum salaries.

Collective Agreements

There is an inter-professional collective agreement dated 9 July 1974, which governs relations between employers and salaried workers under the Labour Code in all companies operating in the country in certain sectors such as commerce, banking and road transport. There are also collective agreements negotiated between workers' associations and employers' organisations for certain professional categories, such as the collective agreement for those working in the private education sector.

Employment Contracts

Individual employment contracts, whether written or oral, define the terms and conditions of employment between an employer and an employee, in compliance with the law and collective agreements.

Case Law

Decisions of the labour courts, while not having any general regulatory value, help to clarify and explain the interpretation and application of legal rules and collective agreements.

In summary, labour law in Burkina Faso is mainly based on the Labour Code and its application texts and is complemented by collective agreements and individual contracts. Case law also plays a role in clarifying the applicable rules.

4.2 Characteristics of Employment Contracts

There are specific rules that apply to employment contracts.

While employment contracts can be verbal or written, Article 54 of the Labour Code states that fixed-term contracts must be in writing. If they are not, they will be considered to be a permanent contract.

The employment contracts of national workers who have to work outside the national territory, as well as the contracts of non-national workers, must also be approved and registered by the local labour inspectorate.

In terms of the duration of contracts, an employment contract may not be concluded for a period of more than two years for national workers and three years for non-national workers under Article 54 of the Labour Code.

Fixed-term employment contracts may be renewed indefinitely. However, where there are abuses, they will only be renewed at the discretion of the labour court.

4.3 Working Time

The legal working time for employees or workers regardless of sex, age, task or type of work they are carrying out or working arrangements is 40 hours per week in all public or private establishments.

In terms of overtime, an order regulates overtime hours and provides that in companies that operate 24/7, including Sundays and national holidays or in companies where hours are worked in shift patterns, day and night shifts are paid at the normal hourly rate within the limit of the legal working time or the time considered to be equivalent.

Article 3 of this order specifies that overtime may be worked in all professional branches up to a maximum of 20 hours per week.

Article 5 of this order specifies that overtime in non-farming companies gives rise to a minimum increase in the actual salary, as follows:

- a higher rate of 15% for the first eight hours;
- 35% for additional hours; and
- 120% for night shifts worked on days of rest and public holidays.

4.4 Termination of Employment Contracts

Fixed-term employment contracts may only be terminated before their term ends if there is a written agreement between the parties, if a force majeure event occurs, or if there is gross negligence.

Failure by either party to comply with these conditions entitles the other party to damages corresponding to the loss suffered by that party.

A permanent employment contract may be terminated at the will of either party, subject to the provisions relating to dismissals for economic reasons. Staff delegates, union delegates and any other protected workers are subject to special rules, notably the prior opinion of the labour inspectorate.

If the reason for dismissal is considered abusive, the employer may be required to reinstate the employee or pay damages.

Termination of a permanent contract is subject to eight days' notice for workers paid by the hour or day, one months' notice for employees and three months' notice for managers and supervisors.

However, the employment contract may be terminated without notice in the event of gross fault, subject to a decision of the competent court taking the gravity of the fault into account. In the event of wrongful resignation, the employee may be required to pay damages for abusive termination.

In the event a dismissal is deemed to be wrongful or irregular, a party may bring an action for damages before the labour court. The amount of damages is capped by law.

In terms of the procedures for collective redundancies which can only be undertaken for economic reasons, the procedure is as follows:

- Consultation with employee representatives to find solutions that will maintain employment. The duration of internal negotiations must not exceed eight days. Solutions may include reduced working hours, shift work, part-time work, technical unemployment, redeployment of personnel, reorganisation of all types of bonus, indemnities and benefits or even a reduction in salaries.
- At the end of internal negotiations, if an agreement has been reached, a protocol agreement specifying the measures adopted and their period of validity is signed by the parties and forwarded to the labour inspectorate for information purposes.
- If negotiations fail, or if dismissal still proves necessary, the employer draws up a list of employees to be dismissed, together with the selection criteria, and communicates with the employee delegates in writing. These delegates have a maximum of eight days in which to make their observations.
- The employer's communication and the delegates' response are forwarded without delay to the labour inspectorate for any action it deems useful to take within eight days. Once this period has passed and unless otherwise agreed by the parties, the employer is no longer obliged to delay the application of its decision to dismiss.

4.5 Employee Representations

In compliance with applicable laws, staff delegates must be elected in all establishments located in Burkina Faso and employing more than ten workers under the Labour Code.

Staff delegates are the workers' representatives within a company. They are responsible for transmitting workers' complaints to the employer and ensuring that working conditions are observed.

Staff delegates are elected for a two-year term and may be re-elected. All employees form a single electoral college for the election of employee delegates.

A union delegate may also be appointed within a company by any duly constituted and representative trade union organisation (Article 289 of the Labour Code). Union delegates are responsible for representing the union in dealings with the company manager and for taking part in collective negotiations in the company.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

In the context of an employment relationship in Burkina Faso, the main taxes and charges payable by the employee and employer are as follows.

Payroll Taxes (Impôt Unique Sur Les Traitements et Salaires) (IUTS)

IUTs is payable by all employees in Burkina Faso, regardless of nationality.

It applies to all public and private salaries, allowances, emoluments and wages of all kinds, including benefits in kind (Article 105 of the General Tax Code (GTC)).

The IUTS rate is progressive, ranging from 0% to 25% depending on the amount of gross taxable salary.

Employees can benefit from a deduction of 20% or 25% on their gross taxable salary for professional expenses and charges.

Employers are required to deduct IUTS from salaries paid and then declare and remit them to their local tax office within ten days of the deduction.

Social Security Contributions

Both employees and employers must make monthly social security contributions to the *Caisse Nationale de Sécurité Sociale* (CNSS).

Under Decree 2023-0129/PRES-TRANSPM/MFP of 24 February 2023 on the rate of contributions to the social security regime organised by the CNSS, the employer contribution rates are as follows but are capped at a monthly salary cap of XOF800,000:

- family welfare – 6%;
- retirement pension – 8.5%; and
- occupational injuries – 1.5%.

The employee contribution rate is 5.5% per month.

CNSS contributions must be deducted and paid by the employer every month if the company has more than 20 employees and quarterly if the company has less than 20 employees.

The payment deadlines are within 15 days following the end of the month for which contributions are due if the employer pays monthly and 30 days following the end of the quarter for which contributions are due if the employer pays quarterly.

Employer Training Taxes (Taxe Patronale d'Apprentissage) (TPA)

The TPA is payable by employers at a rate of 3% of the gross amount of wages, salaries, allowances, emoluments and fringe benefits (Article 228 of the GTC).

The 1% Withholding Tax on Net Salaries

Decree 2024-0027/PRES-TRANS/PM/MEFP/MFPTPS of 17 January 2024 introduced an obligatory withholding tax on the salaries of public employees and workers in the private sector. Withholding tax of 1% has been imposed on the net salaries of public employees and workers in the private sector since 1 January 2024.

The deduction is made each month from the net salaries of employees and must be paid to the local tax centre for the private sector and to the *Fonds de Soutien Patriotique* treasury account

for public sector employees, no later than the fifth day of the month following the deduction.

Universal Health Insurance Contribution

A universal health insurance contribution has been introduced by Decree 2024-0345/PRES-TRANS/PM/MFPTPS/MEF of 3 April 2024, determining the terms and conditions for distribution and deduction of the contribution and the deadlines for its payment to the *Caisse nationale d'assurance maladie universelle*. It is payable by salaried employees and assimilated workers in the public and private sectors.

The applicable contribution rate is 5% and is divided between employers and employees on the basis of gross monthly remuneration, excluding reimbursement costs. The employer and the employee each pay 2.5%. Universal health insurance contributions are deducted by the employer and paid to the *Caisse nationale d'assurance maladie universelle* by the tenth day of the month following the deduction.

5.2 Taxes Applicable to Businesses

All commercial companies must pay all taxes due in Burkina Faso, unless specific tax provisions applicable to a given sector of activity provide for an exemption. All commercial companies are therefore subject to the following main taxes:

- Corporate income tax (IS).
- Tax advances (*Axomptes provisionnels*) calculated on the basis of 75% of the IS due for the previous financial year.
- Value added tax (VAT).
- Income tax on movable capital (IRCM).
- Property tax.
- Land contribution.
- Tax on property income.
- Withholding taxes on imports and sales of goods.
- Business licence tax.
- Local and foreign supplier withholdings.
- Single tax on salaries and wages (IUTS).
- Payroll tax (TPA).
- Capital gains tax on the sale of company shares.
- Motor vehicle tax (TVM).
- The special contribution on corporate profits after tax to the *Fonds de Soutien Patriotique*.

Burkina Faso has not effectively applied Pillar Two of the OECD's rules yet. The country has also not introduced any new taxes benefiting from the OECD's safe harbour status.

5.3 Available Tax Credits/Incentives

The government of Burkina Faso grants VAT tax credits to exporting companies. If the amount of authorised VAT deduction exceeds the amount of tax due on transactions carried out in respect of a given return, the excess constitutes a VAT credit which can be offset against the subsequent return(s). Unused VAT credits are not refundable in the case of companies exporting taxable goods under the internal system.

Tax incentives apply to small businesses registered under the simplified tax regime. Under Article 196 of the GTC, these companies are exempt from business tax for two financial years from the effective date of the start-up of the business, which is recorded by the tax authorities. If they are members of approved management centres (*centres de gestion agréés*), they benefit from reductions on certain types of tax, such as TPA and income tax.

Micro-businesses who are members of approved *centres de gestion agréé* benefit from a 25% reduction in the micro-business contribution.

Burkina Faso's Investment Code provides for tax incentives for investment in development projects in certain strategic sectors defined by the Code. For example, during the investment and operating phases, companies can benefit from exemptions from VAT, customs duties and certain direct taxes (Article 34 of the Investment Code and subsequent consecutive Articles).

5.4 Tax Consolidation

Tax consolidation is not available in Burkina Faso, as there is no legislation for group taxation under Burkinabé tax law.

However, in terms of transfer pricing control, companies belonging to a group of companies and meeting the criteria in Article 99 of the GTC are required to provide documentation. This includes the financial and tax situation of the multinational enterprise group, which includes the annual consolidated financial statements of the multinational enterprise group for the fiscal year in question, if they are otherwise prepared for financial reporting, regulatory, internal management, tax or other purposes.

5.5 Thin Capitalisation Rules and Other Limitations

Burkina Faso has not introduced any specific rules limiting the deductibility of interest paid to holding companies for corporation tax purposes.

However, Article 66 of the GTC provides that for the purposes of calculating corporation tax payable by companies who are dependent on or control companies operating inside or outside Burkina Faso, profits indirectly transferred to companies operating inside or outside Burkina Faso, either by increasing or decreasing purchase or selling prices or by any other means, are incorporated into the account results.

5.6 Transfer Pricing

In Burkina Faso, companies are subject to documentary and reporting requirements relating to transfer pricing. These are as follows.

- Documentation justifying transfer prices (Article 99 of the GTC). Each affiliated entity is required to provide the tax authorities with documentation justifying the pricing policy applied in transactions of all kinds with affiliated companies operating inside or outside Burkina Faso.
- An annual transfer pricing declaration for companies subject to tax (Article 98-1 of the GTC).
- A prior agreement on transfer prices. Companies operating in Burkina Faso may apply to the tax authorities for a prior agreement on the method of determining the prices of future transactions with one or more companies with which they are dependent or control for a period not exceeding four years (Article 588-1 of the GTC).

5.7 Anti-evasion Rules

In order to tackle tax evasion, Burkina Faso has taken measures governed by Article 96-1 of the GTC and the decree of 31 May 2022 on the obligation to declare and keep a register of beneficial owners of legal persons and legal arrangements. These impose an obligation on companies to keep a register of beneficial owners and an obligation on companies to declare their beneficial owners to the tax authorities and the commercial court.

6. Competition Law

6.1 Merger Control Notification

In Burkina Faso, mergers and acquisitions are only subject to notification if they constitute an

anti-competitive practice such as a concentration.

Article 19 of Act 016-2017/AN of 27 April 2017 on the organisation of competition in Burkina Faso (the "Competition Act") states that a concentration is any situation resulting from any act, in whatever form, involving the transfer of ownership or use of all or part of the assets of an undertaking, the object or effect of which is to enable an undertaking or group of undertakings to exercise, directly or indirectly, a decisive influence over one or more other undertakings.

Concentration occurs in particular through mergers, takeovers, joint ventures and any other form of horizontal, vertical or heterogeneous control.

The Competition Act considers mergers that create or strengthen a dominant position, held by one or more undertakings, with the consequence of significantly hindering effective competition on the market as anti-competitive practices.

For this reason, Article 18 of the Competition Act requires mergers to be notified to the National Commission on Competition and Consumption and to be subject to control in accordance with community provisions on competition, specifically Regulation 02/2002/CM/UEMOA on anti-competitive practices and Regulation 03/2002/CM/UEMOA on procedures applicable to cartels and abuses of dominant position within the West African Economic Monetary Union (WAEMU).

6.2 Merger Control Procedure

The main stages in merger notifications in Burkina Faso include the submission of a notification to the National Commission on Competition and Consumption. The National Commission on Competition and Consumption then notifies the WAEMU Commission, which then has six months to make a decision. After the six-month period, it is deemed to have implicitly adopted a negative clearance decision under Regulation 03/2002/CM/UEMOA.

6.3 Cartels

In terms of competition – in addition to the Competition Act – Regulation 02/2002/CM/UEMOA of 23 May 2002, relating to anti-competitive practices within WAEMU regulates competition. Annex VIII of the Bangui Agreement (Act of 2015) establishes an African Intellectual Property Organisation (OAPI), which deals with protection against unfair competition.

The Competition Act includes provisions related to anti-competitive agreements, abuse of a dominant position and public aid distorting competition. The provisions of the Competition Act apply to all production, distribution and service activities in Burkina Faso, including those carried out by legal persons governed by public law.

An anti-competitive agreement is an agreement or concerted action that has the purpose or effect of preventing, restricting, or distorting competition in a given market for goods or services (Article 16 of the Competition Act).

Article 2 of Annex III to the Bangui Agreement defines an act of unfair competition as any act or practice which, in the course of industrial or commercial activities, creates or is likely to create confusion of industrial or commercial activities, or creates or is likely to create confusion with another's enterprise or activities, in particular with the products or services offered by that enterprise.

The scope of application extends to practices implemented within the jurisdiction of WAEMU

and which have an effect on trade between member states.

6.4 Abuse of Dominant Position

Article 17 of the Competition Act defines a dominant position as a position of economic strength enjoyed by an undertaking, group, association, or group of undertakings, which gives it the power to prevent effective competition from developing and being maintained on the relevant market, by enabling it to behave to an appreciable extent independently of its competitors, its customers, and ultimately consumers.

The scope of application extends to practices implemented in the territory of Burkina Faso and which have effects on the national market.

7. Intellectual Property

7.1 Patents

A patent is defined as title issued to protect an invention. The patent expires at the end of the 20th calendar year from the filing date of the application. The patent application is filed with the OAPI or national organisation and contains the following documents:

- a patent application addressed to the general manager of the relevant organisation, in a sufficient number of copies;
- proof of payment of the filing and publication fees to the relevant organisation;
- an unstamped private power of attorney, if the applicant is represented by an agent; and
- a sealed envelope containing:
  - (a) a description of the invention which is the subject of the patent applied for, made in a clear and complete manner so that a person skilled in the art with average knowledge and ability can carry it out;
  - (b) such drawings as may be necessary or useful to understand the invention;
  - (c) the claim or claims defining the scope of protection sought and not exceeding the content of the description of the invention which is the subject of the patent applied for;
  - (d) a descriptive abstract summarising what is set out in the description, the claim(s) referred to and any drawings in support of the abstract; and
  - (e) sufficient indications as to the best mode of carrying out the invention known to the inventor at the date of filing and, if priority is claimed, at the priority date of the application.

Any interested party may oppose the grant of a patent by sending a written notice setting out the grounds for opposition to the relevant organisation, within three months of the publication of the application. The opposition must be based on an infringement or an earlier registered right belonging to the opponent.

The relevant organisation will then send a copy of the notice of opposition to the applicant or their agent, who may reply to the notice, stating the reasons for their reply, within three months, but this period can be renewed once. This reply must be communicated to the opposing party or their representative.

Before ruling on the opposition, the relevant organisation will hear the parties or their representative if so requested.

Where the relevant organisation considers the opposition to be well-founded:

- it will submit the patent application for re-examination; or

- it will terminate examination of the application.

Where the relevant organisation considers the opposition unfounded, it will continue the examination of the patent application.

An action for invalidity or lapses of a patent may be brought by any person having an interest in it.

7.2 Trade Marks

A trade mark or service mark is any visible or audible sign used or intended to be used to distinguish the goods or services of a natural or legal person. The registration of a trade mark is effective for ten years from the date of filing the application for registration. However, ownership of the trade mark may be retained indefinitely by successive renewals which may be issued every ten years.

The trade mark application must be filed with the OAPI or national organisation and contain the following documents:

- a request addressed to the general manager of the relevant organisation;
- proof of payment to the relevant organisation of the required fees;
- a reproduction of the mark, together with a clear and complete enumeration of the goods or services to which the mark applies, and of the corresponding classes of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks;
- the regulations setting out the conditions of use, in the case of a collective mark or a collective certification mark;
- the priority document, if applicable; and
- an unstamped private power of attorney, if the applicant is represented by an agent.

Any interested party may oppose the registration of a mark by sending a written notice setting out the grounds for opposition, which must be based on a violation of law or of a prior registered right belonging to the opponent, to the relevant organisation, within three months of the publication of the application. The opposition may also be based on an earlier filing or an application with an earlier priority date.

The relevant organisation then sends a copy of the notice of opposition to the applicant or their representative, who may reply to the notice, giving reasons, within three months, and this period may be renewed once if requested. The reply must be communicated to the opposing party or their representative.

Before ruling on the opposition, the relevant organisation will hear the parties or their representative if requested.

The relevant organisation's decision on the opposition may be appealed to the higher appeals commission within 60 days from notification of the decision to the parties concerned.

The relevant organisation will reject the application for registration only to the extent that it is well-founded.

The final decision to reject the application is published in the relevant organisation's official newsletter.

7.3 Industrial Design

Any plastic shape, whether or not combined with lines or colours, is considered an industrial design, provided that the assembly or shape gives a special appearance to an industrial or handicraft product and can be used in the manufacture of an industrial or handicraft product. The

term of protection conferred by the certificate of registration of an industrial design expires at the end of the fifth year from the date of the filing of the application.

The industrial design application must be filed with the OAPI or national organisation and contain the following documents:

- a request addressed to the general manager of the relevant organisation;
- proof of payment of the required fees to the relevant organisation;
- an unstamped private power of attorney, if the applicant is represented by an agent;
- an indication of the type of product for which the design will be used;
- on pain of invalidity of the deposit, two identical copies of a graphic or photographic representation or a specimen of the design placed in a sealed envelope of the dimensions laid down by regulation;
- the description of the industrial design(s), if applicable; and
- the priority document, if applicable.

Any interested party may oppose the registration of an industrial design by sending a written notice setting out the grounds for opposition to the relevant organisation, within three months of the publication of the application. The opposition must be based on an infringement of the law or of a prior registered right belonging to the opponent. The opposition may also be based on an earlier filing or an application with an earlier priority date.

The relevant organisation will then send a copy of the notice of opposition to the applicant or their representative, who may reply to the notice, giving reasons, within three months, which may be renewed once if requested. The reply must be communicated to the opposing party or their representative.

Before ruling on the opposition, the relevant organisation will hear from the parties or their representative, if requested.

The relevant organisation's decision on the opposition may be appealed to the higher appeals commission within 60 days from notification of the decision to the parties concerned.

The relevant organisation will reject the application for registration only to the extent that the opposition is well-founded.

The final decision to reject the application will be published in the relevant organisation's official newsletter.

7.4 Copyright

Copyright is the law that protects literary and artistic works such as writings, musical works and works of art. Economic rights are protected during the author's lifetime and 50 years after their death. Moral rights are perpetual.

7.5 Others

Software and database rights are protected in the same way as copyright.

8. Data Protection

8.1 Applicable Regulations

The main regulation is Law 001-2021/AN dated 30 March 2021 relating to the protection of individuals with regard to the processing of personal data (the "Personal Data Protection Act").

The purpose of the Personal Data Protection Act is to protect the fundamental rights and

freedoms of individuals with regard to the processing of their personal data, regardless of the nature, method of execution or persons responsible for the processing.

8.2 Geographical Scope

The Personal Data Protection Act applies to the processing operations in respect of which the controller is established in Burkina Faso, regardless of where they carry out the processing of personal data or, without being established there, if the controller is subject to Burkina Faso law under public international law.

It also applies to data controllers or processors not established in Burkina Faso, who carry out processing operations from the national territory, with the exception of transit data.

The implementation of personal data processing is subject to one of the following prior formalities: request for advice, authorisation, normal declaration and simplified declaration.

The content and format of the declaration, request for advice and authorisation are adopted by the authority of control.

8.3 Role and Authority of the Data Protection Agency

The agency in charge of enforcing data protection rules in Burkina Faso is the Commission for Information Technology and Liberties (*Commission de l'informatique et des libertés* (CIL)).

CIL is responsible for ensuring compliance with the provisions of the data protection law, in particular by informing all data subjects and data controllers of their rights and obligations and by controlling the use of information and communication technologies applied to personal data processing.

9. Looking Forward

9.1 Upcoming Legal Reforms

Four key legislative developments are anticipated. The first is imminent changes to the Investment Code. The second is amendments to the Labour Code, which are currently being considered and mean employment law regulations may change in the near future. The third is changes to the country's Mining Code. The country's new Mining Code was finally adopted by the transitional legislative assembly on july 18, 2024. The fourth is modifications to tax provisions, given that in 2024, contributions to universal sickness insurance were introduced via the Finance Act 2024. This followed the introduction of the patriotic support tax in 2023 via the Finance Act 2023.

CABO VERDE

Law and Practice

Contributed by:
Nelson Raposo Bernardo, Joana Andrade Correia, Júlio Martins Júnior, Manuel Esteves de Albuquerque and Mafalda Contumélias Batista
Raposo Bernardo & Associados

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Raposo Bernardo & Associados is an international full-service law firm, with practices in Africa (Angola, Cabo Verde, Guinea Bissau, Mozambique, and São Tomé and Príncipe) and Europe (Portugal and Spain). In Cabo Verde, with a team of 12 lawyers based both locally and abroad, the firm offers more than 20 years' experience of participating in the most innovative and relevant projects, regularly representing the interests of national and international players, investment and commercial banks, investment funds, financial intermediaries, government entities, and public sector and private agents in legal matters concerning banking, energy, aviation, pharmaceuticals, tourism and leisure, and construction and infrastructure. The firm's expertise includes advising on operations such as corporate finance and major project finance, large M&A transactions, privatisations, PPP projects, large infrastructure projects and drafts of banking, financial markets and insurance legislation. It also works closely with major international law firms.

Authors

Nelson Raposo Bernardo is the managing partner and head of Raposo Bernardo's banking and projects practices, and co-head of the corporate practice. He has more than 25 years' experience as a lawyer in high-profile and complex legal operations and transactions. He is an assistant professor of corporate and commercial law at the Law School of the University of Lisbon and regularly lectures on entrepreneurship, start-up and management courses at INDEG/ISCTE, one of the most highly regarded business schools in Portugal. He also has experience in legislating and has led several legislative reform committees, in several countries, on banking, finance, insurance, projects, start-ups and venture capital.

Joana Andrade Correia is a partner and co-head of Raposo Bernardo's corporate and M&A department. She has led multiple domestic and international operations, including corporate restructurings and M&A transactions for key players in different sectors, such as aviation, banking and finance, pharmaceutical, energy and infrastructure. She has also worked on several projects to review and reform legislation. Joana's recent work includes advising a major European private airline on the privatisation of a public airline, a major European hotels and resorts group on its business incorporation in Portugal and the opening of two hotels, and a leading Iberian paper print company on a merger transaction.

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Júlio Martins Júnior is of counsel at Raposo Bernardo and a member of the Cabo Verdean and Portuguese Bar Associations. He has more than 15 years' experience in corporate law and finance-related operations, particularly in relation to sales and acquisitions of shares and assets, financing operations, licensing and regulation and M&A. Júlio has been involved in major international investment projects in Cabo Verde. His recent transactions include advising over 30 banks operating in the country on financing contracts for large infrastructure and equipment and advising the second-largest bank in the world, in terms of assets, on a loan agreement for an international credit transaction.

Manuel Esteves de Albuquerque is of counsel at Raposo Bernardo and has extensive experience in public law regarding administrative law, public procurement, public works contracts and regulation. He has advised on real estate investments and respective due diligence, and worked on the creation of real estate investment structures and the drafting and negotiation of sale and purchase agreements; he is also experienced in derivatives, regulation and compliance. Manuel's experience includes advising on the sale and purchase of retail and logistic parks and tourism projects, and advising clients in the energy and power projects and trading sectors.

Mafalda Contumélias Batista is managing associate at Raposo Bernardo and has over two decades' experience in insurance, insolvency and restructuring, labour law, litigation and arbitration. She has successfully advised on company restructurings and conducted major and complex operations in civil procedural law, insolvency proceedings and arbitration, for significant players in sectors including oil and gas, energy, tourism, pharmaceuticals, banking and real estate. Her track record in dispute resolution includes expert determination, arbitration, accounting integrity and conduct, insurance disputes and competition damages claims. Mafalda regularly handles matters involving unfair trade practices, consumer fraud and policy coverage issues, as well as complex breach of contract and tort claims.

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Raposo Bernardo & Associados

Av. Fontes Pereira de Melo
Ed. Aviz, nº 35, 18º
1050-118 Lisbon
Portugal

Tel: +351 21 312 1330
Fax: +351 21 356 2908
Email: jacorreia@raposobernardo.com
Web: www.raposobernardo.com

1. Legal System

1.1 Legal System and Judicial Order

Cabo Verdean law is based on the civil law system. The Constitution of Cabo Verde and relevant legislation provide for a judiciary independent from the executive. The judicial system in Cabo Verde is based on three levels of appreciation by different courts:

- First Instance Courts (trial court);
- Courts of Appeal; and
- the Supreme Court.

As a rule, any case shall be presented at the First Instance Courts and, depending on several requisites (such as the value of the case or the subject matter), the party that loses the case may appeal to the Court of Appeal and, subsequently (as a second level of appeal), to the Supreme Court, which only analyses questions of law.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

There are no restrictions on the entry of foreign investments. All investors, regardless of their nationality, have the same rights and are subject to the same duties and obligations under the laws of Cabo Verde. A national partner is not required, and there are no limitations on the distribution of profits or dividends abroad.

The rules governing foreign investment are similar to those applicable to domestic investment. No special registration or notification to any authority regarding foreign investment is required. However, there may be mandatory registration/approvals for specific activities – such as in the banking, finance, aviation, maritime and telecommunications sectors – that are applicable for both foreign and domestic investment.

2.2 Procedure and Sanctions in the Event of Non-compliance

There are no restrictions on the entry of foreign investments, and the rules governing foreign investment are similar to those applicable to domestic investment.

2.3 Commitments Required From Foreign Investors

See **2.2 Procedure and Sanctions in the Event of Non-compliance**.

2.4 Right to Appeal

The law recognises the right of an investor to challenge any decision of the administrative authorities in court. The scope of the legal challenge depends on the nature of the decision by the administrative authority.

As a rule, the first instance court has a mandatory deadline of three years to issue a decision.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The following types of company are the most relevant provided for in the Cabo Verde Companies Code and are frequently chosen by foreign investors aiming to start their own enterprise structure in Cabo Verde. The choice of one of these structures depends on many factors, such as:

- the type of business to be implemented;
- the simplicity or size of the operations;
- the amount of capital to be invested;
- the possibility to transfer ownership freely; and
- disclosure rules about the aforesaid ownership.

The most commonly used forms are public limited companies and limited companies, since they are more operational.

Public Limited Companies (Sociedade Anónima)

This type of company has the following characteristics.

- Minimum share capital of EUR0.01.
- A minimum of two shareholders. A single-shareholder public limited company incorporation is permitted if the single shareholder is another company.
- As a general rule, public limited companies are incorporated by means of a private document (articles of association). Additional formalities may apply if the shareholders perform contributions in kind.
- As a rule, the transfer of shares is free and may be carried out by means of an agreement between the parties.
- The governing bodies of a public limited company are as follows.
  - (a) A management board, generally with a minimum of three members. Management can be entrusted to one director if the turnover for two consecutive years is expected to be less than CVE10 million. In addition to the election of the effective members of the board of directors, substitute directors must be elected in numbers not exceeding one third of the effective directors – this means three effective members and one substitute member, or one effective member and one substitute.
  - (b) A shareholder meeting.
  - (c) A supervisory board (three members) or one auditor – a member of the supervisory board or the auditor must be certified.
  - (d) An auditor (for large companies).
- Shareholders' liability is limited to capital subscribed, but shareholders are jointly and severally liable for all contributions contained in the by-laws.
- Flexibility of capital – only registered shares are allowed. Registered shares are transferred by endorsing the share certificate in the name of the transferee. Notice must be given to the company for the purposes of registration in the share book. Book-entry shares are transferred by registration in the transferee's bank account. The only limit on the free transfer of

shares may arise from any pre-emption rights that have been established by the shareholders in the articles of association.

A public limited company (*sociedade anónima*, or SA) is the form traditionally adopted by larger companies. It is primarily characterised by the fact that it has a more complex organisational structure than, for example, the limited company. The public limited company form also provides greater flexibility when it comes to share capital insofar as no special procedure is required for the transfer of shares.

Limited Companies (Sociedade por Quotas)

This type of company has the following characteristics.

- A minimum share capital of EUR0.01.
- A minimum of two shareholders as a rule. Single-shareholder limited liability company incorporation is permitted.
- As a general rule, limited companies are incorporated by means of a private document (articles of association). Additional formalities may apply if the shareholders perform contributions in kind.
- The transfer of shares may be carried out by means of an agreement between the parties, except when the incorporation has been made through public deed.
- The company is governed by management with one or more directors. An auditor is not mandatory, but companies that do not have a supervisory body must appoint a certified auditor to carry out the statutory audit if their turnover is greater than CVE10 million and/or the number of employees is more than ten.
- Shareholders' liability is limited to capital subscribed, but shareholders are jointly and severally liable for all contributions contained in the by-laws.
- The transfer of shares must be made by written agreement between the parties. The articles of association may set limits or conditions on the transfer of shares or pre-emptive rights in favour of other shareholders or the company itself.

3.2 Incorporation Process

The procedural steps to set up a company are as follows.

- Approval of name – the first step in this type of process is to gain approval of the name of the company to be set up and to indicate what type of company it will be.
- Head office of the company – the company must indicate the location where it will carry out its commercial activity.
- Corporate structure – the identification documents or commercial certificates, according to whether individuals or legal entities are involved, of the shareholders or quota-holders who will make up the corporate structure of the company are required. If the individuals or legal entities are foreign, the above documents must be legalised at the Cabo Verdean consulate in the country of origin or apostilled. If the shareholders or quota-holders are legal entities, it will also be necessary for the written resolution approving the setting up of the Cabo Verdean company and the shareholding to be held by the legal entity in question.
- Powers of attorney – if the share/quota-holders are not available to travel to Cabo Verde to sign the documentation necessary for the process of incorporating the company, they will have to execute powers of attorney granting powers to representatives in Cabo Verde to deal with the respective legal steps of incorporation.

- The articles of association – this document establishes the rules that will govern the operation of the company.
- Composition of the corporate bodies – the members who will form the first board of directors must be indicated at the moment of incorporation.
- Commercial licence – after dealing with the deed of incorporation and respective commercial registration, an application must be made requesting the issue of the commercial licence.
- Commercial representation – foreign branches of commercial companies may choose to be represented in Cabo Verde through branches, agencies, delegations or other forms of representation. Representations are authorised to carry out activity in Cabo Verde in accordance with the applicable time limit.

3.3 Ongoing Reporting and Disclosure Obligations

The ongoing reporting and disclosure obligations depend on the sector of activity of the company. Companies that operate in financial, banking, insurance and communications are subject to different levels of ongoing reporting and disclosure obligations.

Companies that are not subject to special legal regimes must report the following:

- annual accounts, which are to be filed annually with the commercial registry and must be publicly available;
- a statement of commencement of activity from the tax authorities;
- a statement of commencement of activity for social security purposes; and
- any amendment to the articles of incorporation.

3.4 Management Structures

For a *sociedade anónima*, the management must be structured as a board of directors with a minimum of three members or an executive board of directors. Where the share capital does not exceed EUR90,691, the board of directors can be replaced by a single director.

For *sociedades por quotas*, management is discharged by one or more managers, who must be individuals, designated by the shareholders.

3.5 Directors', Officers' and Shareholders' Liability

Directors can face civil and criminal liability.

Directors' Civil Liability

Members of the board of directors can be held liable towards the company for damages caused by acts or omissions resulting from disrespect of their legal or contractual duties, unless the directors can prove that they did not act wilfully or maliciously.

As an expression of the business judgement rule, liability is waived if directors can prove that they acted in an informed manner, free of any personal interest and using the criterion of corporate rationality. A director who does not exercise the right of opposition conferred by law, when able to do so, will be jointly liable for the acts they could have objected to.

Directors are not liable towards the company if the act or omission is part of a resolution of the general meeting, even if that resolution is voidable. However, directors will not be released from liability on the favourable opinion or consent of the supervisory body.

Directors' Criminal Liability

Under Cabo Verdean law, only crimes expressly provided for in the law can be punishable. Companies and individuals can be held criminally liable.

Directors can be liable for any action wilfully performed on behalf of the company, whenever such action qualifies as a crime and even if the relevant type of crime requires (to qualify as such) certain elements that can only occur in the company or if an agent acts in its own interest and the director acted in the company's interest.

Misdemeanour Proceedings

Certain actions of the directors can qualify as misdemeanours and incur fines and accessory penalties applicable to the relevant agent (either a company or generally a director acting on behalf of the company).

4. Employment Law

4.1 Nature of Applicable Regulations

The employment relationship is regulated by the Labour Code (Legislative Decree No 5/2007 of 16 October). Several other laws regulate important issues, such as work-related accidents and sickness.

Nevertheless, the parties may agree some special situation conditions for the employment relationship in employment agreements, provided they do not violate the Labour Code. It is also possible to have collective bargaining agreements with more favourable conditions for employees.

Civil servants or public employment relationships are subject to special regulation.

4.2 Characteristics of Employment Contracts

As a rule, no written document is required and the employment relationship can be proved by any means.

Some types of contract must be in writing – ie, fixed-term or part-time and certain top management contracts. The contract not being in writing does not render it invalid, but it can lead to the contract being requalified as a full-time, permanent contract.

4.3 Working Time

The minimum and maximum working times are regulated by the Labour Code. The normal working period may not exceed eight hours per day and 44 hours per week, and a minimum of 12 consecutive hours of rest must be respected.

The Labour Code provides that, by a unilateral decision of the employer, a single schedule of seven hours of daily work may be established during the months of July to September, between 6am and 3pm on the same day. During daylight saving time, the employee shall be allowed an interval of not less than 15 minutes. The employer may also choose to maintain normal working hours by extending rest time between the morning and afternoon periods, but in such case the afternoon period may not pass 19:30 each day. As a rule, the daily working period shall be interrupted by an interval with a maximum duration of one hour so that the employee does not work more than five consecutive hours.

Overtime hours are also regulated by the Labour Code and are considered to be work outside the normal period of work to which the employee is bound and can only be done in the case of increases in work that do not justify the recruitment of other employees, in the case of force

majeure, or where there are serious reasons that make it necessary in order to prevent serious harm.

4.4 Termination of Employment Contracts

The employment contract is extinguished by:

- mutual agreement of the parties;
- expiry;
- collective dismissal;
- individual dismissal for just cause; or
- termination by the employee.

Mutual Agreement of the Parties

It is always lawful for the employer and the employee to terminate the employment contract by mutual agreement, which must be executed in writing. The parties are free to enter into an agreement with or without compensation and to fix the date of termination – ie, to establish that the termination will be immediate or in the future. However, if the parties intend to give immediate effect to the termination agreement, the employer shall agree compensation with the employee, taking into consideration the type and duration of the employment contract, remuneration and the possibility of finding a new job. The compensation to be agreed between the parties may be paid in cash or in goods, in a single instalment or in several instalments.

The employee can always claim cancellation of the agreement or any of its clauses, by judicial proceedings, if they consider that there has been an error, malicious act or coercion in its conclusion.

Expiry

The employment contract expires as follows:

- once the period has expired;
- if there is a supervening, absolute and definitive impossibility of the employee performing the work for which they were hired;
- by the occurrence of any extinctive facts, not dependent on the will of the parties; or
- upon the retirement of the employee.

The expiry of the contract due to the expiry of the initial or renewal period gives the employee the right to compensation of the following amounts:

- 21 days of basic remuneration if the contract lasts one year;
- 15 days of basic remuneration for each full year of the contract, in addition to the first year; and
- 1.75 days of basic remuneration for each month of the contract term up to one year.

In undetermined-duration and fixed-term contracts with a duration of more than five years, the employee is entitled to compensation in the amount of ten days of basic remuneration for each full year after the first five years and one day of compensation for each month of duration of the contract up to one year.

Collective Dismissal

The employer may terminate the employment contracts of two or more employees on the grounds of reduced business or permanent closure of the company, establishment or part of the company structure for economic, conjectural or technological reasons.

The employer intending to make a collective dismissal shall communicate its intention in writing to the unions representing the employees. If the employees are non-unionised, the company shall notify the employees directly. The communication shall include the following information:

- the grounds for collective dismissal;
- the expected date for the termination of the contracts;
- the criterion for the selection of employees; and
- the number and professional category of the employees covered by the collective dismissal.

The employees covered by the collective dismissal are entitled to compensation, the amount of which depends on the date the employee was hired.

Individual Dismissal for Just Cause

Under certain circumstances, the employer can terminate the contract for just cause. The concept of just cause includes disciplinary dismissal and other forms of dismissal, provided that they are justified according to the law.

For dismissal based on unlawful conduct of the employee, the concept of just cause is the centrepiece of the matter and consists of the impossibility in practice of continuing the employment relationship due to the seriousness of the employee's misconduct. When dismissed with disciplinary cause, the employee is not entitled to any compensation.

If the dismissal is not justified according to the law or if the employer does not comply with the proper proceeding, the termination of the contract can be considered null and void. The contract remains in force, which can lead to reinstatement or compensation.

Termination by the Employee

The employee may terminate the employment contract at any time without any reason or explanation, but is obliged to give prior notice to the employer, which varies between 15 days and two months depending on the duration of the contract.

4.5 Employee Representations

The right to form an employee representative body in any company, regardless of its size, is guaranteed by the Cabo Verdean Constitution. The initiative depends completely on the employees, which means that employers are under no obligation to implement this form of representation.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Employees are subject to personal income tax (PIT) under two tax methods:

- the declarative (self-assessment) method; and
- the final withholding method.

Employees are taxed according to category A (employment income), based on their residence or non-residence status. For PIT purposes, an employee is deemed resident in Cabo Verde if they:

- spend more than 183 days in aggregate in Cabo Verde during a calendar year; or
- stay fewer than 183 days therein and maintain a residence said to be the habitual residence in Cabo Verde with reference to December 31st of a given year.

Declarative Method

Under the declarative method, individuals are taxed according to their annual income statement. This method is mandatorily applicable to taxpayers taxed under category B (business and professional income) with standard organised

accounting, and to taxpayers taxed under category C (rental income). This method is also applicable to dependent workers (category A) who opt to file their tax return on income obtained abroad by resident taxpayers, and on income obtained in Cabo Verde by non-resident taxpayers that could not be taxed at flat rates.

Income will be subject to taxation at rates ranging between 16.5% and 27.5%, as follows:

- up to CVE960,000 – 16.5%;
- CVE960,000 to CVE1.8 million – 23.1%; and
- over CVE1.8 million – 27.5%.

An exemption from taxation applies to net income of up to CVE220,000 annually.

Final Withholding Method

The final withholding method is used to collect taxes when taxpayers are not obliged to submit their annual income statement in the following cases.

Category A – employment and pensions

This income is generally subject to monthly withholding tax (WHT). Employment income is specifically defined in the PIT Code and covers all payments in connection with work (employment contract), such as salary, bonuses, commissions, pensions, allowances (eg, cost-of-living and housing allowances) and benefits in kind (eg, company cars), regardless of where the payment originates. Board members' remuneration is taxed as employment income.

The following types of income are exempt from PIT:

- per diems for national and international trips, for the portion that does not exceed the limits set for the public services;
- lunch allowance, up to CVE250 per day;
- the use of a personal car, up to CVE120,000 per year;
- a cash shortage allowance, of up to 15% of the monthly salary;
- a family allowance, of up to CVE500 per month, for each dependant or equivalent and ancestors; and
- redundancy payments, which are taxable on the portion that exceeds one and a half times the average remuneration paid during the last months of employment, multiplied by the number of years of employment.

As a rule, the monthly WHT is levied as final taxation, unless the taxpayer opts to file the tax return, in which case the tax withheld has the nature of an advance payment on account of the final annual income tax liability. The monthly tax withholdings due are calculated by applying the following progressive WHT rates and the corresponding deduction to the taxable income:

- up to CVE80,000 – WHT is 15% with a CVE5,500 deduction;
- CVE80,000 to CVE150,000 – WHT is 21% with a CVE10,300 deduction; and
- over CVE150,000 – WHT is 25% with a CVE16,300 deduction.

Employees and managers or directors of the company are liable to social security contributions of 8.5% on their gross remuneration. Employers are liable to social security contributions of 16% on the same gross remuneration received by employees and managers or directors of the company.

Category B – business and professional income

Business and professional income earned by individual entrepreneurs is taxed under the following regimes:

- standard organised accounting; and
- single act (*ato isolado*).

Business and professional income earned by individual entrepreneurs under standard organised accounting is subject to WHT at the rate of 20% as an advance payment on account of the final annual income tax liability.

Net income is computed under the rules applicable to companies, with the adjustments provided for in the PIT Code and subject to income tax at the PIT rates applicable.

Net income is computed according to the declaration-based method (*método declarativo*), where tax is levied on the aggregate base of the relevant income categories in the household minus personal deductions and allowances.

Under the PIT Code, a single act is considered a taxable operation performed twice during the tax year.

Category C – rental income

Rental income is subject to WHT at the rate of 20% as an advance payment on account of the final annual income tax liability. To compute the net income, taxpayers may deduct maintenance and repair expenses of up to 30% of gross rental income.

Category D – investment income

In general, investment income is subject to a flat rate of 20%, although the following exceptions apply:

- dividends are subject to a flat rate of 10%; and
- interest on bonds is subject to a flat rate of 10%.

A special tax regime contained in the Tax Benefits Code provides for the following:

- an exemption from taxation on interest on term deposits received by Cabo Verdean emigrants;
- income derived from bonds or similar products (except debt securities listed in the securities market) obtained before 31 December 2017 benefits from a 5% flat rate; and
- dividends from shares listed in the stock exchange, placed at the disposal of their holders before 31 December 2017, are exempt from PIT.

Category E – capital gains

Capital gains earned by individual taxpayers are subject to a flat rate of 1% in the case of gains on the disposal of immovable property, intellectual property or shareholdings. A flat rate of 20% applies in the case of gains on gambling, lottery participation, betting, prizes awarded in sweepstakes or contests.

5.2 Taxes Applicable to Businesses

Cabo Verde's corporate income tax (CIT), called *imposto sobre o rendimento das pessoas colectivas*, is levied on profits obtained within the Cabo Verdean territory and those obtained outside by resident companies (worldwide principle). Non-resident companies with a permanent establishment (PE) in Cabo Verde are also subject to CIT on Cabo Verdean-source income attributable to the PE.

Taxable profit is computed according to the local accounting rules and adjusted for tax purposes.

For the purposes of determining taxable income, CIT payers can be taxed under two methods/regimes, as follows.

- A special regime for micro and small-sized companies:
  (a) micro-sized companies are entities that employ up to five persons, with an annual turnover (gross amount of sales and services) that does not exceed CVE5 million;
  (b) small-sized companies are entities that employ between six and ten persons, with an annual turnover of between CVE5 million and CVE10 million; and
  (c) micro and small importers import goods with a customs value that does not exceed the value of turnover on an annual basis for the purpose of qualifying under the simplified scheme for micro and small-sized companies.
- A standard organised accounting regime – the standard/normal regime under which the computation of profits follows the local accounting rules.

Resident companies are subject to a tax rate of 21%, where taxable income corresponds to the profit minus any tax benefits and any losses carried forward, as stated in the tax return. The tax rate of 21% is also applicable for PEs of non-resident companies.

Micro and small-sized companies are subject to a single special tax (SST) of 4% levied on the gross amount of sales obtained in each taxable year, to be paid quarterly. The SST replaces the CIT, fire brigade surtax and value-added tax (VAT), as well as the contribution to social security attributable to the company.

Non-resident companies without a PE are subject to WHT rates applicable for each income category stipulated in the Tax Code, which range between 1% and 20%. The CIT rate is increased by a fire brigade surcharge, called *taxa de incêndio*, of 2% on the tax due, leading to a final tax rate of 21.44%. This surcharge is levied in the municipalities of Praia (Island of Santiago) and Mindelo (Island of São Vicente).

Permanent Establishment

Non-resident companies deemed to have a PE in Cabo Verde are also subject to tax in Cabo Verde. Under Cabo Verdean tax law, a non-resident company is deemed to have a PE if one of the following applies:

- it has any fixed installation or permanent representation located in Cabo Verde through which, among others, activities of a commercial, industrial or agricultural nature, fishing or the rendering of services are carried out (including agricultural, fishing and cattle-raising explorations);
- quarries or any other places of natural resource extraction are involved; or
- it carries out its activity in Cabo Verde through:
  (a) employees, or any other personnel hired for that purpose, for a period (continuous or not) of not less than 183 days within a 12-month period;
  (b) a person (a dependent agent) who is not an independent agent acting in the Cabo Verdean territory on behalf of a company, with powers to intermediate and conclude binding contracts for that company, within the scope of its business activity; or
  (c) a building site or a construction installation if it lasts for more than 183 days, as well as activities of co-ordination, supervision and inspection related to the building site or its construction installation.

A PE is also recognised in the case of:

- commissionaire arrangements;
- preparatory or ancillary activities carried out by closely related enterprises through a fixed installation; and
- independent agents acting exclusively, or almost exclusively, on behalf of one or more closely related enterprises.

A PE of a non-resident is taxed as a resident company.

5.3 Available Tax Credits/Incentives

Foreign Investor Status (Estatuto do Investidor Externo)

Foreign Investor Status was revoked by the New Investment Law effective as of 1 January 2013; it had previously granted some tax benefits at the level of the investor (eg, exemption from WHT on distribution of profits and on interest related to the financing of the investment). Those tax benefits already granted, or for which recognition has been requested prior to the entry into force of the Tax Benefits Code (TBC) and the Investment Code, are maintained. Investment projects submitted for analysis and approval to the competent authorities prior to the entry into force of the Tax Benefits Code continue to be regulated under the legislation in force at the date of their respective submissions.

Contractual Tax Benefits

There are exceptional incentives – regarding customs duties, CIT, PIT, property tax and stamp duty – for investments that fulfil all of the following conditions:

- the promoter of the investment possesses technical and managerial capacities;
- the invested amount exceeds CVE3 billion (formerly CVE550 million) – the relevant amount is CVE1.5 billion for investments located in a municipal area where the average GDP per capita is lower than the national average (with reference to the last three years); and
- they create, directly, at least 20 qualified jobs (ten in the case of investments located in a municipal area where the average GDP per capita is lower than the national average, with reference to the last three years) – a qualified job requires professional or higher education, or specialised technical training, certified by a national or foreign entity, including management positions.

The concession of contractual tax benefits is subject to approval by the Council of Ministers upon agreement.

Differentiated Merit Projects (DMP)

DMP status was established by Law 80/IX/2020, of 26 March, and is granted to investments that cumulatively meet the following requirements, among others:

- represent an investment equal to or higher than CVE1.5 billion;
- contribute, in net terms, to the improvement of the balance of payments;
- use technology, production and commercialisation processes that minimise environmental impacts or promote environmental sustainability; and
- have a recognised productive social effect, particularly in the creation of at least five qualified jobs (those that require specialised technical training, either professional or of higher education, including management positions).

Investment projects with DMP status are granted the following benefits:

- a reduced customs duty rate of 5% on the importation of materials, goods and equipment mentioned in Article 15 of the Tax Benefit Code;
- customs duty exemption on the importation of raw materials, consumables, finished and semi-finished materials and other products to be incorporated in products manufactured by the company – in the case of industrial investment (ie, projects of companies registered in the *Cadastro Industrial*), the exemption is also applicable to packaging and wrapping materials used in products manufactured by the company;
- CIT tax credit of 30% of the eligible investments effectively made (capped at 50% of the CIT assessed);
- stamp tax exemption on the borrowing of funds for the investment;
- property tax (IUP) exemption on the acquisition of real estate exclusively aimed at the installation of the investment project; and
- other non-tax incentives established in specific legal diplomas.

DMP investment projects implemented in municipal areas where the GDP per capita is lower than the national average have the following additional benefits:

- CIT credit of 40% of the eligible investments effectively made (capped at 50% of the CIT assessed); and
- IUP exemption on the acquisition of real estate used in the development of the company's main activity, including any developing needs arising throughout the first five years following the acquisition.

Direct Investment Made in Cabo Verde by Emigrants

Direct investment made by emigrants shall benefit from the following tax incentives, as established by Law 73/IX/2020, of 2 March:

- exemption from taxation (as contained in the Corporate Income Tax Code) of dividends and profits distributed to the emigrant investor arising from authorised foreign investment; and
- exemption from customs duties on the acquisition of materials for construction, extension or refurbishment of a first residential house, including furniture, appliances and other imported goods, under certain conditions.

The regime applies to emigrant investors permanently living abroad, and to former emigrant pensioners and retired people receiving pensions and similar income from their country of immigration.

Investment in tangible assets or intangibles in Cabo Verde is eligible under the conditions contained in the regime – eg, the incorporation of entities or branches in Cabo Verde, the acquisition of shareholdings, or the granting of loans or other forms of financing of entities in which a shareholding is held.

Industrial Activity

The following tax and customs benefits are provided for industrial activity.

CIT benefits

A CIT credit is available for up to 50% of the eligible investments made in an industrial activity. Any unused tax credit may be carried forward for ten years, subject to certain limitations. Eligible investments include the acquisition of new fixed

assets, patents and licences regarding technologies.

IUP benefits

Industrial activities may benefit from an exemption from IUP on the acquisition of immovable property used exclusively for industrial purposes; however, the recognition of such tax exemption should be approved by the municipality.

Customs duty benefits

Industrial activities benefit from an exemption from customs duties on the importation of construction materials, machines, utensils, semi and fully finished materials, products and raw materials used in the production of goods.

Stamp duty benefits

Financing transactions of industrial projects are exempt from stamp duty.

International Business Centre (IBC) of Cabo Verde

The Cabo Verdean Agency for Foreign Investment is the entity responsible for granting licences to operate within the IBC, upon previous proposal of the Zona Franca Comercial S.A. The following tax benefits are applicable to entities licensed to operate in the IBC on income from industrial or business activities and services (note that these tax benefits are not applicable to entities engaged in tourism, banking and insurance, real estate or construction).

CIT benefits

Reduced CIT rates of 5%, 3.5% or 2.5% are applicable, respectively, to entities that create ten, 20 or 50 jobs. The CIT rate is 2.5% in the case of the creation of four jobs for entities licensed to operate within the International Service Centre. Entities licensed to operate within the IBC are granted to benefit from reduced CIT rates until 2030.

Shareholders' benefits

Shareholders of entities licensed to operate within the IBC are exempt from taxation on dividends and interest received.

VAT and customs duty benefits

All the exemptions contained in the VAT regulation and customs law apply. An exemption from customs duties applies with respect to certain goods, equipment and materials used within the scope of the activity developed and licensed under the IBC.

Maritime Transport (Tonnage Tax)

Cabo Verdean tax legislation contains a special regime for the assessment of the taxable profit applicable to maritime transport activities (tonnage tax).

Entities licensed in the IBC that carry out activities related to the international maritime transport of persons or goods may opt for a special regime for the assessment of taxable profit, provided that they fulfil the following conditions:

- all the ships and vessels owned by the taxpayer must be registered in the International Register of Ships of Cabo Verde (further regulation shall be published), and all the activity carried out must be eligible; and
- at least 85% of the total income derives from activities carried out with other entities licensed and operating in the IBC or with non-resident entities.

Under the tonnage tax regime, the taxable profit shall be determined by applying the following daily amounts to each eligible ship or vessel:

- up to 1,000 net tonnes – the daily taxable income for each 100 net tonnes is CVE646;
- from 1,001 to 10,000 net tonnes – CVE566;
- from 10,001 to 25,000 net tonnes – CVE307; and
- above 25,000 net tonnes – CVE103.

No tax credits are available.

If there is a change from the tonnage tax regime to the general CIT regime, the tax value of the assets held corresponds to the value resulting from the application of the general rules contained in the CIT Code, as if the taxpayer had not applied the special regime. In addition, tax losses or any tax credits carried forward originated during the taxable periods to which the special regime applied are disregarded.

Internationalisation of Cabo Verdean Companies

A regime that provides for tax and financial incentives for investment projects in order to promote the internationalisation of Cabo Verdean companies is in force.

The following incentives, to be granted under a contract of not more than three years, apply to internationalisation projects undertaken before 31 December 2020 by companies whose head office and place of effective management are in Cabo Verde.

CIT benefits

Investments that are eligible for the regime of tax benefits for internationalisation may benefit from:

- a reduction in their CIT rate of up to 50%, applicable until the term of the investment contract; and
- an exemption from CIT on income obtained by qualified expatriate employees.

In addition, a deduction for the creation of employment ranging between CVE26,000 and CVE35,000 for each new job created may apply.

IUP benefits

An exemption from IUP may be available on the acquisition of immovable property for the establishment or expansion of the activity of the investor.

VAT and customs duty benefits

Exemptions provided for in the VAT Code apply, as well as customs duties incentives as provided for in the general applicable legislation.

Stamp duty and other benefits

An exemption from stamp duty is available on the incorporation of companies or an increase of share capital of existing companies, and on financing transactions.

An exemption from notary and registration fees is available on the incorporation and registration of companies.

Touristic Utility Status (Estatuto de Utilidade Turística)

Cabo Verde may grant Touristic Utility Status to the following types of touristic projects:

- installation, granted to new tourist resorts and facilities;
- operation and exploitation, granted to existing tourist resorts and facilities; and
- refurbishment, granted to existing tourist resorts and facilities in connection with improvements and expansions.

Touristic Utility Status generally allows for the following tax incentives and benefits:

- CIT credit of up to 30% of the eligible investments made in tourism, touristic promotion activities and real estate tourism project investment;
- an exemption from IUP on the acquisition of real estate used for the construction and installation of touristic projects if granted by the municipality;
- a reduced rate of 5% of customs duties on the importation of materials and equipment used in touristic projects; and
- exemptions from stamp duty on the financing of tourism investments.

Tax Incentives for Renewable Energies

There is a regime for the promotion of independent production and self-production of electricity based on renewable energy sources. Water, wind, solar, biomass, biogas or industrial, agricultural or urban waste, oceans and tides, and geothermal are to be considered sources of renewable energy. Under the regime, renewable energy producers may benefit from the following.

CIT benefits

A CIT credit is available for up to 30% of the eligible investments made in renewable energies projects.

Customs duty benefits

A reduced rate of 5% of customs duties and other customs charges applies on the importation of capital goods, raw materials and supplies, finished and semi-finished products, and other materials that are incorporated or used in the production of goods or services involved in the production of electrical energy from renewable sources.

IUP and stamp duty

Exemptions from IUP and stamp duty are granted on the acquisition of immovable property and other assets related to the investment project or its financing.

Interest rate support for micro production of renewable energies

Interest rate support of 50% is granted on the interest on loans borrowed from financial institutions by families and by duly incorporated micro and small companies for the acquisition of equipment and installation services aimed at the micro production of renewable energy in accordance with the applicable legislation. This support shall apply to final consumers covered by the normal low voltage category.

Shipping Transport Industry Incentives

CIT benefits

A CIT credit is available for up to 30% of the eligible investments made in shipping, air and sea transportation projects.

Customs duty benefits

A reduced rate of 5% from customs duties applies on the importation of shipping material for the maintenance, production and repair of shipping and respective equipment.

IUP and stamp duty

Exemptions from IUP and stamp duty are granted on the acquisition of immovable property and other assets related to the investment project or its financing.

Job Creation Incentives

Entities taxed under the verification method are entitled to deduct the following amounts for each permanent job created:

- CVE26,000 for each job created in the municipalities of Boa Vista, Praia and Sal;
- CVE30,000 for each job created in the remaining municipalities; and
- CVE35,000 in the case of a disabled person.

Taxpayers covered by the organised accounting regime shall be entitled to a tax credit of CVE20,000 for each unemployed person hired for a minimum of 12 months.

Media, Telecommunications and the Internet

The importation of goods, materials, equipment, vehicles and other equipment exclusively for the purpose of telecommunications and media is exempt from customs duties.

Incentives for the Importation of Vehicles

Exemptions from customs duties, excise duty and VAT are granted for the following for 2024:

- the importation of heavy passenger vehicles for the collective transport of passengers comprising more than 30 seats, including the driver, when imported by duly licensed companies operating in the respective sector;
- the importation of heavy passenger vehicles for the collective transport of passengers comprising more than 12 seats, including the driver, when imported by a public transporter with the respective permit that is in the process of replacing licensed vehicles, as contained in the General Legal Regime of Transport in Motor Vehicles (*Regime Jurídico Geral de Transportes em Veículos Motorizados*); and
- the importation of heavy passenger vehicles intended for school transport, duly equipped, comprising more than 23 seats, including the driver, when imported by an educational entity duly authorised by the competent ministry, local authorities and public transporter, provided that those vehicles are duly licensed and authorised by the competent authorities.

The above incentives shall not apply to vehicles aged more than six years, with the exception of the import of heavy passenger vehicles for collective transport of passengers when imported by a public transporter.

Incentives Under the Young Start-Ups Programme

Incentives for corporate finance

Resident or non-resident entities with a PE in Cabo Verde that make cash capital contributions to companies eligible under the Young Start-Ups Programme, or to companies based in municipal territories where the average GDP per capita in the last three years is below the national average, as well as to micro and small companies, can deduct part of these contributions up to 2% of the tax assessed in the previous tax year, provided that:

- there are no overdue wages;
- their tax and contributory situation is regularised;
- they are not taxed under indirect tax methods; and
- authorisation is granted to all their bank accounts.

The deduction cap shall apply even if the company makes capital contributions in more than one eligible company. This benefit is not cumulative with the tax benefit regarding the conventional remuneration of share capital.

Other incentives

The following incentives are applicable to entities that carry out, directly and as their main activity, an economic activity eligible under the

Young Start-Up Programme, approved by Resolution No 34/2017 of 25 April:

- a CIT rate of 5%, applicable in the first five years of activity, starting 1 January 2019, except in the case of information, communication and technology and research and development enterprises, whose rate is 2.5%, regardless of the location of the head office or place of effective management;
- an exemption from customs duties, excise duty and VAT on the importation of one vehicle for the transport of goods, comprising up to three seats in the cabin, including the driver, with a maximum age of five years, intended exclusively for the respective activity;
- an exemption from import duties on the importation of raw and subsidiary materials, materials and finished and semi-finished products intended for incorporation into products manufactured within the scope of industrial projects – the incentive shall apply if the entities are certified and registered at the Industrial Registry during the installation, expansion or remodelling phase;
- financial incentives, support for capacity-building, and other institutional support provided for in the legislation of micro and small companies;
- an exemption from stamp duty on financing agreements for the development of the respective activities; and
- a reduction of 50% of the fees due on notarial acts and registrations due on the purchase and sale of real estate for the respective installation.

Eligible companies whose places of effective management are located outside the municipalities of Praia, São Vicente, Sal and Boa Vista shall benefit from a tax credit of 50% of the CIT assessed (not applicable to ICT and R&D activities). Eligible companies shall benefit from the incentives provided for in Article 13 (exemption from property tax), Article 15 (exemption from customs duties) and Article 332 (training, internships and scholarships) of the Tax Benefits Code, and from the incentives for employers hiring young people.

Eligible companies benefiting shall be subject to the payment of autonomous taxation under the general terms contained in the CIT Code.

Incentives for Electric Mobility

The importation of electric vehicles, including two-wheel vehicles, is exempt from VAT, customs duties and excise duties. The exemption from VAT and customs also applies to the importation of new rechargeable batteries for electric vehicles, including their connectors, shields, connecting cables and meters, intended exclusively for charging.

Parking fees for such electric vehicles are also exempt from VAT.

Fishing Licence Exemption

An exemption is granted from the payment of fees in obtaining fishing licences for boats up to five tons registered in the National Vessel Registration System if the holder has more than one boat.

Tax Benefits Regarding the Recovery of Business and Insolvency

There are CIT, PIT, stamp duty and property tax benefits for companies under recovery of business and insolvency procedures.

Foreign Tax Credit

Cabo Verdean tax law allows a foreign tax credit to mitigate the double taxation on for-

eign income taxed in another jurisdiction. The tax credit is equal to the lesser of (i) the income tax paid abroad or (ii) the CIT fraction calculated before the deduction is given, corresponding to incomes that may be taxed in the country concerned, net from any costs or losses, directly or indirectly incurred, for the purposes of its realisation. Foreign tax credit cannot exceed the tax outlined in the tax treaty, if applicable.

5.4 Tax Consolidation

The group taxation regime may apply, provided one of the companies directly or indirectly holds at least 75% of the statutory capital of the others and more than 50% of the voting rights. The option to apply this special taxation regime for groups of companies can only be made when such groups meet the following cumulative requirements:

- must be tax resident in Cabo Verde;
- must be subject to the normal regime of taxation at the highest corporate tax rate;
- must maintain a minimum holding participation of 75%;
- all companies must be held by the parent company for more than one year (excluding newly incorporated companies);
- cannot be dormant for more than one year;
- cannot be dissolved or insolvent;
- cannot have tax losses in the three years prior to the regime application, unless the companies have been held by the parent company for more than two years; and
- cannot have a tax period different from that of the parent company.

Furthermore, the parent company must not be controlled by any other Cabo Verde-resident company that meets the criteria to be a parent company, and should not have opted out of this regime in the past three years.

5.5 Thin Capitalisation Rules and Other Limitations

There is a limitation on the tax deductibility of net financing expenses, which are only deductible up to the higher of the following limits:

- CVE110 million; or
- 30% of earnings before depreciation, net financing expenses and taxes.

5.6 Transfer Pricing

There is a transfer pricing regime which establishes that commercial transactions between associated enterprises should be subject to identical terms and conditions to those that would be accepted and agreed between independent entities (the arm's length principle).

Taxpayers must keep information and documentation regarding their transfer pricing policies on hand. The following taxpayers must prepare a transfer pricing documentation file:

- entities classified as "Large Taxpayers";
- entities considered to be taxed under a privileged tax regime, as defined in the General Tax Code;
- PEs of non-resident entities; and
- other entities designated as such by the tax authorities.

5.7 Anti-evasion Rules

Cabo Verdean law provides for anti-evasion rules.

6. Competition Law

6.1 Merger Control Notification

In Cabo Verde there is a Competition Authority (*Autoridade da Concorrência*, or AdC), which

regulates or controls mergers between companies or entities.

Certain sectors also have specific entities that may regulate certain operations, as follows:

- the Central Bank of Cabo Verde for the finance and insurance sectors;
- the Civil Aviation Authority for the aviation sector; and
- the Multisectoral Regulatory Agency for the Economy for the telecoms sector.

6.2 Merger Control Procedure

Mergers that meet the criteria set out in the Cabo Verde Competition Act are subject to prior notification to the AdC.

6.3 Cartels

See **6.2 Merger Control Procedure**.

6.4 Abuse of Dominant Position

See **6.2 Merger Control Procedure**.

7. Intellectual Property

7.1 Patents

A patent is an exclusive right that can be granted to any type of invention in any field of technology, whether it is a product or a process, or to new processes for obtaining products, substances or compounds that already exist. There are three patentability requirements in the Industrial Property Code: novelty, inventive step and industrial application.

A patent shall confer the exclusive right to use the invention anywhere in the national territory, and shall also confer on its owner the right to prevent third parties from manufacturing, offering, stocking, trading or using the product that is the subject of the patent without their consent, and from importing or holding it for any of these purposes.

The registration of a patent is filed with the Institute of Quality Management and Intellectual Property (IGQPI).

Generally, patent rights will be enforced and invalidated before the First Instance Courts. Whoever illegally violates the industrial property rights of another person, with criminal intent or by mere blame, must pay compensation to the injured party for the damages resulting from the violation. For this purpose, the IP right holder must prove the causality of the infringement for the damages calculation. The injured parties can also resort to criminal courts for criminal cases.

The length of protection is 20 years.

7.2 Trade Marks

Trade marks are signs used in trade to identify products and services, and can consist of a sign or set of signs capable of being represented graphically – ie, words (including names of people), designs, letters, numbers, sounds, the shape of the product or its packaging. A trade mark may also consist of advertising slogans for goods or services to which they refer, irrespective of copyright protection afforded to them, provided they are of distinctive character.

The registration of the trade mark grants the right holder the ownership and exclusive use of the trade mark for the products and services that the mark designates.

The registration of a trade mark is filed with the IGQPI.

Generally, trade mark rights will be enforced and invalidated before the First Instance Courts. Whoever illegally violates the industrial property rights of another person, with criminal intent or by mere blame, must pay compensation to the injured party for the damages resulting from the violation. For this purpose, the IP right holder must prove the causality of the infringement for the damages calculation. The injured parties can also resort to criminal courts for criminal cases.

Protection lasts for ten years from the date of the respective concession, and can be indefinitely renewed for equal periods.

7.3 Industrial Design

A design shall mean the ornament or aesthetic aspect of an article, including the appearance of the whole, or part, of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product itself and its ornamentation. Designs that are contrary to public order, public health or morality cannot be registered.

The registration of an industrial design is filed with the IGQPI. The scope of the protection conferred by the registration shall cover all designs that do not give a different overall impression to an informed user. Registration of a design shall confer on its holder the exclusive right to use it and prohibit its use by third parties without their consent, if such acts are carried out for commercial purposes.

Generally, industrial design rights will be enforced and invalidated before the First Instance Courts. Whoever illegally violates the industrial property rights of another person, with criminal intent or by mere blame, must pay compensation to the injured party for the damages resulting from that violation. For this purpose, the IP right holder must prove the causal relationship between the infringement and the injury for the damages calculation. The injured parties can also resort to criminal courts for criminal cases.

7.4 Copyright

Copyright is defined as the exclusive right of authors of literary, artistic and scientific works to enjoy, use and exploit such works or to authorise their enjoyment, use or exploitation by third parties, either in whole or in part. Copyright shall comprise economic rights and personal rights, with the latter being known as moral rights. As a rule, copyright is recognised regardless of registration of the work, its deposit or any other formality.

Copyrighted works are enforced before the First Instance Courts. If the right holder has their right infringed, they can request compensation. Whoever illegally violates the copyright of another person, with criminal intent or by mere blame, must pay compensation to the injured party for the damages resulting from the violation. For this purpose, the copyright holder must prove the causality of the infringement for the damages calculation. The injured parties can also resort to criminal courts for criminal cases.

Non-patrimonial damages may also be compensated if caused by the infringer's acts.

Generally, protection is for the lifetime of the author plus 50 years following their death, even if it is a posthumous work. The length of protection for copyright in works of photography or applied arts is 25 years after such works are produced.

7.5 Others

Software, databases and trade secrets are protected under the regime of industrial and intellectual rights.

8. Data Protection

8.1 Applicable Regulations

In Cabo Verde, the personal data protection legislation currently in force is the Constitution of the Republic of Cabo Verde and Law 133/V/2001, of 22 January.

The Constitution establishes that all citizens shall be guaranteed the right to personal identity, the development of personality and civil capacity, which may only be limited by a judicial decision and in the cases and terms established in the law, and that all citizens shall have the right of access to computerised data that affects them and for the same to be rectified and updated, as well as the right to be informed about the purposes of the data, in the terms of the law.

The Constitution also grants the right of habeas data to ensure knowledge of the information contained in files, computer archives and registers that affects subjects, and to be informed about the purposes of the data and for the same to be rectified or updated.

Law 133/V/2001, of 22 January, establishes the general legal framework for the protection of individuals with regard to the processing of personal data. It applies to the processing of personal data wholly or partly by automated means, and to the processing of personal data other than by automated means contained in manual files or part of manual files. The law shall also apply to the processing of personal data carried out:

- in the context of the activities of an establishment of the controller situated within the national territory;
- outside the national territory in places where the Cabo Verdean law applies by virtue of international public law; and
- by a controller who is not established on the national territory, who, for purposes of processing personal data, makes use of automated or other types of equipment situated in the national territory, except where such equipment is used only for purposes of transit.

8.2 Geographical Scope

Law 133/V/2001, of 22 January, applies in an international context where there are any international treaties in place.

8.3 Role and Authority of the Data Protection Agency

The competent authority is the *Comissão Nacional de Protecção de Dados* (the National Commission of Data Protection, or CNPD), which is an independent administrative entity that exercises its authority throughout the national territory.

Generally, the CNPD is the national authority endowed with the power to supervise and monitor compliance with the laws and regulations in the area of personal data protection, with strict respect for human rights and the fundamental freedoms and guarantees enshrined in the Constitution and the law.

9. Looking Forward

9.1 Upcoming Legal Reforms

Some reforms are expected in relation to the Recovery of Business and Insolvency Code.

Trends and Developments

Contributed by:
Nelson Raposo Bernardo, Joana Andrade Correia, Júlio Martins Júnior, Manuel Esteves de Albuquerque and Mafalda Contumélias Batista
Raposo Bernardo & Associados

Raposo Bernardo & Associados is an international full-service law firm, with practices in Africa (Angola, Cabo Verde, Guinea Bissau, Mozambique, and São Tomé and Príncipe) and Europe (Portugal and Spain). In Cabo Verde, with a team of 12 lawyers based both locally and abroad, the firm offers more than 20 years' experience of participating in the most innovative and relevant projects, regularly representing the interests of national and international players, investment and commercial banks, investment funds, financial intermediaries, government entities, and public sector and private agents in legal matters concerning banking, energy, aviation, pharmaceuticals, tourism and leisure, and construction and infrastructure. The firm's expertise includes advising on operations such as corporate finance and major project finance, large M&A transactions, privatisations, PPP projects, large infrastructure projects and drafts of banking, financial markets and insurance legislation. It also works closely with major international law firms.

Authors

Nelson Raposo Bernardo is the managing partner and head of Raposo Bernardo's banking and projects practices, and co-head of the corporate practice. He has more than 25 years' experience as a lawyer in high-profile and complex legal operations and transactions. He is an assistant professor of corporate and commercial law at the Law School of the University of Lisbon and regularly lectures on entrepreneurship, start-up and management courses at INDEG/ISCTE, one of the most highly regarded business schools in Portugal. He also has experience in legislating and has led several legislative reform committees, in several countries, on banking, finance, insurance, projects, start-ups and venture capital.

Joana Andrade Correia is a partner and co-head of Raposo Bernardo's corporate and M&A department. She has led multiple domestic and international operations, including corporate restructurings and M&A transactions for key players in different sectors, such as aviation, banking and finance, pharmaceutical, energy and infrastructure. She has also worked on several projects to review and reform legislation. Joana's recent work includes advising a major European private airline on the privatisation of a public airline, a major European hotels and resorts group on its business incorporation in Portugal and the opening of two hotels, and a leading Iberian paper print company on a merger transaction.

Contributed by: Nelson Raposo Bernardo, Joana Andrade Correia, Júlio Martins Júnior, Manuel Esteves de Albuquerque and Mafalda Contumélias Batista, **Raposo Bernardo & Associados**

Júlio Martins Júnior is of counsel at Raposo Bernardo and a member of the Cabo Verdean and Portuguese Bar Associations. He has more than 15 years' experience in corporate law and finance-related operations, particularly in relation to sales and acquisitions of shares and assets, financing operations, licensing and regulation and M&A. Júlio has been involved in major international investment projects in Cabo Verde. His recent transactions include advising over 30 banks operating in the country on financing contracts for large infrastructure and equipment and advising the second-largest bank in the world, in terms of assets, on a loan agreement for an international credit transaction.

Manuel Esteves de Albuquerque is of counsel at Raposo Bernardo and has extensive experience in public law regarding administrative law, public procurement, public works contracts and regulation. He has advised on real estate investments and respective due diligence, and worked on the creation of real estate investment structures and the drafting and negotiation of sale and purchase agreements; he is also experienced in derivatives, regulation and compliance. Manuel's experience includes advising on the sale and purchase of retail and logistic parks and tourism projects, and advising clients in the energy and power projects and trading sectors.

Mafalda Contumélias Batista is managing associate at Raposo Bernardo and has over two decades' experience in insurance, insolvency and restructuring, labour law, litigation and arbitration. She has successfully advised on company restructurings and conducted major and complex operations in civil procedural law, insolvency proceedings and arbitration, for significant players in sectors including oil and gas, energy, tourism, pharmaceuticals, banking and real estate. Her track record in dispute resolution includes expert determination, arbitration, accounting integrity and conduct, insurance disputes and competition damages claims. Mafalda regularly handles matters involving unfair trade practices, consumer fraud and policy coverage issues, as well as complex breach of contract and tort claims.

Contributed by: Nelson Raposo Bernardo, Joana Andrade Correia, Júlio Martins Júnior, Manuel Esteves de Albuquerque and Mafalda Contumélias Batista, **Raposo Bernardo & Associados**

Raposo Bernardo & Associados

Av. Fontes Pereira de Melo
Ed. Aviz, nº 35, 18º
1050-118 Lisbon
Portugal

Tel: +351 21 312 1330
Fax: +351 21 356 2908
Email: jacorreia@raposobernardo.com
Web: www.raposobernardo.com

Cabo Verde – A Country Undergoing Modernisation

Public-private partnerships (PPPs)

A preferred route for investment to stimulate the private sector

Cabo Verde's performance has been positively assessed on various levels, with special emphasis on meeting the Sustainable Development Goals (SDGs), particularly in aspects related to poverty eradication, environmental and climate protection, promoting inclusive economic growth, infrastructure and industrialisation.

Indeed, there has been a strong focus on promoting PPPs so that the country can effectively benefit from the advantages provided and obtained in relation to meeting the SDGs. To achieve the SDG targets, the legal framework for PPPs has been identified as an appropriate instrument and one of the preferred routes for investment, stimulating the private sector, and providing essential services and infrastructure traditionally managed by the state.

Thus, it was natural that PPPs were chosen as an important mechanism for achieving the SDGs, especially those aimed at promoting resilience against climate change, reducing production costs, boosting the economy, and improving the provision of essential public services through investments by private partners with technical-financial capacity and commitment to the climate agenda.

In alignment with this, Decree-law No 21/2024 of May 8 was recently approved, establishing and defining the general rules applicable to the state's role in identifying, evaluating, bidding and awarding projects, as well as managing PPP contracts.

This legal instrument applies to the direct and indirect administration of the state, whereby public partners can include the state and its direct administration services and public institutes, regardless of their degree of autonomy, including public foundations, public companies in the public business sector, and other entities established to meet general interest needs. Private partners can be any individuals or entities that offer guarantees of good repute, technical qualification and financial capacity, and that meet the requirements set out in each public procurement process.

To ensure the economic and financial balance of a PPP, the new legal framework includes a special legal provision dedicated to compen-

sation. In this sense, the following sources of revenue for the private partner in a PPP regime were established:

- the consideration from the Public Administration, which can be made through payment in cash, the assignment of non-tax credits, the granting of rights vis-à-vis the Public Administration, the granting of rights over public goods, and other means permitted by law;
- fees or tariffs; and
- unregulated or extraordinary revenues.

In addition, PPP contracts may provide for variable compensation to the private partner linked to their performance in executing the contract, according to pre-defined quality and availability targets and standards, including key performance indicators related to climate change.

Given the importance of PPPs in achieving the SDGs, it has been determined that the release of budgetary and financial resources and payments made to fulfil the contract with the private partner takes precedence over other contractual obligations assumed by the Public Administration, excluding those existing between public entities.

Targeting efficiency

A PPP is understood to be a long-term contract between a private partner and a public entity, aimed at providing or developing a public service or good, under which the private partner assumes significant risks and management responsibility, and compensation is linked to performance.

According to the new legal framework, the PPP regime must adhere to the following directives:

- efficiency in fulfilling state missions and employing society's resources;
- respect for the interests and rights of service recipients and the private entities responsible for executing them;
- non-delegation of jurisdictional regulation functions and police power;
- budgetary responsibility, understood as the capacity to assume budgetary burdens and risks arising from firm and contingent liabilities related to PPP contracts, without jeopardising the long-term budgetary sustainability of public finances or the regular provision of public services;
- transparency of procedures and decisions;
- risk sharing according to the parties' ability to manage them more efficiently;
- financial sustainability and socio-economic advantages of the partnership project; and
- throughout the PPP project's life cycle, alignment with Cabo Verde's climate change mitigation and adaptation goals and policies, and reinforcement of climate risk resilience anticipated during the PPP's life cycle.

Several sectors are considered eligible for PPP contracts, including:

- airports;
- ports;
- roads;
- energy;
- electronic communications;
- water and sanitation;
- inter-island maritime transport; and
- health services.

The essential purposes of the PPP regime are:

- the economy and increased efficiency in allocating public resources compared to other contracting models;

- qualitative and quantitative improvement of the service, guided by effective control methods that allow for its permanent evaluation by the public partner and main users; and
- budgetary, social, environmental and climate sustainability.

The responsibility of the parties in a PPP relationship is defined in the new legal statute, which clarifies that the public partner is primarily responsible for monitoring, evaluating and controlling the execution of the partnership's object to ensure that the underlying public interest goals are achieved, while the private partner is responsible for financing, in whole or in part, the contracted activity and managing it.

Special attention has been paid to the risk-sharing regime within a PPP framework, which must be expressly identified in the contract and follow these principles:

- inherent risks should mainly be assumed by the party best equipped to control them, while exogenous risks should be transferred to the party most capable of absorbing or mitigating them;
- establishing the partnership should imply a significant and effective transfer of risks to the private partner, qualitatively and quantitatively;
- the risk of financial unsustainability of the partnership due to a cause not attributable to non-compliance or unilateral modification of the contract by the public partner, or a force majeure situation, should be transferred to the private partner as much as possible;
- risks allocated to the private partner, when materialised, do not generate potential rebalancing;
- climate risks are shared between the parties in the contract based on a detailed risk allocation assessment and mitigation measures; and
- the private partner is required to obtain insurance for extreme weather events and natural disasters related to climate change above the thresholds established for each PPP project.

Connecting Cabo Verde Programme

Cabo Verde as a regional technology hub in Africa

The government of Cabo Verde aims to position Cabo Verde as a digital nation and a regional technology hub in Africa, through measures that promote innovation and knowledge, as well as the development of information technologies. The digital economy and inclusion are considered crucial factors for achieving various objectives established in the education, health, transport and tourism sectors, as well as an effective accelerator in all sectors of the country's economy.

Widespread internet access is no longer considered a secondary good but a necessity for citizens to fully participate in society, prompting measures to promote network access, allowing for more widespread use of this resource and, consequently, promoting digital inclusion.

In this regard, Decree-law No 16/2024 of April 18 was recently approved, establishing the regime for access to the digital inclusion incentive programme, called the Connecting Cabo Verde Programme, which involves providing fixed or mobile broadband internet access to be offered by all electronic communications service providers offering this type of service.

Scope

Cabo Verde has made substantial investments in connectivity, networks and electronic communications services, and has promoted incen-

tives for sharing infrastructure capable of hosting electronic communications networks. These measures include the so-called digital squares installed in all cities of Cabo Verde, providing continuous 24-hour access to users, as well as a set of public institutions offering broadband internet at no cost to users.

Through fixed or mobile broadband internet access, the Connecting Cabo Verde Programme aims to connect universities, educational institutions from 1st to 12th grade, vocational training centres, digital squares, young people covered by the Cabo Verde Digital Scholarship programme (technology-based start-ups) and other entities to be established by a resolution of the Council of Ministers.

Its financing will be ensured by the State Budget and the Universal Service Fund and Information Society Development, with the aim of transforming the country into a digital nation and a regional technology hub in Africa.

Special Maritime Economic Zone in São Vicente (ZEEMSV)

Transforming Cabo Verde into a maritime and logistics platform in the mid-Atlantic

The ZEEMSV aims to contribute to transforming Cabo Verde into a maritime and logistics platform in the mid-Atlantic, in the medium and long term, aspiring to build a developed country competitively integrated into the regional and global economy, and transforming São Vicente Island into a modern, international island serving the maritime economy, leveraging the development of the northern region and the entire country.

Law No 94/IX/2020 of July 13 created the ZEEMSV to leverage the sea and Cabo Verde's geographical location as the main comparative advantage for developing an integrated maritime economy, thus transforming this comparative advantage into a competitive one through the creation of a chain of maritime-related industries and services.

The strategic sectors of the ZEEMSV are the development of ports, fisheries, tourism, the shipbuilding and repair industry, and renewable energies, with complementary sectors including energy, water, communications and transport infrastructure, as well as the environment, education, health and the financial sector.

The ZEEMSV includes within it the São Vicente International Business Centre (CIN), the Lazareto Industrial and Logistics Zone (ZIL) and the Special Tourist Zones (ZTEs). The ZEEMSV is administered by an Authority that has a One-Stop Shop (BUZ), acting as the sole interlocutor for investors and representing the various services, state and São Vicente Municipality departments related to company creation and investments, facilitating all formalities and procedures related to investment and installation in the ZEEMSV, including registration, administrative, customs, tax, commercial, industrial, environmental, labour, and entry and stay formalities in the national territory, among others.

Advantages

Among other advantages, the ZEEMSV has its own Registry and Notary Services to expedite the process of establishing companies, performing notarial acts and the registration and publication of acts subject to property, commercial and automotive registration, with exemption from fees and charges.

Entities operating in the ZEEMSV can benefit from the special tax and customs regimes provided by law, specifically the ZEEMSV regime, the Cabo Verde International Business Centre

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(CIN-CV) regime and the establishment convention regime. To access the ZEEMSV regime, the investment value must not be less than CVE275 million (equivalent to EUR2,493,991).

Companies licensed by the ZEEMSV Authority are automatically subject to the CIN-CV regime, regardless of the activity undertaken, and thereby benefit from numerous tax advantages provided by this regime.

CAYMAN ISLANDS

Law and Practice

Contributed by:
Daniel Lee, Sophia Scott, Kimberly Robinson and James Turner
Maples Group

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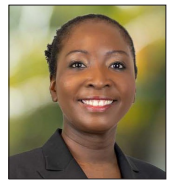
Maples Group advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg, through its leading international law firm, Maples and Calder. With offices in key jurisdictions around the world, the Maples Group has specific strengths in the areas of corporate commercial, finance, investment funds, litigation and trusts. Maintaining relationships with leading legal counsel, the group leverages this local expertise to deliver an integrated service offering for global business initiatives.

Authors

Daniel Lee is head of the Cayman Islands corporate team at Maples and Calder, the Maples Group's law firm. His experience includes advising on a broad range of corporate and commercial work, including private equity, IPOs, mergers and acquisitions, joint ventures and SPACs. He also advises on all types of investment funds and has extensive experience in finance and capital markets.



Sophia Scott is a partner in the Cayman Islands corporate and Latin American teams at Maples and Calder, the Maples Group's law firm. She has a wide range of experience in general corporate and finance transactions, including joint ventures, mergers, acquisitions, restructurings, structured finance, leveraged finance and investment fund transactions, including hedge funds and private equity funds. As part of the Latin America group, Sophia works with clients originating from Latin America as well as those investing into the region. Her clients also include ultra high net worth individuals looking to form their family offices in the Cayman Islands.

Kimberly Robinson is an associate in the Cayman Islands corporate team at Maples and Calder, the Maples Group's law firm. She advises on a wide range of corporate and commercial matters. Kimberly also has experience advising on investment funds, in particular hedge funds and private equity funds, as well as finance matters.

James Turner is an associate in the Cayman Islands corporate team at Maples and Calder, the Maples Group's law firm. His experience includes advising on a broad range of corporate work, including private equity, IPOs, mergers and acquisitions, joint ventures and SPACs. He also advises investment managers, financial institutions and their onshore counsel on the structuring, formation and operation of a wide range of investment fund structures.

Contributed by: Daniel Lee, Sophia Scott, Kimberly Robinson and James Turner, **Maples Group**

MAPLES GROUP

PO Box 309
Ugland House
Grand Cayman
KY1 1104

Tel: +1 345 949 8066
Email: info@maples.com
Web: www.maples.com

1. Legal System

1.1 Legal System and Judicial Order

The Cayman Islands is a common law jurisdiction, which is based on the English model. It comprises statute law and binding case precedents. English and British Commonwealth case authorities are generally persuasive, but not binding, on the Courts of the Cayman Islands.

Cayman Islands law is derived from several sources:

- primary legislation – ie, local statutes passed by the Legislative Assembly of the Cayman Islands or its predecessors, and approved by the Governor of the Cayman Islands; for example, the Companies Act (As Revised) of the Cayman Islands (the "Companies Act") and the Private Funds Act (As Revised) of the Cayman Islands;
- secondary legislation – ie, legislation enacted pursuant to local statues; examples include the Companies Winding-Up Rules (2023 Consolidation) and the Private Funds Regulations (As Revised) of the Cayman Islands;
- statutes passed by the United Kingdom (UK) Parliament that have been expressly extended to the Cayman Islands;
- Orders of His Majesty's Privy Council that are applicable to the Cayman Islands; and
- any relevant remaining English and British Commonwealth common law and rules of equity established by settlement not having been replaced by local or UK statute.

The Grand Court of the Cayman Islands (the "Grand Court") is the superior court of record of first instance for the Cayman Islands. The caseload of the Grand Court is divided into five divisions: Civil, Family, Admiralty, Financial Services and Criminal. Appeals from the Grand Court are to the Cayman Islands Court of Appeal (which usually sits three times each year). The final court of appeal is the Privy Council in England.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Foreign Investments in the Cayman Islands

Local operating business

Approval from the Cayman Islands authorities may be required if foreign investors are investing in a Cayman Islands company that conducts local business (ie, with businesses and individuals located in the Cayman Islands) (a "Local

Company"). This is necessary where it is contemplated that a foreign investor will hold greater than 40% voting or economic interest in a Local Company. The Local Companies (Control) Act (As Revised) of the Cayman Islands (LCCA) has protective provisions therein that provide that a Local Company must have 60% Caymanian shareholders and directors, who maintain 60% of the economic and voting control of the company. An application would have to be made to the Trade and Business Licensing Board (the "Board"), which has been established pursuant to the Trade and Business Licensing Act (As Revised) of the Cayman Islands (TBLA), to obtain a special licence under the LCCA or waiver of the provisions of the LCCA to have greater than 40% foreign ownership and control of the Local Company.

Entities registered or incorporated in the Cayman Islands operating to further their business outside the Cayman Islands

There is no prohibition on foreign investors investing in Cayman Islands entities that do not fall within the category of a Local Company – ie, entities that are registered or incorporated in the Cayman Islands but are not doing business with businesses and individuals in the Cayman Islands.

Certain categories of entities, such as entities registered under the Mutual Funds Act (As Revised) of the Cayman Islands, may require minimum investment thresholds. However, while there may be minimum investment thresholds, there are no restrictions regarding foreign investors making an investment in a Cayman Islands mutual fund.

Property in the Cayman Islands

There are no restrictions on foreign investors purchasing real property in the Cayman Islands

2.2 Procedure and Sanctions in the Event of Non-compliance

Local Operating Business

To the extent a Local Company is unable to procure the required 60% local participation to conduct local business, the Local Company will first need to apply to the Board for an LCCA licence to carry on business in the Cayman Islands. The Local Company would have to submit an application to the Board, together with supporting due diligence documents and evidence that the Local Company did try to procure local participation. Copies of published advertisements in the Cayman Islands newspapers would suffice for evidence that the Local Company did seek local participation. The Local Company would also have to disclose to the Board any responses received from Caymanians. For the purpose of considering that application to grant an LCCA licence, the Board would also have to consider, among other things, the existing local business in the Cayman Islands and the benefit to the Cayman Islands and Caymanians. The application process generally takes approximately three to six months. An LCCA licence may be issued for up to 12 years and may be subject to such terms and conditions that the Board may see fit to specify in the licence. A Local Company that has an LCCA licence must file a return of the shareholdings of such Local Company as at 31 December with the Board in January each year, for so long as the licence is valid. Once the LCCA licence has expired it cannot be renewed.

Any Local Company that has less than 60% local participation that does not hold an LCCA licence and is not otherwise exempted or licensed to operate in the Cayman Islands under another law, commits an offence and is liable (i) on summary conviction to a fine of KYD200 (USD243.90) and (ii) on conviction on indictment to a fine of

KYD1,000 (USD1,219.51), in each case, for each day the offence continues.

2.3 Commitments Required From Foreign Investors

In respect of Local Companies, the Board does not condition their approval on commitments from foreign investors. However, subject to any general directions from the Cabinet of the Cayman Islands (which consists of the Premier of the Cayman Islands, the Deputy Premier of the Cayman Islands, five members of the Cayman Islands Legislative Assembly, appointed to serve as a Minister of the Cabinet, the Deputy Governor of the Cayman Islands and the Attorney General of the Cayman Islands), the Board may have regard to certain matters (such as the advantage/disadvantage which may result from the applicant Local Company carrying on business in the Cayman Islands) when deciding whether or not to grant a licence.

2.4 Right to Appeal

To the extent a Local Company is dissatisfied with a decision made by the Board, such Local Company may, within 28 days of the communication of the decision (or such longer period as the Appeals Tribunal (which is a tribunal established under the TBLA) may allow), appeal against that decision to the Appeals Tribunal. Any notice of appeal must specify, among other things, the decision that is being appealed, the Board's reason for its decision and the grounds of the appeal. The Appeals Tribunal may then decide whether they will allow the appeal and fix a time and date for a hearing.

The decision of the Appeals Tribunal will be communicated to the appellant and the Board within 28 days of the hearing. A further appeal may be made to the Grand Court from a decision of the Appeals Tribunal on a point of law only.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The Cayman Islands has several types of corporate vehicles or legal structures available for conducting business in or outside of the Cayman Islands. Common types of entities are outlined below.

Exempted Companies

Exempted companies are incorporated under the Companies Act and are the most common form of Cayman Islands vehicle used when carrying on business mainly outside of the Islands. They offer a flexible and tax-efficient structure for companies to operate in the global market. The main constitutional documents of an exempted company are its memorandum and articles and association that set out the rules for the governance and operation of the company. The issued share capital of an exempted company can be entirely nominal (for example, a single share) and the liability of the shareholders is typically limited to any amounts unpaid on the shares. There are no restrictions on the number of directors or shareholders that an exempted company may have.

Ordinary Non-Resident Companies and Ordinary Resident Companies

Ordinary companies are incorporated under the Companies Act but, unlike exempted companies, are subject to the LCCA and are required to comply with local licensing, reporting and disclosure obligations in the Cayman Islands.

Ordinary non-resident companies cannot engage in any business activities within the Cayman Islands. Ordinary resident companies may conduct business in the Cayman Islands. Ordinary resident and non-resident companies must file a list of shareholders annually with the

Registrar of Companies. Ordinary resident companies must also file an annual list of shares held by Cayman Islands residents with the applicable Cayman Islands immigration board to comply with the LCCA requirement that 60% of shares of an ordinary resident company must have Cayman Islands ownership.

Overseas Companies

Overseas companies (usually referred to as foreign companies) have been incorporated in a jurisdiction other than the Cayman Islands and intend to carry on business in the Cayman Islands. Overseas companies are required to register with the Registrar of Companies pursuant to Part IX of the Companies Act, which is necessary to enable them to hold land or carry on business in the Cayman Islands, or to act as the general partner of a Cayman Islands exempted limited partnership (for which they are commonly used).

Segregated Portfolio Companies

A segregated portfolio company (SPC) is a form of exempted company incorporated under the Companies Act, which is permitted to create one or more segregated portfolios in order to segregate the assets and liabilities of the SPC held within or on behalf of a segregated portfolio from the assets and liabilities of the SPC held within or on behalf of any other segregated portfolio of the SPC. It may also segregate the assets and liabilities of the SPC which are not held within or on behalf of any segregated portfolio of the SPC (called the general assets of the SPC) from the relevant segregated portfolios of the SPC. The segregation of assets and liabilities within segregated portfolios does not create any new legal entity: the SPC is and remains a single legal entity and any segregated portfolio of, or within, an SPC does not constitute a legal entity separate from the SPC itself. This means, for example, that the SPC for the account of one of its segregated portfolios cannot hold shares issued by the SPC in respect of another of its segregated portfolios. They are commonly used for mutual funds and other investment vehicles seeking to segregate assets and liabilities.

Limited Liability Companies

A limited liability company (LLC) is formed and registered under the Limited Liability Companies Act (As Revised) of the Cayman Islands (the "LLC Act") and offers a flexible legal structure similar to a Delaware LLC and combines characteristics of an exempted company and an exempted limited partnership (described below). They are corporate entities with separate legal personality and limited liability. They can be used for a variety of purposes, including as investment vehicles where there is a need to have separate legal personality and flexibility, in particular with regard to its operation and management, the rights and responsibilities of its members, and the profit sharing between the members.

Exempted Limited Duration Companies

An exempted limited duration company (LDC) is a form of exempted company incorporated under the Companies Act. An LDC exists for a fixed period of time specified in its memorandum of association, which must not exceed 30 years and it must have at least two members. It is generally very uncommon to use an LDC; however, it could be used, for example, where a particular project or venture must be completed within a certain timeframe. Following the expiration of the fixed time period, the LDC will be deemed to have automatically commenced voluntary winding up and will dissolve with its assets being distributed accordingly.

Exempted Limited Partnerships

An exempted limited partnership (ELP) is a partnership that is registered under the Exempted Limited Partnership Act (As Revised) of the Cayman Islands (the "ELP Act") and is the most common type of partnership structure in the Cayman Islands, which provides a flexible vehicle for investors to pool capital and conduct investment activities outside of the Cayman Islands. It is frequently used as a private equity fund, hedge fund or feeder fund for international investors. The respective rights and obligations of the general partner and limited partners are set out in an exempted limited partnership agreement. Limited partners benefit from limited liability with all management responsibility vesting in the general partner who is liable for the debts and liabilities of the ELP in the event that the assets of the ELP are inadequate.

Limited Liability Partnerships

A limited liability partnership (LLP) is a partnership that is formed and registered under the Limited Liability Partnership Act (As Revised) of the Cayman Islands. It is the preferred structure used by professional firms to operate and organise their business in the Cayman Islands due to having a separate legal personality and affording limited liability status to all its partners. An LLP is not a body corporate and, in this respect, differs from a UK LLP which structurally is more akin to a corporate rather than partnership vehicle. The LLP, rather than the partners, is liable for such LLP's debts and losses. A partner may be liable for their own negligent acts or omissions where such partner has assumed an express duty of care and acted in breach of that duty (ie, in the context of providing professional services advice). An LLP must be established by at least two persons who may carry on a business in common for any lawful purpose. Any person, including natural persons, a body corporate or other partnerships, may be a partner in an LLP. As there is no requirement for an LLP to undertake its business "with a view to profit", an LLP may be a helpful structuring option for not-for-profit organisations and other social enterprises.

Foundation Companies and Companies Limited by Guarantee

A foundation company is incorporated under the Foundation Companies Act (As Revised) of the Cayman Islands (the "Foundation Companies Act") as a body corporate with a legal personality distinct from that of its members, beneficiaries, directors, officers, supervisors and founder. Accordingly, it has capacity to sue and be sued and to hold property. Uniquely it is possible for a foundation company not to have any members, provided that its constitution so permits and it continues to have one or more supervisors. A foundation company may be formed for any lawful object, which need not be beneficial to other persons and must be limited by shares or by guarantee with or without share capital. It is a highly flexible vehicle and can, if so desired, include features of a common law trust within a corporate framework. They are typically used for wealth management, estate planning, and asset protection. If used in a private wealth context foundation companies are often incorporated as companies limited by guarantee, which avoids the need for probate to be obtained where shares are issued and one or more shareholders die.

A company limited by guarantee is a Cayman company (whether exempt or ordinary) that instead of having shareholders has members. Typically, the liability of members of a company limited by guarantee is limited under its constitution to USD1. A Cayman company limited by guarantee has many of the same features as a Cayman company limited. It is a body corporate with a legal personality distinct from that

of its members, directors and officers. Accordingly, it has capacity to sue and be sued and to hold property. Companies limited by guarantee are rarely incorporated for purely commercial purposes, rather they are more typically used for non-profit/club scenarios where there is no expectation of profits passing to the members.

Trusts (Including Unit Trusts)

In contrast to the vehicles described above, a trust does not have separate legal personality and so a trust itself cannot hold property in its own name. Rather, legal title to property held upon the terms of the trust is vested in the trustees of the trust and it is the trustees who enter into transactions in that capacity and who can sue and be sued. Trusts can be established for a wide range of objectives similar to those for which a foundation company can be incorporated – for example, for wealth management, estate planning, philanthropic endeavours and employee incentivisation schemes. Cayman permits the establishment of non-charitable purposes trusts (known as STAR Trusts), the purposes of which may be to benefit or carry out, as the case may be, a mixture of persons and purposes so long as they are lawful and not contrary to public policy.

It is also possible to establish a trust for use as an investment vehicle. Such a structure would usually take the form of a unit trust under which the investors (the unitholders) contribute assets to the trustee to be managed and invested in accordance with the terms set out in the trust deed and any accompanying contractual documents.

3.2 Incorporation Process

It is necessary to engage a licensed corporate services provider to assist with the incorporation process.

Exempted/Ordinary Resident/Ordinary Non-Resident Companies/Other Companies

In order to incorporate a company, the corporate services provider will prepare and file the memorandum and articles of association with the Registrar of Companies, together with the appropriate filing fees. In the case of exempted companies only, a statement is also required to be filed, which confirms that the operations of the company will be conducted mainly outside of the Cayman Islands. The initial subscriber shareholder will typically be an affiliate of the corporate services provider and the subscriber will transfer the subscriber share to the shareholder of record after incorporation or shall be automatically repurchased by the company following the issuance of any further shares. Once the Registrar of Companies has processed the incorporation documents, the company will be deemed to have been incorporated and a Certificate of Incorporation will be issued.

Exempted Limited Partnerships

In order to register a Cayman Islands partnership as an ELP, the corporate services provider, on behalf of its general partner, must submit to the Registrar of Exempted Limited Partnerships in the Cayman Islands a statement setting out certain prescribed information and pay the appropriate filing fees. A Certificate of Registration issued by the Registrar of Exempted Limited Partnerships is conclusive evidence that the requirements of the ELP Act have been complied with in respect of the formation and registration of an exempted limited partnership.

Limited Liability Companies

In order to form and register an LLC, a registration statement must be submitted by the corporate services provider to the Registrar of Limited Liability Companies in the Cayman Islands which sets out basic information regarding the

limited liability company and the appropriate filing fees. A Certificate of Registration issued by the Registrar of Limited Liability Companies is conclusive evidence that the requirements of the LLC Act have been complied with in respect of the formation and registration of an LLC.

Timing

The registration and issue of a Certificate of Incorporation (exempted/resident/non-resident companies) or Certificate of Registration (exempted limited partnerships, limited liability companies) generally takes three to five business days but can be expedited by paying an express fee so that the certificate can be provided within one business day.

3.3 Ongoing Reporting and Disclosure Obligations

General – Companies Act

Companies in the Cayman Islands are subject to certain disclosure and reporting obligations depending on the type of vehicle and the activities undertaken. The Companies Act governs the formation, operation and dissolution of exempted companies.

Exempted companies must have a registered office in the Cayman Islands with a licensed and regulated corporate services provider and are required to file certain documents and information with the Registrar of Companies.

Exempted companies must notify the Register of Companies of any of the following:

- changes to the name of the company;
- any increase or reduction in the authorised share capital;
- a change of directors and officers;
- a change in the registered office;
- amendments to the memorandum and articles of association of the company; and
- changes to the beneficial ownership register (if any) of the company.

Notices of all special resolutions referenced in the Companies Act that are passed by one or more shareholder(s) of the company must also be filed with the Registrar of Companies within a prescribed timeframe – ie, within 15 days from the effective date of the special resolution.

Annual Requirements

An annual return (in the case of exempted companies) or an annual list of members and summary of certain specified items relating to share capital (in the case of ordinary companies) must be submitted to the Registrar of Companies in January of the year following incorporation and in each January thereafter, and the appropriate annual fee paid.

Financial Statements

All companies must keep proper books of account, including, where applicable, material underlying documentation including contracts and invoices. The books of account must be such as are necessary to give a true and fair view of the state of the company's affairs and explain its transactions. The books of account must be retained for a minimum of five years from the date on which they are prepared. A company that knowingly and wilfully contravenes these requirements will be subject to a penalty of USD6,100. The books of account need not necessarily be kept at the registered office, but a company must provide to its registered office, annually or with such other frequency and within such time as may be prescribed, information regarding its books of account. If a company fails to comply with this requirement without a reasonable excuse, it shall incur a penalty of

USD610 and a further penalty of USD122 for every day during which such non-compliance continues. If the company is not a bank, trust company, building society, money services business, credit union, insurance company, corporate manager, mutual fund administrator or regulated fund, its accounts need not be audited as a matter of Cayman Islands law.

Beneficial Ownership

On 1 July 2017, the Cayman Islands' beneficial ownership register (BOR) regime came into effect. This regime requires certain Cayman Islands companies to maintain a BOR. The BOR records details of the individuals and certain intermediate holding companies who own or control 25% or more of the equity interests or voting rights in that company, or have rights to appoint or remove a majority of the company directors or LLC managers, together with details of certain intermediate holding companies. Companies that are within the scope of the legislation must maintain their BOR at their Cayman Islands registered office with a licensed corporate services provider. Where an entity is exempted from the primary obligations of the beneficial ownership regime, it must provide its corporate services provider with a written confirmation of exemption, which must set out certain specified information.

Exemptions under the Cayman Islands beneficial regime in force at the time of writing include, among others:

- legal entities listed on the Cayman Islands Stock Exchange or another approved stock exchange;
- legal entities registered with, or licensed by, the Cayman Islands Monetary Authority;
- legal entities that are managed, arranged, administered, operated or promoted by an "approved person" as a special purpose vehicle, private equity fund, collective investments scheme or investment fund;
- legal entities that are regulated in an "equivalent jurisdiction" as an "approved jurisdiction";
- general partners of certain regulated entities or "approved persons"; and
- legal entities that are substantially owned/controlled subsidiaries of one of the exempted entities listed above.

On 24 November 2023, the Parliament of the Cayman Islands passed the Beneficial Ownership Transparency Act, 2023, which was later gazetted on 15 December 2023 (the BOT Act). Although not yet in force at the time of writing, the new provisions of the BOT Act are expected to be introduced shortly in a phased approach throughout the course of 2024. Once in force, the BOT Act will bring fundamental changes to the existing Cayman Islands beneficial ownership regime.

Key changes include consolidation of the beneficial ownership regime under a single Act and the application of the beneficial ownership regime to new entity types including exempted limited partnerships, limited partnerships and foundation companies, which are currently not within scope. The definition of "beneficial owner" will also be amended to align more closely with that under the Cayman Islands Anti-Money laundering Regulations. Significantly, the majority of the exemptions which apply under the existing beneficial ownership regime will be removed or significantly restricted in favour of "alternative routes to compliance".

Economic Substance Act (As Revised)

The Cayman Islands has enacted economic substance legislation in compliance with the

OECD's Inclusive Framework on Base Erosion and Profit Shifting (BEPS). Where an entity is conducting a "relevant activity" (see below for details) in a "relevant financial period" for the purposes of the Cayman Islands economic substance regime, the entity will be required to (i) file an economic substance notification with the Registrar of Companies before 31 January each year, and (ii) file an economic substance return with the Department for International Tax Cooperation of the Cayman Islands no later than 12 months from the last day of the entity's financial year end.

The Economic Substance Act applies economic substance requirements to the following categories of geographically mobile "relevant activities" previously identified by the OECD (and adopted by the EU):

- banking;
- insurance;
- shipping;
- fund management;
- financing and leasing;
- headquarters;
- distribution and service centres;
- holding company; and
- intellectual property.

Automatic Exchange of Financial Account Information

The Cayman Islands has signed an inter-governmental agreement to improve international tax compliance and the exchange of information with the United States (US IGA). The Cayman Islands has also signed a multilateral competent authority agreement to implement the OECD Standard for Automatic Exchange of Financial Account Information – Common Reporting Standard (CRS and together with the US IGA, AEOI).

Cayman Islands regulations have been issued to give effect to the US IGA and CRS (collectively, the "AEOI Regulations"). Pursuant to the AEOI Regulations, the Cayman Islands Tax Information Authority (TIA) has published guidance notes on the application of the US IGA and CRS.

All Cayman Islands "Financial Institutions" are required to comply with the registration, due diligence and reporting requirements of the AEOI Regulations, unless they are able to rely on an exemption that allows them to become a "Non-Reporting Financial Institution" (as defined in the relevant AEOI Regulations) with respect to one or more of the AEOI regimes, in which case only the registration requirement would apply under the CRS. The different types of Non-Reporting Financial Institution under each AEOI regime are specified in the applicable AEOI Regulations.

Anti-Money Laundering and Countering of Terrorist and Proliferation Financing

In common with other financial centres in the world, the Cayman Islands has enacted legislation that is aligned with international principles in preventing and detecting money laundering (AML) and combating terrorist and proliferation financing (CFT and CPF respectively) and breaches of applicable sanctions regimes.

The legislation is also contained principally in the Misuse of Drugs Act (As Revised) of the Cayman Islands, the Proceeds of Crime Act (As Revised) of the Cayman Islands (PCA), the Terrorism Act (As Revised) of the Cayman Islands and the Proliferation Financing (Prohibition) Act (As Revised) of the Cayman Islands. These statutes create a number of offences in relation to activities involving the laundering of the proceeds of crime.

The Anti-Money Laundering Regulations (AMLRs) apply to anyone carrying out "rele-

vant financial business in or from the Cayman Islands", forming a business relationship or carrying out a one-off transaction. What constitutes "relevant financial business" is set out under Section 2 of the PCA and includes, among others, the following activities:

- banking or trust business carried out by a person who is licensed under the Banks and Trust Companies Act (As Revised);
- insurance business and the business of an insurance manager, an insurance agent, or an insurance broker within the meaning of the Insurance Act (As Revised);
- mutual fund administration or the business of a regulated mutual fund within the meaning of the Mutual Funds Act (As Revised); and
- various other investment, financial, trading and lending activities falling within Schedule 6 of the PCA.

As a general rule, entities that are registrable under FATCA/CRS will also be subject to the AML Regime.

The AMLRs provide that a financial services provider carrying out relevant financial business in or from the Cayman Islands cannot form a business relationship or carry out a one-off transaction, with or for another person unless they maintain certain AML/CFT/CPF/sanctions policies and procedures, having regard to money laundering, terrorist or proliferation financing and sanctions risks and the size of the business.

In October 2023, the Cayman Islands passed the Proceeds of Crime (Amendment) Act, 2023 (the "Amendment Act"), which proposes certain amendments to the PCA which relate to Sections 133 (concealing), 134 (arrangements) and 135 (acquisition, use and possession) of the PCA. These amendments require a person to make disclosure to the Cayman Islands Financial Reporting Authority (FRA) and have the consent of the FRA to commit the act in question. The recent Proceeds of Crime (Amendment) Act, 2023 (Commencement) (Amendment) Order, 2024, has delayed the coming into force of these sections until 2 January 2025.

Cayman Islands Removed from FATF Grey List and EU AML List

On 27 October 2023, the Financial Action Task Force (FATF) confirmed that the Cayman Islands had been removed from the FATF's increased "monitoring list" (often referred to as the FATF Grey List). This decision came after the Cayman Islands demonstrated its commitment to international standards by satisfying all FATF Recommended Actions and successfully completing an on-site inspection by the FATF in 2023.

On 12 December 2023, the European Commission published Commission Delegated Regulation (EU) (the "Delegated Regulation") amending Delegated Regulation (EU) 2016/1675 to update its list of "high-risk third countries" ("EU AML List") identified as having strategic deficiencies in their anti-money laundering/counter-terrorist financing (AML/CFT) regimes. The Delegated Regulation provides for the removal of the Cayman Islands from the EU AML List. The Commission consulted the EU's Expert Group on Money Laundering and Terrorist Financing before adopting the Delegated Regulation. The Cayman Islands removal from the EU AML List was made effective on 7 February 2023.

The removal from both the FATF and EU AML Lists affirms that the Cayman Islands has robust and effective AML/CFT/CPF regimes in place, reflecting the jurisdiction's commitment to maintaining a compliant financial sector that aligns with global standards.

Cayman Islands Sanctions Regime

Sanctions Orders are extended by Statutory Instrument to the British Overseas Territories, including the Cayman Islands, to give effect to sanctions regimes implemented by the UK government ("Sanctions Orders").

Sanctions Orders apply to any person or body incorporated or instituted in the jurisdiction, as well as any British citizen or subject ordinarily resident in the jurisdiction. The Sanctions Orders generally restrain persons from dealing in funds or economic resources owned or controlled by, or making funds or economic resources available to, persons or entities listed under the Order ("Designated Persons"). For example, a fund making a redemption payment to a Designated Person would not be permitted.

Since March 2022, significant sanctions measures with respect to Russia's invasion of Ukraine have been published (and continue to be published) by the United Kingdom, United States of America and the European Union. A number of Cayman Islands vehicles have been impacted by the sanctions regime as a result of direct or indirect exposure to Russian individuals and/or Russian entities (eg, where a shareholder in a Cayman Islands company is directly or indirectly controlled by a Russian sanctioned individual). While these entities have been able to apply to the Governor for a specific licence to permit an activity that would otherwise be prohibited by UK asset-freezing measures, until recently, licences could only be granted under one or more specified licensing grounds set out in the legislation. No licensing ground existed to deal with the difficulties Cayman Islands entities have faced regarding frozen investments held in Russia and sanctioned investors on their registers.

On 14 March 2024, however, a new divestment-specific licensing ground came into force which may provide an opportunity for entities to apply for a specific licence to exit a frozen shareholder/LP and freeze the redemption/withdrawal proceeds in a frozen bank account in a British Overseas Territory or in the United Kingdom.

Cayman Islands Country-By-Country Reporting (CbCR)

The Tax Information Authority (International Tax Compliance) (Country-By-Country Reporting) Regulations (As Revised) (the "CbCR Regulations") implement the requirements of the OECD/G20's Base Erosion and Profit Shifting Action 13 Report (Transfer Pricing Documentation and Country-by-Country Reporting) (the "Action 13 Report"). The CbCR Regulations largely implement the model legislation (the "OECD Model Legislation") published pursuant to the Action 13 Report.

The CbCR Regulations apply to any constituent entity ("Constituent Entity") that is "resident in the Islands" and that forms part of a multinational enterprise group ("MNE Group") for the purposes of the CbCR Regulations and the related Guidance Notes issued by the Cayman Islands Department for International Tax Cooperation (DITC). A Constituent Entity will be resident in the Islands if it is incorporated or established in the Cayman Islands, has a place of effective management in the Cayman Islands or is subject to financial supervision in the Cayman Islands.

An MNE Group is broadly defined as a collection of two or more enterprises required to prepare consolidated financial statements under applicable accounting principles (or would be so required if equity interests in any of the enterprises were publicly traded) that (i) includes two or more enterprises that are "tax resident" in at

least two different jurisdictions or includes an enterprise that is tax resident in one jurisdiction and is subject to tax via a permanent establishment in another jurisdiction and (ii) had a total consolidated group revenue of at least USD850 million in the preceding fiscal year.

Any Constituent Entity that is resident in the Cayman Islands and that forms part of an MNE Group will be required to make a notification to the DITC and, if the entity is the "Ultimate Parent Entity" or "Surrogate Parent Entity" of the MNE Group pursuant to the CbCR Regulations, it will also be required to file a country-by-country report with the DITC in a standard form based on the OECD Model Legislation.

3.4 Management Structures

Companies

Companies are generally managed by a board of directors who are responsible for the overall management and decision-making of the company. Subject to the provision of the memorandum and articles of association for the company, the board of directors: (i) may be appointed by the shareholders and the existing board of directors can appoint additional or replacement directors; (ii) can delegate certain powers to committees or individual directors; and (iii) may also appoint officers, such as a vice-president, secretary or chief executive officer, to handle the day-to-day operations of the company.

The approval of the company's shareholders is required for certain matters, including:

- changing the name of the company;
- amending the memorandum and articles of association;
- approving a merger or consolidation in relation to the company;
- altering the company's share capital;
- approving a transfer by way of continuation to another jurisdiction; and
- winding up the company on a voluntary basis.

The process by which the board of directors holds board meetings (eg, notice, quorum) will be set out in the articles of association of the company and generally decisions are made by way of a simple majority of the directors present at a meeting. The articles also typically provide that the board may take action by way of a unanimous written resolution of the directors in lieu of a meeting, which is considered effective on the date which the last director signs.

Limited Liability Companies

LLCs are typically managed by their members, or by non-member managers appointed by the members, who shall undertake and have exclusive responsibility for the management, operation and administration of the business and affairs of the LLC, subject to the terms of its LLC agreement.

Exempted Limited Partnerships

The management and operation of an ELP will typically be set out in its exempted limited partnership agreement entered into between its general partner and limited partner(s). An ELP must have at least one general partner who is responsible for the management and operation of the ELP. Limited partners are typically passive investors and may lose the benefit of their limited liability if they engage in the conduct of the business of the exempted limited partnership (subject to certain "safe harbour" exceptions, which expressly state that certain actions taken by a limited partner will not be construed as taking part in the management of the partnership).

3.5 Directors', Officers' and Shareholders' Liability

The main rules regarding the liability of directors and officers are found in the Companies Act and common law, which include:

Directors' Duties

As a matter of Cayman Islands law, a director of a Cayman Islands company is in the position of a fiduciary with respect to the company. Accordingly, directors and officers owe the following fiduciary duties:

- duty to act in good faith in what the director or officer believes to be the best interests of the company as a whole;
- duty to exercise powers for the purposes for which those powers were conferred and not for a collateral purpose;
- directors should not improperly fetter the exercise of future discretion;
- duty to exercise powers fairly as between different sections of shareholders;
- duty to exercise independent judgement; and
- duty not to put themselves in a position in which there is a conflict between their duty to the company and their personal interests.

However, the latter duty above may be varied by the company's articles of association, which may permit a director to vote on a matter in which the director has a personal interest provided that the director has disclosed the nature of his interest to the board of directors.

In addition to the above, under Cayman Islands law, directors also owe a duty of care that is not fiduciary in nature. This duty has been defined as a requirement to act as a reasonably diligent person having both the general knowledge, skills and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company and the general knowledge, skills and experience that that director has.

A director (even where appointed by individual shareholders) is obliged to act in a manner that the director believes to be in the best interests of the company as a whole (even though it may not be in the best interests of the appointing shareholder).

Breach of Duty

In the event of a breach of duty, directors may be personally liable to account to the company. Companies often indemnify their directors and officers against any liability incurred in carrying out their functions of being a director, subject to certain exceptions (eg, liability resulting from their own actual fraud or wilful default). Companies may also include provisions in their articles of association that exculpate directors from liability for negligence, default or breach of duty, except in cases of actual fraud or wilful default.

Shareholder Liability

Subject to any express provision in the articles of association of the company to the contrary, a shareholder does not owe any fiduciary duty to the company or to any other shareholder in exercising any rights or authorities, or performing any obligations under the articles of association.

The liability of the shareholders of a company limited by shares is limited to the amount unpaid on the shares held by them.

Piercing the Corporate Veil

The concept "of piercing the corporate veil" is recognised in the Cayman Islands only in exceptional circumstances, which would include, by way of example and without limitation, where a

company's separate legal personality has been used:

- for an illegal or improper purpose; and
- for the purposes of fraud.

4. Employment Law

4.1 Nature of Applicable Regulations

The Labour Act (As Revised) establishes minimum employment standards but does not preclude an employer from setting terms and conditions which are above the minimum. It also establishes remedies for unfair dismissal and entitlement to severance pay, prohibits discrimination and regulates the health, safety and welfare of employees.

The Labour Act requires employers to:

- register the workplace by written notice to the Director of Labour in the Cayman Islands;
- furnish each employee with a written statement of working conditions containing specific information referenced in **4.2 Characteristics of Employment Contracts**;
- provide reasonable training to employees during their probationary period;
- maintain prescribed employee work accounts where there are ten or more employees;
- safeguard the health, ensure the safety, contribute to the welfare and provide special protective measures for employees as specified;
- notify the Director of Labour of major industrial accidents and any occupational disease involving employees;
- not discriminate; and
- provide certain minimum entitlements for employees including:
  (a) a minimum wage of KYD6.00 (USD7.32) per hour;
  (b) paid vacation leave (the amount depends on length of service);
  (c) public holiday pay;
  (d) up to ten paid sick leave days per year;
  (e) paid maternity and adoption leave;
  (f) at least 24 consecutive hours of rest in each seven consecutive days;
  (g) overtime pay for hours worked in excess of a standard work day/week; and
  (h) specified advance notice of termination of employment except for certain good causes.

Redress for unfair dismissal may be sought before the Labour Tribunal pursuant to the provisions of the Labour Act. An employee is not precluded from bringing an action at common law (for damages) before the courts of the Cayman Islands. Any compensatory award made by the Labour Tribunal would be deducted from any award for damages made by the court.

The Workmen's Compensation Act (As Revised) provides for the payment of compensation by the employer to any workman who suffers personal injury by accident arising out of and in the course of employment. This is an insurable risk and is normally covered by an employer's insurance.

4.2 Characteristics of Employment Contracts

While the Labour Act does not require that an employment contract be entered into between an employer and an employee, the Labour Act requires an employer to furnish each employee with a written statement of working conditions containing the following information:

- the job title, a brief statement of the general responsibilities and duties of the employee

and of any special requirements or conditions of the job;
- the regular hours of work, together with any particular terms or conditions relating to the hours of work;
- the rate of remuneration, or the method by which it may be calculated;
- the intervals at which remuneration is to be paid;
- in the case of employees whose pay is normally stated on some basis other than hourly, the hourly equivalent save that in the case of persons remunerated wholly or in part by commission, the rate of commission should be stated;
- the period of employment, if other than indefinite;
- the period of probation, if any;
- the employee's holiday entitlement or the method by which it may be calculated;
- the employee's entitlement to sick leave; and
- the length of notice which the employee is obliged to give and is entitled to receive to terminate the contract of employment.

4.3 Working Time

There is no minimum or maximum working time applicable to salaried employees.

4.4 Termination of Employment Contracts

Employer's Notice

Unless the contract of employment is for a fixed term, or the dismissal is for good cause, misconduct, or failure to perform duties in a satisfactory manner, every employer must give advance written notice to an employee whose employment it intends to terminate:

- In the case of an employee still serving a probationary period, at least 24 hours' notice must be given.
- In all other cases, the period of notice must be at least equal to the interval between pay days (for example, if paid every two weeks then two weeks' notice must be given). However, notice need not exceed 30 days in any circumstances, unless the employment contract provides for longer notice.

Once the appropriate advance notice is given, the employer may terminate the employment prior to the effective date so long as the employee is paid an amount equal to that which he/she would have been paid had he/she worked throughout the period. This, however, is subject to the provisions regarding severance pay and unfair dismissal dealt with below.

An employee whose employment is terminated by the employer for any reason shall receive payment for each day of unused vacation leave accrued at the time of termination.

Employee's Notice

The period of notice of termination to be given by the employee is such period as may be required by the employment contract or if not stated in the employee contract, then notice equal to the interval of time between the employee's pay days or 30 days, whichever is less. If the employee fails to give the appropriate notice, the employer may:

- dismiss the employee prior to the date the employee intended to leave by the number of hours or days by which the notice falls short; and
- forfeit all unused vacation leave accrued by the employee during the current employment year.

4.5 Employee Representations

The Cayman Islands currently has no form of employee representation legislation.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

The Cayman Islands currently has no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax.

5.2 Taxes Applicable to Businesses

On 1 July 2021, 130 members of the OECD/G20, including the Cayman Islands, signed an historic agreement for a "two pillar solution" to address the tax challenges arising from globalisation and the digitisation of the economy ("Two Pillar Solution").

As the name suggests, the Two Pillar Solution is a two-prong approach, which aims to bring about "a fairer distribution of profits and taxing rights among countries and jurisdictions with respect to the world's largest Multinational Enterprises (MNEs)".

In short, Pillar One (the first prong) would provide a new right to tax large multinationals in the jurisdictions in which they operate ("Pillar One"), while Pillar Two (the second prong) would introduce a new global minimum effective tax rate of 15%, ensuring that large multinationals pay a minimum level of tax in those jurisdictions ("Pillar Two").

Since July 2021, the Inclusive Framework on Base Erosion Profit Shifting (BEPS) has been working towards the implementation of the Two Pillar Solution. While Pillar One is still being developed, Pillar Two is starting to take shape.

On 11 July 2023, an Outcome Statement was agreed by 138 members of the OECD/G20 Inclusive Framework on BEPS (again, including the Cayman Islands), which recognises the significant progress made to date towards achieving the Two Pillar Solution ("Outcome Statement").

As regards Pillar Two, the Outcome Statement states:

"The global minimum tax under Pillar Two establishes a floor on corporate tax competition which will ensure a multinational enterprise (MNE) is subject to tax in each jurisdiction at a 15% effective minimum tax rate regardless of where it operates, thereby ensuring a level playing field. This global minimum tax framework under Pillar Two is already a reality, with over 50 jurisdictions taking steps towards implementation".

While the Cayman Islands was one of the initial signatories to the agreement for a Two Pillar Solution, Pillar Two has not yet been adopted and there has yet to be a public announcement regarding the introduction of a minimum effective tax rate within the Cayman Islands.

Please refer to **5.1 Taxes Applicable to Employees/Employers**.

5.3 Available Tax Credits/Incentives

Please refer to **5.1 Taxes Applicable to Employees/Employers**.

5.4 Tax Consolidation

Please refer to **5.1 Taxes Applicable to Employees/Employers**.

5.5 Thin Capitalisation Rules and Other Limitations

The Cayman Islands currently has no thin capitalisation rules.

5.6 Transfer Pricing

The Cayman Islands currently has no transfer pricing rules.

5.7 Anti-evasion Rules

Please refer to **5.1 Taxes Applicable to Employees/Employers**. Taking into account the various taxes that are not applicable in the Cayman Islands, the Cayman Islands also has no anti-evasion rules.

6. Competition Law

6.1 Merger Control Notification

The Cayman Islands has merger control legislation in respect of the following markets and sectors that are operating and providing services within the Cayman Islands (together, the "Utilities Markets and Sectors"):

- electricity markets, including the generation, transmission, distribution and supply of electricity;
- fuels markets;
- information and communications technology markets, including broadcasting and content services; and
- water sector, including the production, distribution, supply and treatment of water.

The Utility Regulation and Competition Office (OfReg) is a body that has been established pursuant to the Utility Regulation and Competition Act (As Revised) (URCA), and it has the following responsibilities:

- to promote appropriate, effective and fair competition;
- to protect the short- and long-term interests of consumers in relation to utility services and in so doing:
  - (a) supervise, monitor and regulate any service provider providing any of the utility services referenced above;
  - (b) ensure that utility services are satisfactory and efficient and that charges imposed in respect of utility services are reasonable and reflect efficient costs of providing the services; and
  - (c) publish information, reports and other documents relating to utility services (ie, to keep the public informed in respect of the different utilities service providers);
- to promote innovation and facilitate economic and national development.

6.2 Merger Control Procedure

The utilities service provider will have to notify OfReg prior to the merger transaction taking place. The utilities service provider will have to provide OfReg with a description of the transaction together with all corporate and financial due diligence documents of the entities involved in the merger transaction and any beneficial owners in the transaction that hold 15% or more voting interest in the entities involved in the transaction.

For the purpose of approving any merger transaction, OfReg will have to consider whether such merger transaction would have material adverse effects on the consumer and citizens of the Cayman Islands.

If the merger transaction will not have a material adverse effect, OfReg is required under URCA to consent to the merger transaction.

If the merger transaction would have adverse effects, OfReg has the option to:

- declare the merger incompatible and deny its consent;

- give consent, subject to an order that certain conditions must be satisfied to avoid or eliminate such material adverse effects; or
- give consent without issuing an order if OfReg is satisfied that the efficiencies put forward by the parties to the merger transaction outweigh any potential harm to consumers and citizens of the Cayman Islands.

6.3 Cartels

The Cayman Islands has anti-competitive legislation in respect of the utilities markets and sectors. The URCA prohibits the entry into agreements by service providers in the utilities markets and sectors that prevent, restrict or distort competition.

6.4 Abuse of Dominant Position

The Cayman Islands currently has no rules governing unilateral conduct or economic dependency.

7. Intellectual Property

7.1 Patents

Patents

What may be registered

The Cayman Islands' patent regime is provided by the Patents Act (2018 Revision) (the "Patents Act"). It provides for the recordal and extension ("extension") of:

- UK-registered patents; and
- UK-designated European Patent Convention (EPC) patents,

to the Cayman Islands.

While the Patents Act contemplates that European Patents with Unitary Effect (Unitary Patents) may also be extended, since the UK's departure from both the European Union and subsequent withdrawal from the Agreement on a Unified Patent Court, it is unlikely that these will be properly registrable with the Cayman Islands Intellectual Property Office (CIIPO) or enforceable at law. It is presently not possible to register new patents (subject to an examination process) in the Cayman Islands.

Rights, subsistence duration

The owner of an extended patent has (expressly, by law) equivalent rights and remedies to those available in the UK. Such protection and rights will be effective from the time the right arose in the UK and subsist as long as the protections and rights remain in force in the UK, though no local infringement proceeding may be sustained for any actions occurring prior to the local extension. Relevant local fees must be paid to maintain the extension.

Process of extension

A patent owner, acting through their local registered agent, may apply to the Registrar of Patents to have their patent rights extended to the Cayman Islands, by submitting:

- a copy of the certificate issued by the United Kingdom or other qualifying registry (such as the details of a patent's particulars as obtained from the United Kingdom Intellectual Property Office);
- the form of application as prescribed in the Patents Regulations (As Revised); and
- registration and Cayman Islands Gazette fees.

If the Registrar of Patents is satisfied that the application is in order, they will record the extension of the patent accordingly.

All owners of patents which are (or will be) recorded at the CIIPO must have a registered

agent in the Cayman Islands. The CIIPO maintains a list of approved registered agents for this purpose.

Disputes/enforcement

Disputes in relation to patent infringement (or any other patent-related matter affecting rights or remedies) are heard in the Grand Court of the Cayman Islands. Typical remedies for infringement include declarations, injunctions, damages, or an account of profits, though the full suite of remedies (as would be available in the UK) are available in the Cayman Islands.

If a bad faith assertion of patent infringement is made by any person (including, normally, the owner or licensee), an aggrieved party may bring a claim against the person making the assertion for injunctions, other equitable relief, or damages (including aggravated and/or exemplary damages). The Cayman Islands is a "costs-shifting" or "loser pays" jurisdiction: that is, the losing party typically is obliged to pay the legal costs (or a proportion of them) of the winning party.

7.2 Trade Marks

Trade Marks

The Trade Marks Act (As Revised) (the "Trade Marks Act") provides for the registration of trade marks, certification marks, and collective marks (collectively the "Marks") in the Cayman Islands.

The Trade Marks Act defines the different types of Marks as follows:

- "trade mark" means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of another undertaking and may consist of words, designs, numerals, letters or the shape of goods or their packaging;
- "certification mark" means a mark indicating that the goods or services in connection with which it is used are certified by the proprietor of the mark in respect of origin, materials, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics; and
- "collective mark" means a mark distinguishing the goods or services of members of an association which is the proprietor of the mark from those of other undertakings.

Applications are made to the CIIPO, who maintain the Trade Marks Registry, by a local registered agent. It is no longer possible to extend UK or EU Marks to the Cayman Islands.

Subject to payment of relevant fees (including relevant annual fees), the rights of the mark registration will subsist for ten years from the date of registration, subject to the ability to renew after the initial period. Failure to pay the annual fee by 31 March in any year will result in the rights protected by the registration being suspended from 1 April until the annual fee and any penalty fee have been paid.

The owner, acting through their registered agent, may apply to the Registrar of Trade Marks to have their Mark registered by submitting:

- a copy of the Mark;
- the form of application in the form set out in the Trade Marks Regulations;
- the classes and description of the goods to be covered; and
- registration and Cayman Islands Gazette fees.

If the Registrar of Trade Marks is satisfied that the application is in order, they will register the Mark.

All applicants for trade marks, or owners of trade mark rights which are (or will be) recorded at the CIIPO must have a registered agent in the Cayman Islands. The CIIPO maintains a list of approved registered agents for this purpose.

An action for infringement may be brought by the proprietor in the Cayman Islands (and, in certain circumstances, by licensees of the proprietor). Typical remedies for infringement include injunctions, damages, an account of profits, or declarations. Depending on the type of infringement, a proprietor may seek further or other relief, such as removing/obliterating the infringing sign from infringing goods, delivery-up of infringing goods, and/or orders for disposal of infringing material. Like with patents, if groundless threats are made of trade mark infringement, the aggrieved party may have an action against the person making the threat.

As set out above, the Cayman Islands is a "costs-shifting" or "loser pays" jurisdiction: that is, the losing party typically is obliged to pay the legal costs (or a proportion of them) of the winning party.

Apart from registered trade marks, Cayman Islands law provides for an action in "passing off", which is generally considered protection of "unregistered" trade marks. In the usual course, a passing-off action requires three elements: i) goodwill (generally created by actual trade); ii) misrepresentation; and iii) damage. In the usual course, the misrepresentation is that person B misrepresents their goods as the goods of person A (who owns the goodwill), causing person A harm. Similar relief to that available to trade mark infringement (damages, injunctions, etc) will usually be available when passing off is established.

7.3 Industrial Design

Designs are protected in the Cayman Islands by the Design Rights Registration Act (As Revised) (the "Design Rights Act") providing for the recordal in, and extension to ("extension"), the Cayman Islands of existing registered UK and EU design rights. The Cayman Islands do not currently have a registrar of origin for design rights. The Design Rights Act does not, therefore, enable design rights to be registered anew in the Cayman Islands.

Rights, Subsistence, Duration

The owner of an extended design has (expressly, by law) equivalent rights and remedies to those available in the UK. Such protection and rights will be effective from the time the right arose in the UK and subsist as long as the protections and rights remain in force in the UK, though no local infringement proceeding may be sustained for any actions occurring prior to the local extension. Relevant local fees must be paid to maintain the extension.

In relation to EU-derived rights, caution must be exercised that such rights remain in force or otherwise enforceable in the UK post-Brexit as this will expressly limit their enforceability.

Process of Extension

A design right owner, acting through their local registered agent, may apply to the CIIPO to have their design rights extended to the Cayman Islands, by paying the relevant fees and showing that the design right is currently held in the UK and the design right is derived from registration in the UK or the EU.

If the Registrar of Design Rights is satisfied that the application is in order, they will record the extension of the design right accordingly.

All owners of design rights which are (or will be) recorded at the CIIPO must have a registered agent in the Cayman Islands. The CIIPO maintains a list of approved registered agents for this purpose.

Disputes/Enforcement

Disputes in relation to design rights infringement (or any other design rights-related matter affecting rights or remedies) are heard in the Grand Court of the Cayman Islands. Typical remedies for infringement include declarations, injunctions, damages, or an account of profits, though the full suite of remedies (as would be available in the UK) are available in the Cayman Islands.

If a bad faith assertion of design rights infringement is made by any person (including, normally, the owner or licensee), an aggrieved party may bring a claim against the person making the assertion for injunctions, other equitable relief, or damages (including aggravated and/or exemplary damages). The Cayman Islands is a "costs-shifting" or "loser pays" jurisdiction: that is, the losing party typically is obliged to pay the legal costs (or a proportion of them) of the winning party.

7.4 Copyright

Copyright

The Copyright (Cayman Islands) Order, 2015 and the Copyright (Cayman Islands) (Amendment) Order, 2016 (together, the "Copyrights Orders") extend certain provisions of the UK Copyright, Designs and Patents Act 1988 to the Cayman Islands (principally, Part I), subject to some modifications.

The copyright regime provides for the protection of:

- original literary, dramatic, musical, or artistic works (LDMA):
  - (a) "literary works" expressly include tables, compilations, computer programs (and their preparatory design materials), and databases;
  - (b) "dramatic works" include works of dance or mime;
  - (c) "musical works" expressly refers to the music (excluding any words or action intended to be sung, spoken, or otherwise performed with the music);
  - (d) "artistic works" includes graphic works (paintings, drawings, diagrams, maps, charts, plans, engravings, etchings, lithographs, woodcuts) photographs, sculptures, collages, works of architecture, or works of artistic craftsmanship;
- sound recordings, films, or certain broadcasts; and
- the typographical arrangement of published editions.

The duration of protection of the copyright varies depending on varying factors (type of work/right, whether the author is known, how the work was made, published, etc). In the usual course, protection for original LDMA works will ordinarily be 70 years beyond the life of the author. Other works tend to vary in protection between 25 and 70 years. It is not currently possible (or necessary) to register a copyright in the Cayman Islands.

Copyright may be enforced by court action, generally in the Grand Court of the Cayman Islands. Remedies for copyright infringement include damages, injunctions, delivery-up of the infringing work, right to seizure of infringing work or any other remedy that would be available in respect of any other property right. Criminal sanctions for copyright infringement are also available.

7.5 Others

Software and databases are principally protected as copyright works (see **7.4 Copyright**). In certain circumstances, the law of confidential information may provide further (possibly overlapping) protection for computer code or algorithms.

Trade secrets are protected by an action for breach of confidence. An action for breach of confidence classically requires three elements:

- that the information itself is properly confidential;
- that the information was imparted in circumstances importing an obligation of confidence; and
- that there has been an unauthorised use/misuse of that information.

When a breach of confidence action is made out, typical remedies include injunctions, damages or an account of profits, declarations.

8. Data Protection

8.1 Applicable Regulations

The Cayman Islands Data Protection Act (As Revised) (DPA) is the main applicable legislation. The DPA is modelled on the UK's Data Protection Act 1998, with additional elements taken from the EU's General Data Protection Regulation (GDPR). The requirements of the DPA are broadly speaking similar to the GDPR, but much less onerous.

8.2 Geographical Scope

Like the GDPR, the DPA has extraterritorial effect and will apply to any "data controller" (ie, the person or entity that determines what personal data is processed, why and how) that is established in the Cayman Islands, as well as any "data controller" on whose behalf personal data is processed in the Cayman Islands for any purpose other than mere transit.

Thus, the DPA could potentially apply to an overseas business that markets goods/services to Cayman Islands residents, and collects their personal data in doing so. However, the extraterritorial effect of the DPA will not be triggered merely because goods/services are accessible or available to Cayman residents; there must be an indication that the overseas business is actively targeting Cayman Islands residents in marketing its goods/services.

A data controller must comply with, among other things, the data protection principles in respect of the personal data that it processes (or, in the case of an overseas data controller caught by the extraterritorial effect of the DPA, personal data that is processed on its behalf by any "data processor" based in the Cayman Islands).

The data protection principles are broadly speaking similar to the principles set out in Article 5 of the GDPR, and they provide, for example, that personal data must be processed fairly and only for specified lawful purposes, and that personal data must be processed only to the extent adequate/relevant and not excessive, and so on. Other notable requirements of the DPA include the requirement to respond to access/correction requests, and requirement to notify personal data breaches.

The DPA does not apply directly to data processors, but those who wish to appoint data processors are required to ensure that data processors give certain contractual assurances with respect to the personal data that they process.

8.3 Role and Authority of the Data Protection Agency

The relevant Cayman Islands regulator is the Ombudsman. Breach of the DPA can lead (variously) to remedial action by the Ombudsman, the imposition of penalties, and criminal sanctions. If, following receipt of a complaint by a data subject, the Ombudsman is satisfied that personal data held by a data controller is inaccurate, the Ombudsman may order the data controller to rectify, block, erase, destroy or update the data. The monetary penalties that the Ombudsman can impose are capped at KYD250,000.

9. Looking Forward

9.1 Upcoming Legal Reforms

In January 2024, the Cayman Islands Ministry for Financial Services issued consultation papers in respect of proposed amendments to the Exempted Limited Partnership Act (As Revised) of the Cayman Islands. Those proposed amendments are intended to introduce additional structural flexibility and efficiencies for exempted limited partnerships and include:

- provisions to facilitate statutory mergers between one or more exempted limited partnerships, between one or more exempted limited partnerships and/or one or more exempted companies or limited liability companies or between one or more exempted limited partnerships and one or more foreign entities provided such foreign entities have separate legal personality, consistent with the existing Cayman Islands statutory merger regimes applying to exempted companies and limited liability companies; and
- a provision to facilitate the conversion of an exempted company or a limited liability company to an exempted limited partnership.

The consultation period ended on 20 February 2024, and updated consultation papers are expected to be issued later in 2024.

CHILE

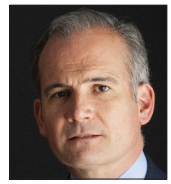
Trends and Developments

Contributed by:
Ignacio García, Cristóbal Porzio, Andrés Sotomayor and Fernando Villalobos
Porzio Ríos García

Porzio Ríos García was founded in 1993 as Porzio, Ríos & Asociados, starting its activities primarily in the field of intellectual property. Due to the growing needs of its clients, both Chilean and foreign, and in order to provide legal advice in a comprehensive manner and at the highest quality standard, the firm developed new practice areas related to corporate, commercial, labour, public and tax law. Porzio Ríos García is now made up of lawyers who have graduated from the most prestigious universities in the country and are recognised as leaders in their respective areas of practice. The firm offers the full spectrum of legal services required by clients. Each practice area specialises in a particular field of law, enabling the firm to form interdisciplinary teams when required by clients.

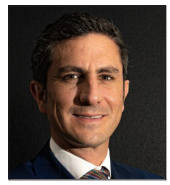
Authors

Ignacio García is a partner at Porzio Ríos García and focuses on corporate and labour law, as well as international trade and customs law. He is also a recognised expert in private international law matters, contracts and international trade, customs law, trade defence, WTO law and customs disputes. Ignacio obtained his bachelor's degree from the Pontifical Catholic University of Chile and his master's degree from Heidelberg University. He is an arbitrator for the dispute resolution system of the Economic Complementation Agreement Chile-Mercosur and the appointed representative of the State of Chile before Unidroit. He is the acting President of the Chilean Association of Private International Law.



Cristóbal Porzio is a partner at Porzio Ríos García. He focuses on advising clients and handling litigation in matters relating to trade marks, patents, technology transfer and copyrights. He also represents clients in negotiations and contracts related to industrial property, unfair competition and advertising. Cristóbal's practice also includes distribution and franchising law, as well as corporate law. He has participated on the board of directors of various companies and serves as counsel for foreign companies in Chile. He has also been President and a board member of the main intellectual property association in Chile.

Andrés Sotomayor is a partner at Porzio Ríos García, and focuses on counselling clients in the areas of corporate and commercial law, customs law and international trade, as well as public law in general. He obtained his bachelor's degree from the Pontifical Catholic University of Chile in 2007 and his master's degree from Georgetown University in 2015. Andrés joined the firm in 2015, but from 2019 to 2021 he was Chief of Advisers in the Ministry of Interior and adviser of the Presidency, both in the government of Chile.



Fernando Villalobos is a partner at Porzio Ríos García, whose practice focuses on advising clients and handling litigation in employment, labour and social security matters, collective bargaining and the resolution of labour disputes, as well as in corporate law, corporate and commercial contracts. Fernando obtained his bachelor's degree from the Pontifical Catholic University of Chile in 2008 and his master's degree from the University of California Berkeley in 2014. He joined the firm in 2015, and previously worked at the International Labour Organization (ILO) and the Minister of Labour and Social Security of the Republic of Chile.

Porzio Ríos García

Cerro el Pomo 5680, fl. 19
Las Condes
Santiago
Región Metropolitana
Chile

Tel: +56 227290 600
Email: porzio@porzio.cl
Web: www.porzio.cl

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A B O G A D O S

Contributed by: Ignacio García, Cristóbal Porzio, Andrés Sotomayor and Fernando Villalobos, **Porzio Ríos García**

Doing Business in Chile: an Introduction

General overview

Chile is widely regarded as one of the top-performing economies in Latin America and as one the best emerging economies globally. For many years, it has been a preferred destination for foreign investors in South America, owing to its stable economy, openness to trade, competitive and transparent business environment, and promising business opportunities.

For these reasons, Chile has been recognised in various rankings and studies, such as the business environment ranking developed by the Economic Intelligence Unit, which ranks Chile 30th worldwide and as the most prominent country in Latin America.

Stable economy

Chile has solid institutions and macro- and micro-economic policies that have been consistent over the years. For example, the Central Bank is a technical entity with constitutional autonomy, whose corporate governance ensures the adequate fulfilment of its primary objective, which is to safeguard the stability of the currency. In addition, governments of different political orientations have been consistent in applying principles of fiscal responsibility, enabling Chile to stand out for reducing its inflation levels. In August 2022, inflation peaked at 14.2% after an explosive increase in public spending to address the COVID-19 pandemic and its social effects, before dropping to 3.9% by the end of 2023. The estimate is that inflation will be even lower during 2024.

It should be noted in this regard that Chile experienced one of its most significant crises towards the end of 2019 and, in response, the centre-right government of Sebastián Piñera, together with most of the political parties in Congress, advocated for constitutional renewal as a potential resolution. After two consecutive processes and two new constitutional drafts were rejected in national plebiscites, it seems that Chile will keep its Constitution enacted in 1980 but amended more than 60 times as a sign of constitutional evolution.

Openness to trade

Chile's proactive approach to bilateral, regional and multilateral trade agreements over the past 30 years accounts for the nation's robust performance in foreign trade of goods and services, earning it high regard as an international partner. Consequently, Chile has entered into trade agreements with more than 65 countries, significantly broadening its domestic market of 18 million residents to encompass over 4.3 billion potential consumers worldwide. This translates to approximately 88% of global GDP and 66% of the world's population.

Chile's main industries

Chile stands out as one of the most industrialised nations in Latin America, with its key sectors including mining (Chile is a leading global copper producer and major lithium supplier), energy, infrastructure and the food industry (including agriculture and manufacturing).

Despite these challenges, Chile remains the most reliable business partner in the region. It faces significant underlying obstacles like stagnant productivity, but its potential in renewable energy generation is noteworthy, especially considering the current high reliance on fossil fuels in the energy mix.

Trends

Further free trade agreements

As already mentioned, Chile stands out for its openness to international trade, and govern-

ments have promoted the signing of new treaties that encourage commercial exchange for more than 30 years.

The current government, despite initially appearing less enthusiastic about it, obtained approval for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which includes Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

It also signed the Advanced Agreement between Chile and the European Union and the free trade agreement between the Pacific Alliance and Singapore, and is negotiating agreements with India, Indonesia, the United Arab Emirates and South Korea, among others.

Notwithstanding this openness to trade, it should be noted that the National Commission for Investigation of Price Distortions in Imported Goods (the Commission), which is the entity responsible for conducting trade defence investigations and imposing trade remedies in Chile, is currently conducting an investigation into imports from China of steel forged grinding balls less than 4 inches in diameter, and steel bars for the production of conventional grinding balls less than 4 inches in diameter. In both cases, the Commission recently recommended the application of provisional anti-dumping duties for a period of six months starting from March 2024.

Fostering investment

Foreign direct investment in Chile has been increasing significantly, accounting for more than USD21 billion during 2023, which was the largest amount since 2015 and is proof of the confidence that foreign investors have in Chile. However, the figures for productive investment have fallen, causing concern among the authorities. That is why, among other measures, the government of Chile has initiated a bill aimed at facilitating the implementation of investment projects by simplifying the required sectoral permits, reducing processing times, and providing certainty to developers by improving regulatory quality. Proposals include replacing authorisations with sworn statements from the project owner, establishing a digital one-stop shop, and better regulating administrative silence.

National Lithium Strategy

Chile's substantial lithium reserves give the country considerable influence on the global lithium market. As one of the leading lithium producers worldwide, Chile stands to gain significant advantages as both an exporter and a supplier.

Lithium plays a crucial role in various industries worldwide, including batteries, electronics and numerous other products. The demand for these goods continues to grow with ongoing technological advancements driving innovation and progress. Given the high consumption levels, efficient production processes are crucial to ensure reliable supply chains.

At present, Chile's lithium market accounts for approximately 40% of the global lithium output, establishing it as one of the primary producers worldwide. Moreover, Chile holds a significant portion of the resource and related technologies in the industry, despite the fact that lithium has a different legal regime to other minerals, such as copper or gold, under which private companies can obtain mining claims for its exploitation and claim a property right over such mining claim.

These circumstances led the Chilean government to enact a National Lithium Strategy in 2023: a set of measures to incorporate capital,

technology, sustainability and value addition in the productive sector, in harmony with local communities. Under the National Strategy,state-owned copper producer Codelco just reached an agreement with SQM, one of the largest lithium producers in the world. The public-private partnership will take responsibility for the production of refined lithium in the Salar de Atacama from 2025 to 2060, and aims to achieve a total additional production of 300,000 Lithium Carbonate Equivalent (LCE) in 2025–2030, while the production of 280,000–300,000 tons of LCE annually has been defined for 2031–2060.

Labour reforms

As promised during the presidential campaign, the current government has promoted an agenda of labour reforms that may place burdens on the employer but should improve the quality of life of employees and generate better relations within the company.

In January 2024, Law No 21.645 for the Protection of Maternity, Paternity and Family Life entered into force. The main changes introduced are the right to preferential use of legal holidays during children's vacation period, the right to temporarily modify shifts or workload during children's vacation period and the employer's obligation to provide remote work for employees caring for children under 14 years of age or caring for a person that has a disability or is in a situation of severe or moderate dependence, regardless of the age of the person being cared for.

Law No 21,565 entered into force in April 2024 and reduces the workday from 45 to 40 hours a week. It also introduces flexibility measures such as compensating overtime with holidays and implementing "4x3" shift schedules.

Finally, Law No 21,643 entered into force in August 2024 and aims to prevent violence in the workplace by introducing new requirements for companies' internal regulations, requiring new investigation procedures within a company and making a company responsible for the violence of customers or suppliers towards its employees.

CHINA

Trends and Developments

Contributed by:
Charles Feng
Tahota (Beijing) Law Firm

Tahota (Beijing) Law Firm was founded in May 2000 and is one of the top five law firms in China, with more than 4,300 legal professionals. It is very experienced in providing legal services relating to IP, data compliance, dispute resolution and foreign investment, in China and other major jurisdictions. As a large western-facing firm, a substantial portion of its lawyers are western-educated and able to work in Chinese, English, Japanese, French, German and other major languages. Its office network spreads across Beijing, Chengdu, Chongqing, Guiyang, Jinan, Kunming, Lhasa, Shenzhen, Shanghai, Tianjin, Hong Kong, Xi'an, Taiyuan, Xining, Nanjing, Wuhan, Haikou, Urumqi, Fuzhou, Guangzhou, Nanchang, Zhengzhou, Hangzhou, Rangtang, Washington, Sydney, Kathmandu, Bangkok, Vientiane and other major cities around the globe. The performance of each office puts it at forefront of the local market.

Author

Charles Feng is a senior partner and Director of the international business department at Tahota (Beijing) Law Firm, and has substantial experience in IP, data protection and antitrust law, focusing on IP litigation, prosecution and enforcement, trade mark and patent portfolio management, and cyber and data law-related legal matters. He has represented foreign clients from the US, the EU, Japan, the UK, Korea and ASEAN countries at various levels of courts, and is particularly experienced in addressing clients' commercial needs in the areas of IP litigation, arbitration and prosecution, including patent, copyright, trade mark and domain names, unfair competition and trade secrets. Charles has also been involved in IP transactional work.

Tahota (Beijing) Law Firm

12F, Tower A
Ocean International Center
56 Dongsihuan Zhonglu
Chaoyang District
Beijing
PRC

Tel: +86 10 85865151
Fax: +86 10 85861922
Email: Charlesfeng@tahota.com
Web: www.tahota.com

Leveraging Copyright-Based Civil Lawsuits to Combat Incontestable Pre-emptive Registrations and Infringements in China

Background

Since the establishment of its trade mark registration and protection system, China has adopted the first-to-file principle, which stipulates that the trade mark rights shall be granted to the applicant who files an application for registration in China first, adding that evidence on the use of the trade mark in other jurisdictions can scarcely be taken into account when deciding the validity or ownership of a mark. Such system facilitates the management by the China National Intellectual Property Administration (CNIPA) of the largest number of trade mark registrations in the world.

In the meantime, it provided a substantial loophole for bad-faith trade mark applicants who took advantage of such system and submitted applications for registrations of foreign brands that had not yet registered their mark in China or that had just registered their mark in its core classes but wished to expand their business scope subsequently.

GQ magazine

Condé Nast is a global mass media company that was founded in 1909 and is owned by Advance Publications. It attracts more than 72 million consumers in print, 394 million in digital and 454 million across social media platforms. Gentlemen's Quarterly, or GQ, is an international monthly men's magazine that is owned by Advance and is based in New York City; it focuses on fashion, style and culture for men, although articles on food, movies, fitness, sex, music, travel, celebrities, sports, technology and books are also featured. The US version of GQ magazine entered China in 1988 through distribution via China International Book Trading Corporation, and Zhizu Magazine was subsequently jointly published as the Chinese version of GQ magazine: 智族 GQ (Zhizu GQ).

The magazine accumulated a huge reputation amongst the Chinese population through substantial distribution and commercial collaborations over the last two decades, introducing a modern lifestyle and advertising numerous international brands, focusing on men's products.

However, for a variety of reasons, the brand owner merely registered the "GQ" mark in relation to the magazine in respect of Classes 16, 18 and others but not Classes 3 or 10, between 1994 and 2003.

Guangzhou-based individual LV Biao noted the commercial interests and potential in the reputation and commercial value of the GQ brand in the areas of men's products, as well as the absence of prior registrations of the brand. He pre-emptively applied for and registered the GQ mark in 2004, covering men's cosmetics and products including condoms in Classes 3, 5 and 10.

Facts

Under the current legal system in China, a mark is scarcely contestable if it is registered with CNIPA for more than five years, unless it is proved that the registration is for a reproduction, imitation or translation of a prior well-known mark, adding that there is evidence to prove that the application was made in bad faith according to Article 13 of the PRC Trademark Law.

In the meantime, an investigation by Condé Nast revealed that LV had also engaged in unauthorised manufacture and distribution of infringing products by using the "GQ" mark, including facial cleanser (0301), skin care product (0306), cosmetics (0306), moisturiser (0306),

toner (0306), perfume (0306), condom (1006), magazine (1606), jewellery (1403) and clothing (2501). In addition, LV Biao acquired the domain names "www.gq.cn", "www.gqman.cn" and "gqmen.cn" from others via lawsuits based on his pre-emptive trade mark registrations. He also promoted his infringing products through websites linked to his domain names and through his WeChat account ("GQ Men's website") and his Weibo account ("GQ Men's website official blog"), as well as other channels.

LV arbitrarily used the GQ logo on the website pages related to the gq.cn and gqman.cn domain names, and distributed infringing condom products through his WeChat account. He engaged in unauthorised use of the GQ logo in the relevant pages of the Toutiao (TikTok) account of "GQ Men's website", and indicated that his condom products are from an international luxury brand, implying Condé Nast.

He also copied or plagiarised a large number of articles and photographs from Condé Nast's official website and substantially distributed them via his "GQ Men's website" Toutiano account (identical to the official name of the official website and Condé Nast's original Toutiao account), in order to confuse consumers (see here) and to promote his own infringing products such as condoms (see here) and cosmetics (see here).

Proposal and actions

Condé Nast sought to take action against these serious infringements on multiple fronts, including the use of the "GQ" logo on infringing products and viamedia including WeChat, Weibo and Toutiao, although its trade marks in the same classes of goods had not been registered. Rather than filing an invalidation against LV's pre-emptive registrations, it was proposed to file a civil lawsuit against LV Biao on the basis of GQ-based copyright infringement and GQ trade name-based unfair competition directly, in order to exert the following effects:

- cease all infringements and seek damages with an emphasis on cessation of the use of the GQ logo and name; and
- force LV Biao to cease his use of the mark, which will likely facilitate subsequent non-use cancellation.

Acting in this order rather than filing invalidation first and then filing a civil action will save substantial time (reducing the procedure from three to five years to one to two years – see "Actions Against Infringement" diagram) to cease infringement and acquire damages, and will avoid the obstacle of the period of immunity where the marks of LV Biao have been registered for more than five years and are essentially unchallengeable, as discussed above (given no feasibility for well-known recognition due to evidence).

Difficulties and solutions

However, this strategy did not come without difficulties, specifically relating to the following three aspects.

Whether "GQ" constitutes a copyrightable work under the law

According to Article 2.2 of the Guidelines for the Trial of Copyright Infringement Cases of the Beijing High People's Court ("The Copyright Guidelines"), the following factors should be considered when determining the originality (copyrightability) of a subject matter:

- whether it is independently created by the author;
- whether the arrangement of expression reflects the author's choice and judgement; and

- whether the fact it is original is irrelevant to its artistic merits.

Under such provision and according to other previous cases, the constitution of copyrightable work is an open-ended question that would depend on factual evidence, including how the artist created the artwork of the GQ logo independently and how the logo expressed the author's choice and judgement. Therefore, the following evidence was presented:

- a detailed description of the artist's process of creating the work;
- the arrangement of expression in the GQ artwork reflects the author's unique choice and judgement; and
- a reflection of the author's choice and judgement from three aspects:
  (a) the creation of the letter typeface;
  (b) the selection and judgement of the letter combination; and
  (c) the selection and judgement of the position and combination of the letters "G" and "Q".

Whether the use of a registered mark can still be found to be infringing – "ostensible" conflict of rights

The use of the logo on the goods not covered by the trade mark registrations of LV Biao does not constitute a conflict of right, or it constitutes an "ostensible" conflict of rights. Specifically, Article 10 of the Opinions of the Supreme People's Court on Several Issues concerning Making IPR-related Trials Serve the Overall Objective under the Current Economic Situation, issued by the Supreme People's Court in 2009, states: "Apart from civil disputes involving conflicts between registered trade marks, for civil disputes involving conflicts between registered trade marks, enterprise names, and prior rights, including disputes where the defendant has actually changed the registered trade mark in use or used the registered trade mark beyond the approved scope of goods, as long as they belong to civil rights disputes and meet the conditions for acceptance stipulated in the Civil Procedure Law, the People's Court shall accept them." Furthermore, it is stipulated that "The fact that the allegedly infringing trade mark has not been registered at the time the case is accepted by the People's Court shall not hinder the People's Court from accepting and adjudicating it in accordance with the law".

"Real" conflict of rights

Use of the logo in regards to the goods that are covered by the trade mark registrations of LV Biao can still be found as infringing.

In accordance with Article 1 of the Provisions on Several Issues Relating to the Adjudication of Cases of Civil Disputes Involving Conflicts between Registered Trade Marks, Enterprise Names and Prior Rights by the Supreme People's Court in 2008, where a plaintiff initiates a lawsuit on the grounds that the words, graphics, etc, used in another's registered trade mark have infringed upon the plaintiff's prior rights, such as copyright, design patent right and enterprise name right, and insofar as the provisions of Article 108 of the Civil Procedure Law have been satisfied, the People's Court shall accept the case.

In addition, according to the Interpretation and Application of Law on Several Issues Concerning the Trial of Civil Disputes Involving Conflicts between Registered Trade Marks, Enterprise Names, and Prior Rights by the Supreme People's Court, such prior rights include not only copyrights, design patent rights and enterprise

name rights listed in the articles but also the distinguishable brand names, packaging, decoration, domain names of well-known goods as defined by the regulations of the Anti-Unfair Competition Law, and other prior rights or interests.

Therefore, even for the use of marks in regard to goods being covered by registered marks of LV Biao, it was elaborated to the court that they could still be found as infringing.

Constitution of unfair competition between men's magazine goods and men's cosmetic goods

There is a critical question regarding whether unfair competition can be found between the distinctive name regarding the men's magazine and men's cosmetics and products.

Apart from copyright infringement, it was alleged that there was unfair competition between the distinctive QG name in regard to the men's magazine and the infringing men's cosmetics and products under the Anti-Unfair Competition Law, it was asserted that "GQ" is the name of the plaintiff's influential magazines "GQ" and "智族 GQ". Due to the plaintiff's long-term advertisements for men's fashion and lifestyle products via the "GQ" and "智族 GQ" magazines, the fame of the "GQ" product name in the men's magazine has been well recognised in the industries of men's life supplies, especially in the field of men's cosmetics, contraceptives and other daily necessities (men's magazine v men's products).

Constitution of unfair competition between men's magazine and men's cosmetic and men's products, including condoms

The State Administration of Industry and Commerce issued a Response on "Determination on the nature of use of other's distinctive name, packaging and decoration in regards to different and dissimilar goods", whereby it provided that unauthorised use of another's distinctive name, packaging and decoration in regards to different and dissimilar goods could also cause confusion and shall be found as constituting unfair competition. The plaintiff also quoted the Supreme People's Court Xiao Mu Zhi Automobile Case, where the Court found that unfair competition may not be restricted as between direct competitors but could also exist between indirect competitors. In another case, it found unfair competition in the use of the distinctive name of Great Lake on juice products against the use of the same name on shampoo products.

Results and implications

In June 2023, Haidian District People's Court ruled that LV Biao and his affiliated Guangzhou Chloe Co., Ltd shall immediately cease infringing copyrights and engaging in unfair competition behaviour, including:

- ceasing other infringements of copyrights and unfair competition behaviours, specifically the use of infringing GQ patterns in male facial cleansers, moisturisers, toners, perfumes and other grooming products produced and sold by them;
- ceasing the online sale of goods containing the infringing GQ patterns;
- ceasing the use of GQ patterns in profile photos and articles published on three accused websites, the official WeChat account of the GQ Men Website, and the official Weibo account of the GQ Men's Website; and
- compensating Condé Nast for the loss of CNY2 million.

The same judgment was upheld in the second instance at the Beijing IP Court in May 2024.

The judgment has a significant positive effect not only on the civil lawsuit but also on the whole brand protection landscape for the plaintiff in the following perspectives.

- It established that "GQ" is a protectable artwork under Copyright Law and a famous trade name under the Anti-Unfair Competition Law of China, thus overcoming the incontestable registration of LV by finding his infringement.
- It provided the ground-breaking ruling that the GQ logo is copyrightable, giving a huge advantage to the brand protection strategy of Condé Nast as a whole, which can be quoted in fights against other pre-emptive registrations in China as well.
- LV Biao suspended his use of the GQ logo and GQ name for more than three years while the trial was ongoing, due to fear of potential legal liability, which facilitated the plaintiff's non-use cancellation against the rest of his registrations and thus completely saved Condé Nast from pre-emptive registrations and confusing use by infringers.

What can be learned from the case

Whether the brand owner could have success in China would largely depend on its selection of good lawyers and an efficient litigation strategy.

In this case, the strategy resulted in favourable court decisions and efficient deterrence, not only winning the injunction and damages but also having a significant impact on the brand protection strategy and landscape of trade mark protection for the client in China as a whole.

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Condé Nast was represented by Tahota (Beijing) Law Firm in its case against LV Biao.

COLOMBIA

Law and Practice

Contributed by:
Jaime Trujillo, Juan David Velasco, Natalia Ponce de León and Juliana Gómez
Baker McKenzie

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Baker McKenzie was established in 1949 and is recognised as one of the foremost international law firms. With a presence in 45 countries through 75 offices, including in 36 of the top 40 global economies, the firm employs nearly 5,000 lawyers and around 13,000 staff. Renowned for transactional law services, it offers a comprehensive global platform, industry-specific expertise, and profound local market insights. The firm is the go-to choice for multinational corporations and both domestic and international private equity firms, valued for its integrated global, Latin American and local Colombian market expertise. Serving a diverse clientele, the firm specialises in advising high-profile multinational companies, particularly in heavily regulated industries such as oil and gas, energy, healthcare, life sciences, automotive, agri-food, chemicals and real estate. With a focus on delivering sector-specific counsel, it is at the forefront of legal services, driving innovation and excellence in a complex global market.

Authors

Jaime Trujillo has advised clients on transactional matters, including M&A and private equity deals, in both public and private acquisitions and divestitures for over 25 years. He was acting global chair of Baker McKenzie in 2018 and 2019. He was a member of Baker McKenzie's global executive committee from 2017 to 2021 and has also been the chair of Baker McKenzie's financial committee and the Latin America region, as well as the managing partner in Colombia. Between 2013 and 2016, he was the leader of Baker McKenzie's Latin America M&A/private equity practice group and has advised on some of the most relevant M&A transactions in Colombia.

Juan David Velasco is a transactional tax partner and wealth management practice group leader at Baker McKenzie in Colombia. He has advised numerous public and private companies, as well as private equity and venture capital firms on multi-jurisdictional tax-related aspects of investment, project finance, M&A and disposition of business interests and corporate reorganisations. He also works with high net worth individuals on private wealth management, tax-efficient estate planning strategies and cross-border asset-protection structures. His practice focuses on international tax, transactional tax, M&A tax, taxation of private equity and venture capital, taxation of digital economy, taxation of compensation and benefits, and wealth management.

Natalia Ponce de León is a partner in the M&A and private equity practice at Baker McKenzie in Colombia with over 13 years of experience, focusing on advising foreign clients and private equity funds on acquisitions of assets in Colombia. She completed an LLM at New York University and was admitted to the New York Bar in 2017. She has notable experience in M&A and private equity and her practice involves foreign and local clients, with an emphasis on cross-border transactions. She has been especially involved in the infrastructure and energy industry, advising on some of the most relevant deals in Colombia.

Juliana Gómez has more than five years of experience in corporate and contractual law, as well as in reorganisations and M&A at Baker McKenzie in Colombia. Before joining the firm, she worked at an Ibero-American law firm in the corporate and M&A practice area, and at Empresas Municipales de Cali – EMCALI ESP. She specialises in mergers and acquisitions, and her experience includes advising clients on the structuring, negotiation and preparation of transactional and corporate contracts and documents, as well as on the closing of domestic and foreign M&A and cross-border credit transactions in the health, real estate, energy, and oil and gas sectors.

Baker McKenzie

Carrera 11 #79-35
9 floor
Bogotá
Colombia

Tel: +57 601 634 1500
Email: ServicioalCliente.Bogota@bakermckenzie.com
Web: www.bakermckenzie.com

1. Legal System

1.1 Legal System and Judicial Order

Colombia's legal system follows the civil law tradition. The branches of government are the legislative, the executive and the judiciary. The ordinary judiciary structure is:

- the *Corte Suprema de Justicia;*
- the *Tribunales Superiores de Distrito Judicial;* and
- the *Juzgados*.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Foreign investments in Colombia do not require approval from the authorities. The country generally has a liberal approach to foreign investment, with a few exceptions.

Foreign investment is not allowed in activities directly related to defence, national security, and the processing or disposal of toxic, dangerous or radioactive waste which is not generated in the country. Colombian companies can also be fully foreign owned, except for those in the national broadcast television sector, where foreign ownership is capped at 40%.

Although foreign investment is not subject to approval from governmental authorities, all investments made by non-residents in Colombia must be registered in a timely way with the Colombian Central Bank either directly or through the local financial institutions through which the funds are transferred.

To complete this process, foreign investors must register the investment by submitting a foreign exchange declaration (*declaración de cambio*).

The registration process requires the submission of certain information, such as the value of the investment, the number of shares or membership interests acquired and the destination of the investment. Depending on the type of investment, deadlines for registration will vary. Registering foreign investment ensures access, through the formal exchange market, to convertible currency to remit dividends and repatriate the investment.

2.2 Procedure and Sanctions in the Event of Non-compliance

Although foreign investment is not subject to approval from governmental authorities, all investments made by non-residents must be registered with the Colombian Central Bank. Failing to properly complete this registration may lead to penalties being imposed. Under the Colombian exchange regime, the *Superintendencia de Sociedades* has the authority to audit international investment records and impose sanctions for non-compliance. Although Decree 1746 of 1991 authorises penalties of up to 200%, the *Superintendencia de Sociedades* typically enforces penalties, which reflect the severity of the violation.

2.3 Commitments Required From Foreign Investors

This section is not applicable in Colombia.

2.4 Right to Appeal

This section is not applicable in Colombia.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The most common form of legal entity in Colombia is the simplified stock corporation (S.A.S.) due to its flexible regime and the freedom its shareholders have to establish the terms and conditions for its functioning and internal governance structure. Corporations (*sociedades anónimas* or S.A.) and foreign company branches are vehicles that are also used.

Simplified Stock Company (S.A.S.)

Benefits and most common uses

The S.A.S. offers greater flexibility than other types of corporate vehicles in Colombia. Its incorporation process is simple, there are fewer administrative requirements, and shareholders have greater freedom to determine operational terms and internal structure. The S.A.S. is used for almost any business (except those that, by law, require a corporation).

Incorporation process

An S.A.S. can be incorporated by a private document registered with the chamber of commerce or by public deed (if assets are being contributed to the company for its incorporation the simplified stock company must be incorporated by means of a public deed granted before a Colombian Notary Public).

Term

The term can be indefinite.

Number of partners/shareholders

An S.A.S. must have a minimum of one shareholder and there are no limits on how many shares they can hold. There is also no limit on the maximum number of shareholders.

Liability

Liability is limited to shareholder contributions, except in situations involving company fraud or abuse that harms third parties.

Capital requirements

Shareholders have a maximum term of two years from incorporation to pay for the subscribed shares.

Governance

The shareholders of an S.A.S. appoint managers responsible for the company to represent it before third parties (called legal representatives). Although the S.A.S may have a board of directors, it is not a requirement.

Other relevant matters

The S.A.S does not need a legal reserve, and a statutory auditor is only required if their profits are above 3,000 minimum monthly wages.

Corporation (S.A.)

Benefits and most common uses

A corporation or S.A. offers a more traditional structure. Their shares can be registered and traded on the national stock market. Banking institutions and listed companies must be corporations by law.

Incorporation process

An S.A. can only be incorporated by a public deed granted before a Colombian Notary Public and registered with the chamber of commerce. By-law amendments would have to be formalised by public deed.

Term

The term must be limited but may be extended by the shareholders.

Number of partners/shareholders
There must be a minimum of five shareholders in an S.A. Under Colombian law, no shareholder may have 95% or more of the outstanding capital of the corporation.

Liability
Shareholder liability is limited to the amount of their contributions. However, in cases of fraudulent actions, overvaluations of contributions in kind and wilful misconduct or actions of a parent company giving rise to the bankruptcy of an affiliate, the liability of shareholders could be extended.

Capital requirements
At the moment of incorporation, shareholders have to subscribe to at least 50% of the authorised capital and make an initial payment of at least one-third. The balance must be paid within one year from the date of incorporation.

Governance
An S.A. must have a board of directors. This must consist of at least three members and their alternates, and a legal representative.

Other relevant matters
An S.A. must have a legal reserve and statutory auditor.

Foreign Company Branch

Benefits and most common uses
Branches are a great alternative for foreign companies that want to have a permanent presence in Colombia. A branch office is an extension of the company's home office and is not a separate legal entity. Branches are widely used by investors in the hydrocarbons sector.

Incorporation process
The home office issues a resolution which is formalised in a public deed granted before a Colombian Notary Public and registered with the chamber of commerce.

Term
The term is limited to the duration of the home office but can be extended as long as it is within the duration of the home office.

Number of partners/shareholders
The branch is not a separate entity to the foreign company. The foreign company is therefore the sole owner.

Liability
As it is not a separate entity from the foreign company, the home office is liable for the assets and liabilities of the branches. They are jointly and severally liable for tax obligations.

Capital requirements
The allocated capital must be fully paid, and any increase in capital requires an amendment to the by-laws along with authorisation by the foreign company's competent corporate body. However, increasing supplementary investment does not need a by-law amendment and can be made in cash from abroad.

Governance
Branches do not have any separate governance bodies from their home office. A legal representative/general agent acts on behalf of the company.

Other relevant matters
A branch must have a legal reserve and statutory auditor.

3.2 Incorporation Process

Once the shareholders identify the type of corporate vehicle that suits their needs best, the incorporation process is generally simple and expeditious. The incorporation of corporations and branches does not require authorisation from governmental authorities as a rule. However, there are specific cases where authorisation from governmental authorities will be required.

Companies and branches must be registered in the commercial registry kept by the corresponding chamber of commerce of the municipality where it is to be domiciled.

For purposes of incorporating a corporate vehicle in Colombia, the following main steps must be completed:

- An incorporation document must be prepared containing the company's by-laws and the names of the shareholders and identification documents. If the shareholders are foreign entities, apostille identification documents are needed. Depending on the type of vehicle, this may be completed through a private document or a public deed.
- The new entity must be registered with the corresponding chamber of commerce of the municipality where it is to be domiciled, by filling out the *Registro Único Empresarial y Social* (RUES) form.
- The new entity must be registered with the tax authorities by completing the form to obtain a tax identification number (NIT). The chamber of commerce also handles the processing of the national tax registry (RUT) used for registering entities with the Tax and Customs National Authority (DIAN). The RUT includes general taxpayer information, along with tax and customs obligations. To obtain this registration, the requisite fees and taxes must be paid to the chamber of commerce.
- Acceptance letters for the positions of legal representative, substitutes, and board members must be obtained, if these appointments are made in the incorporation document, along with copies of the documents for the appointed positions.

These documents must be filed with the chamber of commerce. Once all documentation is submitted, the registration process with the chamber of commerce often takes between one and two weeks.

3.3 Ongoing Reporting and Disclosure Obligations

Companies are required to report changes in management to the chamber of commerce within a month of the change being completed. Any amendments to the company's name, legal address or social activity must be registered. Any changes in capital, whether increases or decreases, must also be reported to the chamber of commerce.

Private companies are required by Colombian law to fulfil the following main periodic obligations:

- Companies and commercial establishments must renew their commercial registration (*matrícula mercantil*) with the chamber of commerce by March 31st each year.
- If the company is under permanent supervision or control by the *Superintendencia de Sociedades*, or if the company has received a special request for information, it has to submit the financial statements along with their notes, management report, statutory auditor's report, and other required documents to the *Superintendencia de Sociedades*. In addi-

tion, controlling companies must provide, in respect of their controlled subsidiaries, consolidated financial statements to the *Superintendencia de Sociedades*.
- If under permanent supervision or control by the *Superintendencia de Sociedades*, the company has to submit the business practices report as of December 31 the previous year.
- The financial statements, notes and report must be filed with the chamber of commerce, unless these have already been submitted to the *Superintendencia de Sociedades*.
- The ultimate beneficial owner (UBO) of the company must be registered in the single registry of ultimate beneficial owners administered by the Colombian tax authority. The UBO must be an individual person. Identifying the ultimate parent company alone is not sufficient to meet Colombian regulatory requirements.

3.4 Management Structures

Companies are operated and managed according to the rules set out in their by-laws, except for foreign company branches, which must follow the rules established in the by-laws of the home office. Except as set out below, there is freedom to establish the conditions for the operation and management of local vehicles.

Legal entities must appoint at least one legal representative, who is an authorised officer and is empowered to act on behalf of the company. Except for simplified stock corporations, all other entities are obliged to appoint an alternative to the legal representative as well. The legal representative is usually appointed by the board of directors and in the event the company does not have a board of directors, the legal representative is appointed by the shareholders. The by-laws may establish limits to the powers of the legal representative by means of including events in which the legal representative may require prior authorisation of the shareholders or the board of directors to carry out or perform certain actions (eg, entering into contracts exceeding a certain amount).

Simplified stock corporations (S.A.S.) are not required to have a board of directors. However, for corporations (S.A.), a board of directors is mandatory and must be composed of at least three members, with their alternates. Decisions taken by the board of directors and by the shareholders must be approved according to the majority rules set out in the company's by-laws, and both shareholder and board decisions must be recorded in minutes, which must also be incorporated into the corresponding company's minutes ledger.

A foreign branch does not have any separate governance bodies from its home office. Instead, a legal representative or general agent acts on behalf of the company, suggesting more centralised control from the parent company.

3.5 Directors', Officers' and Shareholders' Liability

Shareholders of corporations (S.A.) and simplified stock corporations (S.A.S.) are only liable up to the amount of their respective contributions. However, it is possible to pierce the corporate veil if the company is used to defraud the law or to the detriment of third parties. In these cases, the shareholders and administrators who have carried out, participated in, or facilitated the fraudulent acts are liable too. However, piercing the corporate veil involves a high burden of proof, and the specialist company court rarely finds sufficient evidence to do so.

The business judgement rule applies to administrators and usually does not interfere with the normal course of business of administrators or companies. However, the law establishes certain duties for administrators that they need to uphold, with the most important ones being acting with loyalty, diligence, and in the interest of the company. If shareholders consider that an administrator has not acted accordingly, they can commence a corporate action for liability (*acción social por responsabilidad*), and an administrator who has breached their duties can be liable for the damages caused to the company.

4. Employment Law

4.1 Nature of Applicable Regulations

Even though Colombia follows a civil law system, consistent case law can also be binding precedents on the parties to a dispute. Employment relationships are governed by the law, by the employment contracts, by the collective bargaining agreements (where applicable) and, in some cases by consistent case law (where not expressly regulated by law).

4.2 Characteristics of Employment Contracts

Employment agreements in Colombia can be agreed verbally. Although not required by law, for evidence purposes it is advisable to formalise the terms of the employment relationship in writing and ensure the written agreement contains certain minimum information (eg, initiation date, type of contract and events of termination for cause). Some provisions are only valid if agreed in writing, such as:

- trial period;
- the characterisation of salary as being "integral"; and
- fixed-term duration of the employment agreement.

4.3 Working Time

The ordinary working hours are those agreed by the parties, or in the absence of an agreement, the legal maximum established which is currently 47 hours per week (which is being gradually reduced so that, by 15 July 2026, it will be 42 hours).

Overtime work is that exceeding the ordinary working hours of the company and, in all cases, that exceeding the legal maximum working hours. Daily or nightly overtime work may never exceed two hours a day and 12 hours a week. The employer must have authorisation from the Ministry of Labour for employees to work overtime. Overtime work, daily or nightly, must be remunerated as follows:

- Daily overtime work (between 6.01am and 9pm): 25% over the value of daily ordinary work.
- Nightly overtime work (between 9.01pm and 6am): 75% over the value of daily ordinary work.
- Regular night work: 35% over the value of daily ordinary work.

4.4 Termination of Employment Contracts

Generally, Colombia is an employment at will jurisdiction, as an employment agreement may be terminated by a unilateral decision of either of the parties, with or without just cause. It can also be terminated by mutual consent, by the termination of the fixed-term agreed upon or by failure to extend the probation period.

The employee must be notified in writing of the termination of employment.

In some cases, the employer must give the employee advance notice of no less than 15 days. These include where the employer terminates the employment agreement due to poor job performance and recognition of a retirement pension if the employee is still providing services. Apart from those cases, employment law does not require advance notice for the termination of employment contracts, except in the case of non-renewal of fixed-term contracts. Notice of non-renewal of a fixed-term contract must be provided at least 30 calendar days in advance of the date of the expiration term. If it is not, the contract will be automatically renewed.

Employers must pay employees amounts due immediately upon termination (eg, salaries, outstanding vacations, accrued social benefits, outstanding commissions, and any other labour benefit owed). The exact amounts vary depending on the agreed salary structure (eg, integral salary or ordinary salary plus mandatory benefits structure) and the termination scenario (eg, dismissal for cause, mutual consent or resignation).

Unilateral termination without cause will give rise to the payment of statutory severance. The formula to calculate the statutory severance upon unilateral termination without cause depends on the employee's monthly salary, whether the labour contract is for a fixed or indefinite period of duration, and the actual time of duration of the employment.

For indefinite-term contracts, the legal severance for dismissal is as follows:

- For employees who earn less than ten minimum legal monthly salaries (for 2024, COP13 million or USD3,250), the severance is equivalent to 30 days of salary for the first year of service and 20 additional days of salary for each additional year of service, proportionally per fraction.
- For employees who earn ten minimum legal monthly salaries or more, the severance is equivalent to 20 days of salary for the first year of service and 15 additional days of salary for each additional year of service and proportionally per fraction.
- For employees who had more than ten years of service as of 27 December 2002, the severance is equivalent to 45 days salary for the first year of service and 40 additional days of salary for each year subsequent to the first and proportionally for fractions of the year.
- For employees who had ten years of service or more as of 31 December 1990 and are entitled to reinstatement, the severance is equivalent to 45 days salary for the first year of service and 30 additional days of salary for each year subsequent to the first and proportionally for fractions of the year.

For agreements entered into under a fixed period or for the duration of a specific job or activity, the severance is equivalent to the salaries corresponding to the unexpired period of the contract, but in the case of contracts for the duration of the job the indemnity cannot be less than 15 days salary.

Under Colombian law, a collective dismissal occurs when an employer unilaterally and without cause terminates the employment agreements of a certain percentage of its employees within a period of six consecutive months, without the required authorisation from the Ministry of Labour. These percentages, which are established by law, vary depending on the size of the company's workforce.

To proceed with a collective dismissal, the employer must obtain prior authorisation from the Ministry of Labour. The Ministry, at its discretion, can approve or reject this request. In practice, the Ministry is often reluctant to grant such authorisation, typically taking more than 12 months to review the request and possibly denying it. If the authorisation is not granted, the employer may be ordered to pay severance to the affected employees.

4.5 Employee Representations

In Colombia, works councils/employee representative bodies, as such, do not exist. However, employees have the right to form or join unions.

A union must have at least 25 members to be formed. To become part of a union, employees must be at least 14 years old and perform employment-related activities under special conditions. These requirements must be certified at an initial constitution meeting and executed with the intention to become unionised employees, at which time the employees will sign a foundation minute. The foundation minute is one of the requirements that must be fulfilled to register the union with the Ministry of Labour.

Unions are authorised to enter into collective bargaining agreements on behalf of the affiliated employees. In addition to the provisions agreed upon between the parties, the collective bargaining agreement must indicate the company or establishment, industry and trades covered thereby, the place or places where it is to govern, the date on which it takes effect, its duration, the causes and methods of its renewal and termination, and the responsibility for non-performance. Irrespective of the kind of union or the number of affiliates working for an employer, negotiation is held by each union within an entity.

An employee may belong to more than one union, and unions of the same or different nature may coexist in the same company. Employers must recognise the right of association of employees and unions.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Employees are subject to payment of income tax, at rates that depend on the employee's total income and/or compensation earned during the corresponding fiscal year and that range from 0% to 39% of the employee's taxable income.

Employers are required to withhold the applicable income tax when the salary is paid to the corresponding employee.

Both the employee and employer must make contributions to the social security system. For the healthcare system, a contribution of 12.5% of the employee's base salary must be made, of which the employee contributes 4% and the employer 8.5%. For the pensions system, a contribution of 16% of the employee's salary must be made, of which the employee contributes 4% and the employer contributes 12%.

Employers must also make mandatory contributions to certain private and public entities that provide services to the community related to welfare, education and children's rights (locally referred as *parafiscales*) which collectively amount to 9% of the employee's salary.

5.2 Taxes Applicable to Businesses

The main taxes applicable to companies and the current applicable rates are as follows:

Corporate Income Tax (CIT)

The general CIT rate for 2024 is 35%. This tax is imposed on the total income (generated or not in Colombia) of the Colombian company (ie, companies incorporated in Colombia, domiciled in Colombia or having their place of effective management in Colombia) and on the income of foreign non-resident companies generated in Colombia. An additional surcharge ranging from 5% to 15% is applicable to companies in the hydrocarbons and mining sectors. Industrial users of a free trade zone (FTZ) are subject to a special CIT rate of 20%. Since the 2023 fiscal year, local companies are subject to a minimum effective tax rate of 15% of accounting profits. If the tax liability calculated on net taxable income results in an effective tax rate lower than 15% of accounting profits, the taxpayer must increase the tax liability until it reaches the minimum.

Capital Gains Tax

In Colombia, a company must pay capital gains tax when it sells fixed assets held for two years or more or upon liquidation if the company was incorporated for a term of two years or longer, at a rate of 15%.

Withholding Tax (WHT)

The WHT system is a general mechanism of advance tax collection. All corporate entities are required to collect or withhold taxes from payments made to third parties. The WHT collection agents must collect the applicable WHT amounts and every month deposit the withheld amounts to the tax authority, file monthly WHT returns and issue WHT certificates to the withheld third parties. The withheld third parties, who are also subject to CIT declaration/payment, may credit the withheld taxes in their annual CIT return. The WHT rates vary depending on the nature of the payment. The general WHT rate on payments made to foreign non-residents is 20%.

Value Added Tax (VAT)

The standard VAT rate in Colombia is 19% of the invoiced amount. This tax is applicable to:

- the sale of movable assets;
- the provision of services in Colombia or from abroad (if the beneficiary is located in Colombia); and
- the import of assets or goods that have not been expressly excluded. Certain services are exempt from VAT, such as medical services, educational services, internet connectivity, and in some cases, energy, gas, and water utilities.

Industry and Commerce Tax

This is a municipal tax applicable to all individuals, legal entities and de facto companies who carry out industrial, commercial or service activities within the jurisdiction of the relevant municipality. The rates vary from 0.2% to 0.7% calculated over the gross income for industrial activities and 0.2% to 1.6% calculated over the gross income for commercial and services activities.

5.3 Available Tax Credits/Incentives

Colombia offers the following tax incentives to local and foreign companies:

- Double taxation treaties: Colombia has entered into an extensive network of double taxation treaties.
- Foreign tax credit applicable to all Colombian companies: foreign income taxes may be credited by Colombian companies against their local CIT liability, subject to certain limitations.
- Corporate income tax exemptions: the following income generated locally by a Colombian company is exempt from CIT:

(a) income obtained from eco-tourism services;
(b) income related to the sale of social interest or priority housing, provided that the taxpayer obtains the corresponding governmental permit; and
(c) income of companies incorporated in the departments of La Guajira, Norte de Santander, and Arauca (ZESE) until 2024 will have a five-year CIT exemption.

- Tax credit applicable to certain investments: a 30% tax credit is available for investments made in certain scientific and/or technological projects or in professional training projects of governmental, public or private institutions.
- Special CIT rate for free trade zones: these are geographically delimited areas in the Colombian territory that have a special tax and customs regime. Companies that have this status can access tax benefits such as the application of a preferential (lower) income tax rate, 0% VAT and tariffs on foreign goods and 0% VAT on domestic goods, among others.
- Tax benefits for investments in non-conventional energy sources: tax incentives exist to encourage the generation of energy frm clean and renewable sources. The following are the main tax incentives:
  (a) income from the sale of electric power generated from wind, biomass or agricultural waste is exempt from CIT, provided the seller issues and negotiates greenhouse gas reduction certificates;
  (b) income tax deduction of 50% of the value of the investment made in energy generation projects from non-conventional sources;
  (c) VAT exemption on the acquisition of goods and services necessary for the development of non-conventional energy projects;
  (d) exemption from payment of import duties on machinery, equipment, materials and inputs necessary for the production of energy from non-conventional sources; and
  (e) accelerated depreciation incentive for machinery, equipment and civil works necessary for the development of non-conventional energy generation projects.

5.4 Tax Consolidation

Tax consolidation is not allowed in Colombia.

5.5 Thin Capitalisation Rules and Other Limitations

Thin capitalisation rules (when the level of debt of a company is much greater than its equity capital) are applicable in Colombia based on the following:

- Debt-to-equity ratio: for income tax purposes, a taxpayer generally may not deduct interest paid on loans that are acquired, directly or indirectly, from related parties and exceed a 2:1 debt-to-equity ratio, considering the taxpayer's net equity on December 31 in the preceding year.
- Loans from third parties: loans from third parties, where a related party acts as guarantor or provides a guaranty, participates in a back-to-back operation, or substantially acts as a creditor in any other transaction, are subject to the thin capitalisation limitation.

5.6 Transfer Pricing

Transfer pricing rules are applicable in Colombia.

5.7 Anti-evasion Rules

The following are some of the key anti-evasion rules applicable in Colombia:

- Indirect sales: Colombia has an indirect transfer regime. The regime taxes the indi-

rect disposal of assets located in Colombia, through the transfer, by any means, of shares, participations or rights in foreign entities, as if the Colombian underlying assets were directly transferred. Secondary legislation clarifies the tax basis calculation and withholding tax obligations on indirect transfers.
- General anti-abuse rule: this rule grants DIAN the power to recharacterise operations that have no business purpose. This encompasses transactions that are artificial, have no economic or commercial purpose or are aimed at obtaining a tax advantage. The burden of proof for this purpose is on DIAN.
- Limitation on benefits rule: Colombia has an anti-abuse clause that contains a limitation on benefits rule, whereby only one tax benefit can be applied to a single economic event. Otherwise, a taxpayer will lose the higher benefit applied.

6. Competition Law

6.1 Merger Control Notification

Any transaction (shares or asset purchase, acquisition of IP rights, etc) that meets the requirements below is subject to pre-merger control by the *Superintendencia de Industria y Comercio* (SIC):

- The transaction entails a change of control over the target company, assets, rights or business line. "Control" is defined in antitrust law as the possibility of influencing another company's corporate policies and commercial strategies or disposing of key assets. Minority shareholdings may grant control under this definition in certain circumstances.
- The parties to the transaction (eg, buyer and seller) are active in Colombia either in the same economic activity (horizontal overlap) or on different levels of the same value chain (vertical overlap).
- The parties had, for the fiscal year immediately preceding the transaction, operating income or total assets in excess of the value set yearly by the SIC. For 2024, this is COP77.2 billion or USD18 million.

If these conditions are met, a filing with the SIC will be required. The type of filing will depend on the parties' combined market share. If market shares in all relevant markets are below 20%, a short-form notification is available. If the combined share in at least one relevant market is equal to or exceeds 20%, a full filing (or pre-assessment request) will be required.

Joint Ventures

As per SIC precedent, joint ventures (JVs) are economic integrations (fulfilling the first criteria above) if they:

- are permanent or long-lasting;
- involve the joint development of a non-complementary activity of the parties; and
- are fully functional in terms of financial and administrative capacity.

If the JV meets these requirements and additionally meets the local overlap and thresholds test, it will be subject to pre-merger control.

6.2 Merger Control Procedure

For short-form notifications, the SIC has ten business days from the date the required information is filed to review it and issue a letter acknowledging the notification's proper filing and deeming the transaction approved.

For full filings, the SIC has a preliminary phase (Phase 1) that lasts 30 business days from the date the required information is filed. During this

phase, the SIC can either approve the transaction or escalate to a more detailed review. In Phase 1, the SIC also posts a notice on its website to inform third parties about the transaction, giving them ten business days to submit any relevant information.

Phase 2 lasts for three months from the date the required information is submitted. In this phase, the SIC requests additional information from other authorities, competitors, clients and suppliers to perform its market analysis. If the SIC issues a request for further information (RFI) to the parties during Phase 2, this resets the three-month period, but only the first RFI has this effect; subsequent RFIs do not alter the duration.

6.3 Cartels

Colombian competition law generally prohibits anti-competitive conduct, such as price fixing, bid rigging and market allocation, among others.

Antitrust laws apply to any market agent, whether domestic or foreign, whose conduct has or may have an effect, whether total or partial, in any market in Colombia.

Penalties for engaging in anti-competitive agreements can be up to 100,000 minimum monthly wages (approximately COP130 billion or approximately USD30 million) for companies, and up to 2,000 minimum monthly wages (approximately COP2.6 billion or approximately USD650,000) for individuals, including corporate officers and employees, who executed, authorised or tolerated the conduct.

6.4 Abuse of Dominant Position

Colombian competition law generally prohibits anti-competitive behaviour (ie, behaviour that is restrictive regardless of the existence of a dominant position) and abuses of dominance (eg, tying, discrimination and market access obstruction, among others).

Penalties for engaging in unilateral conduct, including acts or abuses of dominance, can be as high as 100,000 minimum monthly wages (approximately COP130 billion or approximately USD30 million) for companies, and up to 2,000 minimum monthly wages (approximately COP2.6 billion or approximately USD650,000) for individuals, including corporate officers and employees, who executed, authorised or tolerated the conduct.

7. Intellectual Property

7.1 Patents

A patent is an exclusive right granted to an inventor over their invention. In Colombia, the patent protection period lasts for 20 years from the filing date, and it cannot be renewed.

The registration process begins with the submission of the application to the SIC, along with the required registration fees. Following this, the office carries out formal and substantive examinations to ensure compliance with legal requirements and to assess the invention's novelty, inventive step and industrial applicability. If all criteria are satisfied, the patent is granted.

Enforcement of patent rights may involve cease and desist letters and conducting mediation hearings as out-of-court remedies. Judicial remedies include filing for injunctions, ordering seizures and pursuing infringement lawsuits, which enable the patent holder to seek monetary compensation for damages.

7.2 Trade Marks

A trade mark identifies goods or services and can be categorised into types such as word, stylised and figurative trade marks. Protection is valid for ten years from the registration date and can be renewed indefinitely every subsequent ten years.

The registration process involves filing an application with the Trademark Office, paying the required fees, and undergoing a formal examination. Following this, the trade mark is published to allow for opposition. If no oppositions arise or they are resolved, a substantive examination takes place. The Office then issues a resolution granting or denying the registration of the trade mark.

Enforcement activities for trade marks include issuing cease and desist letters and holding mediation hearings as out-of-court remedies. Judicial remedies include filing for injunctions, seizures and infringement actions, through which the owner can seek monetary compensation for damages.

7.3 Industrial Design

Industrial design protects the ornamental aspects of a product, focusing on its aesthetic appearance rather than its technical or functional features. The protection for industrial designs lasts for ten years from the filing date and cannot be renewed.

The registration process for industrial designs begins with filing an application and paying the required fees. This is followed by a formal examination and publication of the design for opposition purposes. After the opposition period, a substantive examination takes place, which results in a resolution either granting or denying the registration of the design.

Enforcement of industrial design rights may involve sending cease and desist letters and conducting mediation hearings as out-of-court remedies. Judicial remedies include filing for injunctions, seizures and infringement actions, allowing the owner to seek monetary compensation for damages incurred due to the infringement.

7.4 Copyright

Copyright protects the original expression of artistic, scientific or literary works. It encompasses both moral and economic rights, with moral rights protected indefinitely and economic rights protected for the lifetime of the author plus 80 years from the work's creation.

In Colombia, registering works with the National Copyright Office (*Dirección Nacional de Derecho de Autor)* has declaratory effects but not constitutive effects. However, it is advisable to register works to establish evidence of ownership.

Enforcement of copyright involves activities such as cease and desist letters and conducting mediation hearings as out-of-court remedies. Judicial options include filing for injunctions, seizures and infringement actions, allowing the owner to seek monetary compensation for damages caused by the infringement.

7.5 Others

Other protected IP rights include trade secrets, which can be enforced via unfair competition actions. Trade secrets encompass undisclosed information usable in productive, industrial or commercial activities, capable of transmission to third parties.

Software is safeguarded under copyright law in Colombia and follows similar procedures.

8. Data Protection

8.1 Applicable Regulations

Law 1581 of 2012 is the primary regulation governing data protection in Colombia. It adopts a consent-based approach for the processing of personal data concerning Colombian data subjects. It covers various important matters, including:

- requirements for valid consent for the processing of personal data;
- special treatment and protection of sensitive personal data;
- rights of data subjects regarding their personal data;
- transmission and transfer of personal data to third parties;
- obligations imposed on data controllers and processors; and
- penalties for violations of the data protection regulations.

Additionally, Decree 1377 of 2013 supplements these provisions by imposing additional obligations related to the minimum content requirements for privacy policies, notices, data transmission and transfer agreements, and specifications for international data transfers.

8.2 Geographical Scope

The SIC has consistently ruled that Colombian data protection laws apply to any company that processes personal data in Colombia. According to the definition of "processing" in Law 1581 of 2012, which includes data collection, any company, whether local or foreign, that collects or processes personal data from Colombian residents is subject to the provisions and obligations of Colombian data protection law.

In several cases, the SIC has explicitly stated that even the act of collecting data through cookies from web or mobile browsers falls under the scope of Colombian data protection regulations. Therefore, any foreign entity engaged in online data collection from Colombian individuals must comply with local data protection laws.

8.3 Role and Authority of the Data Protection Agency

The data protection authority in Colombia is the SIC.

9. Looking Forward

9.1 Upcoming Legal Reforms

International Trade Reform

A new bill modifying the Colombian customs statute was recently approved and will introduce significant changes. These include requiring all import declarations to be submitted within 48 hours prior to the arrival of goods and a revised definition of "different goods", which could lead to potential seizures due to tariff classification errors during customs control. A thorough review of tariff subheadings and diligent verification are therefore recommended to ensure accurate classification.

Labour Reform

The current administration submitted a labour reform package to Congress. In general terms, the package proposes the following changes.

- The general rule applicable to employment contracts would be for them to be indefinite term agreements, with fixed-term contracts being the exception.
- A requirement for apprentices to be hired under fixed-term employment contracts.

- The formalisation of scenarios of reinforced labour stability, incorporating them into the law rather than relying on case rulings as has been the practice to date.
- An increase in severance payments for wrongful termination of employment contracts by the employer.
- A defined day shift from 6am to 7pm and a night shift from 7pm to 6am.
- Regulations for special work categories including agricultural workers, migrants, and sportsmen and women.
- Measures aimed at promoting equity and reducing gaps.

The package of reforms must be discussed in four debates before Congress (two in the Senate and two in the House of Representatives). It was approved in the first debate on 18 June 2024.

Intellectual Property

Bill No 059 of 2023-128 was filed before the Senate. It proposes establishing public policy guidelines for the development, use and implementation of artificial intelligence.

This important bill can serve as a starting point for a serious multisectoral debate that allows an analysis of the need for a specific law to regulate AI technologies.

Trends and Developments

Contributed by:
Jaime Trujillo, Juan David Velasco, Natalia Ponce de León and Juliana Gómez
Baker McKenzie

Baker McKenzie was established in 1949 and is recognised as one of the foremost international law firms. With a presence in 45 countries through 75 offices, including in 36 of the top 40 global economies, the firm employs nearly 5,000 lawyers and around 13,000 staff. Renowned for transactional law services, it offers a comprehensive global platform, industry-specific expertise, and profound local market insights. The firm is the go-to choice for multinational corporations and both domestic and international private equity firms, valued for its integrated global, Latin American and local Colombian market expertise. Serving a diverse clientele, the firm specialises in advising high-profile multinational companies, particularly in heavily regulated industries such as oil and gas, energy, healthcare, life sciences, automotive, agri-food, chemicals and real estate. With a focus on delivering sector-specific counsel, it is at the forefront of legal services, driving innovation and excellence in a complex global market.

Authors

Jaime Trujillo has advised clients on transactional matters, including M&A and private equity deals, in both public and private acquisitions and divestitures for over 25 years. He was acting global chair of Baker McKenzie in 2018 and 2019. He was a member of Baker McKenzie's global executive committee from 2017 to 2021 and has also been the chair of Baker McKenzie's financial committee and the Latin America region, as well as the managing partner in Colombia. Between 2013 and 2016, he was the leader of Baker McKenzie's Latin America M&A/private equity practice group and has advised on some of the most relevant M&A transactions in Colombia.

Juan David Velasco is a transactional tax partner and wealth management practice group leader at Baker McKenzie in Colombia. He has advised numerous public and private companies, as well as private equity and venture capital firms on multi-jurisdictional tax-related aspects of investment, project finance, M&A and disposition of business interests and corporate reorganisations. He also works with high net worth individuals on private wealth management, tax-efficient estate planning strategies and cross-border asset-protection structures. His practice focuses on international tax, transactional tax, M&A tax, taxation of private equity and venture capital, taxation of digital economy, taxation of compensation and benefits, and wealth management.

Contributed by: Jaime Trujillo, Juan David Velasco, Natalia Ponce de León and Juliana Gómez, **Baker McKenzie**

Natalia Ponce de León is a partner in the M&A and private equity practice at Baker McKenzie in Colombia with over 13 years of experience, focusing on advising foreign clients and private equity funds on acquisitions of assets in Colombia. She completed an LLM at New York University and was admitted to the New York Bar in 2017. She has notable experience in M&A and private equity and her practice involves foreign and local clients, with an emphasis on cross-border transactions. She has been especially involved in the infrastructure and energy industry, advising on some of the most relevant deals in Colombia.

Juliana Gómez has more than five years of experience in corporate and contractual law, as well as in reorganisations and M&A at Baker McKenzie in Colombia. Before joining the firm, she worked at an Ibero-American law firm in the corporate and M&A practice area, and at Empresas Municipales de Cali – EMCALI ESP. She specialises in mergers and acquisitions, and her experience includes advising clients on the structuring, negotiation and preparation of transactional and corporate contracts and documents, as well as on the closing of domestic and foreign M&A and cross-border credit transactions in the health, real estate, energy, and oil and gas sectors.

Baker McKenzie

Carrera 11 #79-35,
9 floor
Bogotá
Colombia

Tel: +57 601 634 1500
Email: ServicioalCliente.Bogota@bakermckenzie.com
Web: www.bakermckenzie.com/

Contributed by: Jaime Trujillo, Juan David Velasco, Natalia Ponce de León and Juliana Gómez, **Baker McKenzie**

Colombia's Political Climate

Colombia is currently commencing the third year of its first ever left-wing government. This period has been marked by strident announcements more than tangible achievements. President Petro has announced extensive and business-averse reforms in key sectors such as healthcare, energy and utilities, but has failed to pass them through Congress.

Nonetheless, on 14 June 2024, a comprehensive pensions reform was approved by Congress, which will be effective as of July 2025. The opposition has announced they will challenge the reform before the Constitutional Court due to, among others, failure to properly comply with its approval process.

This pushback in Congress reflects positively on the Colombian system of checks and balances. However, President Petro's leadership approach has divided the nation, downplayed security and added an undesirable level of unpredictability to the business climate, as have other unfavourable factors such as constrained GDP growth and persistently high inflation and interest rates.

Despite the challenging environment, a number of significant deals were executed in the last year. The aggressive bids by Gilinski Group for Grupo Nutresa (one of the region's largest food processing conglomerates) and the successful divestitures of retailer Almacenes Éxito by Groupe Casino and generic drug manufacturer Genfar by Sanofi, indicate that major investors remain attracted to the Colombian market due to its size, demographic makeup and geographic location and diversity.

Regional and Local Climate

Except for Argentina and Ecuador, the region has been shifting to the left for a number of years and governments have on occasion adopted stances and policies that are hostile to private investment. This is especially pertinent because large investors do not view countries in the region as separate markets, but rather categorise them into three or four major markets.

Consequently, events in a specific country in the region tend to create a domino effect, influencing investment decisions in other regional countries.

The eagerly awaited economic revival of Brazil, traditionally a powerhouse in deal-making for the entire region, is progressing at a slower rate than anticipated. Meanwhile, Mexico, which is performing well, is understandably concentrating on capitalising on its proximity to the United States and benefiting from trends such as nearshoring, rather than considering investments further south.

Trends and Developments in M&A and Corporate

Regional scale targets

In recent years, there has been a noticeable shift in M&A transactions towards targets with regional, multi-jurisdictional operations. Investors are looking for companies that offer regional scale and have a presence beyond Colombia. This trend is particularly evident in sectors such as energy, telecommunications and healthcare, where companies have successfully expanded their operations into the Andean region and Central America.

Colombian companies with a proven track record of regional expansion are particularly attractive to investors. These companies provide an opportunity to gain a foothold in multiple markets and leverage regional synergies. The focus on regional scale reflects a broader strategic shift among investors, who are seeking

to diversify their portfolios and mitigate country-specific risks by investing in companies with a broader geographic reach.

Dominance of strategic investors

Strategic investors have been at the forefront of M&A activity in Colombia and the broader Latin American region. These investors are typically more resilient to short-term market fluctuations and economic instability because they have a long-term investment horizon. Unlike financial investors, who may be more sensitive to short-term economic changes and volatility, strategic investors are focused on the bigger picture and their long-term strategic goals.

One significant advantage that strategic investors have is access to cheaper financing. Many of these investors have substantial cash reserves and can secure financing at preferential rates, making it easier for them to pursue and close deals even in challenging economic conditions. However, the dominance of strategic investors in the M&A market has also led to increased antitrust scrutiny. Regulators are more vigilant about potential anti-competitive effects, which can prolong the deal-making process and lead to more frequent use of carve-outs to address regulatory concerns.

Pre organisation carve-outs

Carve-outs have become a prevalent trend in the Colombian M&A market. Companies are increasingly engaging in pre-sale reorganisations to create portfolios that are easier to sell, more attractive to investors and subject to less regulatory scrutiny. By isolating specific business lines or assets, sellers can unlock hidden value by excluding underperforming units from transactions and focus on high-growth segments.

Carve-outs allow sellers to highlight and capitalise on high-performing parts of their business, making them more appealing to potential buyers. By separating out specific business units or assets, companies can set competitive prices for these parts enhancing their attractiveness and facilitating smoother transactions.

Earn-outs and deferred payments

The economic instability and higher costs of capital have made it challenging to accurately value businesses, leading to an increase in the use of earn-outs and deferred payment mechanisms in M&A transactions. Earn-outs and deferred payments are payment structures that allow the final purchase price to be contingent on the future performance of the acquired business. These mechanisms help bridge the valuation gap between buyers and sellers and mitigate the risks associated with past performance volatility and uncertain future outcomes.

However, while earn-outs and deferred payments offer a practical solution to valuation challenges, they also come with potential downsides. These structures can lead to future disputes and litigation if the agreed-upon performance targets are not met or if there are disagreements over the calculation of earn-outs. Despite these risks, the use of earn-outs and deferred payment mechanisms has become increasingly common in the Colombian M&A market as investors seek to navigate economic uncertainty.

Artificial intelligence (AI) in due diligence

Identifying how target companies are relating and adapting to AI developments has become a key part of conducting due diligence. It has become important to identify if the target has incorporated AI tools and applications in its business and if the AI tools being used comply

with IP regulations and are not misusing intellectual property rights from third parties.

Buyers conducting due diligence in IP-related companies are also seeking to understand if the IP rights of the target are properly protected from potential misuses of third parties' AI developments.

Integration of artificial intelligence (AI)

The adoption of artificial intelligence (AI) is transforming the M&A landscape by streamlining processes, enhancing decision-making, and improving efficiencies. AI tools can quickly analyse vast amounts of data, identify patterns and provide insights that help legal professionals and investors make more informed decisions. This technological advancement is expected to continue shaping the M&A market in the years to come.

In the Colombian legal sector, AI is increasingly being used in due diligence, document preparation and deal execution overall.

ESG considerations

Environmental, social, and governance (ESG) factors are playing an increasingly critical role in M&A and corporate related processes. Investors are prioritising thorough due diligence on ESG matters to ensure that potential targets align with their own ESG values, have sustainable business models and are not exposed to significant reputational risks. This focus on ESG integration is becoming a key driver in decision-making processes, as investors seek to mitigate risks and capitalise on opportunities related to sustainability.

Conflicts of interest

To improve certain business practices, the government issued Decree 0046 of 2024, which provides a clearer and more comprehensive framework and guidelines regarding conflicts of interest. This Decree also expressly recognises the application of the business judgement rule, which has previously only been recognised via case law.

Developments in Data Protection

Data protection officers

The *Superintendencia de Industria y Comercio* (SIC) issued a guideline on the appointment of data protection officers (DPOs) in Colombia, considering it best practice in terms of the principle of accountability. The guideline recommends that both local and foreign entities that collect or in any way process personal data from data subjects in Colombia appoint a DPO who is:

- knowledgeable in privacy matters; and
- accessible to data subjects and the SIC in cases of claims or requests.

In fact, as of 2024, the SIC is requesting information from the DPO on companies that are required to register databases in the national database registry.

Trends in Employment and Compensation Matters

Impact of high inflation in employment agreements

In Colombia, employees are entitled to receive an adjustment to their ordinary or integral salary under inflation after rendering services for one year. Considering the high inflation rates, employers are looking at how to apply this principle so as it doesn't impact the viability of their business. One alternative several companies are implementing is to apply a differentiated adjustment rate for different groups of employees, according to their position at the company, their salary and, in general, their compensation pack-

age. These measures must be taken carefully to avoid claims based on the equal treatment principle.

Another important trend we are seeing right now in this regard is the denomination of salaries in US dollars rather than in Colombian pesos.

Re-design of compensation plans

A recent tax reform increased the income tax rates applicable to individuals and also decreased some benefits that existed when contributing to construction funds or to voluntary pension funds. This change has had an important effect on the take-home pay of many employees. Given this, many employers are redesigning their employees' compensation plans in ways that seek to increase their take-home pay.

Diversity, equity and inclusion

One of the most prevalent practices we have seen is the inclusion of diversity, equity and inclusion issues in companies' sustainability plans and corporate governance programmes. This may include policies such as affirmative actions in recruitment and selection plans, training and coaching programmes for women or other historically discriminated groups and extended paternity leave to make men responsible for the care of the home, among others.

Developments in Tax Matters

Tax reform of 2022 – Minimum effective tax rate

Colombia now has a minimum effective tax rate (METR) which applies to all Colombian entities, with a few exceptions.

Although the METR is inspired by and has similarities with the OECD's Pillar Two initiative, the local tax reform did not implement the global minimum tax under the OECD's BEPS 2.0 project and the calculation of the tax is not aligned with the Pillar Two model rules.

Several issues have arisen in the application of the formula to determine the "calculated profit". Among others, it is unclear whether the formula allows for the inclusion of accounting losses, whether the application of the formula may lead to the payment of an additional tax when there is no taxable income or if the formula applies to taxpayers who have previously been afforded special tax benefits and incentives.

Tax reform of 2022 – Significant economic presence

Effective 1 January 2024, Colombia subjects the "significant economic presence" of foreign entities in Colombia to income tax in Colombia.

Although these rules are based on the OECD's Pillar One guidelines, their scope, effects and structure are substantially different from the OECD's proposals.

According to these new rules, a foreign entity or individual will be considered to have a "significant economic presence" in Colombia if a "deliberate and systematic interaction" is maintained in the Colombian market and if it generates a gross income from sales or services in Colombia over a certain threshold, which for 2024 is approximately USD368,000.

A "deliberate and systematic interaction" is deemed to exist when the foreign entity or individual maintains a marketing interaction with 300,000 or more users or customers located in Colombia and/or when it allows payment in Colombian pesos or allows its customers to view its prices in Colombian pesos.

Foreign entities and individuals that have a "significant economic presence" in Colombia are subject to income taxes in Colombia and have two options to comply with their tax obligations. One option is to apply a 10% withholding tax to all payments made from Colombian residents and remit these amounts to Colombian tax authorities. Alternatively, they may register with the Colombian tax authority, file an annual return and pay income tax at a rate of 3% on all gross revenues derived from their sales to Colombian customers.

As this is an "income tax", foreign entities or individuals that are in a jurisdiction that has a double taxation treaty in place with Colombia may not be subject to significant economic presence rules.

Looking Ahead

Growth of representations and warranties (R&W) insurance in M&A

R&W insurance has been gaining traction in the Colombian and Latin American M&A markets. While still relatively new in the region, R&W insurance offers significant potential for growth.

The market has become increasingly competitive, with insurers lowering premiums and deductibles to make R&W insurance more attractive to both investors and sellers. As more deals incorporate this type of insurance, it is expected to become a standard component of M&A transactions, providing greater protection and certainty for all parties involved.

However, the novelty of R&W insurance in Colombia presents challenges. Many local lawyers and clients are still unfamiliar with its benefits and applications. As the use of R&W insurance becomes more widespread, it is anticipated that the market will continue to evolve, with more legal professionals and clients recognising its advantages and incorporating it into their deals.

Regulation of public tender offers

The Gilinski Group's hostile tender offers for Grupo Sura and Nutresa have highlighted several weaknesses in Colombian securities regulations. These include inadequacies in the regulation of fiduciary duties, conflicts of interest among officers and directors of listed companies, constraints that hinder competing tender offers and the absence of guidelines for follow-on tender offer pricing.

These issues underscore the need for a more robust legal framework to address these regulatory gaps and enhance the overall transparency and fairness of the M&A process in Colombia.

DOMINICAN REPUBLIC

Law and Practice

Contributed by:
Sarah de León Perelló, Elizabeth Silfa Micheli and Naomi Rodríguez Manzueta
Headrick Rizik Álvarez & Fernández

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Headrick Rizik Álvarez & Fernández (Headrick) was founded in 1985 and has 13 partners, a team of 27 associate attorneys and 23 paralegals. Headrick's office is located in Santo Domingo, National District, Dominican Republic. Matters related to doing business are handled by the corporate/business division, which is comprised of seven partners, ten associates and eight paralegals. Headrick represents financial institutions that are financing projects and renewable energy projects in the country; offers general advice in connection to cross-border transactions; and offers general advice to local and foreign clients that undertake or wish to undertake business in the country. The firm's key clients include MercaSID and Induveca, Imperial Tobacco La Romana, Grupo PuntaCana, Marsh Franco Acra, Los Angeles Dodgers, New York Yankees, Merck, Pfizer, Google, Phillip Morris International, General Electric, Johnson & Johnson.

Authors

Sarah de León Perelló is a senior partner at Headrick Rizik Álvarez & Fernández, secretary of its management committee and partners' board, co-head of its transactional practice (corporate/business division), and a business and corporate law expert with over two decades of experience. She is co-chair of the Dominican Republic chapter of the Vance Center Women in the Profession programme. Sarah is recognised for her extensive knowledge in mergers and acquisitions, reorganisations, strategic alliances, corporate governance, franchise and distribution relationships, free zones, real estate development, contracts, and foreign investment, among others. She is a member of the International Bar Association (IBA), the Dominican Bar Association, and the National Association for Young Businesspeople, Inc. (ANJE).

Elizabeth Silfa Micheli is a senior associate attorney at Headrick Rizik Álvarez & Fernández. Her practice is focused on general business matters, banking and financial law, project finance, contracts, collateral, mergers and acquisitions, immigration law, real estate matters, environmental matters, regulatory matters, foreign investment, and data protection and privacy. She is a member of the Dominican Bar Association.

Naomi Rodríguez Manzueta is a senior associate attorney at Headrick Rizik Álvarez & Fernández. Her practice is focused on mergers and acquisitions, corporate law, tax law, free trade zones, regulatory law, energy law, banking and financial law, project finance, contracts, fintech, and commercial law, among others. She is a member of the Dominican Bar Association and the National Association for Young Businesspeople, Inc. (ANJE), the National Council of Citizen Participation (local chapter of Transparency International), and a member of the Association of Alumni of the Sorbonne-Assas International Law School (SAILS).

Headrick Rizik Alvarez & Fernández

Gustavo Mejía Ricart No 106
Torre Piantini
6th Floor
Santo Domingo,
National District
Dominican Republic

Tel: +1 809 473 4500
Fax: +1 809 683 2936
Email: info@headrick.com.do
Web: www.headrick.com.do

HEADRICK
HEADRICK RIZIK ÁLVAREZ & FERNÁNDEZ
ABOGADOS | ATTORNEYS

Contributed by: Sarah de León Perelló, Elizabeth Silfa Micheli and Naomi Rodríguez Manzueta,
Headrick Rizik Álvarez & Fernández

1. Legal System

1.1 Legal System and Judicial Order

The Dominican Republic is a civil law jurisdiction. The judicial system is organised on a territorial basis and has a hierarchical structure. There are ordinary courts and courts of exception, which hear particular matters.

The ordinary courts are the Courts of First Instance (trial courts) and the Courts of Appeal. The Courts of First Instance have jurisdiction over civil, criminal, commercial and administrative cases at the trial level. The Courts of Appeal hear appeals to judgments rendered by trial courts and review issues of law and errors of procedure. The Supreme Court of Justice is the highest court. It holds the ultimate authority and serves as the highest judicial body in the country. It is responsible for evaluating the correct interpretation and application of laws.

The courts of exception are the Justice of the Peace (*Juzgado de Paz*) and the Land Courts (*Tribunal de Jurisdicción Original/Tribunal Superior de Tierras*).

Specialised courts address specific areas of law, for instance, the Superior Electoral Court (*Tribunal Superior Electoral*) is the highest authority in electoral contentious matters, while the Superior Administrative Court (*Tribunal Superior Administrativo*) has jurisdiction over disputes arising between the administration and private individuals.

The Constitutional Court is the supreme organ of interpretation and control of the constitutionality. Decisions rendered by the Constitutional Court are binding.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Foreign investments do not require prior approval from the authorities except when a regulated sector requires regulatory approval both for domestic and foreign investment. In general, the Dominican Republic affords standard national treatment to foreign investors. There are no exchange control restrictions and there is the right to free transfer of funds abroad.

Foreign investment is regulated by Law No 16-95, which was enacted to promote foreign investment in the Dominican Republic and provides equal treatment for foreign and local investors. It includes attractive benefits for foreign investors. Under said Law, foreign investment is allowed in all sectors, with the exception of those linked to the disposal of certain hazardous materials or waste not produced in the country, activities that affect public health or the environment, or the production of material and equipment linked to national defence and security.

In order for foreign investors to obtain the benefits set out in Law No 16-95, interested parties must register their investment with the Prodominicana of the Export and Investment Center of the Dominican Republic (CEI-RD), after completing their investment.

2.2 Procedure and Sanctions in the Event of Non-compliance

In the Dominican Republic, the registration of a foreign investment is done before the CEI-RD. Foreign investors investing without registration would not benefit from the incentives offered by the Law. Failure to register is not subject to sanctions.

In order to register an investment, a foreign investor must submit an application and other required formalities to the CEI-RD within 180 calendar days from the date on which the investment is made. The CEI-RD is to evaluate the application and, if the registration qualifies, issue the corresponding certificate of registration within 15 business days. However, in practice, this is a lengthier process, as the review and evaluation of the application is very rigorous.

2.3 Commitments Required From Foreign Investors

The applicable legal framework does not condition the approval of an application to register an investment to certain commitments. However, in order to benefit from the Investment Residency Permit Program, a minimum investment of USD200,000, its equivalent in Dominican pesos, or any other currency accepted by the Central Bank of the Dominican Republic, must be made in the Dominican Republic to the share capital of a newly incorporated or existing company.

2.4 Right to Appeal

An investor may challenge the decision not to authorise an investment. Any administrative acts may be appealed before the bodies that issued them (by way of a reconsideration request), or before the entity which is hierarchically superior to the issuing body, within the 30 days of the notice of the decision subject to the appeal. The applicant may also appeal before the Superior Administrative Court within the aforementioned 30 days.

In the event of a rejection of the application, if the applicant decides to submit a reconsideration request before the CEI-RD, or before the hierarchically superior entity, as applicable, the applicant would have the option to withdraw their reconsideration request and instead file an appeal before the Superior Administrative Court.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

Main Corporate Vehicles for Doing Business in the Dominican Republic

The most common types of corporate vehicles used in the Dominican Republic for doing business with limited liability are:

- stock corporations (*sociedades anónimas* or S.A.s);
- simplified stock corporations (*sociedades anónimas simplificadas* or S.A.S.s), which are a sub-type of corporations; and
- limited liability companies (*sociedades de responsabilidad limitada* or S.R.L.s).

These corporate vehicles may be incorporated with a minimum of two shareholders, which can be legal or natural persons, domestic or foreign.

S.R.L.s

S.R.L.s were conceived as corporate vehicles suitable for medium and small businesses. It is a hybrid between a partnership and a corporation. The capital for S.R.L.s is formed by non-negotiable shares, and a restriction on the entry of new shareholders is one of its principal features.

S.R.L.s use the concept of a limited liability company by separating the personal assets of its members from those of the company. S.R.L.s may be managed by one manager (*gerente*), two managers or a board of managers acting as a collegiate body, who may or may not be shareholders, who may be individuals, domestic or foreign.

The minimum capital requirement for an S.R.L. is DOP200, since Law No 479-08 on Commercial Companies and Sole Proprietorships with Limited Liability ("Law No 479-08"), as amended, requires a minimum of two shareholders and a minimum value per share of RDD100 each.

In S.R.L.s, the maximum number of shareholders is 50.

S.A.s

S.A.s are typically reserved for large businesses. Due to their characteristics, corporations are the ideal vehicle for companies that wish to pursue venture capital, accumulate a large number of shareholders, and/or eventually pursue an initial public offering. Corporations must be mandatorily managed by a board of directors composed of at least three members and are required to have a statutory auditor (*comisario de cuentas*).

The minimum capital requirements for an S.A. are:

- authorised capital: DOP30 million; and
- paid-in capital: DOP3 million (a minimum of 10% of the authorised capital shall be subscribed and paid).

S.A.S.s

S.A.S.s are a subtype of corporations (S.A.), suitable for medium or large investments and businesses that will not venture into the stock market. The management and control of an S.A.S. is more flexible than that of a corporation. The provisions of Law No 479-08, apply supplementarily for all situations not described in the by-laws.

Management and control rules for Dominican S.A.S.s are flexible as they will be governed by its by-laws. In that sense, they may be managed by a sole director (president), a board of directors or any other management body or structure.

The minimum capital requirements for an S.A.S. are:

- authorised capital: DOP3 million; and
- paid-in capital: DOP300,000 (a minimum of 10% of the authorised capital shall be subscribed and paid).

3.2 Incorporation Process

Incorporation of a Company

The main steps in order to incorporate a Dominican company as well as for registering a branch of a foreign entity are as follows.

- Registration of the company's trade name with the National Office of Industrial Property (ONAPI), prior to the incorporation of the company. For branch registration, this step is not mandatory but highly advisable.
- Registration at the Mercantile Registry of the relevant Chamber of Commerce and Production of the jurisdiction of the seat of the company. The company's Mercantile Registry Certificate would be issued and the company shall be considered to be duly incorporated.
- Once registered at the Mercantile Registry, the company must then be registered with the National Taxpayers' Registry (*Registro Nacional de Contribuyentes* or RNC, by its Spanish acronym) at the local tax department. The tax department will issue a certificate validating the company's registration and assigning an RNC number to the company.

In addition, as secondary steps in order to do business, should the company have employees, it would also have to register at the Ministry of Labour and the National Social Security Treasury (TSS); other registrations may be applicable

depending on the activity of the company and if it operates within a regulated sector.

Tax for the Incorporation of Companies

Tax of 1% on the Dominican company's authorised share capital. This is not applicable to the registration of foreign branches.

Timeframe

Local registration of a foreign legal entity typically takes four to six weeks after the relevant filings take place, while the incorporation of a Dominican company could take around six to eight weeks from the date of execution of the incorporation documents until effective registration with RNC.

3.3 Ongoing Reporting and Disclosure Obligations

Reporting and Disclosure Obligations

Private companies are subject to reporting and disclosure obligations. Every year, the board of directors or the manager or managers, as applicable, must prepare an annual management report. In addition, in companies with a statutory auditor, the same must also prepare an annual report. Companies must hold an annual shareholders' meeting, within the first 120 days after the end of the fiscal year, to discuss and approve the accounts of the previous fiscal year. The audited financial statements (when applicable), the annual management report, the resolutions to be submitted to the shareholders and the statutory auditor report (when applicable) shall be made available to the shareholders at the company's registered address during the 15 days preceding the meeting.

Changes in management, statutory auditor and/or shareholders, capital increase, domicile change, amendment of by-laws, dissolution, mergers, the minutes of shareholders meetings and any other relevant corporate documents, must be registered before the Mercantile Registry, which is a public registry. The registration of documents in the Mercantile Registry grants these documents effectiveness against third parties. There is, however, no governmental agency in charge of enforcing these filings or corporate governance in general, unless it is a listed company or regulated sector.

In addition, companies are subject to monthly and annual tax reporting and filings.

Notice of Relevant Changes

Companies should register with the corresponding Mercantile Registry and the Tax Department (DGII, by its Spanish acronym) the general information of the company (domicile, share capital, shareholding structure, management, etc). Relevant changes to the company's registered information should also be reported.

Financial Statements

All commercial entities that borrow funds from third parties, issue securities of any nature or have gross income greater than a 100 minimum wages must have their financial statements audited in accordance with the norms of the Certified Public Accountants Institute of the Dominican Republic.

Ultimate Beneficiary

Under Anti-Money Laundering and Terrorism Act ("Law No 155-17"), companies must disclose to DGII general information on the ultimate beneficial owners of the company. A "beneficial owner" is defined as the natural person who exercises final effective control over a legal person or that holds at least 20% of the share capital of said legal person, including the natural person for the benefit of whom a transaction is carried out. The disclosure of the company's ultimate beneficial

owner(s) is conducted through the filing of form RC-02 (necessary to register changes in the RNC of the DGII) and is also requested as part of the annual tax declaration forms (IR-2) and other applicable tax forms.

3.4 Management Structures

The company's by-laws shall determine the rules in connection with its management structure. Directors are appointed by the shareholders. The management structures available for the more commonly used corporate vehicles are set out below.

- S.A.s are managed mandatorily by a board of directors composed of at least three members, and supervised by one or more statutory auditors (*comisario de cuentas*).
- S.A.S.s' rules of management and structure are governed by their by-laws. They may be managed by a sole director (president), a board of directors or any other management body or structure. A statutory auditor is optional, unless the company issues the securities allowed by the law for this legal form, in which case it is mandatory.
- S.R.L.s can have one sole manager, two managers or a board of managers. Managers can only be individuals. A statutory auditor is optional and is not customary.

3.5 Directors', Officers' and Shareholders' Liability

Liability of Directors

Directors shall be liable, towards the company or toward third parties, for any infringement of the law, breach of the company's by-laws, defaults in their management, including negligence, or any torts and damages against shareholders or third parties resulting from their acts or omissions vis-à-vis shareholders or third parties.

Directors are under a general duty of loyalty, duty of acting as a good businessperson (duty of care), duty of non-compete and duty of confidentiality. Directors' related transactions (and shareholders transactions in S.A.S.s and S.R.L.s) are regulated by the law and certain director-related transactions (and shareholders transactions in case of S.R.L.s) are prohibited.

Available civil claims in damages for directors' liability include both individual claims by the aggrieved party (shareholder or third parties) in accordance with general civil liability rules of law, as well as a company's claim in damages for directors' liability that, individually or collectively, shareholders may seek.

In addition to civil liability, the law also provides for directors' criminal liability. Provisions on liability vary depending on the company type in question.

Relieving Directors from Liability: Statute of Limitations

The statute of limitations for the civil claims in damages provided in the law is two years from the date of the default or breach of duty.

Piercing the Corporate Veil

The general principle is that companies have separate legal personality, independent from that of their shareholders. However, in limited cases, the legal personality of the company may be pierced, thus making its shareholders and/or its directors and/or officers liable.

According to Law No 479-08, the corporate veil can be pierced when there is reason to believe that the company is used to commit fraud against the law, violate public order or to commit fraud to the detriment of the rights of shareholders or third parties.

The Tax Code abides by the "substance over form" concept, and thus, under said principle the corporate veil may be pierced.

The Labour Code also includes a provision for piercing the corporate veil in the case of companies that constitute an economic group and there is fraud involved. When there are one or more companies that are under the direction, control or administration of other companies or that constitute an economic group, then all companies will be jointly and severally liable with respect to the labour obligations of its employees in the event of fraud.

4. Employment Law

4.1 Nature of Applicable Regulations

The Labour Law Regime

Since the Dominican Republic is a civil law jurisdiction, the nature of legal rules governing the employment relationship are mainly statutory. The Dominican labour law regime is governed essentially by the Labour Code and resolutions issued by administrative labour authorities. Case law is used to interpret and further clarify labour law provisions but are subordinate to the same.

The provisions of the Dominican Labour Code are public policy, and therefore any contractual clauses and legal provisions contrary to the same are considered to be void and without effect. Hence, internal labour handbooks and employment agreements are valid, provided they do not contravene the Labour Code. An employment agreement does not have to be in writing (except for labour agreements for a determined period of time or for a specific project), but proven by the facts, which is what prevails.

Dominican labour law is territorial and applies to all employees that work in Dominican territory, whether they are foreign or national, even if they have been hired in a foreign country.

Collective Bargaining Agreements

Collective bargaining agreements may establish more favourable conditions for the workers, which are deemed to be included in and automatically modify the individual employment contracts.

4.2 Characteristics of Employment Contracts

Employment agreements can be concluded verbally or in writing. Labour agreements for a determined period of time or for a specific project need to be executed in writing. Pursuant to the Dominican Labour Code, an employment contract is one whereby a person undertakes to render a personal service to another, under their immediate or delegated dependence and direction, in exchange for a remuneration.

The duration of employment contract is regulated as follows:

- for an indefinite time;
- for a limited time; or
- for a specific job or service.

All labour contracts are presumed to be made for an indefinite time period. Contracts for a limited time and for a specific job or service can only be entered into when the nature of the work requires it and/or under the conditions foreseen by the Dominican Labour Code.

The existence of an employment contract is presumed (until proven to the contrary) in any personal employment relationship. The employment contract may be purely consensual in nature, the

validity of the verbal agreement is established by law, and practice is consistent with this criterion since the simple agreement of the parties is sufficient for an employment relationship to take place.

Under the Labour Code what prevails are the facts over what is in writing; thus, what prevails is not the employment contract that is made in writing, but the one that is executed according to the facts, which will allow the establishment of the nullity of any contract in which the parties have proceeded in simulation or fraud of labour laws.

4.3 Working Time

Working Hours

There is a maximum working time applied to salaried employees. The working week will end at 12pm on Saturday, and, in principle, it must not exceed eight hours per day or 44 hours per week, except for the exceptions provided via resolution of the Minister of Labour.

The aforementioned general rule is not applicable (unless agreed otherwise) to the following workers:

- those that act as representatives or agents of the employer;
- those that are appointed to management or inspection positions;
- those that work in rural establishments run by members of a same family or one person; and
- those who perform intermittent activities or activities that solely require their presence in the workplace.

Workers are not allowed to remain for more than ten hours a day at their place of work. In addition, after four hours of continuous work, there must be a rest period of one hour, and after five hours, a rest period of one and a half hours. All workers have the right to an uninterrupted weekly rest of 36 hours.

Overtime

The employer must pay 35% over the normal wage for overtime between 44 and 68 hours per week and 100% for overtime surpassing 68 hours per week.

The working day may be extended, but only to the extent necessary to avoid a serious disturbance to the normal operation of the employer's company, in the cases specified by the law.

4.4 Termination of Employment Contracts

Dominican labour law can be considered an "employment at will" jurisdiction, as it allows unilateral termination without cause by either party in indefinite term agreements but establishing the payment of severance and acquired rights when effected by the employer.

Generally speaking, termination of the employment contract is divided into two groups in the case of indefinite term agreements: termination without cause; and termination with cause.

- Termination with cause: termination by the unilateral decision of the employer is justified if the employer is able to prove the existence of a just cause as defined by the Labour Code. Otherwise, termination of employment is considered unjustified, and the employer is required to pay severance as described below.
- Termination without cause: any of the parties in an employment contract has the right to end a contract for an indefinite time via advance notice to the other and without alleging cause.

When the employer exercises their right of dismissal without a cause, it has ten days to pay the worker severance (advance notice and severance) as provided by the Labour Code, plus other acquired rights, as follows:

- advance notice;
- severance pay;
- mandatory Christmas bonus;
- compensation for vacation, if applicable; and
- a profit bonus, within 120 days of the closing of the fiscal year.

4.5 Employee Representations

It is not mandatory for employees to be represented by someone other than themselves. In principle, employees do not have to be informed or consulted by management with respect to decisions regarding the company's operations. However, if decisions that may affect employees' working conditions are to be taken, the employees must be informed of such decisions.

Employees have the right, but not the obligation, to unionise for the representation of their professional interests within their workplace, and employers may not restrict the right of workers to join or refrain from joining a union, or to withdraw from a union to which they belong. The exercise of the right to unionise is an individual prerogative of each worker.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

An employer is under the obligation to withhold income tax on salaries paid to its employees.

All natural and legal persons residing or domiciled in the Dominican Republic will pay income tax on revenue of Dominican source and on revenue of foreign source originating from financial investments and gains.

Individuals residing in the Dominican Republic are subject to income tax ranging from 15% to 25% of their taxable net income for each fiscal year. The exempted annual income is adjusted every year according to the inflation rate for the previous year published by the Central Bank of the Dominican Republic. For 2024, the annual income of up to DOP416,220 is exempted from income tax and, above that sum, the following scale would apply.

- Annual income from DOP416,220.01 to DOP624,329.00: 15% for the sums exceeding DOP416,220.01.
- Annual income from DOP624,329.01 to DOP867,123.00: DOP31,216.00 plus 20% for the sums exceeding DOP624,329.01.
- Annual income from DOP867,123.01 and above: DOP79,776.00 plus 25% for the sums exceeding DOP867,123.01.

Individuals shall be considered resident of the Dominican Republic for tax purposes if they are in the Dominican Republic for over 182 days, continuously or not, during a fiscal year.

National or foreign individuals who come to reside in the Dominican Republic will only be subject to the payment of income tax on their revenues of foreign source from investments and financial gains from the third year or taxable period to be counted from the period on which they became residents. Additionally, if a non-resident employee receives income from a Dominican source, those amounts shall be subject to local taxes, specifically income tax, amounting to 27% for foreign/non-resident individuals and entities.

Complimentary compensation given to an employee is subject to income tax (27%) over the gross amount of such compensation. Housing, transportation, mobile phone charges, among others, is considered as complimentary compensation. Unlike the income tax withholding on the salaries of employees, this tax is to be covered by the employer and not by the employee.

All companies that have salaried employees must be registered with the Social Security Treasury (TSS) and make their payments on a monthly basis as follows.

- Family health insurance (SFS): 10.13% of the quotable salary (7.09% shall be covered by the employer and 3.04% by the employee).
- Pension fund (AFP): 9.97% of the quotable salary (7.10% covered by the employer and 2.87% by the employee).
- Occupational risk insurance (SRL): the employer must pay a fixed fee of 1% on the salary of the employee and an additional variable fee of up to 0.6% on the salary of the employee depending on the risk level of the activities performed by the company.

In addition, the employer must pay the National Institute of Technical Professional Training (INFOTEP) 1% of its employee payroll and the employee must pay 0.5% deductible from bonuses.

5.2 Taxes Applicable to Businesses

Dominican tax laws are territorial.

All natural and legal persons residing or domiciled in the Dominican Republic will pay income tax on revenue of Dominican source and on revenue of foreign source originating from financial investments and gains. Companies incorporated in the Dominican Republic are considered resident for tax purposes as well as foreign entities' branches registered locally and permanent establishments. If the individual or legal entity is not considered resident for tax purposes, then it would pay tax on each revenue of Dominican source and would be taxed on its gross income.

A "permanent establishment" is defined as a fixed place of business in which a natural person, legal entity or foreign entity carries out all or part of its activities, such as: headquarters, offices, branches, commercial agencies, factories, workshops, mines, oil or gas wells, quarries or any other place of extraction of natural resources, assembly projects, including supervision activities thereof. It also includes construction or supervision activities derived from the sale of machinery or equipment when their cost exceeds 10% of the sale price of said goods, business consulting services, provided they exceed six months within a fiscal year, and representatives or agents, when the representatives or agents of a legal entity would generate a risk of a taxable presence for such legal entity when they carry out all or almost all of their activities in the Dominican Republic on behalf of the legal entity.

The main applicable taxes to companies doing business, among other, are set out below.

- Income tax: any earning or benefit obtained from a good or activity and all the benefits, profits received or accrued, and capital gains made by the taxpayer, whatever their nature, origin or denomination, shall be deemed as "income". The applicable annual income tax on the net income of legal entities, resident or with a registered permanent establishment in the Dominican Republic is 27%.

- VAT: the transfer of industrial goods and services (ITBIS, which is the local VAT equivalent) tax rate applicable to the transfer of products, the import of industrialised goods and the provision of services to the local market is 18%.
- Tax on assets: 1% tax on the value of its assets (not adjusted for inflation, and applying the deduction for depreciation, amortisation and reserves for uncollectable accounts).
- Capital gains tax: this tax must be paid by any individual or legal entity that transfers or disposes of capital assets subject to this tax. To determine the capital gain, the fiscal cost of the respective good or capital asset will be deducted from the sale price or disposal value. The rate is 27% for companies.
- Withholdings on dividends: dividends from Dominican sources are subject to a single and definitive withholding of 10%. Those dividends from foreign sources are considered financial gains and are taxed at a rate of 27% for companies and 25% for individuals.

Other withholding obligations include:

- 27% payments abroad;
- 10% on interest paid to non-resident individuals or companies;
- withholding on salaries of employees according to a progressive scale with a cap up to 25% and other contributions to the National Social Security System and INFOTEP; and
- 10% on fees, commissions and other payments for the provision of services in general.

Custom duties and tariffs apply to the importation of goods, with the exceptions and provisions established in different international treaties signed by the country.

In connection to Pillar Two of the Global Anti-Base Erosion Model Rules (GloBE) published by the Organisation for Economic Co-operation and Development (OECD), the Dominican Republic's income tax rate applicable to MNE (Multinational Enterprises) complies with the minimum global tax set forth by the OECD, ie, 15% (the Dominican Republic's current rate for corporate income tax is 27%). Likewise, the current rate for taxes over the payment of interests, dividends and royalties is 10% (higher than the 9% proposed by the OECD for the same concept). In this vein, since the Dominican Republic already complies with Pillar II of the GloBE rules, the introduction of domestic top-up tax is not required. Nevertheless, as explained herein, there are certain special tax regimes that grant an exemption from corporate income tax, such as the free trade zones regime.

5.3 Available Tax Credits/Incentives

Tax Incentives

The main tax incentive regimes are for:

- free trade zones;
- comprehensive border development;
- tourism development; and
- renewable energy.

Free Zones

Free zones are granted the following tax incentives and exemptions for legal entities classified as free zone companies according to the procedure established by law:

- tax on the incorporation of companies and on capital increases;
- income tax;
- import duties, tariffs, custom rights and other taxes affecting raw materials, equipment, parts of buildings, etc, destined for construc-

tion, preparation or operation within free zones;
- all existing export and re-export taxes, with certain exceptions those regarding import tariffs;
- construction taxes, taxes on loan agreements and on registration and transfer of real estate property from the date of formation of the free zone operator;
- free zones are exempted from giving their employees a yearly company bonus; however, free zones are still required to pay to their employees a Christmas bonus;
- consular fees; and
- taxes on assets and ITBIS.

Comprehensive Border Development

Law No 12-21 creates the special zone for comprehensive border development (SBDZ) and an incentive regime, which covers the Dominican Republic provinces of Pedernales, Independencia, Elías Piña, Dajabón, Montecristi, Santiago Rodríguez and Bahoruco, providing the following tax incentives and exemptions for legal entities classified according to the procedure established by law.

- Selective tax on consumption, applicable to telecommunications and insurance services for the facilities of the project located in the SBDZ.
- Tariffs and ITBIS on machinery and equipment imported or acquired in the local market, as applicable, required for the installation and start-up of the company.
- ITBIS on the acquisition and import of inputs and raw materials used in the production of goods exempt from ITBIS in accordance with current tax legislation.
- 50% of ITBIS on the acquisition and import of inputs and raw materials used in the production of goods which are not exempt from ITBIS in accordance with the current tax legislation.
- Tariff on the import of inputs and raw materials used for the production of goods, only when they are not produced in the Dominican Republic.
- Real estate transfer tax and other taxes related to real estate operations on the land and infrastructure where the classified project will be developed.
- Taxes, fees and registration rights related to the capital gain and transfer of shares in companies with registered offices within the SBDZ.
- Exemption from the obligation to withhold and pay to the Tax Department payments abroad for technological innovation services required by the classified project exclusively during construction and start-up.

Tourism Development

Under Law No 158-01 for the Promotion of Tourism Development, companies domiciled in the Dominican Republic that qualify to benefit from the incentives of such law are exempt from paying:

- income tax, as established under Law No 158-01;
- national and municipal taxes charged for using and issuing construction permits, including the acts of land purchase, provided they are used as authorised by Law No 158-01; and
- import taxes and other taxes, such as rates, rights, surcharges, including ITBIS that are applicable to the equipment, materials and furniture that are necessary for the first equipment and commissioning and the tourist facility in question.

Renewable Energy

All projects of public, private or mixed facilities that generate energy from the following renewable sources may benefit from the incentives provided in Law No 57-07 on Incentives to the Development of Renewable Energy Sources and its Special Regimes, as amended, upon prior approval, according to the procedure established by law:

- wind farms with an initial installed capacity that does not exceed 50 MW;
- hydroelectric facilities of which hydroelectric capacity does not exceed 5 MW;
- electro-solar (photovoltaic) installations of any type and of any power level;
- solar thermal installations (concentrated solar energy) of up to 120 MW of power per plant; and
- facilities that produce energy from biomass up to a generated power capacity of 150 MW.

The main applicable incentives for the renewable energy regime are:

- an exemption from import taxes and VAT; and
- a ten-year income tax exemption; and
- a reduction of taxes on external financing: a 5% reduction of the tax for payment of interest from external financing, only in relation to interest payments to financial institutions.

5.4 Tax Consolidation

Tax consolidation is available and can be requested by the interested party or declared ex-officio by the Tax Administration to prevent tax evasion or to clearly reflect the income of any of the organisations or companies of an economic group.

5.5 Thin Capitalisation Rules and Other Limitations

The Dominican Republic has thin capitalisation rules. The maximum amount of debt-to-equity ratio for the purposes of deduction of interest is 3:1. Per the Dominican Tax Code, the amount for interest deduction may not exceed the value resulting from multiplying the total amount of interest accrued in the tax period (1) by three times the relationship between the average annual equity balance (C) and the annual average balance of all debts (D) of the taxpayer that accrue interest (1*3(C/D)).

5.6 Transfer Pricing

Transfer pricing rules are applicable, whereby transactions between related parties are regulated. Transactions between a resident and a related natural person, legal person or entity must be carried out in accordance with the prices that would have been agreed between independent parties in comparable transactions and under the same or similar circumstances.

Such rule also applies when a resident conducts commercial or financial transaction with:

- a related resident; or
- physical or legal persons or entities domiciled, incorporated or located in territories with preferential tax regimes, low or no taxation, or tax havens, whether the latter are related or not.

When the prices agreed for commercial or financial transactions between companies in scope of this provision do not adjust to the values of similar transactions between independent companies, the Dominican Tax Administration may challenge them and make the corresponding adjustments.

Taxpayers must file a transfer pricing information return (DIOR) with respect to transactions with its related parties, which must be filed annually within 180 days after the fiscal closing date.

When operations made with related parties exceed DOP12,193,981.70 in the fiscal year, the taxpayer must have prepared a transfer pricing study or report on the process of the assessment of prices agreed between the related parties at the time of filing the DIOR.

5.7 Anti-evasion Rules

The Dominican Tax Code prohibits and sanctions tax evasion and tax fraud. Tax evasion is incurred by those who, through actions or omissions that do not constitute any of the infractions provided for in the Tax Code, produce or could produce an illegitimate decrease in tax revenue, the improper granting of exemptions or damage to the creditor of the tax obligation.

Tax evasion is considered an infraction under the Dominican Tax Code and is sanctioned with a monetary penalty of up to two times the amount of the omitted tax, without detriment to the possibility of the Tax Administration ordering the closing of the establishment of the offender, if applicable.

6. Competition Law

6.1 Merger Control Notification

As a general rule, Competition Law No 42-08 does not create a notification regime for merger and acquisition transactions but companies in specific industries are subject to the requirements established by their corresponding regulators and sectorial laws.

Mergers and acquisitions are subject to notification in the case of telecommunications companies, insurance, reinsurance and insurance intermediation companies, as well as financial intermediation entities, companies which are the beneficiaries of public concessions for electricity generation and mining, pension fund administrators and companies making public offerings.

6.2 Merger Control Procedure

Law No 42-08 does not set forth a merger control procedure but companies in specific industries are subject to the requirements established by their corresponding regulators and sectorial laws.

In the case of telecommunication companies, written notice should be given to the authorisations department of the Institute of Telecommunications (*Instituto Dominicano de las Telecomunicaciones* – INDOTEL) prior to the closing of any transaction which implies, directly or indirectly, the loss or possibility of loss, on the part of the seller or assignor, of corporate control, or the possibility of forming the corporate will of the company which holds the authorisation to operate as a telecommunication service provider in the Dominican Republic. If INDOTEL determines that prior authorisation is required in order to execute the transaction, the telecommunications service provider must comply with the procedure provided for in INDOTEL's Regulation for Authorisations.

Authorisation of change of control is issued by INDOTEL via a resolution. The process takes at least 97 business days.

In the case of free zone companies, a change in their shareholding structure requires a formal notice to be given to the National Council of Free Export Zones (*Consejo Nacional de Zonas*

Francas de Exportación – CNZFE), which may be given after the transaction has closed or the change is effective. This notice is not legally mandated and is made purely for informational purposes. No prior authorisation is required for changes to the shareholding structure of a free zone company.

6.3 Cartels

Law No 42-08 governs anti-competitive agreements and practices. It prohibits all practices, acts and agreements between competitor economic agents, be it express or implicit, in writing or verbal, that have for effect imposing unjustified barriers in the market.

Law No 42-08 is a public policy law whose purpose is to promote and defend effective competition with the aim of increasing economic efficiency in goods and services markets with a view to generating benefits and value for consumers and users of said goods and services in the Dominican territory. It is applicable to all economic agents, legal or natural persons, governed by private or public law, for profit or non-profit, foreign or domestic, that do business in Dominican territory. It is also applicable to:

- acts, agreements or conducts, including those derived from a dominant position, that originate outside the Dominican territory, if they have restrictive effects on competition within the national territory; and
- acts, agreements and administrative provisions that have the effect of restricting competition.

Law No 42-08 basically regulates:

- concerted practices;
- abuse of dominant position; and
- unfair competition.

The National Commission for the Defence of Competition (Pro-Competencia) is the authority in charge of ensuring the protection of free competition in the Dominican Republic.

In certain regulated sectors, the applicable sectorial laws contain provisions regarding the defence of free competition that delegate functions in this area to the regulator of the sector in question (eg, INDOTEL in matters of telecommunications).

6.4 Abuse of Dominant Position

Economic Dependence

The abuse of economic dependency, the economic subordination of one contracting party to the other in a given contract, is not regulated. There are legal provisions, such as Consumer Protection Law No 358-05, that prohibit abusive clauses in adhesion contracts in commercial relations with consumers (B2C). The commercial or contractual relationships between professionals (B2B) are governed based on the principle of "the free will to contract" and Article 1134 of the Dominican Civil Code, which establishes that legally formed agreements have the force of law between the parties.

Abuse of Dominant Position

Law No 42-08 prohibits the abuse of dominant position. Pursuant to the provisions of this Law, dominant position is defined as the control of the relevant market enjoyed by an economic agent, by itself or jointly with others, that gives it the power to hinder the maintenance of effective competition or allows it to act in said market regardless of the behaviour of its competitors, clients or consumers.

The possession of a dominant position in the market or its increase, by itself, does not constitute an offence under the law, only its abuse.

7. Intellectual Property

7.1 Patents

A patent is an exclusive right granted by the Dominican state to inventions and utility models and gives the inventor exclusivity for its exploitation for a fixed period of time. According to Law No 20-00 on Industrial Property ("Law No 20-00"), an invention is any idea or creation of the human intellect capable of being applied to industry that meets the patentability conditions set forth in the applicable legal framework and may refer to a product or a procedure. To be patentable, the invention must be capable of industrial application, be novel and have an inventive level.

Likewise, a utility model is considered to be any new form, configuration or disposition of elements of any artifact, tool, instrument, mechanism or other object, or of any part of it, that allows a better or different operation, use or manufacture of the object that incorporates it, or that provides some usefulness, advantage or technical effect.

The right to the patent belongs to the inventor and is obtained through its registration before ONAPI's inventions department. However, it can be transferred.

The Dominican Republic is a contracting party to the Patent Cooperation Treaty (PCT). The PCT is an international co-operation agreement that allows applicants to apply for patent protection for an invention in multiple countries at the same time by filing an "international" patent application before the national patent office of the contracting state of the nationality or domicile of the applicant or before the International Office of the World Intellectual Property Organization (WIPO). Consequently, the Dominican Republic can be automatically designated in any international application, and nationals and residents of the Dominican Republic have the right to file applications under the PCT.

The patent application must contain the details of the applicant and the inventor(s), and a Spanish translation of the specification, including the description, claims, drawings and sequence listing, if applicable, and the priority claim declaration and certified copy of the priority document, if applicable. Once filed, ONAPI's inventions department oversees the formal examination of merits of the application.

The scope of the patent protection is to exclude third parties from the exploitation of the invention. However, legislation contemplates some limitations as long as they do not unreasonably conflict with the normal exploitation of the patent or cause unreasonable prejudice to the legitimate interests of the patent holder, taking into account the legitimate interests of third parties.

The law establishes criminal and economic sanctions for the infringement of a patent. The owner of a patent can initiate civil or criminal actions before a court with jurisdiction against any person who infringes the rights granted by the law, including petitioning for conservatory measures.

The invention patent has a duration of 20 non-extendable years, commencing from the filing date of the application in the Dominican Republic. However, under DR-CAFTA and Law No 20-00, the titleholder of a patent may request a patent term adjustment (PTA) if there is an unreasonable delay in the patent granting process incurred by ONAPI's inventions department. Compensation may be requested for a maximum of three years if ONAPI incurs in a delay

of more than five years in the granting of the patent or more than three years from the date of the request for an examination on the merits. To maintain a patent or a patent application, the applicant must pay annual fees.

The utility model patent expires after 15 non-extendable years, commencing from the filing date of the patent application in the Dominican Republic.

7.2 Trade Marks

Law No 20-00 defines a trademark as any sign or combination of signs capable of graphic representation that allows the products or services of a company to be distinguished from the products or services of other companies.

The right to the exclusive use of a trademark is acquired through its registration before ONAPI.

After the trademark application is filed before ONAPI, the distinctive signs department proceeds with the formal evaluation of the merits. Once the trademark is approved, it is published in the Official Gazette of ONAPI. After the publication, any third party may file an opposition against the application for registration, within a period of 45 days from the notice's publication date. After this period has elapsed, and if no oppositions are filed, ONAPI proceeds to grant and register the trademark.

Upon registration, a trademark is valid for ten years from the date on which the registration certificate is issued and may be renewed for successive periods of ten years following the expiration date. The owner has a grace period of six months to proceed with the renewal, after the expiration date.

The law establishes criminal and economic sanctions for unauthorised commercial use of a registered trademark or a fraudulent imitation of a trademark, in relation to the products or services that it distinguishes, or to related products or services. The owner of a registered trademark can initiate administrative actions against applications or registered trademarks that affect their trademark, or file civil actions before the relevant court against any person who infringes the rights granted by law, including petitioning for conservatory measures.

7.3 Industrial Design

According to Law No 20-00, an industrial design is any collection of lines or combinations of colours, or any two-dimensional or three-dimensional external shape that is incorporated into an industrial or handicraft product, including parts intended for assembly in a complex product, the packaging, presentation, graphic symbols and typographic characters, excluding computer programs, to give it a special appearance, without changing the destination or purpose of said product.

The right to obtain the protection of an industrial design belongs to the designer(s).

The protection is acquired via registration before the inventions department of ONAPI, provided that it is a new design and has a unique character.

The protection of an industrial design does not include the elements or characteristics of the design determined solely by the performance of a technical function that does not incorporate any arbitrary contribution of the designer or that its reproduction is necessary to allow the product that incorporates it to be mechanically assembled or connected with another product of

which it constitutes a part or integral piece. The scope of its protection is to exclude third parties from the exploitation of the industrial design.

The application must be filed before ONAPI, including the details of the applicant, the designer, a brief description of the visible characteristics that appear in each graphic or photographic representation, and the drawings and/or photographs of the industrial design. Once the application is filed, ONAPI's inventions department proceeds with the evaluation of the application to verify if meets the requirements established to grant protection over the industrial design.

The duration of the registration is five years, and it may be extended for two additional periods of five years by paying the established extension fee.

7.4 Copyright

Copyright is regulated by Law No 65-00 on Copyright.

Pursuant to Law No 65-00, copyright includes the protection of literary and artistic works, the literary or artistic form of scientific works, including all creations of the mind in the indicated fields, whatever the mode or form of expression, dissemination, reproduction or communication, or gender, merit or destiny.

It is important to note that, unlike trademarks, the author's right is an immanent right that is born with the creation of the original work. The formalities that Law No 65-00 enshrines are to give publicity and greater legal certainty to the holder of the rights, and the omission does not harm the exercise of their rights. Therefore, the registration of these works is not mandatory.

The National Copyright Registry of the National Office for Copyright (ONDA, by its Spanish acronym) is in charge of the registration of the works, performances, productions, including phonograms and broadcasts protected by Law No 65-00, acts and contracts that refer to copyright or related rights.

The limitations and exceptions to copyright are of restrictive interpretation and may not be applied in such a way that they violate the normal exploitation of the work or cause unjustified damage to the interests of the owner of the respective right.

The owner of the copyright or a related right, successors in title, or whoever has the conventional representation of the same, has the right to decide how they will initiate and proceed in the exercise of the rights conferred by law. Law No 65-00 contemplates administrative sanctions, such as fines and civil and criminal liability for violation of copyright.

The copyright over a work is divided into moral and economic rights. Regarding moral rights, the author has a perpetual, imprescriptible and inalienable right to claim paternity over the work. While, economically, the rights correspond to the author during their life and to the spouse and successors for 70 years from the death of the author. For some works, such as anonymous and collective works, the protection starts from the publication or from its creation, if it is not published within 50 years from its creation.

Protection for computer programs is 70 years from publication or from its creation, if it is not published within 50 years from its creation.

7.5 Others

Computer Programs

Software, or computer programs, as they are regulated by Law No 65-00 on Copyright, are protected in the same terms as literary works, whether source programs or object programs, or by any other form of expression, including technical documentation and user manuals.

A computer program is defined by Law No 65-00 as the expression of a set of instructions through words, codes, plans or in any other way that, when incorporated into an automated reading device, is capable of making a computer or other type of machine execute a task or obtain a result.

The protection of software extends to both operating and application programs, in source code or in object code, as well as technical documentation and user manuals.

Database

In the Dominican Republic, databases are also recognised as literary works.

The protection extends to the bases or compilations of data or other materials that are legible by machine or in any other way that, further to the selection or provision of its contents, constitute creations of an intellectual nature. However, the protection does not extend to the compiled data or information.

Trade Secrets

Trade secrets are regulated by Law No 20-00 on Industrial Property. They are identified as business secrets and defined as any undisclosed commercial information that a natural or legal person possesses that can be used in any productive, industrial or commercial activity, and that is likely to be transmitted to a third party.

According to the law, a business secret shall be recognised as such for purposes of its protection when the information which constitutes it:

- is not generally known or easily accessible by persons who are in the circles that normally manage the respective information; and
- has been subject to reasonable measures taken by its legitimate owner to keep it secret.

Law No 20-00 establishes that actions considered unfair competition with respect to a business secret are:

- exploiting it without the authorisation of the legitimate owner; and
- a business secret to which access has been obtained subject to a confidentiality obligation, resulting from a contractual or employment relationship.

It is important to take into account that the law does not establish specific sanctions for the violation of rights over business secrets, therefore, it is presumed that any remedy falls on the civil liability regime for violating the provisions of the aforementioned law or for breach of contract in the event of a confidentiality agreement or contractual relationship between the owner of the secret and the person who exercises the infringement.

8. Data Protection

8.1 Applicable Regulations

The Dominican Republic's Constitution recognises the fundamental nature of an individual's right to honour, respect and non-interference in one's private life. It also enshrines the fundamental principles that govern the treatment of per-

sonal data, notably, the principles of reliability, legality, integrity, security and purpose.

Law No 172-13 on the Protection of Personal Data is the general law for the protection and processing of personal data. This Law:

- governs the collection, storage, safekeeping, use and access rights to personal data recorded in files, databases and registries for the issuance of public or private reports; and
- regulates the incorporation and operation of Dominican credit bureaus.

Monetary and Financial Law No 183-02 imposes on banks and other regulated financial institutions:

- secrecy requirements;
- a legal obligation to maintain confidentiality regarding deposits received from the public and to refrain from revealing information in a detailed or segregated manner that could reveal the identity of their customers or account holders; and
- a confidentiality obligation, which prohibits banking entities from releasing personal banking data, except for the reasons provided for under the Law.

Additionally, the Dominican Republic's legal system has, in writing, some of the general principles instituted by the General Data Protection Regulation (GDPR), using consent as the justification for the processing of personal data. Hence, it is important to point out that the Dominican Republic is a consent-based market with respect to the processing of personal data.

8.2 Geographical Scope

Even if processing of information is carried out abroad, if a foreign company targets customers in the Dominican Republic, there is a risk that customers may claim the collection of data takes place in the Dominican Republic and, accordingly, the provisions of Law No 172-13 would apply to the collection and treatment of data in the Dominican Republic.

The "treatment of personal data" is defined as:

- any operations or processes that allow for personal data processing, such as the collection, creation, storage or organisation of personal data;
- the evaluation or analysis of such personal data; or
- the transmission of such personal data.

Law No 172-13 applies to all data controllers that collect information in the Dominican Republic and is of public order (ie, mandatory, and the parties may not opt out of its provisions). The definition of treatment is considerably broad under Law No 172-13 and includes operations and procedures that entail the collection of information as well as its processing per se.

Personal data may only be transferred internationally if the owner of the data expressly authorises such transfer. The processing and transfer of personal data is unlawful when the owner of the data has not given their free, explicit and conscious consent, which shall be in writing or by other means to equate to it. Said consent must appear expressed in a provable way.

8.3 Role and Authority of the Data Protection Agency

Data Protection Authority

The Dominican Republic does not have a national data protection authority. However, Law No 172-13 provides that databases and registries, whether public or private, intended to provide

credit reports (ie, credit bureaus) are subject to the inspection and supervision of the Superintendency of Banks. Hence, save for the Superintendency of Banks of the Dominican Republic, which regulates personal data matters in connection with banking matters, there is no data protection authority that supervises compliance with the legal framework.

Habeas Data

In that sense, most of the claims must be resolved utilising the general or common procedures that Dominican courts have instituted. The Constitution of the Dominican Republic provides any person with the opportunity to initiate a "habeas data" claim. A habeas data claim is a legal action through which any person can confirm the existence of their personal data in registries, as well as the content of said data. Through habeas data, in the event of falsehood or discrimination, the person may also request the suspension, rectification, confidentiality or update of the data.

9. Looking Forward

9.1 Upcoming Legal Reforms

Newly Enacted Law 25-24 amending Section 11 of the Dominican Tax Code (Law 11-92)

Via judgment TC/0943/23 issued on 27 December 2023, the Constitutional Court of the Dominican Republic determined that Section 11, letters b and c of the Dominican Tax Code (Law 11-92) are against the Dominican Constitution, and therefore declared them void. These legal provisions established a joint and several tax liability of presidents, vice-presidents, directors and managers of a company and representatives of entities without legal personality with regard to the tax obligations of a company or entity. For this decision, the Constitutional Court has said that, since the aforesaid Sections established an objective joint liability, they therefore created provisions with an indeterminate scope that conflicts with the principle of legal certainty, and which could foster the risk that the Tax Administration might pursue officers in an "indeterminate, generic and discretionary manner", without verifying their direct involvement or actions regarding the tax debt. In response to this judgment, the Executive Branch introduced a bill of law before Congress attempting to reinforce the joint and several tax liability of officers in the Tax Code, by adding the criteria that they would be jointly and severally liable when there is intent or negligence.

A bill of law was filed with the Chamber of Deputies on 10 April 2024, and seeked to amend Section 11 of the Dominican Tax Code as mentioned above, as well to include other proposed amendments. The bill was signed into law on 29 July 2024. Law 25-24 provides that the presidents, vice-presidents, directors and managers of a company and representatives of entities without legal personality, will be jointly and severally liable if they have evaded or neglected their responsibility or allowed tax non-compliance, whether intentionally or negligently. The shareholders of a legal entity, as well as the ultimate beneficial owners of the entity, will be jointly and severally liable for the company's tax debt, if there is negligence, up to the limit of their investment (equity). Additionally, among other provisions, the joint and several tax liability of companies belonging to the same economic group is established when it is considered that said economic group has been established exclusively for the purposes of evading tax obligations.

Potential Fiscal Reform

There are currently discussions on a potential fiscal reform, and the President of the Dominican

Republic has announced that he will resume said discussions. Nevertheless, there is no official information and no bill of law has been introduced in connection thereof at present.

EGYPT

Law and Practice

Contributed by:
Mohamed Hashish, Heba El Abd, Farida Rezk and Zeina Sherif
Soliman, Hashish & Partners

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Soliman, Hashish & Partners (SHP) is a full-service corporate law firm, recognised as a leading financial and corporate law firm in Egypt. SHP is renowned for its innovative, high-quality, and commercially astute approach to every task. SHP works exclusively with well-established multinational clients in a wide range of practice areas, including corporate, M&A, banking and finance, telecoms, media and technology, energy and electricity, construction, public procurement, dispute resolution, intellectual property rights and employment. SHP acts as local legal counsel to private and public sector entities, including governments, NGOs and leading multinational companies operating in a wide range of sectors. Over the years, SHP has represented over 1,000 leading multinational clients in Egypt's largest mega projects and has established strong relationships with decision-makers in the public and private sectors.

Authors

Mohamed Hashish is managing partner at Soliman, Hashish & Partners. He has over 19 years of experience in handling corporate, M&A, restructuring, banking and finance, energy and electricity, TMT, construction and public procurement matters. Hashish has extensive experience in representing over 700 multinational clients across all business sectors.

Heba El Abd is a bilingual Arabic and English lawyer with five years of experience in handling corporate, M&A, employment and TMT matters. Before joining Soliman, Hashish & Partners, Heba worked as an associate at a reputable law firm. Heba graduated from Cairo University with a BA in Law (English Section). During her studies, Heba took part in various internships at top-tier law firms in Egypt.

Farida Rezk is an associate at Soliman, Hashish & Partners. She is a bilingual Arabic and English lawyer with four years of experience in handling corporate matters. Farida graduated from the University of Liverpool. Her exceptional performance and notable progress propelled her to the role of International Student Ambassador for the University. Whilst in the UK, Farida sought to enhance her professional legal skills by volunteering as a student adviser at the University's legal clinic, carrying out pro bono work in family and immigration cases.

Zeina Sherif is a junior associate at Soliman, Hashish & Partners. She is a bilingual Arabic and English lawyer. Zeina graduated from the University of Edinburgh with an MA in International Relations and Law.

Soliman, Hashish & Partners

2nd Floor
Plot No 15
Ninetieth Street
New Cairo
Cairo
Egypt

Tel: +202 2812 4499
Fax: +202 3536 5787
Email: info@shandpartners.com
Web: www.shandpartners.com

SOLIMAN, HASHISH & PARTNERS
LAW FIRM

1. Legal System

1.1 Legal System and Judicial Order

The Egyptian legal system is primarily based on the French civil legal system, various other European codes, and religious law. In practice, religious law is applied only to personal status and family matters which are governed by the religious law of the individual concerned. The fundamental and organic law of Egypt is its Constitution, which was passed in a referendum in January 2014 and amended in April 2019.

The Egyptian judiciary is highly independent, and judges are immune to dismissal, subject to no other authority but the law, and equal in rights and duties.

The judicial order under the Egyptian system is outlined below.

Regular Courts

At the apex of the regular judiciary system in Egypt is the Court of Cassation, which was established in 1931 and is based in Cairo. The Court of Cassation is a court of law as opposed to a trial court and guarantees the uniformity and consistency of the implementation and interpretation of the law. Following this are the courts of appeal which have the competence to consider rulings by the courts of first instance falling under their jurisdiction, should these rulings be subject to appeal. Next are the first instance courts, also known as primary courts, which are strategically located in various district capitals. Complementing these are summary courts, which are found in central locations, coastal towns, and even within certain neighbourhoods. These courts' jurisdictions are determined based on two main factors: the monetary value involved in the legal matter and the specific geographic area over which the court has authority.

State Council

The State Council is an independent judicial body competent to adjudicate administrative disputes and disciplinary proceedings. Article 172 of the Constitution establishes other jurisdictions. The judicial section consists of the Supreme Administrative Court, the Administrative Judiciary Court, the administrative courts, the disciplinary courts, and the State Commissioners' Authority, each competent to consider such submissions in accordance with the law.

The Supreme Constitutional Court

The Supreme Constitutional Court is an autonomous and independent judicial body with its headquarters in Cairo. However, in cases of emergency, it may, upon the approval of its General Assembly, hold its sessions elsewhere in Egypt. The Supreme Constitutional Court is solely competent to decide on the constitutionality of laws and regulations, interpret legislative provisions, and adjudicate on disputes pertaining to the affairs of its members, on jurisdictional disputes between judicial bodies and entities that have judicial jurisdiction, on disputes pertaining to the implementation of two final contradictory judgments, one of which is rendered by a judicial body or an authority with judicial jurisdiction and the other is rendered by another, as well as on disputes pertaining to the execution of its judgments and decisions.

The State Lawsuits Authority

The State Lawsuits Authority is an Egyptian judicial institution that resembles, in respect of competencies, the Attorney General in common law disciplines and particularly the United States Solicitor General.

The Authority represents the interests of the state in a variety of areas before national and international courts and arbitral tribunals. Under the applicable law, the Egyptian State Lawsuits Authority is granted the power to plead on behalf of the state even if the state itself does not wish to do so and vice versa.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Foreign investments are subject to screening in Egypt based on specific criteria, including the investor's nationality and the company's activities, as activities carried out by non-Egyptian investors, as well as the investor's nationality, may be restricted by relevant Egyptian laws and may require certain conditions to be met. Therefore, screening must be performed to ensure the satisfaction of these conditions and requirements. It is worth noting that foreign ownership restrictions are applicable in several sectors and locations such as:

- importation activities for resale or trading purposes;
- commercial agencies or intermediary businesses; and
- carrying out business in the Sinai Peninsula.

It is worth noting that, a security clearance must be obtained for any foreigner to work or do business in Egypt. In practice, the General Authority for Investment and Free Zones (GAFI) usually approves changes in shareholding structures and the incorporation of companies without initially requiring a security clearance, with the exception of certain nationalities, such as China, Russia, Ukraine, Nigeria, Israel, Iran, Belarus, Bangladesh, Iraq and Palestine, as such restricted nationalities require an advance security clearance. However, GAFI has recently started to relax the conditions of obtaining security clearance prior to incorporation with respect to some nationalities.

Aside from the security clearance, work permits must also be obtained for any foreign employees to be employed by the relevant company.

2.2 Procedure and Sanctions in the Event of Non-compliance

Prior to engaging in any business in Egypt, upon the incorporation application of the company, or upon the approval of a general assembly meet-

ing for changes in the shareholding structure, a security clearance application is submitted to the relevant authority indicating all relevant data of the foreign investor.

Generally, investing in Egypt without obtaining a security clearance or any other necessary approvals for engaging in business may have legal ramifications, which could include legal penalties such as fines or other sanctions imposed by the relevant regulatory authority, restrictions on business operations and activities through a suspension imposed by the relevant governmental authority and the eventual disruption of any business plans the foreign investor may have made, severe financial losses, and contractual issues where certain contracts may be deemed null and void due to the lack of obtaining the necessary approvals, all of which may result in severe reputational damage to the business.

2.3 Commitments Required From Foreign Investors

In certain circumstances, the regulatory authorities may require certain conditions such as:

- a minimum capital for obtaining certain approvals and licenses;
- the creation of a minimum number of jobs for Egyptian nationals; and
- requiring foreign investors to use a minimum percentage of local resources in their products.

2.4 Right to Appeal

Foreign investors have the right to appeal and review such decisions by way of referral to an administrative court, which has exclusive oversight over any administrative matter. Further, foreign investors may refer any dispute to international arbitration subject to certain conditions under the relevant Bilateral Investment Treaty (BIT), whereby any award issued in favour of investors will be enforceable vis-à-vis any assets owned by the Egyptian Government outside Egypt.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

Both the Companies Law and the Trade Code provide several legal forms of business, similar to those legal forms that are available in North America and Europe, such as:

- branch of a foreign company;
- joint stock company (JSC);
- limited liability company (LLC); and
- one-person company (OPC).

The two most common types of companies selected by investors in Egypt are JSCs and LLCs, whereby the capital of a JSC shall be owned by at least three shareholders and constitute a minimum capital of EGP250,000. Whereas, for an LLC the minimum number of partners is two and no minimum capital is required. An LLC is usually the most recommended corporate vehicle because an LLC has a simplified corporate structure compared to a JSC.

However, it is worth noting that depending on the activity of the company, a specific corporate structure may be required for certain activities such as banking activities. Further, depending on the company's activities, a company may be formed under different laws, such as the Capital Markets Law No 95 of 1992.

3.2 Incorporation Process

An incorporation application is submitted to the General Authority for Investment and Free Zones

(GAFI), which is the regulatory authority overseeing the incorporation of companies in Egypt. Attached to such incorporation applications are a set of documents including corporate documents related to the shareholders or partners, passports of the directors or shareholders, the auditor's bank certificate and the lease agreement of the company's premises.

The Articles of Association and/or statutes of the company are then issued by GAFI after the provision of the relevant details such as share capital, auditor's information, address, duration of the company, directors/managers and the company's commercial register.

The incorporation process may vary depending on the readiness of all necessary documents required to be submitted at the time of incorporation. However, once all documents are ready, the incorporation process usually takes from one to two weeks. However, GAFI offers VIP services for the incorporation process for an additional charge of EGP10,000 (equivalent to approximately USD206).

3.3 Ongoing Reporting and Disclosure Obligations

Foreign investments are subject to review and screening by GAFI. All companies incorporated in Egypt that are entirely or partially owned by non-Egyptian investors (collectively, non-Egyptian owned companies), regardless of the percentage of the ownership or the applicable legal regime, must regularly submit their Foreign Direct Investment (FDI) Data to GAFI, which includes information on, inter alia, foreign shareholders, corporate and financial information, pursuant to Decree No 2731 of 2019, as follows:

- within 30 days of the incorporation date or the date of any change in the non-Egyptian-owned company's capital, purpose, shareholding structure or board members (as the case may be);
- within 45 days of the end of each quarter of the calendar year; and
- within four months of the end of the relevant non-Egyptian-owned company's financial year.

Further, failure to satisfy the FDI requirement will entail a penalty fine of EGP50,000 for non-Egyptian-owned companies, in accordance with the Investment Law No 72 of 2017.

3.4 Management Structures

The one-tier management structure, where one governing body is responsible for management and decision-making, is widely considered the most common management structure in Egypt. For example, a JSC primarily consists of the board of directors, which is responsible for overseeing the operations of the company and making major decisions; they are elected or appointed by the shareholders of such company. Further, the executive management may be chaired by a CEO or managing director who is responsible for the day-to-day operations of the company and executing resolutions and decisions taken by the board of directors. Further, the general assembly of the company generally has the authority to elect or dismiss directors, approve financial statements, increase the company's capital and take other important decisions in relation to the company.

3.5 Directors', Officers' and Shareholders' Liability

The Companies Law No 159 of 1981, in general, does not recognise the concept of piercing the corporate veil, therefore, the liability of shareholders in a JSC or allotment holders in an LLC is strictly limited to the paid-in capital.

However, the aforementioned rule is subject to certain exceptions, such as if the number of shareholders in a JSC becomes less than three, then the concept of piercing the corporate veil shall apply to the remaining shareholders in a JSC to legitimise their legal status by increasing the number of shareholders to reach the minimum required number.

4. Employment Law

4.1 Nature of Applicable Regulations

The Egyptian Labour Law No 12 of 2003 (the "Labour Law") provides for the general legal rules governing the employment relationship.

Any condition or agreement that violates the provisions of the Labour Law and/or derogates from the employee's rights and entitlements, shall be considered invalid. However, in the event that a rule and/or a stipulation originating either from the employment contract, employment practice, or any other employer resolution or internal work regulation, grant the employee better rights and/or benefits not provided by the provisions of the Labour Law, the said rule and/or stipulation shall remain valid as it provides better benefits in the interests of the employee.

4.2 Characteristics of Employment Contracts

In accordance with the provisions of the Labour Law, an employer must conclude an employment contract with an employee. It must be drafted in Arabic and provided in three identical copies. The employment contract must include the following information:

- employer's name and place of employment;
- employee's name, qualifications, profession or craft, social insurance number and residence;
- the nature and type of work to be carried out by the employee;
- agreed salary, method and time of payment; and
- any other benefits, in cash or kind.

The employment contract may be concluded for either a definite or indefinite period. The Labour Law does not determine the maximum or minimum duration of the employment contract.

In the event that no written contract is concluded, the employee may provide evidence of the employment relationship by other means.

4.3 Working Time

The maximum applicable working hours of employees shall not exceed eight hours per day or 48 hours per week excluding breaks. These maximum working hours are regulated by public order rules and cannot be superseded or extended by any form of agreement.

Overtime is only allowed in case of emergencies, unusual and/or exceptional circumstances in work conditions, provided that:

- the employer obtains the prior written approval of the competent authority (ie, the Ministry of Manpower); and
- the actual working hours per day shall not exceed ten hours and the employees shall be entitled to monetary compensation.

Overtime work shall be compensated as follows:

- Overtime during working days: In addition to their regular pay, employees are entitled to receive a 35% increase in their salary for

overtime during the day, and a 70% increase for overtime hours worked at night.
- Overtime during weekends: In addition to their regular pay, employees are entitled to an additional 100% of their salary for overtime worked. The employer is also obliged to grant the employee a day off during the following week in place of the lost rest day.
- Overtime during public holidays: In addition to their regular pay, employees are entitled to double their regular pay.

4.4 Termination of Employment Contracts

As a general rule, an employee may be dismissed if they commit one of the following acts, which shall be deemed a gross error ("Gross Error"), including, inter alia:

- assumption of a false identity or submission of false documents;
- failure to follow safety instructions;
- absence from work without a legitimate reason for more than 20 intermittent days in the course of a year or more than ten consecutive days;
- disclosure of the secrets of the establishment at which they work, leading to the occurrence of serious damage to the establishment;
- competing with the employer in the same field;
- visible intoxication or being under the influence of drugs during working hours;
- acts of aggression against the employer or general manager and/or committing serious aggression against any superiors either during work hours or related to work; and
- failure to observe the controls of the Labour Law relating to the right of employees to go on strike.

There are different procedures for terminating employment contracts, depending on whether they are fixed or permanent.

Termination of a Fixed-Term Employment Contract

An employer shall not have the right to terminate a fixed-term employment contract early unless the employee commits a Gross Error. The employer has the burden of proving that the employee committed a Gross Error.

If an employer terminates a fixed-term employment contract early without proving that the employee committed a Gross Error, the employee shall be entitled to compensation for the damages incurred as a result of such termination.

As a general rule, the employee shall not have the right to terminate a fixed-term employment contract early except in the following cases:

- the employment contract explicitly states that the employee has the right to resign; or
- if the employment relationship exceeds five years, the employee may have the right to terminate the employment relationship by providing three months' notice in accordance with the Labour Law.

Termination of a Permanent Employment Contract

An employer shall not have the right to terminate a permanent employment contract unless the employee commits a Gross Error. The employer has the burden of proving that the employee has committed a Gross Error.

Further, if the employer wishes to terminate a permanent employment contract, they should provide the employee with two months' notice if the employee's period of service with the

employer does not exceed ten years or three months' notice if the employee's period of service with the employer exceeds ten years.

If the employer terminates a permanent employment without proof of any Gross Error by the employee, the said employee shall be entitled to compensation that is equivalent to the salary of at least two months for each year of service in addition to any other financial entitlements (if any).

Under Egyptian Law, the employer shall have the right to completely or partially shut down the organisation or reduce its size by terminating the employment contracts of a number of employees to mitigate any economic crisis, provided that (i) a downsizing request is submitted to the competent authority for approval; and (ii) the competent syndication and the employees shall be notified of both the downsizing request and approval.

In this case, a dismissed employee shall be entitled to the following end-of-service indemnity:

- an indemnity equivalent to one month of their salary for the first five years; and
- an indemnity equivalent to one month and a half of their salary for the remaining period.

In the event that the employer does not obtain the relevant approval from the competent authorities on the downsizing and decides to reduce its size by terminating the employment contracts of a number of employees, the employees shall be entitled to monetary compensation, as the termination of the employment contracts in this case shall be deemed unfair dismissal.

4.5 Employee Representations

The Egyptian Trade Union Law No 213 of 2017 grants the employees of an establishment the full right to establish, join or withdraw from a union committee, in accordance with the applicable Egyptian laws and internal regulations of the relevant union committee.

In order for a union committee to acquire legal personality and to be able to exercise its activities, it should be formed of at least 50 employees. As of the date on which the required documents are provided to the relevant administrative authority and provided that the establishment conditions are fully satisfied, the union committee shall be considered to be legally established under the Trade Union Law.

The union committee shall be entitled to directly exercise and manage the following matters with the relevant employer:

- resolving individual and collective disputes relating to their members;
- collective labour agreements at the enterprise level;
- participating with the general trade union in the preparation of draft collective labour agreements, organised primarily under the Labour Law;
- participating in the discussion of projects of the production plans of the facility and assisting in their implementation;
- participating in the implementation, development and/or amendment of internal regulations and guidelines relating to the regulation of labour and employees' affairs in the establishment;
- implementing the services programmes determined by the general trade union; and

- organising and managing the union committee's affairs and activities freely, without restriction to this right.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

The Egyptian Income Tax Law No 91 of 2005 provides that the monthly gross salaries of employees shall be subject to taxes, to be deducted from each employee's monthly gross salary, based on the relevant tax brackets of each employee's annual salary.

Further, in accordance with the Egyptian Social Insurance and Pensions Law No 148 of 2019, all Egyptian entities are required to register with the Social Insurance Authority and insure their employees.

The social insurance contribution's percentage is 29.75% of the monthly gross salary, capped at EGP9,400 (equivalent to approximately USD195), which is required to be paid to the Social Insurance Authority as follows:

- 18.75% of the monthly gross salary shall be borne by the employer; and
- 11% of the monthly gross salary shall be borne by the relevant employee.

5.2 Taxes Applicable to Businesses

Business in Egypt is generally subject to certain taxes such as:

- corporate income tax at approximately 22.5%;
- value-added tax (VAT) on goods and services at a 14% standard rate;
- withholding tax on certain payments to non-residents such as dividends;
- property taxes;
- stamp duty on certain documentation, such as leases and deeds; and
- capital gains tax on general profits from the sale of assets.

5.3 Available Tax Credits/Incentives

Under the Investment Law No 72 of 2017, there are a variety of general tax incentives foreign investors may benefit from, in addition to other additional incentives under the Investment Zones Incentives, such as the free zones or technological zones, which may enjoy certain incentives such as: reductions on corporate income tax; custom duties exemption on imported materials and equipment; and reduced VAT rates on certain goods and services. It is worth noting that such incentives vary from one investment zone to the other and the nature of the activities of the business, which shall be confirmed by a local tax adviser.

5.4 Tax Consolidation

Tax consolidation is not currently regulated under Egyptian law.

5.5 Thin Capitalisation Rules and Other Limitations

In accordance with the Income Tax Law, the Egyptian thin capitalisation rules provide that the debt-to-equity ratio is 4:1. The debt interest paid by legal persons on loans and advances obtained and that are more than four times the average of equity rights according to the prepared financial statements, are not deductible costs.

Debt interest includes all amounts chargeable by the legal person in return for the loans, advances of any kind obtained thereby, bonds and bills.

The loans and advances include, for the purposes of this item, bonds and any form of financing by debts through securities with fixed or variable interest. Equity includes the paid-up capital in addition to all reserves and dividends reduced by retained losses, provided that the difference of the adjusted account is not included in the reserves account and is determined to be non-taxable.

5.6 Transfer Pricing

Under the Income Tax Law, if related companies place conditions in their commercial or financial transactions that differ from those between unrelated companies, that will reduce the tax base or transfer its burden from one taxable company to another exempt or non-taxable company, the Egyptian Tax Authority (ETA) shall be entitled to determine the taxable profit on the basis of the neutral price of the relevant transaction, which shall be deemed transfer pricing of transactions concluded between related companies under common ownership or control.

The ETA shall verify the proper application of neutral price (market price) by related persons in their transactions with respect to the exchange of goods, services, raw materials, capital equipment, the distribution of shared expenses, royalty returns and other commercial or financial transactions that are carried out.

A Transfer Pricing Decree was adopted in 2018 to provide new tax guidelines for cross-border transactions between related companies, requiring the submission of specific documents by the relevant companies.

5.7 Anti-evasion Rules

As a general rule, the Egyptian Unified Tax Procedures Law No 206 of 2020 ("Unified Tax Law") provides that financiers, taxpayers and others shall abide by specific requirements, including the following:

- notifying of the commencement of the activity and registering with the ETA;
- obligation to keep paper or electronic books and records within the prescribed legal period, and issue tax invoices in accordance with the provisions of laws and regulations;
- enabling the ETA's employees to perform their duties with regard to the procedures of review, examination, completion and control;
- notifying the ETA of any changes in the activity or establishment within the specified legal period;
- determining the responsible person(s) dealing with the ETA, whether the individual concerned or a legal representative thereof;
- calculating the tax correctly in accordance with the laws and regulations;
- paying tax in the manner and within the time limit specified; and
- including the unified tax registration number in all correspondence and dealings with the ETA or third parties.

Further, legal persons who sell a commodity or provide a service shall register all their purchases and sales of goods and services on the electronic system, in a manner that ensures that the ETA can track the movement of transactions permanently, and to determine the size, value, parties involved, and other matters necessary for assessing and collecting the prescribed tax.

6. Competition Law

6.1 Merger Control Notification

With respect to the amendments in late 2022 to the Antitrust Law No 3 of 2005, as amended, the pre-closing clearance for any transac-

tion that constitutes an "economic concentration", subject to meeting the relevant criteria with respect to financial thresholds, has been newly introduced, replacing the post-notification regime. Under the new amendments, economic concentration is defined as any change of control or material influence as a result of a merger or acquisition or establishment of a joint venture.

6.2 Merger Control Procedure

In April 2024, the Egyptian Prime Minister issued Decree No 1120 of 2024, issuing the Executive Regulations of the Antitrust Law, whereby the application of the new amendments to the Antitrust Law have been introduced and the Egyptian Competition Authority is granted the authority to review and approve proposed mergers and acquisitions prior to entering into the transaction. The new pre-merger control system went into effect as of 1 June 2024.

6.3 Cartels

The Antitrust Law primarily governs anti-competitive agreements and monopolistic practices, and prohibits agreements between competitors with the purpose of restricting competition such as price fixing and other forms of anti-competitive agreements. The Antitrust Law also sets penalties for any violation under the provisions thereof, such as nullity of certain agreements and fines on a case-by-case basis.

6.4 Abuse of Dominant Position

The Antitrust Law addresses the abuse of a dominant position by one entity or more within the market, such as unfair pricing, unwillingness to deal and discrimination.

7. Intellectual Property

7.1 Patents

According to the Intellectual Property Law No 82 of 2002 (the "Intellectual Property Law"), the following conditions must be met for an invention to be granted a patent:

- novelty;
- inventive step; and
- capability of economic exploitation.

The owner of the patented innovation has the right to prohibit others from using the patent commercially once it has been registered. Generally, patent protection is valid for 20 years from the date of filing the application.

7.2 Trade Marks

According to the Intellectual Property Law, a trademark is a logo, mark or word that is used by a certain person, company, or group to differentiate their products and/or services from others in the market. In accordance with the Intellectual Property Law, the trademark registration serves simply as a kind of ownership evidence that can be challenged. The first use of the mark in the market establishes ownership of the trademark in accordance with Egyptian law and as established and confirmed by precedent.

According to the Intellectual Property Law, the trademark's protection period spans ten years, and can be extended for similar durations upon request by the owner during the final year of each protection period, provided that the corresponding registration fee is paid. However, if the owner fails to apply for renewal within six months after the protection period has ended, they can still apply for a renewal by paying the prescribed fee and an additional fee determined by the executive regulations of the Intellectual

Property Law, not exceeding EGP500, otherwise the trademark shall be deleted.

7.3 Industrial Design

According to the Intellectual Property Law, an industrial design is any arrangement of lines and each stereoscopic shape, with or without colours if it takes a distinctive appearance characterised by novelty and capable of industrial use. The Intellectual Property Law provides that the period of protection of the industrial design or model is ten years starting from the date of submitting the application for registration in Egypt. Protection is renewed for another five years if the owner of the design or model submits an application for renewal within the final year of the term. However, the owner has the right to apply for renewal within three months following the date of expiry of the protection period, otherwise the registration shall be cancelled.

The Intellectual Property Law stipulates that the registration of the industrial design or model grants the owners exclusive rights to prevent others from manufacturing, selling, or importing products that take the form of such design or model or include it. The right to prevent third parties from importing, selling, or distributing the aforementioned products shall be exhausted if the owner markets those products in any country or licenses others to do so.

7.4 Copyright

Copyright constitutes the rights granted to authors and artists regarding their creative works under the Intellectual Property Law. A variety of works are protected by copyright under the aforementioned Law, including computer software, databases, advertisements, geographic maps, and technical drawings in addition to books, music, oil paintings, sculptures, and films. Copyright protection extends only to expressions and not to ideas, procedures, and methods of operation or mathematical concepts.

Moreover, there are neighbouring rights which are known as copyright-associated rights, and which enable innovators to spread their ideas and publish their works by providing performers, sound recording companies, and broadcasting organisations with legal protection. The protection of copyright and related rights extends to Egyptians and foreigners, both natural and legal persons, belonging to one of the member states of the World Trade Organisation. Under the aforementioned Article, protection is granted:

- for performers: if one of the following conditions is met:
  - (a) if the performance takes place in a member state of the World Trade Organisation;
  - (b) if the performance is captured in sound recordings, the producer of which belongs to a member state of the World Trade Organisation, or the sound is first recorded in the territory of a member state of the organisation;
  - (c) if the performance is broadcast by a broadcasting organisation based in a member state of the World Trade Organisation, and the broadcast is broadcast from a transmitter also located in a member state;
- for producers of phonograms: if the sound is first recorded in a Member State of the Organisation; and
- for broadcasting organisations: if the headquarters of the broadcasting organisation is located in the territory of a member state of the World Trade Organisation, and the broadcasting programme has been broadcast from a transmitter also located in the territory of a member state of the organisation.

7.5 Others

It is worth noting that plant varieties developed in Egypt or abroad, whether they are obtained in a biological or non-biological manner, shall enjoy protection in accordance with the provisions of the Intellectual Property Law upon their registration in the register of plant varieties that grant the right of protection. In order to enjoy protection, the variety must be characterised by novelty, distinction, homogeneity, and stability, and to bear its own name. The Intellectual Property Law stipulates that the period of protection of plant varieties shall be 25 years for trees and grapes, and 20 years for other agricultural crops.

Further, undisclosed information shall be protected in accordance with the provisions of the Intellectual Property Law, provided that the following conditions are met:

- the information is confidential in nature, such that the details of the information or its composite components are not widely known or circulated among individuals in the specific industrial sector related to the information;
- its commercial value is derived from its confidential status; and
- its confidentiality relies on the effective measures undertaken by its lawful owner to maintain it.

8. Data Protection

8.1 Applicable Regulations

The general laws regulating data protection in Egypt are the Constitution, the Penal Code No 58 of 1937, and the Anti-Cybercrime Law No 175 of 2018 ("Cybercrime Law"). It is worth noting that the main legislation governing personal data is the Data Protection Law No 151 of 2020 ("Data Protection Law") which applies to any personal data that is subject to any electronic processing whether partially or entirely, with the exception of certain data that is processed by the Central Bank of Egypt. The Data Protection Law prohibits personal data from being collected, processed, or disclosed by any means except with the explicit consent of the data subject. Further, the Data Protection Law places restrictions and conditions on the transfer of any "personal data" abroad, which is subject to a license from the Data Protection Centre (DPC) and a certain level of protection not less than the one provided for under the Data Protection Law. However, it is worth noting that the applicability of the Data Protection Law is subject to the issuance of the Executive Regulations, which have not yet been issued.

8.2 Geographical Scope

The Data Protection Law applies to any processor, controller or handler, whether corporate or natural, who breaches the Data Protection Law if they are:

- an Egyptian national inside or outside Egypt;
- a non-Egyptian residing within Egypt; or
- a non-Egyptian outside Egypt if the act is punishable in any form in the country where it occurred and the data subject who is affected by the breach is an Egyptian national or a non-Egyptian residing in Egypt.

8.3 Role and Authority of the Data Protection Agency

The DPC is the regulatory authority empowered by virtue of the Data Protection Law to oversee and enforce the Data Protection Law, including the issuance of required licences, authorisations and certifications in accordance with the Data Protection Law. However, the DPC is not yet operational and is subject to the issuance of the

Executive Regulation of the Data Protection Law, which has not yet been issued.

9. Looking Forward

9.1 Upcoming Legal Reforms

A new Labour Law is set to be introduced with aims of creating an attractive climate for investment by establishing a balance between the two parties to the production process, adopting a new economic policy in the field of employment, expediting the settlement of labour disputes and achieving prompt justice. The new Labour Law also aims to link wages to production to reassure national and foreign investors and maximise the role of mechanisms of consultation, negotiation and dialogue between the parties to the employment relationship. Moreover, the new Labour Law regulates working hours and rest periods for workers in the private sector, controls for reducing the maximum working hours, and the conditions for accruing weekly breaks.

Furthermore, it is worth noting that it has been reported that the Egyptian government is currently in the process of preparing an all-new Arbitration Law that will be proposed to the Egyptian House of Representatives.

Trends and Developments

Contributed by:
Mohamed Hashish, Heba El Abd, Farida Rezk and Zeina Sherif
Soliman, Hashish & Partners

Soliman, Hashish & Partners (SHP) is a full-service corporate law firm, recognised as a leading financial and corporate law firm in Egypt by Chambers and Partners. SHP provides exceptional legal services and offers a creative, quality and business-aware approach to all assignments. SHP works exclusively with well-structured multinational clients within a plethora of practice areas, including corporate, M&A, banking and finance, TMT, energy and electricity, construction, public procurement, dispute resolution, IP rights and employment. SHP acts as local legal counsel to private and public sector entities, including governments, NGOs and leading multinational companies operating in a wide range of sectors. Over the years, SHP has represented over 1,000 leading multinational clients in Egypt's largest mega projects and established strong relationships with decision-makers in public and private sectors.

Authors

Mohamed Hashish is the managing partner at SHP, and has over 19 years of experience in handling corporate, M&A, restructuring, banking and finance, energy and electricity, TMT, construction and public procurement matters. Hashish has extensive experience in representing over 700 multinational clients across all business sectors.

Heba El Abd is a bilingual Arabic and English lawyer with five years of experience in handling corporate, M&A, employment and TMT matters. Before joining Soliman, Hashish & Partners, Heba worked as an associate at a reputable law firm. Heba graduated from Cairo University with a BA in Law (English Section). During her studies, Heba took part in various internships at top-tier law firms in Egypt.

Zeina Sherif is a bilingual Arabic and English lawyer at SHP with over four years of experience working as a paralegal, both at SHP and previously at an upstream oil and gas company. Zeina graduated from the University of Edinburgh with an MA in International Relations and Law.

Farida Rezk is a bilingual Arabic and English lawyer at SHP with four years of experience in handling corporate matters. Farida graduated from the University of Liverpool. Her notable progress throughout her studies led to her appointment as an International Student Ambassador for the University. Whilst in the UK, Farida sought to enhance her professional legal skills by volunteering as a student adviser at the University's legal clinic, carrying out pro bono work for family and immigration cases.

Contributed by: Mohamed Hashish, Heba El Abd, Farida Rezk and Zeina Sherif, **Soliman, Hashish & Partners**

Soliman, Hashish & Partners

2nd Floor
Plot No 15
Ninetieth Street
New Cairo
Cairo
Egypt

Tel: +202 2812 4499
Fax: +202 3536 5787
Email: info@shandpartners.com
Web: www.shandpartners.com

Over the past few years, the Egyptian government has been significantly improving the business environment in the country, which has resulted in various changes to the legal framework governing the establishment and operation of businesses in Egypt. Egypt has attracted more foreign direct investment (FDI) across multiple industries, predominantly within the financial services, technology and infrastructure sectors. Egypt was ranked 3rd in the top 17 African Tech Ecosystems of the Future for the year 2021/2022, according to the fDi Report 2021 African Tech Ecosystems of the Future 2021/2022. Egypt was also recognised as one of the top five destinations globally for greenfield FDI in 2016, with Cairo ranked among the top 10 cities hosting start-ups in 2016. Egypt is also at the top of all ranked MENA countries by capital investment in 2020, acquiring 12% capital investment with a total value of USD13.7 billion, where financial services were among the top five sectors in 2019.

Despite international and local crises faced by the country over the years (including revolutions, COVID-19, the Russia-Ukraine war, inflation, foreign currency shortages and the threat of potential recession), Egypt has continued to implement its best efforts to improve the legal environment to attract foreign investors and regulate certain activities under the current climate.

Investment in Egypt

According to Investment Law No 72 of 2017 ("Investment Law") and Prime Minister's Decree No 56 of 2022, companies with the aim of establishing strategic or national projects that contribute to the development or partnership projects between the private sector and the state, the public sector, or the public business sector in the areas of public utilities and infrastructure, new or renewable energy, or roads, transportation, or ports, have the opportunity to apply for a single license for the establishment, operation, and management of the project (the "Golden License"). Such Golden License shall be sufficient for the operation of an investment project with no need to apply for any further licenses or approvals. The Golden License Committee at the General Authority for Investment and Free Zones (GAFI) shall be responsible for the co-ordination with all the relevant governmental authorities in Egypt in order to obtain all the licenses and

approvals required by law for the establishment of the investment project.

According to Decree No 56 of 2022, the Golden License shall be granted by a decision of the Prime Minister for investment projects that satisfy at least two of the following required conditions:

- The investment project shall contribute to the growth of exports through exporting no less than 50% of its products abroad annually, within three years from the commencement of its activity.
- The investment project shall aim to reduce imports, industrial domestication, as well as deepening local components in its products, provided that the percentage of local components in its products, including raw materials and production requirements, constitutes at least 50%, and further provided that the aforementioned percentage be calculated by subtracting the value of the imported components from the product cost.
- The financing of the investment project shall be primarily dependent on the foreign currency transferred from abroad through any bank registered with the Central Bank of Egypt (CBE).
- The establishment of the investment project in one of the undeveloped areas, including, inter alia, Southern Giza Governorate, the governorates of the Suez Canal Region: Port Said, Ismailia and Suez (east of the canal), border governorates, including the Red Sea Governorate to the south of Safaga, and Upper Egypt governorates.
- The investment project shall contribute directly to fields of technology transfer and localisation in Egypt, innovation support, and scientific research development.
- The main objective of the investment project shall be securing strategic goods for the country, thereby reducing reliance on imports.
- The investment project shall lessen environmental impact via reducing gas and temperature emissions and climate improvement.
- The investment project shall offer a labour-intensive investment project by employing not less than 500 Egyptian nationals.

It is worth noting that as of March 2024, a total of 29 Golden Licenses have been issued by GAFI, of which six Golden Licenses were granted in 2024.

Furthermore, recent amendments have been made to the Investment Law's Executive Regulations by virtue of Decree No 2140 of 2023 to promote foreign direct investment. This includes the Private Free Zones regime, including the incorporation of a provision permitting the Cabinet to approve the establishment of any projects in the Private Free Zone, upon a proposal from the competent minister after GAFI conducts an assessment of the project, subject to various conditions. Furthermore, the aforementioned Decree lifted some of the requirements for establishing projects in the Private Free Zones, including:

- the requirement to check initially whether there is a location in the Public Free Zone that would accommodate the project;
- the minimum capital requirement of USD10 million, and the investment costs thereof not being less than USD20 million or its equivalent in the free currency;
- the minimum area requirement for the project being 20,000 square metres; and
- a minimum requirement of 500 employees. In addition, this Decree has introduced provi-

sions regarding the inclusion of the services industry under the Private Free Zone system.

Merger Control

The amendments made to the Anti-Trust Law No 5 of 2003 (the "Antitrust Law") in December 2022 replaced the post-notification regime for a transaction with the newly introduced pre-merger control system, whereby the Egyptian Competition Authority (ECA) is given the authority to review and approve proposed mergers and acquisitions prior to entering into the transaction. In April 2024, the Egyptian Prime Minister issued Decree No 1120 of 2024, enacting the Executive Regulations of the Antitrust Law and thereby implementing the new amendments.

The new pre-merger control system went into effect as of 1 June 2024 and requires pre-approval from the ECA for transactions that constitute "economic concentration" between the contracting parties (namely, a change in control or material influence of a person resulting from a merger, acquisition or joint venture), subject to meeting the relevant criteria with respect to financial thresholds.

It is worth noting that any transaction that constitutes an "economic concentration" shall be subject to the pre-closing clearance requirement from the ECA. By virtue of the new amendments, economic concentration is defined as any change of control or material influence as a result of a merger or acquisition or establishment of a joint venture.

Fintech

It is worth noting that Fintech has been newly introduced in 2020 in Egypt as part of the issuance of the new Banking Law No 194 of 2020 with the purpose of promoting financial inclusion and the digitalisation of the financial sector in Egypt. However, the applicability of obtaining a fintech license for the banking sector is still pending the issuance of further regulations in this regard by the CBE. Fintech has since been further regulated in the Non-Banking Financial Services (NBFS) by the issuance of the new Fintech Law No 5 of 2022 and its Executive Regulation, which facilitate the integration of technologies into NBFS and the regulatory framework for the licensing scheme for such services from the Financial Regulatory Authority (FRA). These services include, inter alia, insurtech, microfinance, robo-advisory, artificial intelligence, mobile applications and digital platforms.

In July 2023, the CBE issued regulations regarding the licensing and regulatory framework for digital banks in Egypt, which shall effectively allow for the establishment and operation of digital banks, in an effort to support innovation and transformation of the digital economy, whilst representing an important step in aligning with global developments in the financial technology industry.

Furthermore, in January 2024, the FRA issued Decree No 286 of 2023 (the Decree) regarding the rules and procedures for the establishment and licensing of emerging financial technology companies to engage in non-banking financing activities. The Decree applies to a variety of non-banking financing activities, including, inter alia, real-estate financing, consumer financing and factoring. The Decree stipulates the conditions required to enable the incorporation of a non-banking financing company, as well as the procedures for obtaining the required license to engage in their activities.

Data Protection

In 2020, Egypt introduced the Law on the Protection of Personal Data No 151 of 2020 ("Data Protection Law"), which regulates personal data

that is processed electronically. Prior to the issuance of the Data Protection Law, data protection was only governed by the Constitution, the Penal Code No 58 of 1937 (the "Penal Code") and Law No 175 of 2018 on Anti-Cyber and Information Technology Crimes (the "Cybersecurity Law"). The Data Protection Law is a reflection of the European General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR), as it aims to establish various standards and rules that safeguard data protection and the rights of individuals in Egypt. However, the Executive Regulations of the Data Protection Law have not been issued to date. There are certain types of personal data that are not subject to the Data Protection Law, including, inter alia, data held by the CBE.

It is worth noting that the Data Protection Law applies to any controller, processor or handler (natural or juristic) of personal data. It also applies to any of the aforementioned persons who breach the Data Protection Law if they are:

- an Egyptian national inside or outside Egypt;
- a non-Egyptian residing within Egypt; or
- a non-Egyptian outside Egypt if the act is punishable in any form in the country where it occurred and the data subject who is affected by the breach is an Egyptian national or a non-Egyptian residing in Egypt.

The Data Protection Law sets out the requirements related to processing, handling and controlling any personal data, which in principle is primarily based on the element of consent of the data subject and licensing from the Data Protection Centre. It is worth noting that the Data Protection Centre is the regulatory authority overseeing the application and enforceability of the Data Protection Law. However, the Data Protection Centre has not been established yet, and the regulations regarding the issuance of the said licenses are subject to the issuance of the Executive Regulations. Also, the Data Protection Law regulates the transfer of personal data abroad and sets out certain conditions and standards for allowing the transfer of personal data outside of Egypt.

Banking, Finance and Exchange Control

It is worth noting that the Egyptian Pound has encountered various devaluations throughout 2022 in order to secure IMF loans.

Despite the fact that investors are freely allowed by law and the relevant and applicable Bilateral Investment Treaty to transfer dividends to their home country, the current shortage and unavailability of foreign currency in Egypt has made it difficult to transfer such proceeds and dividends of the investors to their home country and therefore, most foreign investors secure their own source of foreign currency, as each bank is currently applying a list of priorities for exchanging Egyptian Pounds with any foreign currency, which differs from one bank to the other.

Imports

As of December 2022, the CBE abolished the system of requiring importers to obtain letters of credit for their purchases and returned to the cash-against-documents system for importing goods. This change alleviates the previously higher costs and time burdens on importers.

In conclusion, different legal developments have taken place across different regulations and sectors in Egypt. These measures reflect the Egyptian government's aim to foster a stable and well-regulated economy, not only for Egyptians, but also to promote foreign direct investment in Egypt. Notably, reports indicate that further changes are anticipated in the coming years, including the introduction of new labour and arbitration laws.

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Law and Practice

Contributed by:
Emma Lejeune, Stuart Dalmedo, Michael Adamberry, Nick Isola and Louise Anne Turnock
ISOLAS LLP

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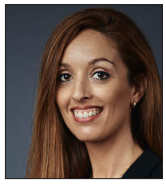
Contributed by: Emma Lejeune, Stuart Dalmedo, Michael Adamberry, Nick Isola and Louise Anne Turnock, **ISOLAS LLP**

ISOLAS LLP is a leading international law firm with its headquarters in Gibraltar. Established in 1892, it is Gibraltar's oldest law firm. Truly independent, ISOLAS offers clients the benefits of commitment, continuity and the close personal interest expected of a long-established firm. ISOLAS has a reputation for combining expert legal advice with commercial pragmatism, and is known to be practical and confident in the advice it gives.

Authors



Emma Lejeune is a partner at ISOLAS, with a strong private client practice. Emma established her own boutique private client and family office practice, before joining the ISOLAS partnership. Her main practice involves advising ultra-high net worth individuals, high net worth individuals and family offices on all their requirements. She deals with relocations and assists in the establishment of succession plans and family asset planning, as well as advising on family governance. Emma also advises family offices on relevant financial services regulatory matters, and has significant experience in other areas of corporate and financial services law.

Stuart Dalmedo is a partner at ISOLAS and has over a decade of experience in tax and private client matters. Stuart has become the "go to" lawyer within the firm for all tax matters and has extensive experience in advising high net worth individuals on the establishment of tax-efficient structures and cross-border planning. He regularly counsels clients on setting up businesses in Gibraltar and the corporate, tax and regulatory aspects concerning the company's business, as well as assisting individuals relocating to Gibraltar, and dealing with their residency and all other aspects of relocation, including Category 2 (Cat 2) and High Executive Possessing Specialist Skills (HEPSS) applications.

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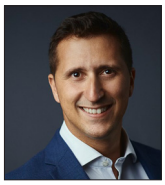
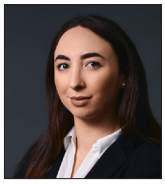
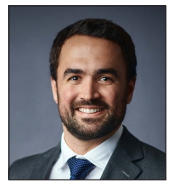


Michael Adamberry is a senior associate and a former regulator at the Gibraltar Financial Services Commission, prior to joining ISOLAS in 2016. With a strong background in regulation, Michael provides general regulatory advice to ISOLAS' financial services and banking clients on various aspects of regulatory compliance, focusing on AML/CFT, data protection and e-privacy. He recently assisted the government of Gibraltar on implementation of the Fifth Money Laundering Directive, and legislative drafting amendments required to implement MONEYVAL recommendations (including the travel rule). As a dual-qualified solicitor and barrister, Michael advises public authorities and law enforcement bodies on privacy compliance, conducting GDPR/LED compliance audits, DSAR handling, DPIAs and policy drafting.



Louise Anne Turnock is an associate in the private client and tax department of ISOLAS. She regularly assists the team on corporate, tax and private client matters, including re-structuring corporate and trust structures, whilst also advising on tax implications under Gibraltar law. She recently obtained a distinction in the Certificate of International Trust Management and the Advanced Certificate in Principles of International Taxation, AML and Compliance through the Society of Trusts and Estate Practitioners, and successfully completed the Professional Certificate of Competence in Gibraltar Tax through the University of Gibraltar.



Nick Isola is a senior associate who works closely alongside Mark Isola KC in the areas of employment, landlord and tenant, property and civil litigation. Nick joined ISOLAS in September 2017 and was previously an assistant manager in the Indirect Taxes Team of Deloitte UK. Nick regularly advises both employers and employees on a wide range of statutory and/or contractual claims, including redundancies, collective redundancies, unfair dismissals, bullying, discrimination and personal injury. As part of the litigation practice, Nick has assisted as junior counsel in several cases brought against major employers and businesses in Gibraltar, both at the Employment Tribunal and in the Supreme Court of Gibraltar.

Contributed by: Emma Lejeune, Stuart Dalmedo, Michael Adamberry, Nick Isola and Louise Anne Turnock, **ISOLAS LLP**

ISOLAS

23 Portland House
Glacis Road
GX11 1AA
Gibraltar

Tel: +350 2000 1892
Fax: +350 2007 8990
Email: emma.lejeune@isolas.gi
stuart.dalmedo@isolas.gi
Web: www.gibraltarlawyers.com

1. Legal System

1.1 Legal System and Judicial Order

Gibraltar is a British overseas territory with a culture that emanates from the UK. Its laws are based on English law (common law system) and although its jurisprudence is largely home-grown, English and Commonwealth judicial precedent and rules of equity, although not strictly binding, are of persuasive authority in Gibraltar.

Gibraltar has its own government and parliament that are responsible for domestic affairs, while its foreign affairs are handled by the UK. It has its own written constitution, and statutes are enacted by its parliament.

Certain English acts are applied, either in whole or in part, in the following ways:

- by express reference to the schedule of the English Law (Application) Act, 1962;
- by Order of Her Majesty in Council;
- as expressed in the English act itself or in any other act; and
- by necessary implication.

Court Structure

While similar to the court structure in England and Wales, there are notable differences in Gibraltar. This includes the absence of a High Court, Crown Court and County Courts, with Gibraltar's Supreme Court having jurisdiction over both criminal and civil matters. Gibraltar's Supreme Court handles matters that would fall under the UK High Court's Chancery, King's Bench and Family Divisions, as well as serving as an appellate function from the Magistrates' Court.

Judiciary

Judges and magistrates are appointed locally, with a parallel system of lay assessors in the Magistrates' Court, as seen in England and Wales. The judiciary is independent from the government of Gibraltar and politically impartial.

Appeals from the Supreme Court are made to the Court of Appeal, which sits at periodic intervals and is presided over mostly by English judges. Appeals from that court are to the Privy Council, which sits in London.

Civil Proceedings

Under Section 38A of the Supreme Court Act 1960, the Civil Procedure Rules (CPR) made

under the Civil Procedure Act 1997 in England and Wales, as amended from time to time, apply in Gibraltar, with such modification as the circumstances may require. The Supreme Court Rules 2000 supplement these procedural rules, providing further requirements in terms of, inter alia, interpretation, court records, fees and costs and prescribed forms.

Civil proceedings can be split into a variety of "jurisdictions", but most are handled in the Supreme Court, with the Magistrates' Court hearing only a limited range of civil matters (eg, the Stipendiary Magistrate holds the office of the coroner in the UK). These jurisdictions include the following:

- family jurisdiction – non-contentious probate, divorce and matrimonial proceedings, and child proceedings;
- civil jurisdiction – contract and tort, commercial matters, and constitutional, public and administrative law matters;
- appellate jurisdiction – the Supreme Court will hear appeals from certain tribunals as well as the Magistrates' Court;
- admiralty jurisdiction – ship arrests and general admiralty matters;
- ordinary jurisdiction and company jurisdiction (Chancery equivalent) – equity and trusts, contentious probate, bankruptcy and insolvency, company matters;
- miscellaneous jurisdiction – landlord and tenant, mutual legal assistance, administrator general, deed polls, admissions to the Gibraltar Bar; and
- Court of Protection – jurisdiction over the property, financial affairs and personal welfare of people who lack mental capacity to make decisions for themselves.

Criminal Proceedings

The Criminal Procedure and Evidence Act 2011 prescribes the applicable procedure in the Magistrates' Court and Supreme Court when they exercise criminal jurisdiction. Together with the Crimes Act 2011, these acts brought about significant changes to the criminal justice system in Gibraltar, effectively creating a modern criminal code for Gibraltar. From a business perspective, corporate manslaughter prosecutions are also possible, with extension of this offence beyond corporations to the police, trade unions, partnerships and employers' associations.

All criminal proceedings commence in the Magistrates' Court, with the more serious (indictable) offences being sent to the Supreme Court, either for jury trial or sentencing.

Lawyers

Most lawyers are England and Wales-qualified barristers or solicitors, with a minority of European lawyers. Qualification for call to the Bar in Gibraltar is via a separate procedure to qualification in the UK, and it is possible for UK-qualified solicitors to be called to the Gibraltar Bar. There is a practical training requirement before admission to the Gibraltar Bar, consisting of a period of 12 months' employment at an approved establishment, together with an approved academic course in Gibraltar law. In certain cases, the Chief Justice may waive one or more of these requirements – for example, when an English barrister is instructed to act as an advocate on a particular case or cases.

Gibraltar enjoys what is termed a "fused profession", whereby both barristers and solicitors called to the Gibraltar Bar enjoy rights of audience in every court, and barristers can be "acting solicitors". This results in practitioners with a diverse skill set who are all client-facing and

able to conduct litigation or non-contentious work without restriction.

The Legal Services Regulatory Authority (LSRA) regulates the legal services industry in Gibraltar.

The Law and Brexit

EU law formerly applied in Gibraltar pursuant to Article 355(3) of the Treaty on the Functioning of the European Union, as it was considered a territory over whose relations a member state (ie, the UK, when it was a member state) was responsible. Following the end of the Brexit transition period, Gibraltar has retained certain EU legislation (subject to modifications where necessary) in a similar manner to the UK, by virtue of Gibraltar's European Union (Withdrawal) Act 2019 (EUWA). The EUWA repeals Gibraltar's European Communities Act 1972 and provides for the continuing validity of legislation passed or made for the purposes of complying with obligations derived from EU law.

By virtue of the UK opting out of the Schengen Agreement, Gibraltar is also not a part of this agreement, as is the case with the single currency of the EU's Economic and Monetary Union, resulting in the Gibraltar pound sterling (GIP) being the local currency; this is pegged to, and exchangeable with, the British pound sterling (GBP) at par value. Gibraltar is also exempted from the EU customs union, and the common agricultural policy.

Although a Gibraltar Brexit deal was finalised on 31 December 2020, only hours before the UK was due to leave the EU, additional conditions are still being negotiated, at the time of writing. The government of Gibraltar has warned Gibraltar citizens to prepare for the possibility of a non-negotiated outcome in the event that it is not possible to conclude a treaty between the UK and the EU on the future relationship of Gibraltar. Such a possible "hard-Brexit" scenario would have a negative impact on a number of areas, including movement of goods and persons, cross-border healthcare, driving and telecommunications, among others. In a best case and "soft-Brexit" scenario, Gibraltar hopes to maintain fluidity at its land border with Spain, and could be included under the terms of the Schengen Agreement, although it is not expected to be fully integrated within the Schengen information databases maintained by the European Commission.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

In Gibraltar, there is no distinction between foreign and domestic investment. In general, there are no restrictions on foreign or domestic shareholders. However, certain financial services, gaming and telecommunications businesses do require pre-authorisation from a regulator regarding their shareholders to ensure that the shareholders are reputable persons and meet applicable fitness and proprietary requirements.

2.2 Procedure and Sanctions in the Event of Non-compliance

Generally, an application would have to be made to the relevant regulator (for example, the Gibraltar Financial Services Commission in relation to a financial services business) as part of the wider application for the issuance of a licence in connection with the proposed activities. This sets out the details of the proposed shareholder, source of wealth, details regarding the fitness and proprietary requirements of the individual (for example, whether the individual has ever

been declared bankrupt) and details regarding the beneficial interest held.

Failure to notify a regulator of any changes in shareholders, or obtain the pre-approval of a shareholder, could result in regulatory sanctions and revocation of the relevant licence.

2.3 Commitments Required From Foreign Investors

Generally, authorities do not condition their approval to certain commitments (although this may vary depending on the activities of the proposed investment), but individuals must notify the regulator should there be any material changes to the information provided in the initial application for approval.

2.4 Right to Appeal

Generally, there is no right of appeal. However, this will depend on the circumstances on a case-by-case basis as there may be situations where there is some element of recourse.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

Corporate vehicles in Gibraltar may take various forms; these include trusts, foundations, limited partnerships, protected cell limited partnerships, limited liability partnerships, companies limited by guarantee, companies limited by shares, protected cell companies and unlimited companies.

As each form of corporate vehicle contains its own unique set of characteristics, the most suitable vehicle for a particular use case will depend on various factors, such as the nature of the underlying business activity or reasons for the establishment of the vehicle (eg, asset protection or succession planning).

Companies limited by shares are by far the most common form of corporate vehicle in use in Gibraltar. These may be set up as a private company (in which case the company's shares or debentures are not allowed to be offered to the general public) or as a public company (in which case the company's shares or debentures are allowed to be offered to the general public).

Private Companies

As with all companies, private companies are required to adopt articles of association which set out the rules governing the relationship between the company and its shareholders, as well as the responsibilities of its directors.

Private companies must have a minimum of one director, and there is no statutory maximum number of directors. A company may, however, provide for a maximum number of directors under its articles of association. A sole director of a company is unable to also act as the secretary of that company.

Private companies must have a share capital that is divided into shares of a fixed amount, and there is no minimum or maximum share capital requirement. Therefore, private companies may be set up with a single shareholder and can consist of any number of shareholders (although regard must be had to regulatory implications of what could be construed as a collective investment scheme) without the need to register as a public company.

Due to their flexibility, the ease with which they can be set up and the limited liability offered to shareholders, private companies are usually perceived to be the preferred corporate vehicle for most businesses, joint ventures and holding companies.

Trusts

A trust is an equitable obligation binding one party, the trustee, to control and manage property for the benefit of one or more parties, the beneficiaries. A settlor will transfer property to the trustee (whether during their lifetime or under a will) on specified terms which are usually contained in a trust deed and supplemented by a non-binding letter of wishes from the settlor to the trustees.

The provisions relating to the establishment and administration of a trust are contained in the document constituting the trust, known as the declaration of trust or trust deed. This document sets out the powers and fiduciary obligations of the trustees vis-à-vis the trust property/fund and the beneficiaries.

3.2 Incorporation Process

The incorporation process of a private company requires an application form, together with payment of the applicable fee, to be submitted to Companies House.

In the case of a company, the application form must include:

- the proposed name of the company;
- the liability of its members;
- whether the company is to be private or public;
- a statement of the intended registered office address;
- the memorandum of association and articles of association (to the extent that bespoke articles of association or the memorandum of association are to be adopted);
- in the case of a company that is to be limited by shares, a statement of the authorised share capital, initial shareholding and particulars of the rights attached to shares;
- in the case of a company that is to be limited by guarantee, a statement of guarantee from the proposed members; and
- a statement of compliance.

There is no requirement for the first director(s) and secretary of a company to be named on the application form. Instead, the Companies Act facilitates a 14-day period during which details of the first director(s) and secretary of the company may be filed.

Standard incorporation takes approximately three working days and costs GBP100. However, Companies House also offers a same-day incorporation service for an additional GBP100.

Upon successful incorporation, Companies House will issue a Certificate of Incorporation which serves as conclusive evidence that the requirements of the Companies Act have been complied with and that the company is duly registered in Gibraltar.

3.3 Ongoing Reporting and Disclosure Obligations

Companies are subject to various ongoing annual and event-driven reporting and disclosure obligations.

All companies are required to deliver an annual return to Companies House, at least once in every calendar year. The annual return is a snapshot of certain information relating to a company including the company's main activity, shareholders, directors, secretary and share capital. The annual return must be delivered within 30 days of the date which the annual return is made up to.

Companies are also required to deliver annual accounts to Companies House. The account-

ing principles to be observed when preparing the accounts vary, depending on the size of the company, and range from an abridged balance sheet to full accounts (including balance sheet, profit and loss account, notes, directors' report and auditors' report). The annual accounts must be filed within 12 months (in the case of a private company) or ten months (in the case of a public company) of the financial year-end. Special rules apply in the case of a company's first reporting period.

Companies are also required to deliver certain information and shareholder resolutions when particular changes occur within the company. The Companies Act applies various filing dates depending on the event which triggered a filing requirement. In the majority of cases where filing of documentation is required, the Companies Act imposes a 30-day filing period.

3.4 Management Structures

There is a separation between ownership and control in companies limited by shares. Shareholders are the owners of a company and the directors are responsible for a company's management and day-to-day running, owing a fiduciary duty to the company.

Most of the obligations and responsibilities of the directors and shareholders are set out in a company's articles of association. However, the Companies Act does prescribe certain statutory obligations and responsibilities – for example, under the Act, any changes to a company's name or articles of association require the approval of a company's shareholders. These statutory requirements cannot be overridden by a company's articles.

3.5 Directors', Officers' and Shareholders' Liability

Directors' and Officers' Liability

Under the Companies Act, the officers of a company may be held criminally liable for certain offences; these include situations where the officers fail to comply with certain filing and reporting obligations.

Directors are subject to common law, equitable and fiduciary duties. Broadly, these include the following duties:

- to exercise skill and care;
- to act in good faith and in the best interests of the company;
- to act within the powers conferred by the company's memorandum and articles of association and to exercise powers for a proper purpose;
- not to fetter their discretion;
- to avoid conflicts of interest; and
- not to make a secret profit.

The concept of "piercing the corporate veil" is recognised in Gibraltar and personal liability may therefore be imposed in certain situations – for example, where the directors permit an insolvent company or prospectively insolvent company to continue trading unless they can demonstrate that it is beneficial for the creditors to continue to do so.

Under the Companies Act, any provision that seeks to exempt or indemnify a director or officer of the company from any liability which by virtue of any rule of law would otherwise attach to them in respect of any negligence, default, breach of duty or breach of trust of which they may be guilty in relation to the company, is deemed to be void. This does not prevent the company from indemnifying directors or officers against liability

incurred in defending proceedings (whether civil or criminal) in which judgment is given in their favour or in which they are acquitted. Companies may also purchase and maintain directors' and officers' liability insurance cover.

Shareholders' Liability

Under the Companies Act, the liability of the shareholders of a company limited by shares is limited to the amount unpaid on the shares respectively held by them. Shareholders may, however, be held personally liable in certain circumstances, such as where they provide a personal guarantee and accept a direct contractual liability with a third party.

4. Employment Law

4.1 Nature of Applicable Regulations

The legal rules governing the employment relationship in Gibraltar share some similarities to the employment law of England and Wales, both in terms of legislation and common law, modified to suit the needs of the jurisdiction. The applicable legislation is contained primarily in the Employment Act 1932 and its subsidiary legislation, consisting of Orders and Regulations made under various sections of the Act, including but not limited to the:

- Employment Regulations 1994;
- Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996;
- Employment (Annual and Public Holidays) Order 1996;
- Conditions of Employment (Redundancy Pay) Order 2001;
- Fixed-Term and Part-Time Employees (Prevention of Less Favourable Treatment) Regulations 2003;
- Employment (Information and Consultation of Employees) Regulations 2005; and
- Conditions of Employment (Standard Minimum Wage) Order 2001.

Other primary legislation includes, but is not limited to, the Working Time Act 1999, the Equal Opportunities Act 2006 and the Employment (Bullying at Work) Act 2014, which is unique to Gibraltar with England and Wales never legislating in this manner for claims of bullying. The Employment (Trade Union Recognition) Regulations 2023 made under the Employment Act provide a framework for recognition by employers of trade unions for collective bargaining purposes and set out a statutory recognition procedure whereby a trade union may apply to the Director of Employment should an employer refuse to grant recognition.

Collective bargaining agreements apply to some employers; these are most commonly negotiated by trade unions. However, there are also new regulations in this area following the introduction of the Employment (Trade Union Recognition) Regulations 2023.

Gibraltar employment law applies to all employees working in Gibraltar, irrespective of nationality or even residence, given the large proportion of cross-border workers commuting to Gibraltar from Spain on a daily basis.

The parties to a contract may choose the governing law of the contract to be that of a different country. However, such an election of governance will likely be limited to contractual disputes, and Gibraltar law will continue to govern the law on the employment relationship generally.

4.2 Characteristics of Employment Contracts

A contract of employment may be concluded verbally. However, there is a minimum requirement to file a Notice of Terms of Engagement with the Department of Employment for all workers. In some cases, this notice may be the only written part of a contract between an employer and employee and sets out basic mandatory terms of the employee's employment, such as working hours, salary, holiday entitlement and notice periods, the minimum of which are set in statute. While the requirement to file the notice is mandatory in all cases, some employers will also provide workers with a more detailed employment agreement, in addition to the notice, setting out its contractual terms and conditions and incorporating any additional benefits.

In addition to the rights imposed by statute, there are other terms implied into contracts by common law, including a duty to provide work and a mutual duty to maintain trust and confidence.

Variations to the employment relationship must be notified to the Department of Employment on a prescribed form known as the Notice of Variation of Terms of Engagement.

The duration of the employment contract is not regulated under Gibraltar law, but a worker is able to bind themselves to provide services for a fixed or indefinite term. This must be set out in the Notice of Terms of Engagement.

4.3 Working Time

Under the Working Time Act 1999, a worker's average working time, including overtime, must not exceed 48 hours each week, over a period of 17 weeks excluding any periods of sick leave, maternity leave or annual leave.

However, any worker may agree with their employer in writing that this maximum should not apply to them, provided the employer can comply with certain requirements set out in the Working Time Act 1999.

In the case of a worker between the ages of 15 and 17 (inclusive), the maximum working time shall not exceed eight hours a day, or 40 hours a week (between midnights on successive Sundays), and such workers may not opt out of the stipulated maximum working time.

There is no minimum working time applicable to workers in Gibraltar. Accordingly, zero-hour contracts are permitted under Gibraltar law.

The Employment (Annual and Public Holidays) Order 1996 sets out the rights employees have who work extra hours on public holidays when they are not ordinarily required to do so.

4.4 Termination of Employment Contracts

Employment contracts can be terminated by providing notice. Statute determines what the minimum notice periods are. However, employers often agree notice periods under the contract that are greater than those set out in statute.

A contract may also provide for payment in lieu of the notice period.

The first week of any employment under a contract of service is deemed to be probationary under statute, and the employment may be terminated at the end of such a week by either party without notice. After this period, the minimum statutory notice period must be applied, which will depend on, among other things, whether notice is given by the employer or the

employee, and how often the employee is paid by the employer.

In the case of an employee giving notice of termination, the required period is determined by reference to how often they are paid only. For example, an employee must give one month's notice to terminate the employment, unless the employee is paid weekly where one week's notice is required. A failure to provide appropriate notice will give rise to a claim for wrongful dismissal. However, an employer may dismiss an employee, and an employee may abandon the service of an employer, without giving notice where there is good and sufficient cause for such dismissal (eg, gross misconduct) or abandonment, but an employer is not entitled to set up as good and sufficient cause that (a) the employee's lack, loss or impairment of skill, ability or efficiency makes the fulfilment of the contract of service impossible, or (b) that the employee no longer enjoys the employer's confidence.

Additionally, employees have a statutory right not to be dismissed unfairly if they have been employed for a continuous period of at least 52 weeks, ending with the effective date of termination and provided that the employee has not been dismissed for an automatically unfair reason (eg, making protected disclosures) where the qualifying period does not apply. Employees may be dismissed "at will" before they have attained 52 weeks' continuous service, provided that the employer complies with minimum notice provisions under statute or the contract, and provided that the employee is not dismissed for an automatically unfair reason. Depending on the reason(s) underlying the dismissal, employers may also need to consider the Employment (Bullying at Work) Act 2014 and/or the Equal Opportunities Act 2006.

After 52 weeks' continuous employment, the employer must prove that there was a permitted reason for the dismissal of the employee. Permitted reasons for a dismissal are:

- reasons relating to capability of the employee;
- reasons relating to the conduct of the employee;
- that the employee was redundant;
- that the employee's continuous employment would result in the contravention of the law; or
- some other substantial reason of a kind to justify dismissal.

If an employee is found to be unfairly dismissed, they are entitled to compensation calculated by a statutory formula and which includes compensation for the unfair dismissal including a basic award (GBP2,200 or such higher amount as calculated by a statutory formula) and a compensatory award which is capped, presently at the lesser of two years' salary of the employee at the time of the dismissal and GBP65,707. There are deductions that can be made to these awards and the maximum upper limit for the compensatory award does not apply where an employee is found to be unfairly dismissed in certain circumstances, for example, dismissals in health and safety cases.

On termination of employment, a Notice of Termination must be filed with the Department of Employment.

Under the Employment Act 1932, collective redundancy consultation requirements apply where an employer is proposing to dismiss as redundant five or more employees at one establishment within a period of 90 days or less. In such circumstances, the employer must consult with the affected employees' representatives at

the earliest opportunity and at least 60 days before the first dismissal takes place. Employee representatives include representatives of a trade union or representatives elected by the affected employee satisfying the requirements of the Employment Act 1932. The consultation must be undertaken by the employer with a view to reaching agreement with the employee representatives and must include a consultation about avoiding dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals. Further, and as part of the consultation process, the employer shall disclose to the employee representatives and to the director the following in writing:

- the reasons for the proposed redundancies;
- the number and descriptions of affected employees;
- the total number of employees of any such description employed by the employer at the establishment in question;
- the proposed method for the selection of affected employees;
- the proposed method of carrying out the dismissals; and
- the proposed method of calculating the amount of any redundancy payments to be made.

A failure to consult in a collective redundancy situation can give rise to a declaration by the Employment Tribunal, and the Employment Tribunal may also make a protective award of compensation.

Employees dismissed for redundancy reasons are entitled to redundancy pay calculated by a statutory formula that is dependent on the employee's years of service, subject to a maximum of one year's pay and provided that the employee has completed one year's service.

4.5 Employee Representations

There are no general mandatory rights under Gibraltar law except regarding the following.

- Various consultation requirements are imposed on employers in respect of collective redundancy situations (as discussed in **4.4 Termination of Employment Contracts**) or where an employee is affected by a transfer of an undertaking commonly known as TUPE.
- Additionally, the Employment (Information and Consultation of Employees) Regulations 2005 provide a framework for the rights to information and consultation upon the request of employees. In such cases, the employer must make a formal agreement about what business information it will share with its employees and when it will consult them, provided the employer employs a minimum of 50 employees, and 15 employees or 10% of the total workforce (whichever number is greater) make the request. Before the consultation process commences, the employer must arrange for its employees to elect the relevant number of information and consultation representatives by ballot: this means one representative per 50 employees or part thereof, provided that that number is at least two and does not exceed 25.
- Sub-regulation 4(1) of the Employment (Trade Union Recognition) Regulations provide that if a trade union wants to negotiate with an employer on behalf of a bargaining unit (defined as the group of employees concerned), it must be (a) registered and (b) recognised by that employer. The trade union may apply in writing to an employer for recognition as a bargaining agent (any such application needing to comply with Sub-regulation 4(4)) with the employer required within ten working days of receipt of that application to inform the trade union in writing

whether it recognises that trade union as a bargaining agent or refuses to recognise the trade union as a bargaining agent and state the reasons thereof (Sub-regulation 4(5)). If the employer accepts the request for recognition then the parties must decide on a bargaining procedure. However, if the employer rejects the request for recognition, but (a) agrees to negotiate further, then a further 20 working days will be provided to negotiate (which can be extended by agreement of both parties under Sub-regulation (7)) or (b) does not agree to negotiate further, then the trade union may apply to the Director of Employment for statutory recognition in accordance with Regulation 5 (Sub-regulation 4(6)). Regulation 5 contains the regulations relating to an application to the Director of Employment for a statutory recognition order directing the employer to recognise the trade union, but there are basic requirements that must be fulfilled for an application for statutory recognition including that the employer must employ a minimum of 21 employees or at least average 21 employees in the 13 weeks ending with the day on which the request was received. There are regulations focusing on collective agreements (Regulation 7), bargaining units and disclosure of information (Regulation 10) and rights to be accompanied to a disciplinary or grievance hearing (Regulation 10).

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Income Tax

Income tax is charged on the profits or gains from any office or employment, including any allowances, perquisites or benefits in kind (such as expense payments, vouchers and credit tokens, living accommodation, car expenditure and loans to employees).

For employees, tax on the income from employment is deducted from wages and salaries under the pay-as-you-earn (PAYE) system. An employer is required to deduct tax from the wages of the employee on each pay, and then pay the tax by the 15th day of the following month.

Taxpayers may, in their tax return, choose between an allowance-based system (ABS) or a gross income-based system (GIBS). However, irrespective of the system opted for, on final assessment the Income Tax Office will apply the system most beneficial to the taxpayer.

Allowance-Based System (ABS)

This system enables an individual to claim certain allowances against assessable income. Allowances include:

- personal;
- spouse;
- child;
- medical insurance premiums paid;
- life insurance premiums paid;
- pension contributions paid;
- first-time home purchase;
- mortgage interest;
- social insurance contributions paid; and
- pensioner.

The tax rates under the ABS are as follows:

- Individuals with gross assessable income not exceeding GBP100,000:
  (a) 15% on the first GBP4,000;
  (b) 18% on the next GBP12,000; and
  (c) 40% on the balance.

- Individuals with gross assessable income exceeding GBP100,000:
  (a) 16% on the first GBP4,000;
  (b) 19% on the next GBP12,000; and
  (c) 41% on the balance.

Gross Income-Based System (GIBS)

Under the GIBS, a taxpayer is entitled to very few allowances/reliefs, but the applicable rates are lower.

The allowances/reliefs available under the GIBS include:

- first-time home purchase;
- mortgage interest;
- pension contributions paid; and
- medical insurance premiums paid.

The tax rates under the GIBS are as follows.

- Individuals with gross assessable income up to GBP25,000:
  (a) 7% on the first GBP10,000;
  (b) 21% on GBP10,001 to GBP17,000; and
  (c) 29% on the balance.
- Individuals with gross assessable income of more than GBP25,000 and up to GBP100,000:
  (a) 17% on the first GBP17,000;
  (b) 20% on GBP17,001 to GBP25,000;
  (c) 26% on GBP25,000 to GBP40,000;
  (d) 29% on GBP40,001 to GBP100,000; and
  (e) 26% on the balance.
- Individuals with gross assessable income of GBP100,000 or more:
  (a) 18% on the first GBP17,000;
  (b) 21% on GBP17,001 to GBP25,000;
  (c) 27% on GBP25,001 to GBP40,000;
  (d) 30% on GBP40,001 to GBP105,000; and
  (e) 27% on the balance.

Any taxpayer with income of GBP11,450 or less is not liable to income tax in Gibraltar.

Social Insurance

Social insurance contributions are payable by every employee in any week in which they work.

Employee contributions are 10% of gross earnings, subject to a minimum of GBP13.00 per week and a maximum of GBP37.00 per week.

Employer contributions are 18% of gross earnings subject to a minimum of GBP29.00 per week and a maximum of GBP51.00 per week.

Individuals aged 60 and over are exempt from paying the employee's share of social insurance contributions.

There is also an exemption (subject to certain conditions) from the employer's and employee's social insurance contribution in respect of an employee's secondary employment.

A credit in respect of the employer's social insurance contributions is available to businesses with ten employees or less. This is increased to 20 employees for new businesses within the first year of operation.

5.2 Taxes Applicable to Businesses

Companies are taxed on a territorial basis of taxation, meaning that only income accrued in or derived from Gibraltar will be subject to taxation in Gibraltar. Accrued in and derived from refers to the location of activities, which gives rise to the profits of the company.

A business whose income arises from an underlying activity that requires a licence and regulation under any law of Gibraltar (such as a business licence or licence issued by the Gibraltar

Financial Services Commission), or is licensed in another jurisdiction but enjoys passporting rights into Gibraltar, shall have its income deemed as accruing in and deriving from Gibraltar.

Intercompany loan interest (which exceeds GBP100,000 per annum) and royalty income shall be deemed to accrue in and derive from Gibraltar if it is received by a company registered in Gibraltar. Intercompany loan interest and royalty income will be subject to tax at 12.5%.

The standard rate of taxation for a company is 12.5%.

There is no VAT or withholding tax on interest, dividend or royalty payments.

Companies could also be subject to import duty on the importation of certain goods, if applicable.

Stamp duty could also be payable on the transfer of a Gibraltar property owned by a company.

Gaming duty is levied at 0.15% on the gross profits of holders of a bookmaker, betting intermediary and gaming operator's licence. The first GBP100,000 of gross profits is exempt from this duty.

5.3 Available Tax Credits/Incentives

There is no capital gains tax, estate duty, wealth tax, gift tax or inheritance tax in Gibraltar.

Category 2 Status

Gibraltar offers the opportunity for high net worth individuals to obtain Category 2 status which places a cap over the tax liability of that individual. Tax is applied to the first GBP118,000 of assessable income (including worldwide income) meaning that a Category 2 individual will pay a maximum of GBP44,740 tax per annum, subject to a minimum tax payable of GBP37,000 per annum (current rates).

The requirements for Category 2 status are as follows:

- must have available for exclusive use approved residential accommodation in Gibraltar for the whole year of assessment (can be either purchased or rented);
- must have a minimum net worth of GBP2 million;
- must have private medical insurance (which must meet the minimum requirements of cover);
- must not have been resident in Gibraltar for five years immediately preceding the Category 2 application; and
- must pay an amount equivalent to the maximum tax payable (currently GBP44,740) as part of a Category 2 application, which will be held as a deposit and used to settle the individual's final tax liability upon leaving Gibraltar.

High Executive Possessing Specialist Skills (HEPSS) Status

HEPSS status is a special employment tax status available to individuals with specialist skills who intend to relocate to Gibraltar to take up employment. An individual in respect of whom a HEPSS certificate is issued shall be charged to tax on the first GBP160,000 per annum of their income under the Gross Income Based tax system of their assessable income only. This would mean that an individual with HEPSS status would pay a fixed amount of GBP43,140 tax per annum (current rates) regardless of their employment income.

The requirements for HEPSS status are as follows:

- must have available for exclusive use approved residential accommodation in Gibraltar for the whole year of assessment (can be either purchased or rented);
- must possess skills that are necessary to promote and sustain economic value in Gibraltar;
- must possess skills that are not readily available in Gibraltar;
- must not have been resident in Gibraltar for three years immediately preceding the HEPSS application; and
- must earn more than GBP160,000 per annum from that employment.

Development Aid

In order to encourage private development in Gibraltar, promoters and developers of approved projects are offered certain incentives such as tax relief, import duty relief and rates relief. In order to qualify for the above reliefs, the project needs to be a new project and meet certain criteria.

5.4 Tax Consolidation

Tax consolidation is not available in Gibraltar.

5.5 Thin Capitalisation Rules and Other Limitations

Thin capitalisation rules are applicable in Gibraltar. For instance, interest paid on a loan by a company to related parties that are not companies, or loans secured by related parties where the ratio of the value of the loan capital to the equity of the company exceeds 5:1, would be considered a dividend payment and would not be a deductible expense for tax purposes.

The interest limitation rule in Gibraltar provides that exceeding interest expenses are deductible up to the greater of (i) 30% of EBITDA, or (ii) EUR3 million.

The overarching anti-avoidance provision in place in Gibraltar relates to the principle of "artificial and fictitious", as referring to transactions that are seen as inauthentic and not real.

5.6 Transfer Pricing

The general anti-avoidance rules should be interpreted in the manner that best secures consistency with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations and other documents designed as comprising part of the transfer pricing guidelines.

If an amount charged for goods and services by a connected person is not at arm's length, the expense allowed shall be subject to a minimum of (i) the amount of the expense; (ii) 5% of the gross turnover of the company; or (iii) 75% of the pre-expenses profit of the company.

5.7 Anti-evasion Rules

A person commits an offence if they are knowingly involved in the fraudulent evasion of income tax by them or any other person, and could be imprisoned for up to seven years.

6. Competition Law

6.1 Merger Control Notification

On 1 January 2021, the Competition Act 2020 (the "Act") was introduced into Gibraltar law. The Act is the primary legislation governing merger control in Gibraltar. Under the Act, notification of arrangements or proposed arrangements which might have resulted or might result in the creation of a "relevant merger situation" may be done on a voluntary basis.

A "relevant merger situation" is created for the purpose of the Act if two or more enterprises "cease to be distinct" and the value of the turnover in Gibraltar of the enterprise being taken over exceeds certain thresholds or meets the share of supply test.

Enterprises will be deemed to "cease to be distinct" if they are brought under common ownership or control.

Enterprises will be treated as being under common control if they are:

- enterprises of interconnected bodies corporate;
- enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control; or
- an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate.

The threshold for the value of the turnover in Gibraltar of the enterprise being taken over must exceed: (i) GBP1 million, if in the course of the enterprise ceasing to be distinct, a person or persons has brought a relevant enterprise under the ownership or control of the person or group; or (ii) GBP25 million in any other case.

The share of supply test is met if:

- as a result of the enterprises ceasing to be distinct, one or both of the conditions mentioned in Subsections (4) and (5) (as set out below) prevails or prevails to a greater extent; or
- in the course of the enterprises ceasing to be distinct, a person or group of persons has brought a relevant enterprise under the ownership or control of the person or group mentioned in Subsections (6) and (7) (as set out below) was satisfied in relation to the relevant enterprise before it ceases to be a distinct enterprise.

For the purpose of Subsection (4), in relation to the supply of goods of any description, at least two thirds of all the goods of that description which are supplied in Gibraltar:

- are supplied by one and the same person or are supplied to one and the same person; or
- are supplied by the persons by whom the enterprises concerned are carried on, or are supplied to those persons.

For the purpose of Subsection (5), in relation to the supply of services of any description, the supply of services of that description in Gibraltar is to the extent of at least two-thirds:

- supply by one and the same person, or supply for one and the same person; or
- supply by the persons by whom the enterprises concerned are carried on, or supply for those persons.

For the purpose of Subsection (6), in relation to the supply of goods of any description:

- at least two thirds of all goods of that description which were supplied in Gibraltar were supplied by or to the person or persons by whom the enterprise was carried on; and
- that supply was made in connection with activities of the enterprise by virtue of which it was a relevant enterprise.

For the purpose of Subsection (7), in relation to the supply of services of any description:

- the supply of services of that description in Gibraltar was to the extent of at least two thirds of all the services of that description, supply by or for the person or persons by whom the enterprise is carried on; and
- that supply was made in connection with activities of the enterprise by virtue of which it was a relevant enterprise.

6.2 Merger Control Procedure

Under the Act, notices of arrangements or proposed arrangements which might have resulted or might result in the creation of a relevant merger situation may be given to the Gibraltar Competition and Markets Authority (GCMA) on a voluntary basis.

Any such notice must contain the information and be in the form prescribed by the GCMA. Where the GCMA is satisfied that a merger notice meets the requirements set out in the Act, the GCMA must give notice to that effect to the person who gave the merger notice.

In the absence of an extension, the GCMA is required, so far as is practicable, to take such action as it considers appropriate to bring the existence of the proposal, the fact that the merger notice has been given and the date on which the period for considering the notice may expire to the attention of those whom the GCMA considers would be affected if the arrangements were carried into effect within 40 working days, beginning with:

- the first working day after the day on which the GCMA gives notice to the person who gave the merger notice; or
- the first working day after the day on which the GCMA informs the person carrying on the enterprises concerned by the notice that it has sufficient information to enable it to bring an investigation.

The GCMA may extend the initial period if it considers that a relevant person has failed (with or without reasonable excuse) to comply with any requirement of a notice under Section 168 requiring them to attend as a witness and produce documents in relation to the case in question.

6.3 Cartels

Under Part VI of the Act, an individual is guilty of an offence if they agree with one or more other persons to make or implement, or cause to be made or implemented, arrangements of the following kind relating to at least two undertakings ("A" and "B").

The arrangements must be ones which, if operating as the parties to the agreement intend, would:

- directly or indirectly fix a price for the supply by A in Gibraltar (other than to B) of a product or service;
- limit or prevent supply by A in Gibraltar of a product or service;
- limit or prevent production by A in Gibraltar of a product;
- divide between A and B the supply in Gibraltar of a product or service to a customer or customers;
- divide between A and B customers for the supply in Gibraltar of a product or service; or
- be an arrangement under which, in response to a request for bids for the supply of a product or service in Gibraltar, or for the production of a product in Gibraltar (i) A but not B may make a bid, or (ii) A and B may each make a bid but, in one case or both, only a

bid arrived at in accordance with the arrangements.

Unless one of the last three points as set out above apply, the arrangements must also be ones which, if operating as the parties to the agreement intend, would:

- directly or indirectly fix a price for the supply by B in Gibraltar (other than to A) of the product or service;
- limit or prevent supply by B in Gibraltar of a product or service; or
- limit or prevent production of the product by B in Gibraltar.

Any person that is guilty of a cartel offence is liable:

- on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or both;
- on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum (GBP10,000), or to both.

Proceedings for a cartel offence may only be instituted with the consent of the Attorney General and no proceedings may be brought in respect of an agreement outside Gibraltar, unless it has been implemented in whole or in part in Gibraltar.

The GCMA has the power to conduct an investigation if there are reasonable grounds for suspecting that a cartel offence has been committed.

6.4 Abuse of Dominant Position

Under Chapter 2 of the Act, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position within a market is prohibited if it may affect trade within Gibraltar. For the purpose of the Act, conduct may constitute such an abuse if it consists of:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contract.

The prohibition set out above is subject to certain exclusions. These exclusions cover a number of scenarios including: services of general economic interest, compliance with legal requirements, avoidance of conflicts with international obligations and reasons of public policy.

Where the GCMA has reasonable grounds for suspecting that the prohibition has been infringed, it may conduct an investigation. If the GCMA forms a decision that the conduct infringes the prohibition, it may give to such a person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. A direction may, in particular, include provision requiring the person concerned to modify the conduct in question or require them to cease that conduct.

If a person fails without reasonable excuse to comply with a direction, the GCMA may apply to the court for an order requiring the defaulter to

make good their default within a time specified in the order, and if the direction relates to anything to be done in the management or administration of an undertaking, to require the undertaking or any of its officers to do so.

If the GCMA is satisfied that an infringement has been committed intentionally or negligently by an undertaking, it may require the undertaking concerned to pay the GCMA a penalty not exceeding 10% of the turnover of the undertaking in respect of the infringement.

7. Intellectual Property

7.1 Patents

A patent is a form of intellectual property which grants the inventor the right to exclude others from making or selling their invention for a period of time, thus being able to take legal action against anyone who makes, uses, sells or imports the invention without their permission. The invention must not be specifically excluded from protection.

Original applications to register a trade mark or patent in Gibraltar cannot be made; the Gibraltar Registry will only replicate successful registrations made in the UK Intellectual Property Patent Office.

The grantee of a UK patent may apply within three years from the date of issue of the patent to have such a patent registered in Gibraltar in accordance with Section 2 of the Patents Act 1924.

As part of the registration process, the following documents must be submitted to the Gibraltar Registry in accordance with Section 3 of the Patents Act 1924 together with the application for registration of a patent (Form 1) and a filing fee of GBP30 in accordance with the Patent Rules:

- certified copies of the specification(s) (including drawings, if any) of the UK patent; and
- certificate of the Comptroller-General of the UK Patent Office giving full particulars of the issue on such specification(s) and, in the case of a patent treated as being granted in the UK by virtue of the provisions of Section 2 of the Patents Act 1924, a certificate by an officer duly authorised under the Patents Act that the UK has accepted the European Patent (UK) designating the patent as being effective in the UK and that the particulars of the application are true.

Upon such an application being received, together with the documents mentioned in Section 3, the Registrar of Patents shall issue a certificate of registration in accordance with Section 4 of the Patents Act 1924. The protection of a patent will remain valid for as long as the UK patent is valid; the time period is 20 years from the date of issue of the UK patent, provided that the applicable renewal fees have been paid accordingly.

Patent rights are able to be enforced against a party through the UK or Gibraltar courts. The remedies for patent infringement include the seizure/destruction of the infringing goods, monetary damages and injunctive relief. Section 7 of the Patents Act 1924 outlines the powers of the Supreme Court of Gibraltar and states that:

“The Supreme Court shall have power upon the application of any person who alleges that his interests have been prejudicially affected by the issue of a certificate of registration, to declare that the exclusive privileges and rights conferred by such certificate of registration have not been

acquired on any of the grounds upon which the United Kingdom patent might be revoked under the law for the time being in force in the United Kingdom.

Provided that such grounds shall be deemed to include the manufacture, use or sale of the invention in Gibraltar before the priority date applicable to the patent in the United Kingdom, but not to include the manufacture, use or sale of the invention in Gibraltar by some person or persons after the priority date applicable to the patent in the United Kingdom and before the date of the issue of the certificate of registration under Section 4.

For the purposes of this proviso the expression 'priority date' in its application to a patent in the United Kingdom has the meaning assigned to it in Section 5 of the Patents Act, 1949, or any other Patents Act for the time being in force."

7.2 Trade Marks

A trade mark is a sign which can distinguish the trade origin of goods and/or services from those of competitors. A trade mark must be considered to be distinctive, which means it can be recognised as a sign that differentiates the origin of goods and/or services from those of other sources. A trade mark may include words, sounds, logos, colours, shape or any combination thereof.

The Registrar of Trade Marks deals with the registration of trade marks under the Trade Marks Act 1948 and the Trade Marks Rules 1948. It is not possible for originating applications to be made in Gibraltar. In accordance with Section 3 of the Trade Marks Act 1948, and subject to Part 3 of that Act, any person being the registered proprietor of a trade mark in the United Kingdom by virtue of an entry in the register of trade marks kept under the Trade Marks Act 1994, or any person deriving title from such registered proprietor by assignment or other mode of transfer, may apply at any time during the existence of the registration in the United Kingdom to have such trade mark registered in Gibraltar in respect of some or all of the goods comprised in the United Kingdom registration.

Part 3 of that Act refers, in particular, to the following.

- An international trade mark (UK) (ie, a trade mark entitled to protection in the UK which results from an international application made on or after 1 January 2021 for registration under the Madrid Protocol and designates the UK) where the registered proprietor of an international trade mark (UK) shall enjoy in Gibraltar the like privileges and rights as though the certificate of registration of the international trade mark (UK) had been issued with an extension to Gibraltar. Those privileges and rights shall continue in force only for so long as the registration in the UK remains in force.
- A comparable trade mark (EU) and (UK) where the registered proprietor of a trade mark registered in the UK as a comparable trade mark (EU) or a comparable trade mark (IR) under the Trade Marks Act 1994 shall enjoy in Gibraltar the like privileges and rights as though the registration in the United Kingdom had been extended to Gibraltar, until the date of expiry of the registration of such trade mark. Those privileges and rights conferred shall continue in force only for so long as the registration of the comparable trade mark (EU) or the comparable trade mark (IR), as the case may be, in the UK remains in force.

The following documents are required in order to register a trade mark under the Trade Marks Act 1948:

- application for registration of a trade mark (Form 1) (the Trade Marks Rules 1948);
- certified representation of the trade mark and a certificate of the Comptroller of the UK Patent Office (under their title of Registrar of Trade Marks) giving full particulars of the registration of the trade mark in the UK and such other documents as may from time to time be prescribed (Section 4 of the Trade Marks Act 1948);
- where the trade mark to be registered is a device, two prints of the trade mark; and
- the applicable filing fee of GBP30 (the Trade Marks Rules 1948).

Once all the relevant documents have been submitted to the Gibraltar Registry, the Registrar will then enter the prescribed particulars in the register and shall issue a certificate of registration to the applicant, who shall then be the registered proprietor in Gibraltar of the trade mark in respect of the goods entered in the register.

The registration of the trade mark is renewable every ten years and valid in Gibraltar as long as it is valid in the UK or the EU.

7.3 Industrial Design

Industrial design is an intellectual property right that legally protects the visual design of objects or part of an object in the territories it is registered in, and constitutes the ornamental aspect of an object. In Gibraltar, there are two forms of industrial design: registered and unregistered.

Designs registered in the UK are automatically protected in Gibraltar by virtue of Section 2 of the Gibraltar Designs Act 1928. UK-registered design right applications are made and obtained through the UK Intellectual Property Office.

A design is legally defined as being the appearance of the whole or part of an object resulting from the features, shape, colours or materials of the object or ornamentation. Both 3D and 2D designs are protected by registered designs. The design must not have been publicly disclosed or published within the EEA prior to being registered. There is, however, a 12-month grace period following the disclosure which allows the designer to make its application.

An unregistered design right in the UK arises automatically on the creation of an original object and where it has been recorded in an article or design document, subject to the provisions of Part 3 of the UK Copyright, Designs and Patents Act 1988.

Designs registered in the UK have their rights extended and protected in Gibraltar, and there is no need for any applications to be made in Gibraltar. Designs produced in Gibraltar enjoy reciprocal protection in the UK under Part 3 of the UK Copyright, Designs and Patents Act 1988.

A registered design can be renewed every five years up to 25 years, subject to the payment of fees. The length of protection afforded to an unregistered design according to Section 216 of the UK Copyright, Designs and Patents Act 1988 will be 15 years from the earlier of the end of the calendar year in which the design was first recorded in a design document or an article was first made to the design; or if articles made to the design are made available for sale or hire within five years from the end of that calendar year, ten years from the end of the calendar year in which that first occurred.

Owners of both registered and unregistered designs are able to enforce action through the UK or Gibraltar courts. For unregistered designs, remedies can include injunctive relief, damages or accounting for profit made. For registered designs, remedies can include injunctive relief, damages, accounting for profit made, delivery or destruction of the infringed product.

7.4 Copyright

Copyright is a property right which subsists in sound recordings, films or broadcasts, original literary works – which includes databases, computer programs and preparatory design – dramatic, musical or artistic works and in the typographical arrangement of published editions. Copyright protects the author's work in several ways and prevents others from replicating this work, making an adaptation of this work, putting it on the internet and performing or playing this work in public.

Copyright protection is automatic upon the creation of the qualifying work, so no registration process is required. The length of the copyright is dependent on the type of work – for example, works such as written, sound, films and artistic work will last for 70 years after the author's death.

A copyright holder is able to enforce court proceedings where they believe that there has been an infringement on the copyright, and remedies include damages, injunctions and accounts. It is a criminal offence to infringe copyright.

7.5 Others

Other intellectual property rights in Gibraltar also extend to trade secrets. This is a common law right in which the information contained within has commercial value because it is secret, and the use or disclosure is likely to harm the interests of the trade secret holder in several ways – for example, regarding scientific and technical potential, business or financial interests, strategic positions or the ability to compete.

In accordance with Section 4 of the Protection of Trade Secrets Regulations 2018, it is possible the acquisition of trade secrets in Gibraltar shall be considered lawful if obtained by any of the following means:

- independent discovery or creation;
- observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret;
- exercise of the right of workers or workers' representatives to information and consultation in accordance with any rules of law applicable in Gibraltar; or
- any other practice which, under the circumstances, is in conformity with honest commercial practices.

In accordance with Section 8 of the Protection of Trade Secrets Regulations 2018, the limitation period for bringing a claim for the unlawful acquisition, use or disclosure of a trade secret is six years. The start date for reckoning the limitation period for a claim for the unlawful acquisition, use or disclosure of a trade secret against an infringer begins with the later of:

- the day on which the unlawful acquisition, use or disclosure that is the subject of the claim ceases; or
- the day of knowledge of the trade secret holder.

Where damages are awarded in relation to unlawful acquisition, Section 16 of the Protection of Trade Secrets Regulations 2018 states that all appropriate aspects shall be considered, including:

- any negative economic consequences, including any lost profits, which the trade secret holder has suffered, and any unfair profits made by the infringer;
- elements other than economic factors, including the moral prejudice caused to the trade secret holder by the unlawful acquisition, use or disclosure of the trade secret; and
- where appropriate, damages may be awarded on the basis of the royalties or fees which would have been due had the infringer obtained a licence to use the trade secret in question.

8. Data Protection

8.1 Applicable Regulations

In Gibraltar, the overarching national law on data protection is the Data Protection Act 2004 (DPA 2004). The DPA 2004 was amended on 25 May 2018 to:

- implement the General Data Protection Regulation (Regulation (EU) 2016/679) (EU GDPR);
- transpose the Law Enforcement Directive (Directive (EU) 2016/680);
- implement a data protection framework under the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data of 1981 (Convention 108); and
- implement Articles 126–130 of the Convention of 19 June 1990 applying the Schengen Agreement of 14 June 1985.

The changes made to the DPA 2004 took Brexit into account, as well as the Data Protection Act 2018 of England and Wales (DPA 2018). Both statutes share a similar structure, but with notable differences, such as the repeal of Part IV of the DPA 2004, which related to intelligence service processing and was similar in structure and content to Part 4 of the DPA 2018.

Following the end of the Brexit transition period (see **1. Legal System**), the DPA 2004 was further amended, and the EU GDPR now forms part of Gibraltar law by virtue of Section 6 of the European Union (Withdrawal) Act 2019, as read with (i) Section 2(1B)(a) of the DPA, and (ii) the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019. This is now referred to as the "Gibraltar GDPR", which is essentially the EU GDPR read with certain modifications. It is, therefore, important to read the Gibraltar GDPR and the DPA 2004 side-by-side.

The DPA 2004 and the Gibraltar GDPR are supplemented by the following:

- the Communications (Personal Data and Privacy) Regulations 2006 (CPDP Regulations), made under the Communications Act 2006; and
- the Data Protection (Search and Seizure) Regulations 2006 (DPSS Regulations).

The Communications Act 2006, together with the CPDP Regulations, transpose the E-Privacy Directive (Directive 2002/58/EC), imposing obligations on publicly available electronic communications services providers and users when they process personal data.

The DPSS Regulations, among other things, authorise justices of the peace to issue war-

rants to the supervisory authority (see **8.3 Role and Authority of the Data Protection Agency**) in certain circumstances, allowing them to enter premises, inspect and seize as required.

8.2 Geographical Scope

Both the EU GDPR and Gibraltar GDPR have what is referred to as "extraterritorial effect", in that, respectively, the EU GDPR can apply outside the EU, and the Gibraltar GDPR can apply outside Gibraltar. This is achieved in a similar manner in both pieces of legislation. Focusing on Gibraltar, the territorial scope of the Gibraltar GDPR can extend to any of the following situations.

- Where a controller/processor has an "establishment" in Gibraltar and processing occurs "in the context of the activities" of that establishment. This applies regardless of whether the processing occurs in Gibraltar or not.
- Where goods or services are offered to data subjects in Gibraltar, irrespective of whether payment is required by a non-Gibraltar controller/processor. There should be an element of targeting and other evidence will be considered, such as whether consumers are able to pay in their local currency, or whether a marketing campaign has taken place. This test is also not limited by citizenship or residency of the data subjects.
- Where the monitoring of behaviour of data subjects in Gibraltar is carried out by a non-Gibraltar controller/processor. Examples of monitoring would be predicting trends, or use of geo-location.
- Where a controller is not established in Gibraltar, but in a place where Gibraltar law applies by virtue of public international law.

Under Article 27 of the Gibraltar GDPR, controllers and processors established outside of Gibraltar would need to consider the appointment of a local representative in Gibraltar, if they are offering goods or services or monitoring the behaviour of data subjects in Gibraltar.

Controllers and processors based in Gibraltar offering goods or services or monitoring the behaviour of data subjects in the EU are subject to the EU GDPR, and will need to consider their obligations in that context. In particular, until the issue of adequacy is decided by the European Commission in respect of Gibraltar, appropriate safeguards (eg, such as standard contractual clauses) would need to be considered prior to a data transfer from Gibraltar to the EU or vice versa, given that, at the time of writing, Gibraltar is considered as a "third country" for the purposes of Chapter V of the EU GDPR.

8.3 Role and Authority of the Data Protection Agency

The DPA 2004 designates the Gibraltar Regulatory Authority (GRA) as the Information Commissioner.

The GRA is an independent statutory body responsible for the enforcement of the DPA 2004, as read with the Gibraltar GDPR, and its primary role as Information Commissioner is to uphold the privacy rights of individuals.

Under changes made to the DPA 2004, the GRA now has increased regulatory powers under that Act, as well as those granted under Article 58 of the Gibraltar GDPR. These powers are classed as "investigative", "corrective" and "authorisation and advisory", allowing the Information Commissioner to, among other things:

- bring or defend legal actions in Gibraltar or other courts;

- co-operate with and render assistance to supervisory authorities in other states of territories;
- conduct data protection compliance audits;
- issue information notices, requiring others to provide it with information to investigate compliance;
- issue assessment notices to allow it to enter premises, obtain documents and equipment, and interview persons;
- issue enforcement notices, including warnings and reprimands, which may impose temporary or definitive bans on processing, or order a controller/processor to take corrective action; and/or
- issue monetary penalty notices.

Article 57 of the Gibraltar GDPR also prescribes the tasks and functions of the Information Commissioner. These include, but are not limited to: promoting awareness of rights and obligations; handling complaints; conducting investigations and taking enforcement action against those controllers or processors failing to comply; and certifying and approving certain mechanisms and schemes such as contractual clauses or binding corporate rules.

9. Looking Forward

9.1 Upcoming Legal Reforms

The Legislative Reform Programme (LRP), which came into effect on 15 January 2020, consolidated and rationalised over 90 financial services legislative instruments into one act (the Financial Services Act 2019) and additional supporting, sector-specific LRP Regulations. The LRP Regulations complement the new structure, concepts and terminology of the Financial Services Act 2019 by consolidating prudential business conduct and other requirements applicable to each financial services industry within respective sets of regulations.

The UK and Gibraltar governments have agreed to reciprocal market access for UK and Gibraltar financial services firms. These are unique arrangements not available to any other Overseas Territory, Crown Dependency or Third Country and are being referred to as the Gibraltar Authorisation Regime (GAR). The UK Government has delegated the introduction of the GAR to HM Treasury and the current estimated timeline is that the GAR will come into force in late 2024 or early 2025. Until the GAR is in force, passporting rights will continue for firms operating between the UK and Gibraltar preserving the status quo of deemed-passporting for Gibraltarian firms following the end of the Brexit Transition Period. These transitional arrangements have been extended in the UK until Tuesday 31 December 2024 and may be further extended until such time as permanent arrangements under the GAR are in place.

No further legislative reform is expected in the near future in Gibraltar.

INDIA

Law and Practice

Contributed by:
Anoop Narayanan, Priyanka Gupta and Sri Krishna
ANA Law Group

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ANA Law Group is a full-service law firm based in Mumbai, with a team of experienced professionals who have broad industry knowledge and specialisation across a wide spectrum of business areas. The firm has significant experience in counselling international clients on data privacy and cybersecurity law issues in India, and regularly represents clients from various industries. The firm works with global clients to implement privacy programmes, create compliant processes, products, and services. It also assists international companies with carrying out transfer impact assessments, drafting and negotiating contracts with Indian counterparts, and preparing privacy policies for international companies operating in India and their Indian subsidiaries. The firm routinely advises clients on issues such as permitted data processing, consent requirements, data collection, retention and disclosure, regulatory requirement compliance, transfer of sensitive personal data, security breaches and drafting security breach policies, on international compliance projects, and on prosecutions and offences.

Authors

Anoop Narayanan is the founder of ANA Law Group and a leading Indian lawyer, with three decades of experience. Focusing on a broad range of IP, IT, outsourcing, employment, technology, data protection, telecommunications and entertainment law matters, his practice encompasses both litigation and commercial or transactional advice. He has worked with India's most high-profile companies, as well as global corporates in the manufacturing, banking and finance sectors and telecommunications and technology companies. His experience and expertise in TMT and data privacy have been invaluable in setting up the Indian operations of large global technology companies and in handling several India-bound outsourcing transactions with major Indian IT companies.

Priyanka Gupta is a senior attorney at ANA Law Group and has been in practice for 13 years. Ms Gupta advises multinational banks, financial institutions, technology businesses and other companies on TMT transactions, regulatory aspects, employment and data privacy laws. She also has extensive experience in handling advisory, transactional and litigation projects in all areas of TMT and intellectual property practice.

Sri Krishna is a senior associate at ANA Law Group working in its TMT and IP practice group. He advises multinational technology companies and other global businesses on Indian legal matters. He has extensive experience in handling advisory projects in all areas of intellectual property practice. He also advises international clients on healthcare, and pharmaceutical-related issues in transactional, compliance, and regulatory matters.

ANA Law Group

7th Floor, Keshava
Bandra Kurla Complex
Bandra East
Mumbai - 400 051
India

Tel: +91 22 6112 8484
Fax: +91 22 6112 8485
Email: mailbox@anaassociates.com
Web: www.anaassociates.com

1. Legal System

1.1 Legal System and Judicial Order

India is a common law jurisdiction, along with a combination of codified laws and judicial precedents. The laws relating to companies, contracts, and property are largely based on principles of common law.

India has an independent judiciary with an established hierarchy of courts, which follow an adversarial system and a higher court's precedent is binding on the lower courts. The lower court judgments are appealable to higher courts. India does not have a jury system, and all issues of fact and law are decided by the judges.

The judicial order followed in India is as follows:

- Supreme Court of India: The Supreme Court is the apex court of the country, comprising the Chief Justice of India and 25 other judges, and it is the highest court having appellate jurisdiction in the country. Additionally, the Constitution of India gives extensive original jurisdiction to the Supreme Court for enforcement of fundamental rights, and the court is empowered to issue directions, orders, or writs, to adjudicate challenges to the legality of actions of government authorities. Any party aggrieved by the actions of such authorities may petition the Supreme Court for relief, such as the issuance of a writ in the form of habeas corpus, mandamus, prohibition, quo warranto, and certiorari, to enforce them.
- High Courts: India has a total of 25 High Courts having appellate jurisdiction from the lower courts. The Presidency High Courts in Delhi, Mumbai, Calcutta (Kolkata), and Madras (Chennai) enjoy original jurisdiction. Further, some of the High Courts have special divisions to exclusively deal with a certain type of cases, such as Delhi High Court's Intellectual Property Division, Commercial Division, etc.
- District Courts: The district courts are established for every district or a group of districts with civil and criminal jurisdictions. Additionally, there are special courts such as courts of metropolitan magistrates in metropolitan cities specifically to adjudicate a large number of matters to be heard in the cities.

- Lok Adalats: These are city/town-level subordinate courts that provide means of alternate dispute resolution.
- Tribunals: Tribunals are quasi-judicial authorities set up by the government of India with the power granted under the Constitution of India to adjudicate specific matters concerning intellectual property rights, company disputes, land, tax, consumer complaints, etc. Some of the tribunals include district and state consumer dispute forums, income tax appellate tribunals, company law tribunals, labour courts, etc.

Additionally, specialised regulatory authorities have the power to issue regulations in various fields. For instance, banking, financial, and foreign exchange dealings are regulated by the Reserve Bank of India (RBI), the public securities market is regulated by the Securities and Exchange Board of India (SEBI), and the insurance industry is regulated by the Insurance Regulatory and Development Authority (IRDAI).

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

India has a liberal foreign investment regime and foreign direct investment (FDI) is permitted through either the automatic or government route. In India, the Department for Promotion of Industry and Internal Trade (DPIIT), a department under the Ministry of Commerce and Industry, is the nodal department for the formulation of government policy on FDI. The foreign investment and foreign currency transactions are regulated by RBI by the foreign exchange laws.

FDI is allowed through the following routes:

- Automatic route: Under the automatic route, no investment requires prior approval of the government or RBI, so long as the investment is within the sectoral cap and meets the conditions prescribed for that sector.
- Government approval route: Under the government approval route, prior approval of RBI, the concerned government authority, or ministry is required.

The applicable route depends on the sector of the proposed investment and the extent of shareholding to be acquired.

Permitted Sectors

FDI is permitted up to 100% on the automatic route, subject to applicable laws/regulations and other prescribed conditions. While 100% FDI is allowed in many sectors, others may have a specified sectoral cap (ie, the maximum amount that can be invested by foreign investors in an entity). For instance, 100% FDI is permitted through the automatic route for sectors such as agriculture and animal husbandry, plantation, petroleum and natural gas, broadcasting carriage services, airports, construction development, trading, e-commerce activities, railway infrastructure, pharmaceuticals, other financial services, etc. Whereas public sector banking, satellites, print media, broadcasting content, multi-brand retail trading, etc, fall under the government approval route.

Prohibited Sectors

FDI is currently prohibited in the following sectors:

- lottery business;
- gambling and betting, including casinos;
- chit funds;

- National Initiative for Developing and Harnessing Innovations (Nidhi) company, a non-banking finance business;
- real estate business or construction of farm-houses;
- manufacture of cigars, cigarettes, etc, of tobacco or tobacco substitutes; and
- activities/sectors that are not open to private sector investment (eg, atomic energy).

Foreign technology collaborations in any form including licensing for franchise, trade mark, brand name and management contract are also prohibited for lottery business and gambling and betting activities.

Foreign Portfolio Investments

Foreign Portfolio Investors (FPI) may make investments in the manner and subject to the terms and conditions specified in Schedule II of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.

Foreign Venture Capital Investment

A Foreign Venture Capital Investor (FVCI) may make investments in the manner and subject to the terms and conditions specified in Schedule VII of Foreign Exchange Management (Non-Debt Instruments) Rules 2019.

2.2 Procedure and Sanctions in the Event of Non-compliance

Procedure and Timeline for Foreign Investors to Obtain Approval

The DPIIT has issued a standard operating procedure (SOP) for processing FDI proposals, which contains the following procedure:

- Proposals for foreign investment requiring government approval are to be filed online on the Foreign Investment Facilitation Portal.
- The DPIIT will identify and assign the proposal to the relevant competent sectoral authority within two days of the online filing. The Administrative Ministries/Departments would be the competent authorities for approval of foreign investment.
- The DPIIT will also circulate the proposal for comments to the RBI, the Ministry of External Affairs, and in case of proposals requiring security clearance, the Ministry of Home Affairs.
- Within 12 days, the competent authority shall scrutinise the proposal and documents attached and ask the applicant for relevant additional information/documents, if required.
- Once the processing of the proposal is complete, the competent authority shall decide within four weeks and convey the decision to the applicant.

In case of proposals involving a total foreign equity inflow of more than INR50 billion, the competent authority shall place the same for consideration by the Cabinet Committee on Economic Affairs (CCEA).

Criteria

Based on the SOP, a foreign investment approval application will have to be accompanied by the following key particulars and documents:

- summary of the proposed foreign investment;
- audited financial statements of the investor and investee entities for the preceding financial year;
- a signed copy of the joint-venture agreement, shareholders' agreement, etc.;
- particulars of the ownership and control of the parties;
- foreign inward remittance certificates in case of post-facto approvals; and

- valuation certificate issued by an approved chartered accountant and statutory auditor.

Penalties

Violations of the FDI policy are covered by the penal provisions of the Foreign Exchange Management Act 1999 (FEMA Act). If a person or a company contravenes any FDI regulations, or any conditions subject to which approvals are issued by the government/RBI from time to time, the contravener upon adjudication shall be liable to a penalty of up to three times the amount involved in the contravention. In cases where the amount involved is not quantifiable, the penalty may extend up to INR200,000. Further, for a contravention that continues beyond the first day, an additional penalty of up to INR5,000 for every day of delay is also payable by the contravener (Annexure 5, paragraph 3, FDI policy 2020).

2.3 Commitments Required From Foreign Investors

Apart from the entry routes and sectoral caps specified in the FDI policy, the provisions do not cover any specific commitments based on which authorities may approve. However, the investors are required to comply with all relevant sectoral laws, regulations, rules, security conditions, and state/local laws/regulations to be liable for approval. In some cases, the concerned ministry or government authority may exercise discretion in requiring additional clarifications or commitments from the investors, such as clarifications on future business plans. Similarly, the concerned authority may also require the investor and investee entities to comply with commitments such as non-compete arrangements, compliance with pricing norms, etc.

2.4 Right to Appeal

There is no specific provision for filing an appeal against decisions/rejections of the competent authorities. However, this will not prevent the parties from submitting a revised proposal for review.

Further, in case a proposal for foreign investment complies with the FDI policy and other applicable regulations and conditions and is arbitrarily rejected by the competent authority, the investor will have the option to avail constitutional remedies by seeking judicial review of the authority's actions.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

In India, the Companies Act 2013 (Companies Act) regulates the incorporation, management, and winding up of companies in India. Further, there are other specific legislations such as the Limited Liability Partnership Act 2008, the Partnership Act 1932, The Societies Registration Act 1860, etc. The most common types of corporate vehicles available in India and their characteristics are as follows:

- A one person company is a company with a single person as its member.
- A private company is a company with the minimum amount of paid-up share capital as may be prescribed, with a maximum of 200 members. Private companies do not give out their securities for subscription to the public. The minimum number of members needed to form a private company is two in general and one in the case of a one-person company.
- A public company is a company that lists out its securities for the public to subscribe to, with a minimum paid-up share capital as may be prescribed. The minimum number of members needed to form a public company is seven.

- A small company is a company except a public company, that has a maximum paid-up share capital of INR4 million, and a maximum turnover of INR400 million.
- A partnership firm is a partnership where two or more persons come together to establish a business and divide its profits amongst themselves in the agreed ratio.
- A limited liability partnership (LLP) is where the partners have limited liability. LLPs are separate legal entities having perpetual succession. The change in partners of an LLP will not affect its rights, liabilities or existence. The minimum number of members to form an LLP is two.

3.2 Incorporation Process

The company incorporation procedure is prescribed under the Companies Act and Companies (Incorporation) Rules 2014, and the process broadly involves the following steps:

- company name reservation;
- incorporation of the new company;
- allotment of Director Identification Numbers (DINs) for at least three directors;
- securing a Permanent Account Number (PAN);
- securing a Tax Deduction and Collection Account Number (TAN);
- securing a Goods and Services Tax Identification Number (GSTIN);
- registration with the Employees' State Insurance Corporation and Employees' Provident Fund Organisation (EPFO);
- opening a banking account for the company; and
- securing a professional tax registration for the new company.

The MCA has recently launched a streamlined portal that allows applicants to make a single application for all the foregoing services at the same time.

Company

An application for incorporation of a company will have to be submitted to the concerned Registrar of Companies (RoC) having the jurisdiction, along with the required documentation, such as details of the directors and subscribers, memorandum of association (MoA), and articles of association (AoA).

The RoC, if satisfied with the application, will issue a certificate of incorporation in the prescribed form along with the Corporate Identity Number.

Partnership Firm

To incorporate a partnership firm, a duly signed statement, along with the prescribed fee and a true copy of the partnership deed containing the firm's particulars, must be sent by post or delivered to the registrar of the area where the firm is currently or proposed to be situated. This must be done within one year from the date the firm was constituted.

The registrar will thereafter enter the firm's statement in the Register of Firms. Once the entry is made, the firm is deemed to be registered. The registered firm must use the suffix "(Registered)" immediately.

Limited Liability Partnership (LLP)

Once the incorporation document is submitted to the registrar, the registrar, if satisfied, will register the incorporation document and grant a certificate of registration to the LLP.

Normally, the incorporation process takes one to two weeks.

3.3 Ongoing Reporting and Disclosure Obligations

The Ministry of Corporate Affairs (MCA) has mandated detailed financial reporting by all companies, both public and private. Financial reporting has been made easier with online portals over recent years. Further, all such filings and disclosures are publicly available in the MCA database for a nominal fee.

Financial Disclosure

Each company must carry out the annual reporting of all audited financials within six months of the closing of the financial year, along with a Directors' Report and a Directors' Responsibility Statement. Further, the SEBI mandates that all publicly listed companies must report their shareholding pattern, corporate governance report, statement on investor complaints, and audited financial statements, to all the stock exchanges where their securities are traded.

The MCA also requires companies to provide the following additional information while reporting the financial statements:

- disclosure of shareholding of promoters;
- maturities of long-term borrowings;
- immovable property details;
- aging schedule of capital work in progress, intangible property and trade payables and receivables; and
- disclosure of financial ratios such as current ratio, debt-equity ratio, return of equity ratio, net capital turnover ratio and return on investment.

Corporate Governance Reporting/Disclosure

The reports must contain detailed particulars regarding the company, the number of board meetings held in the financial year, related-party transactions, the performance of subsidiaries and joint ventures, and the directors' appointment or resignation, among other things.

Companies must report any change in the directors, managing directors, secretary, or manager, within a stipulated time of thirty days from the date of change. The Companies Act allows for private companies to amend their AoA and AoAs to contain entrenchment provisions. For instance, the AoA can only be altered if certain requirements like that of special resolution (a resolution having a three-fourths majority) have been met. A private company may also amend its AoA by way of a special resolution to change itself to a public company. This alteration can only have effect once the appropriate tribunal passes an order approving it. Thereafter, such amended AoA along with a copy of the tribunal's order shall be filed before the RoC within 15 days.

The Directors' Responsibility Statement filed along with the annual reports must contain a declaration regarding the compliance of applicable accounting standards and maintenance of accounting records.

3.4 Management Structures

The management structure of a company under the Companies Act should consist of individual directors, collectively known as the board of directors. Further, a public company must have a minimum of three directors, a private company shall have a minimum of two directors, and both shall have a maximum of fifteen directors. In case a company wishes to have more than fifteen directors, the board of directors shall pass a special resolution of not less than a three-fourths majority of its members.

The board management structure is one-tier, and there is no distinction between a managerial or

supervisory board. Further, at least one director of the company shall be an Indian resident. Additionally, in case of a public company that is listed on the stock exchange, one third of its total directors should be independent directors. The central government based on the class of the public company can prescribe a minimum number of independent directors. Furthermore, public listed companies with paid-up capital of INR1 billion or a turnover exceeding INR3 billion shall appoint at least one female director.

3.5 Directors', Officers' and Shareholders' Liability

The main duties of the directors as prescribed under the Companies Act are as follows:

- duty to act in accordance with the AoA;
- duty to act in good faith to promote the bona fide interests of a company, employees, shareholders, the community in general, and environment protection;
- exercise duties with reasonable care, skill and diligence;
- duty to exercise independent judgement; and
- duty not to be involved in conflicting interests with the company and the duty not to achieve any undue gain or advantage.

The director also has the following responsibilities:

- review the annual budgets, business plans, and oversee major capital expenditures, acquisitions and divestments;
- monitor the company's effectiveness and governance practices;
- monitor and manage potential conflicts of interest of management and board members;
- maintain high ethical standards and consider the interests of stakeholders; and
- facilitate the independent directors to perform their role effectively as board members.

Further, the independent directors' additional duties are also stipulated by the Companies Act.

Additionally, according to the provisions of the Companies Act and case law precedents, directors of a company are jointly liable for losses suffered by the company due to any breach of their duties and may also be personally liable to make good any loss suffered by the company. A director in breach of his/her fiduciary duty towards the company is liable to be removed or disqualified from the company by way of passing a general resolution.

The Companies Act states that a member of the company or officer committing a legal offence shall be liable for imprisonment or a fine as a penalty. The act does not carve out a section for piercing the corporate veil; however, it has provided the power to the courts and tribunals to disregard the privilege of the corporate personality of the company when a member defaults. The courts and tribunals have the power to pass orders in favour of regulating the company's management if the incorporation of the company has been done with misconceived facts and fraudulent tactics and means. The liability shall extend to the first directors, the promoters and the individual making a declaration under the Companies Act.

4. Employment Law

4.1 Nature of Applicable Regulations

Until recently, the labour and employment law framework was dealt with by a combination of central and state legislations focused on various aspects of wages, industrial relations, social

security and welfare benefits, and working conditions, health and safety.

One of the recent developments in Indian labour and employment law has been the codification of over 29 central laws into four labour codes, which include the following:

- Code on Wages 2019, which replaces various wage-related laws, including those on equal remuneration, payment of bonuses and the minimum wage;
- Occupational Safety, Health and Working Conditions Code 2019, which merges thirteen laws regulating the health and safety conditions of workers in establishments;
- Industrial Relations Code 2019 (IR Code), replacing the Industrial Disputes Act 1947 (ID Act), the Trade Unions Act, 1926 (TU Act), and the Industrial Employment (Standing Orders) Act 1946 (IE Act); and
- Code on Social Security 2020, which will replace nine social security-related laws in India.

The codes are yet to be fully implemented by the central government and are aimed to address the following issues:

- to provide universal social security coverage to all workers, including those in the informal sector;
- to ensure minimum wages and the timely payment of wages;
- to promote industrial harmony and collective bargaining;
- to protect workers' health and safety; and
- to improve the ease of doing business and compliance.

It is anticipated that the new labour codes will be implemented and enforced after the general elections in May 2024. So far, the provisions of the Code on Social Security 2020 regarding identification of beneficiaries of the employees for receiving statutory benefits through Aadhar Card, and the provisions in the Code on Wages 2019 relating to the "central advisory board in relation to minimum wages" have been made effective by the central government by way of notification. However, the other codes and provisions are yet to be notified.

Collective Bargaining Agreements

In India, collective bargaining is regarded as an effective dispute resolution mechanism, particularly in industries where the employees are largely unionised, such as manufacturing, construction and mining sectors. The terms and conditions of employment, including welfare activities, banking and medical facilities for the employees, are negotiated and agreed through collective bargaining under the collective agreements. These collective agreements are also structured as memoranda of settlements, which specify various clauses governing the relationship between the employees represented by trade unions and employers. The IE Act requires the employer to consult the employees or their representatives to finalise the terms of employment contained in the organisation's standing orders. Collective bargaining agreements do not usually exist in the private sector, and the employees' collective grievances are dealt with through other means, including labour unions initiating online campaigns and resorting to social media to secure employees their statutory rights.

The IR Code proposes to prohibit and punish the commission of any unfair labour practices, including, interfering, restraining or coercing workers in their right to engage in concerted activities for collective bargaining, and refus-

ing to bargain collectively in good faith with the trade unions/employers.

Employment Agreements

Private sector employees are governed by their employment contracts, which adhere to the general principles of contract law under the provisions of the Indian Contract Act 1872, if such a contract is signed, as Indian law does not mandate employer-employee contracts.

Certain state-specific shops and establishment legislations require an employer to issue an appointment letter in a prescribed form, containing basic information such as the employer's name and address and employee details, wages, allowances and joining date. Furthermore, the rules under the IE Act (to the extent applicable) require that the employer issue a written order on the employee's completion of the probation period.

It is prudent to execute comprehensive employment contracts to capture the key terms and conditions of employment. There are certain implied terms in an employment contract, such as confidentiality obligations, the protection of trade secrets, or good faith and duty of care.

4.2 Characteristics of Employment Contracts

Certain characteristics of an employment contract in India are as follows:

- A comprehensive employment contract must include all the important terms, such as the job description, rate of compensation, statutory entitlements, terms of employment, rights and obligations of both parties, termination conditions, confidentiality and non-disclosure provisions, intellectual property and technology assignment, compliance with company policies and the preferred dispute resolution mechanism.
- For senior designations, the agreement may also include post-termination obligations such as non-competition and non-solicitation (to the extent enforceable, or also for deterrent purposes), stock options, indemnity and gardening leave.

Formalities

The requirements to execute an employment contract are:

- The contract must be stamped before execution, or within three months of its receipt in India, if executed abroad. An unstamped contract is inadmissible as evidence in Indian courts.
- Furthermore, it may be time-consuming to stamp the agreement at the litigation stage and may delay the proceedings, which may be prejudicial to employers seeking urgent relief in cases of employee breach.

Verbal Conclusion of Employment Contracts

Verbal conclusions of employment contracts are permitted in India so long as the arrangement follows the basic principles of a valid contract, such as offer, acceptance, consideration and meeting of minds. In general, verbal agreements are considered valid contracts under the Indian Contract Act 1872 if the four conditions are met.

Duration and Regulation of Employment Contracts

The duration of the employment contract would be according to what has been agreed between the employees and the employers, and the types of contracts are as explained below:

- India's employment laws do not have any provisions prescribing the terms of an

employment contract. Broadly, employment contracts can be for an indefinite term or a fixed term.
- Fixed-term contracts are commonly used for employees undertaking work of a temporary nature or project-based work. Consultants and contract employees also execute fixed-term contracts with employers.
- The government has extended fixed-term employment to all sectors to ensure statutory benefits for fixed-term workers as well as those employed on an indefinite basis.
- From a practical standpoint, it is advisable to execute short-term contracts with employees to ensure flexibility in termination, and for better enforcement, particularly of restrictive covenants such as non-compete and non-solicitation clauses.
- However, in many cases, including that of government employees, open-ended agreements are preferred to secure long-term employment and to make use of the statutory benefits available to employees based on the length of their service.
- In the private sector, short-term agreements present hiring challenges for employers because well-qualified employees at all levels seek job security and long-term commitment.

4.3 Working Time

The working hours of an employee are based on the following aspects:

- The Factories Act 1948 (FA Act), state-specific Shops and Establishment laws (the SE Acts), the Model Shops and Establishments (Regulation of Employment and Conditions of Service) Act 2016 (Model Shops Act) prescribe a maximum of nine working hours per day and 48 hours a week.
- A worker shall not be made to work for more than five hours without taking a break of at least half an hour.
- The Code on Wages 2019 allows the government to fix working hours to constitute a normal working day inclusive of one or more specified intervals.
- The total spread-over period (that is the total length of time from the start of a working day to its conclusion including breaks) shall not exceed ten and a half hours under the FA Act.
- However, the spread-over period is extendable up to twelve hours by a chief inspector for specific reasons under the FA Act.
- The SE Acts permit a spread-over period of 11 hours per day. Furthermore, the workers must be given at least one day off a week.
- The foregoing work hours, overtime and the spread over periods may be modified by the orders of chief inspectors under the respective statutes. The Model Shops Act does not prescribe the opening or closing hours, and the establishments can remain open throughout the week.

Overtime

- If workers are required to work more than the maximum daily and weekly working hours stipulated under various statutes, they will be entitled to receive wages for that overtime work, at twice their normal wages.
- The FA Act stipulates a maximum of 50 overtime hours in a quarter, which can be extended to a maximum of 75 hours in exceptional circumstances.
- The SE Acts also contain provisions relating to overtime and permit up to 40-50 overtime hours in three months. However, the Model Shops Act, and the respective SE Acts of Maharashtra and Gujarat, have increased the permitted overtime hours significantly, to 125 hours in a quarter.

4.4 Termination of Employment Contracts

The employment contract can be terminated based on what has been agreed between the parties in the contract, and the following rules generally apply:

- Employers must include clauses in their employment contracts that give them the flexibility to terminate the employment without incurring any liabilities or making potential claims by outgoing employees more likely.
- Indian law does not restrict employers from executing termination agreements with outgoing employees, which has become standard industry practice. Employers prefer to sign the agreement simultaneously with the severance payment.
- The law does not provide for "at-will" termination, other than the newly introduced Model Shops Act and the corresponding Maharashtra Shops and Establishment Act 1948 and the Gujarat Shops and Establishment Act 2019, which do not include any termination provisions, thus granting flexibility to both the employers and the employees to terminate the employment.
- A termination agreement normally incorporates provisions such as settlement and release of claims by the employee, the employee's acknowledgment of receipt of the final severance consideration, the employee's indemnity and representations not to defame the employer.
- As regards the statutory formalities, a nominal government levy known as stamp duty must be paid on the agreement for it to be admissible as evidence in Indian courts. Furthermore, it is a good practice to execute the agreement in a notary public's presence to validate the parties' signatures.
- There are no statutory requirements or restrictions on termination agreement terms. Reasonable releases, non-disclosure and non-disparagement provisions may be enforceable against the employees.
- There are no formal requirements for severance payments. However, from a practical standpoint, it is advisable to have the outgoing employees execute separation and release agreements with the employer, if required.

4.5 Employee Representations

Indian law does not grant management representation rights to employees.

Besides the trade unions, the ID Act requires that any establishment with more than 100 employees must appoint a Works Committee consisting of an equal number of representatives of the employer and the employees.

- The representatives of the workmen on the Works Committee must be elected in the statutorily prescribed manner and in consultation with the relevant trade union, to secure and preserve amicable relations between the employer and the employees, and to discuss and bring resolution to any issues of common interest or concern.
- Any establishment with 20 or more employees must appoint a Grievance Redressal Committee to resolve disputes arising out of individual grievances. The committee can have maximum of six members, with an equal number from the employer and the employees. The committee's chairperson will be selected from the employer and the employees on a rotating basis.
- Any establishment with ten or more employees must constitute an Internal Complaints Committee under the Sexual Harassment of

Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, to handle instances of sexual harassment against women in the workplace.

At least half the members of the Internal Complaints Committee (ICC) should be women, and the presiding officer must be a woman of a senior designation. At least two members of the ICC should be employees, and there must be one independent member from a non-government organisation or someone familiar with the issues relating to sexual harassment.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

The taxes paid by the employee and the employer are governed by the Income Tax Act 1961 (IT Act), where tax rates are imposed on domestic and foreign companies in India. The tax rates depend on factors like the entity's residential status, business type, turnover, cess and surcharge rates applicable.

Under the existing legal framework, employers shall comply with a variety of tax laws and payroll contributions, including individual income tax (IIT), social security contributions, GST, value added tax (VAT), withholding tax, and business tax. Nonetheless, employers do not have to withhold any income taxes for their employees. The employers have to subtract a portion of the salary of their employees and pay tax deducted at source (TDS).

In India, the employer is expected to make a social security contribution, which equates to 12% of an employee's compensation. Further, depending on the employer company size, it will have to make a contribution of an additional 4.75% to the Employees State Insurance Cooperation (ESIC) scheme.

As regards the employees, individual tax rates will be applicable under two tax mechanisms, namely the traditional and new regimes, and it is the employee's prerogative to choose the tax regime.

A summary of individual tax rates for the financial year 2023-2024 is as follows:

Traditional Regime

- up to INR250,000 – nil;
- INR250,000-INR500,000 – 5%;
- INR500,000-INR1 million – 20%; and
- above INR1million – 30%.

New Regime

- up to INR300,000 – nil;
- INR301,000-INR600,000 – 5%;
- INR600,001-INR900,000 – 10%;
- INR901,000-INR1.2 million – 15%;
- INR1.2 million-INR1.5 million – 20%; and
- above INR1.5 million – 30%.

Under the traditional regime, individuals can claim deductions such as travel allowances, house rent allowances, etc. The new tax regime excludes deductions on tax such as home loan interest, allowance for rent and others.

5.2 Taxes Applicable to Businesses

A summary of tax rates applicable to companies in India is as follows:

- A domestic company with a gross turnover that does not exceed INR4 billion will be taxed at 25%.

- A domestic company with a gross turnover that exceeds INR4 billion will be taxed at 30%.
- A surcharge and education and health cess will be applicable in both of the above cases. The government notifies the surcharge and cess annually, which ranges between 11.28% and 16.48% of the foregoing base tax, depending on the company's taxable income.
- In case the basic tax liability is less than 15% of the company profits, the minimum alternate tax (MAT) of 15% of book profit will be applicable, in addition to surcharge and cess, in lieu of the normal tax liability.
- In case of foreign companies, a flat rate of 40% is applicable on business income accrued in India, and a surcharge which ranges from 6.08-9.2% of the base tax, which will vary based on the taxable income.
- All other special incomes in the form of dividends, interest, royalties, etc, are taxed at varied rates. For instance, 20% on dividends, 5-20% on interest, and 20% on royalties are applicable.
- A rate of 30% tax is applicable for a partnership firm (resident and foreign), along with surcharge and cess that ranges from 4-12.48% of base tax, which will vary based on the taxable income.

Other taxes payable by an incorporated business also include some of the following indirect taxes:

- the goods and services tax (GST), which consolidates multiple indirect taxes inclusive of VAT, excise duties, service tax, and central sales tax;
- integrated GST on goods and services imported into India, in addition to customs duty;
- GST for export of goods/services (which is nil subject to compliance with the prescribed conditions);
- stamp duty, which is a government levy payable on all transactions; and
- property tax.

Withholding Taxes on Dividends and Interest

The payments extended to residents, including technical and consultancy fees, dividends, rent, commission, royalties should be subject to the withholding tax according to the rates under the IT Act.

A summary of withholding taxes is below:

- The rate for withholding tax is between 2-10% and can be adjusted against the total tax liability against the one receiving.
- For non-resident recipients, the withholding tax is 20% (plus the cess surcharge).
- Fees for technical services (FTS) and royalties are subject to a 20% withholding tax for payments made to non-residents.
- Interest payments are subject to a 10% withholding tax rate, and 5% on the interest on a foreign currency loan paid by a resident to a non-resident.
- The tax rate for dividends is 20% on the payments to a non-resident.

Organisation for Economic Co-operation and Development (OECD) Outcome Statement on the Two-Pillar Solution

India has joined the OECD Outcome Statement on the Two-Pillar Solution; however, the Two Pillar model has not yet been introduced in India. However, it is anticipated that the model may be implemented in the July 2024 budget.

5.3 Available Tax Credits/Incentives

The IT Act provides for concessions, credits, and incentives on various incomes. Some of the incentives include:

- International Financial Service Centres (IFSC) can be set up by foreign banks, which allows for a tax exemption of 100% on profits for the initial five years and 50% on the next set of five years.
- Under the IT Act, start-up companies are provided a tax holiday of 100% for three consecutive taxable years out of ten.
- Income from royalties from patents developed and registered in India is eligible for concession, and such income will be subject to 10% plus surcharge and cess.
- Entities that are carrying out specific business such as warehousing, operating and building hotels, hospitals, and others can claim a 100% deduction on capital expenditure in the year the expense occurs.
- The government also offers certain incentives for businesses and companies that have been established within Special Economic Zones (SEZ).
- SEZ business units get a full tax exemption for the first five years, 50% exemption for the next five to ten years, and 50% for ploughed back export profit for 10 to 15 years.

In addition to the foregoing, the IT Act provides multiple weighted deductions and incentives on technological investments.

5.4 Tax Consolidation

Tax consolidation is not permitted in India.

5.5 Thin Capitalisation Rules and Other Limitations

Thin capitalisation rules are applicable in India and are part of the IT Act. The rules under the IT Act put a cap of 30% of earnings before interest, taxes, depreciation, and amortisation (EBITDA) for deduction on interest towards Indian companies.

5.6 Transfer Pricing

The transfer pricing regulations are governed under the IT Act and are notified by the central government. The rules are applicable to cross-border transactions, and the prices are adjusted by the tax authorities. India's transfer pricing rules generally follow the OECD Transfer Pricing Guidelines. The regulations have incorporated the arm's length principle, and targeted anti-avoidance rules are prescribed in the IT Act regarding transfer pricing.

5.7 Anti-evasion Rules

Both general and specific anti-avoidance rules are applicable in India.

Specific Anti-avoidance Rules

- When a transaction between sellers and buyers occurs at a discounted rate from its fair value, such discounted rates are considered ordinary income for the recipient.
- If shares are issued by a closely held company at a price above the fair price, such increase would be considered ordinary income for the entity that has issued the shares.
- Transfer pricing rules are explained in **5.6 Transfer Pricing**.
- Thin capitalisation rules are explained in **5.5 Thin Capitalisation Rules and Other Limitations**.
- If a foreign company is managed and controlled from India, it can be subject to Indian tax laws and can be taxed accordingly.

General Anti-avoidance Rules

- General Anti-Avoidance Rules (GAAR) have been active in India since 2016 to overcome aggressive tax avoidance and planning.
- GAAR discourage transactions that are entered into with the objective of tax benefits.
- GAAR will be applicable to situations where the impact of tax exceeds the INR30 million threshold.
- India has signed the Multilateral Instrument (MLI) in 2020 with many tax-paying jurisdictions and has modified its tax treaties in accordance with the MLI.

6. Competition Law

6.1 Merger Control Notification

Under the Competition Act 2002 (Competition Act), when acquisitions, mergers, or amalgamations exceed the prescribed threshold limits (based on the value of their assets and turnover), they are considered "combinations" for the purposes of the Competition Act and are subject to notification. The jurisdictional thresholds under the Competition Act are as follows:

- The parties/enterprises involved in the transaction jointly have:
  (a) in India, assets valued at more than INR10 billion or turnover of more than INR30 billion; or
  (b) in India or outside India, in aggregate, assets valued at more than USD500 million, including at least INR5 billion in India, or turnover of more than USD1,500 million, including at least INR15 billion in India.
- The group (to which the enterprise would belong after the acquisition/merger/amalgamation), jointly has or would jointly have:
  (a) in India, assets valued at more than INR40 billion or turnover of more than INR120 billion; or
  (b) in India or outside India, in aggregate, assets valued at more than USD2 billion, including at least INR5 billion in India, or turnover of more than USD6 billion, including at least INR15 billion in India.

In this context, "group" means two or more enterprises that, directly or indirectly, can: (i) exercise 26% or more of the voting rights in the other enterprise; or (ii) appoint more than 50% of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise.

According to the new Competition (Amendment) Act 2023 (Amendment Act), the Competition Commission of India (CCI) must also be notified regarding a combination where the value of any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds INR20 billion. However, this provision of the Amendment Act is pending notification by the central government.

Combinations that cause or are likely to cause an appreciable adverse effect on competition within the relevant market in India are prohibited in India.

Exempted Categories

Certain categories of transactions may be exempted from the requirement to be notified to the CCI, as they are ordinarily not likely to cause an appreciable adverse effect on competition in India. These include the acquisition of shares or voting rights made "solely as an investment" or "in the ordinary course of business", which does not entitle the acquirer to hold

25% or more of the total shares or voting rights of the targeted company, and does not lead to the acquirer gaining any controlling rights over the targeted company.

Provisions for joint ventures are not expressly included in the Competition Act. However, certain joint ventures that are formed through the trandsfer of assets by one or more enterprises may be notifiable if the jurisdictional thresholds in the Competition Act are met and they do not fall into the exempted categories. However, there is limited clarity regarding the notifications of joint ventures provided by the CCI.

6.2 Merger Control Procedure

Any person or enterprise that proposes to enter into a combination, must provide notice to the CCI, in the form specified and the fee determined by regulations, disclosing the details of the proposed combination, within 30 days of the approval of the merger/amalgamation's proposal, or the execution of any agreement or other document for acquisition.

The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination Rules) specify the steps to file the notice before the CCI.

Forms

- The notice must be filed in Form I specified in Schedule II to the Combination Rules, along with the proof of payment of the fee by parties to the combination.
- The parties also have the option to give notice through Form II of Schedule II to the Combination Rules. Filing of Form II may be required if:
  - (a) the parties to the combination are competitors and the combined market share of the parties to the combination after such combination is more than 15% in the relevant market; or
  - (b) the parties to the combination are engaged at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or trade in goods or provision of services, and their individual or combined market share is more than 25% in the relevant market.

The Combination Rules provide that in case of acquisition or hostile takeover, the acquirer must file a notice and in case of a merger or an amalgamation, the parties have to jointly file the notice.

Timing

Combinations shall not come into effect until 210 days have passed from the day on which the notice has been given to the CCI, or the CCI has granted approval (whichever is earlier). The Amendment Act has reduced this time limit from 210 days to 150 days; however, this provision is yet to be notified.

Green Channel Route

There is also a provision for a "green channel" approval route under the Combination Regulations, which allows parties to file Form I along with a declaration and receive deemed approval of the transaction immediately upon filing the notice. However, the green channel can only be availed of by parties falling under Schedule III of the Combination Rules – ie, in cases where parties to the combination do not have any horizontal, vertical, or complementary arrangements or agreements, where another party to the combination is involved.

6.3 Cartels

Anti-competitive agreements are void in India. The Competition Act prohibits any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

The following types of agreements, including practices/agreements by cartels, are presumed to be anti-competitive (ie, have an appreciable adverse effect on competition) in India:

- which directly or indirectly determines purchase or sale prices;
- which limits or controls production, supply, markets, technical development, investment or provision of services;
- which shares the market or source of production or provision of services by way of allocation of the geographical area of the market, or type of goods or services, or number of customers in the market or any other similar way; or
- which directly or indirectly results in bid rigging or collusive bidding.

Agreements entered by way of joint ventures are exempt from the above provision.

Further, agreements such as tie-in arrangements, exclusive dealing agreements, exclusive distribution agreements, refusals to deal, and resale price maintenance agreements, are considered anti-competitive agreements if they cause, or are likely to cause, an appreciable adverse effect on competition within India. However, this provision does not apply to agreements between an enterprise and an end consumer.

Moreover, the Competition Act provides that the provisions prohibiting anti-competitive agreements shall not restrict any person's right to prevent infringement or impose reasonable conditions that may be necessary to protect their intellectual property rights.

The CCI is the primary authority that must eliminate practices having adverse effects on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in markets in India.

The CCI has the power to impose penalties on enterprises involved in anti-competitive agreements and direct them to discontinue and not re-enter such agreements. If an anti-competitive agreement has been entered into by a cartel, the CCI may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times the profit of the company for each year of continuance of the cartel, or 10% of the company's turnover for each year of continuance of the cartel, whichever is higher.

6.4 Abuse of Dominant Position

The Competition Act prohibits enterprises from abusing their dominant position. If an enterprise or group carries out any of the following acts, such acts/practices qualify as "abuse of dominant position" per Indian law:

- imposing unfair or discriminatory conditions or prices in the purchase or sale of goods or services (including predatory pricing);
- limiting or restricting the production of goods or provision of services or market;
- limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers;

- indulging in practices leading to denial of market access;
- concluding contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; and
- using a dominant position in one market to enter into, or protect another relevant market.

While determining whether an enterprise enjoys a dominant position, the CCI will consider the following factors:

- market share of the enterprise;
- size and resources of the enterprise;
- size and importance of the competitors;
- economic power of the enterprise, including commercial advantages over competitors;
- vertical integration of the enterprises or sale or service network of such enterprises;
- dependence of consumers on the enterprise;
- monopoly or dominant position, whether acquired as a result of any statute or by virtue of being a government company or a public sector undertaking or otherwise;
- entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- countervailing buying power;
- market structure and size of market;
- social obligations and social costs; and
- relative advantage, by way of contribution to economic development, of the enterprise enjoying a dominant position that has or is likely to have an appreciable adverse effect on competition.

The CCI may also take into account any other factor which it may consider relevant for the determination of the dominant position. The CCI also has the power to impose penalties on enterprises involved in the abuse of their dominant position and direct parties to discontinue such abuse of their dominant position.

7. Intellectual Property

7.1 Patents

India is a party to the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, the Paris Convention, and the Patent Cooperation Treaty (PCT), and the Indian patent regime is governed by the Patents Act 1970 (Patents Act) and the Patents Rules 2003. Patents are examined, granted and administered by the Patents Act, which complies with the foregoing international treaties.

An invention relating either to a product or process that is new, involving inventive steps and capable of industrial application can be patented. However, an invention is not patentable if it falls into the categories of inventions that are non-patentable as prescribed under Sections 3 and 4 of the Patents Act. For instance, mere discovery of a new form of a known substance is not patentable, unless there is enhancement of the known efficacy of that substance. The Patents Act excludes inventions relating to mathematical or business methods or a computer program, per se, or algorithms from patentability.

Term of Protection

The validity of a patent is 20 years from the filing date, or the priority date.

Registration Procedure

Three main types of patent applications can be filed: ordinary domestic patent application, convention application, and PCT national phase application. An ordinary application is usually filed when the applicant does not want to claim priority in a convention country. A convention application is filed to claim a priority date based on the same or substantially similar application filed in one or more of the convention countries. The convention application must be filed in the patent office within 12 months from the date of the first filing of a similar application in the convention country. Whereas, after filing an international application according to PCT designating India, an applicant must file the national phase application in India within 31 months from the international filing date or the priority date, whichever is earlier. Applications must include a specification (complete/provisional) containing claims set out in a prescribed format, and details of the inventor and applicant.

Applications are published in the Patent Journal after (i) 18 months of filing in India; or (ii) 18 months after the priority date, and are open to third-party opposition. The applications are examined only after publication and upon filing a request for examination. The request for examination can be filed along with the patent application or within 31 months from the filing date/priority date (for applications filed after 15 March 2024). The First Examination Report (FER) will be issued after examination and the applicant must file the response to the FER within six months of the date of FER, which is extendable by three months. If the patent office is satisfied with the response, and there is no pre-grant opposition filed against the patent, the office will grant the patent. However, if pre-grant opposition exists, the office will schedule a hearing to address the matter before deciding on whether to grant the patent.

Enforcement and Remedies

The Patents Act provides for enforcement through infringement actions. Such actions in India can be instituted before the district courts, and the four high courts having original jurisdiction, subject to their pecuniary jurisdiction. In case of a suit for infringement, the patent owner can claim damages from the date of publication of the patent application or the date of infringement, whichever is earlier. However, the suit for infringement can be filed only after a patent is granted.

The reliefs that a court may grant in any suit for infringement can include either damages or an account of profits. The court may also order that the infringing goods be seized, forfeited or destroyed, as the court deems fit without payment of any compensation.

7.2 Trade Marks

Trade mark law in India is administered by the Trade Marks Registry (Registry) under the Office of the Controller General of Patents, Designs and Trade Marks, and the Trade Marks Act 1999 (TMA) is the comprehensive legislation that governs all aspects of trade mark protection in India.

A device, design, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging and colour combination can be registered as a trade mark under the TMA, if it can be graphically represented and is capable of distinguishing the goods or services thereunder from those of others.

Term of Protection

The length of protection of a trade mark registration is ten years in India, which can be renewed

perpetually. The trade mark's use is not mandatory for maintaining or renewing the trade mark. However, a registered trade mark will become vulnerable to cancellation action if it is not used for a continuous period of five years from the date of its entry into the Register of Trade Marks.

Trade Mark Prosecution Procedure

Once a trade mark application is filed, the Registry first carries out procedural examination and, thereafter, substantive examination of the trade mark application. If the Registry has no objections, it will accept it for registration, and in case of any objection or issues, it will issue an examination report. This examination/review process may take up to two to three months depending on the branch of the Registry in which the mark is filed.

In a straightforward case, where the Registry directly accepts a trade mark, it will be published in the Trade Marks Journal for public objection. If no one opposes the mark within the four-month publication period, the trade mark will proceed to registration. In case the Registry objects, the applicant will have to file a response, based on which the Registry may either accept the mark or schedule a pre-acceptance hearing.

In a straightforward case, if there are no objections, a trade mark application proceeds to registration within eight to ten months of filing. However, the following factors may increase the timeframe:

- nature of objections raised by the Registry;
- extension requests filed in the Registry;
- any hearings scheduled by the Registry and any subsequently filed written submissions and oppositions filed against the trade mark; and
- any amendment and assignment recordation applications filed by the applicant.

Enforcement and Remedies

The TMA provides for enforcement through infringement and passing-off actions. An infringement or passing-off action in India can be instituted before the district courts, and the four high courts having original jurisdiction. Trade mark infringements and falsifications are punishable offences under the TMA, with imprisonment for a term of six months to three years and/or a fine of INR50,000 to INR200,000, or both. Further, a trade mark owner may file a criminal complaint before a magistrate seeking investigation, search and seizure of infringing goods within the premises of the infringer, under the Code of Criminal Procedure 1973. A criminal complaint can also be filed with the police for the infringement and falsification of trade marks.

Administrative enforcement includes recordation of the registered trade mark with the Customs Department at different posts, to prevent the import of infringing goods.

The following civil remedies are available in infringement and passing-off actions:

- interlocutory injunctions, upon establishing a prima facie case of infringement, irreparable harm or injury caused to the aggrieved party, and balance of convenience in favour of the aggrieved party;
- permanent injunctions;
- damages;
- accounts of profit;
- delivery up of infringing materials for destruction;
- Anton Piller orders;
- Mareva injunctions;
- John Doe orders; and

• Quia timet actions.

Monetary reliefs may vary depending on various factors, such as the loss caused to the trade mark proprietor's business, goodwill and reputation, punitive damages (usually twice the amount of compensatory damage), exemplary costs, etc.

The TMA provides for criminal remedies in trade mark infringement and falsification of trade marks with imprisonment extending up to three years or a fine of up to INR200,000, or both. In certain cases, Indian courts have granted substantial damages to brand owners. For instance, an Indian court awarded costs of approximately USD700,000 in a trade mark infringement suit in 2020.

7.3 Industrial Design

Industrial designs are governed by the Designs Act 2000 (Designs Act), and Designs Rules 2001, and under the office of Controller General of Patents, Designs and Trade Marks (Controller).

A design refers to the features of shape, configuration, pattern, ornamentation or composition of lines or colours applied to any article, whether in two- or three-dimensional (or both) forms. This may be applied by any industrial process or means (manual, mechanical, or chemical) separately or by a combined process, which in the finished article appeals to and is judged solely by the eye.

Term of Protection

The registered proprietor of a design has copyright in the design for ten years from the date of registration.

Registration Procedure

An application for registration of a design may be accompanied by a statement of novelty if required by the Controller. Thereafter, the application is examined and once the examination report is issued to the applicant, the applicant must file a response to the examination report. If the Controller is not satisfied with the response, a hearing will be provided to the applicant. After the hearing, the Controller shall decide whether the application should be accepted or not. Once the objections are rectified, the controller may accept the application, and the application is published in the patent office journal. If the controller rejects the application, an appeal may be filed in the relevant high court within three months of the controller's decision.

Enforcement and Remedies

The Designs Act provides for enforcement through infringement actions. An infringement action in India can be instituted before the district courts, and the high courts having original jurisdiction.

According to the Designs Act, a design is infringed, if during the term of registration of the design, a person (without authorisation of the registered design owner):

- applies or causes to be applied to any article in any class of articles in which the design is registered, the design or any fraudulent or obvious imitation thereof, for the purpose of sale;
- imports for sale any article belonging to the class in which the design has been registered, and has applied to it the design or any fraudulent or obvious imitation of the design; and
- knowing that the design or its fraudulent or obvious imitation has been applied to any

article in any class of articles in which the design is registered without the consent of the registered proprietor, publishes or exposes or causes to be published or exposed for sale, that article.

Under the Designs Act, in cases of infringement/piracy of designs, the registered proprietor of the design is entitled to civil remedies by way of injunctions and damages. Further, the infringer is liable to pay a fine of up to INR25,000, to the registered proprietor of the design (recoverable as a contract debt).

7.4 Copyright

The Copyright Act 1957 (CRA) provides for copyright protection in India. The CRA provides that copyright subsists in the form of original literary, dramatic, musical, or artistic work, cinematograph films, and sound recordings.

Term of Protection

Although copyright registration is not mandatory for protection in India, a copyright registration will serve as evidence of the copyright in the work. A copyright registration is valid for the lifetime of the author, plus an additional 60 years after the author's death.

Copyright Registration Process

A copyright registration application must be filed in the Copyright Office, along with the relevant supporting documents. If no one objects to the copyright application within 30 days' mandatory waiting period, the Copyright Office will examine the application and approve it or raise its objections, if any. The application will proceed further based on the applicant's response in satisfying the Copyright Office's objections.

Upon completion of the notice period and examination, the Copyright Office normally issues the copyright certificate within two to three months. In case of no major objections from third parties or the Copyright Office, the overall registration process can be concluded within eight to ten months from the date of filing.

Enforcement and Remedies

The CRA provides for enforcement through infringement actions. An infringement action in India can be instituted before the district courts, and the high courts having original jurisdiction. A copyright owner can take legal action against any person who infringes the copyright in the work.

In India, "fair use" is an exception to infringement of copyright. Certain unauthorised uses of a copyrighted work without its owner's permission, for criticism, comment, news reporting, teaching, scholarship, or research, etc, may be considered fair use and may not qualify as infringement under the CRA. Indian courts often consider the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion of the copyrighted work used, and the effect of the use upon the potential market, among other factors, to determine fair use.

The remedies provided by the CRA against infringement of copyright are:

- Civil remedies: The copyright owner is entitled to civil remedies by way of injunctions, damages, and accounts.
- Criminal remedies: The CRA provides for search and seizure remedies by the police. If the complainant has a copyright registration certificate, it will be sufficient for the police to conduct the search and seizure in case of an infringing use on an urgent basis by invoking its powers under the Copyright Act.

Infringement is punishable under the CRA with imprisonment, for a term of six months to three years and/or a fine of INR50,000 to INR200,000, or both. If the court finds that the infringement was not made for gain in the course of trade or business, it may impose imprisonment of fewer than six months or a fine of less than INR50,000.

7.5 Others

Software

The CRA covers computer programs under the purview of literary work, and therefore, the literary portions of a computer program, including the source code, are protected under the CRA. Although the Patents Act excludes protection for standalone computer programs, a piece of software claimed in conjunction with a novel hardware element can be patentable in India (Guidelines for Examination of Computer Related Inventions 2017).

Databases

There is no specific legislation or statutory protection for databases in India, nor in respect of data and databases used in machine learning. However, the CRA protects a computer database under the purview of literary work. The CRA also protects databases by granting rights associated with the labour involved in compiling and presenting data in a particular form.

Trade Secrets

Currently, there is no legislation or statutory protection for trade secrets in India. However, different courts in India have extended protection to trade secrets and confidential information in India, if information's confidentiality is reflected in contractual documents, such as confidentiality agreements, non-disclosure agreements, and reasonable and legally enforceable non-compete clauses in the agreements.

8. Data Protection

8.1 Applicable Regulations

- The Constitution of India guarantees the right to privacy (which includes the right to data security) to all citizens as part of the right to life and personal liberty under Articles 19 and 21. This was also upheld by the Supreme Court of India landmark judgment of Justice K S Puttaswamy (Retd) and Another v. Union of India and Others (2017) 10 SCC 1.
- The current law governing data protection in India is the Information Technology Act 2000 (ITA) and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (SPDI Rules), which prescribe reasonable security practices and procedures to be implemented for collection and the processing of personal or sensitive personal data.
- The SPDI Rules prescribe the protection of personal information and Sensitive Personal Data (SPD).
- SPD includes passwords, medical records and history, biometrics, and such information received or provided to body corporates.
- The SPDI Rules mandate a body corporate that has sensitive personal data to employ reasonable security practices to protect the stored data by seeking consent from those to whom the SPD belongs for the use of the data.
- Collection of SPD is permitted by the body corporates in case of lawful purpose and where collection of SPD is necessary for such purpose.
- Usually, disclosures of SPD by a body corporate to a third party require consent from who provided the SPD unless disclosure is required for a legal obligation.

- In case of any information security breach, such corporations are required to show to the authorities that the prescribed security control measures have been implemented.
- Any lapse on the part of such bodies corporate shall attract charges under Section 43A of the ITA and they will be required to compensate all those affected as a result of such breach.

Recent Developments

- India enacted its first comprehensive law on data privacy in 2023, called the Digital Personal Data Protection Act 2023 (DPDPA), which will come into force once the central government notifies it.
- It is anticipated that the central government will notify the DPDPA in 2024.
- The DPDPA will replace Section 43A of the ITA and the entire SPDI Rules.
- The rules under the DPDPA have been drafted and pending to be notified by the central government.
- Pending notification, the DPDPA serves as a regulatory compliance for the organisations to follow.
- DPDPA has categorised data as "personal data" if it can be used to identify an individual.
- Processing of personal data can only happen by way of consent of the data principal. A notice must be given to the data principal before seeking consent. The notice should contain details about the personal data to be collected, the purpose of processing, as well as the way the data principal may withdraw its consent, avail the grievance redressal mechanism and make a complaint to the Data Protection Board (DPB).
- The DPDPA prescribes that the consent obtained from the data principal must be free, specific, informed, unconditional, and unambiguous, with a clear affirmative action, and shall signify an agreement to the processing of personal data for the specified purpose and be limited to such personal data as is necessary for such specified purpose.
- Consent need not be sought for legitimate uses which include processing for:
  (a) specified purposes for which the data principal has voluntarily shared personal information without objecting to such processing;
  (b) purposes of employment;
  (c) responding to medical emergencies;
  (d) performing any function under law or the State providing any service or benefit to the data principal;
  (e) compliance with any judgment or order issued under any law; and
  (f) taking measures to ensure safety during breakdown of public order, etc.

8.2 Geographical Scope

As regards the regulations in the international content, the ITA and the SPDI Rules apply to foreign companies operating outside India who target Indian customers. The ITA extends even to offences committed outside Indian territory by any person.

The body corporate can transfer sensitive personal data to any other body corporate or a person in India or located in another country, that ensures the same level of data protection that is adhered to by the body corporate. The transfer of sensitive personal data is allowed only if it is necessary for performance of the lawful contract between the body corporate and the information provider.

In a landmark case involving collection and transfer of citizens' personal data for COVID-19 tracking purposes by the government of Kerala (a

southern Indian state) to a US-based data analysis company, the Kerala High Court restricted the government from sharing citizens' sensitive personal data, unless the data was anonymised. The court had also recognised the importance of the data subject's informed consent prior to collecting their personal data and the safeguards to ensure confidentiality of the data collected.

Upcoming Framework

- The DPDPA also applies to the processing of digital personal data outside the territory of India, if such processing is in connection with activities related to offering goods/services to data principals within the territory of India.
- Transfer of personal data to territories outside India for processing purposes is permitted, except to countries restricted by the central government through notification. Such list of prohibited countries is not yet framed by the government.

8.3 Role and Authority of the Data Protection Agency

- There is no standalone agency under the ITA and the SPDI Rules for enforcing data protection rules.
- However, the Data Protection Board (DPB) is the central data privacy authority per the provisions of the DPDPA. The DPB is currently being set up. The DPDPA specifies that before a matter reaches the Data Protection Officer (DPO), it should be heard by the data fiduciary or the consent manager. A consent manger is a person who is registered with the Board and serves as a point of contact with the data principal. If the individual is aggrieved by the decision of the DPO, then he/she can approach the Appellate Tribunal for appeal.
- Under the DPDPA, the Telecom Disputes Settlement and Appellate Tribunal established under Section 14 of the Telecom Regulatory Authority of India Act 1997 adjudicates on appeals from the orders of the DPB, and the SCI is the final appellate authority for all purposes under the DPDPA.
- As regards cybersecurity, the Indian government has established the CERT-In under the ITA as the national nodal agency for cybersecurity. CERT-In has also set up sectoral CERTs to implement cybersecurity measures at a sectoral level.

9. Looking Forward

9.1 Upcoming Legal Reforms

Data Protection

The Digital Personal Data Protection Act 2023 (DPDPA) is set to change the legal framework of data protection in India. The key features of the DPDPA are briefly covered in **8. Data Protection**. The DPDPA will come into force when it is notified by the central government.

Patents

The DPIIT, on 15 March 2024, notified the Patents (Amendment) Rules, 2024, which amend the Patents Rules 2003. Some of the key features of this amendment include:

- The deadline to file a request for examination is reduced from 48 months to 31 months, for applications filed after 15 March 2024.
- Before the amendment, a patentee was required to file a working statement for granted patents annually, starting from the financial year commencing immediately after the one in which the patent was granted. With the new amendment, the working statement will be required to be filed once every three years.

- The amendment clarifies the filing of divisional applications. The applicant can now file one or more divisional application(s) under Section 16 based on an invention disclosed in the provisional specification or complete specification or any previously filed divisional application.
- The amendment introduces a provision to apply for a grace period of twelve months in the event that a patent has been publicly displayed.
- Inventors can obtain a certificate of inventorship, based on the new amendment.

Competition Law

The Amendment Act amends the Competition Act. Some of the key amendments include the broadening of the scope of anti-competitive agreements, the introduction of the green channel into the Competition Act, the power granted to CCI to issue guidelines on the Competition Act, and rules made thereunder. Other relevant amendments are briefly covered in Section 6.

IRAQ

Law and Practice

Contributed by:
Ahmed Al-Janabi
MENA Associates in association with AMERELLER

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MENA Associates in association with AMERELLER is a leading international law firm largely located in the Middle East, with more than 60 lawyers working in fully integrated offices in Basra, Baghdad, Berlin, Cairo, Dubai, Erbil, Munich, Ras Al Khaimah and Tripoli. The offices are legally separate entities, as required by applicable laws, but are managed and operated as a single law firm. The full-service Baghdad office advises local and international corporate clients, government authorities and NGOs on commercial and corporate law, including general corporate governance issues, director duties and obligations, and corporate housekeeping. The offices in Baghdad and Erbil are each staffed with teams of seven locally admitted lawyers. The firm has advised major international companies and organisations on their entry strategy to Iraq and continues to provide legal and strategic advice on major investments, including infrastructure projects, project financing, direct investments, real estate, M&A, general commercial transactions and day-to-day legal matters.

Author

Ahmed Al-Janabi is the managing partner in the Baghdad office of AMERELLER and head of the Iraq practice. He is consistently recognised for his expertise in oil and gas. Over the past 15 years, he has advised numerous international clients on high-profile matters in Iraq. He advises primarily on corporate and commercial law, labour law, dispute resolution, M&A and project finance. Ahmed joined the firm in 2007 and became a partner in 2012. He was admitted to the Iraqi Bar in 2007, and is also a member of the Iraqi Jurists Association and the Iraqi Translators Association.

Mena Associates in association with AMERELLER

Princess Street 7
Baghdad
Baghdad Governorate
Iraq

Tel: +964 780 000 3232
Fax: +44 207 691 7215
Email: baghdad@amereller.com
Web: www.amereller.com/office/baghdad

1. Legal System

1.1 Legal System and Judicial Order

Iraq's legal system is civil law-based and uses a three-level civil court system, which comprises the courts of first instance, courts of appeal and a court of cassation. The judiciary is regulated by Judicial Organisation Law No 160 of 1979. A separate judiciary exists for the Kurdistan Region, which instead applies Judiciary Authority Law No 23 of 2007. Unless otherwise expressly indicated, references to any law, instruction or regulation in this guide are to statutes as applied in Federal Iraq.

The civil courts have jurisdiction over all natural and juristic persons as well as the government, unless otherwise provided by law. Cases in the courts of first instance are presided over by one judge and may be appealed at a court of appeal, subject to certain exceptions. The court of cassation is the highest court and is located in Baghdad. The Kurdistan Region has its own court of cassation, located in Erbil, which follows the same structure as that of Baghdad.

In addition to the above courts, the Iraqi Constitution established a Federal Supreme Court to determine the constitutionality of laws, interpret the constitution and rule in disputes between the federal and regional governments, as well as other constitutional matters.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Foreign companies looking to invest in Iraq may benefit from tax breaks and other privileges under Investment Law No 13 of 2006 by applying for an investment licence. The law does not contain a list of activities eligible for the licence, but it does exclude certain sectors, such as oil and gas extraction and production, banking and insurance, which are regulated by different laws. However, it is worth noting that it is not necessary to obtain an investment licence in order to operate a business in Iraq.

The Kurdistan Region of Iraq passed a separate Investment Law No 4 of 2006 on Investment in the Kurdistan Region and has its own investment authority.

2.2 Procedure and Sanctions in the Event of Non-compliance

The application for obtaining an investment licence contains the following:

- a request form from the Investment Authority;
- a confirmation letter from an accredited bank regarding the investor's financial situation;
- a list of projects inside or outside of Iraq;
- details of the investment project and economic feasibility; and
- a timeframe for project completion.

The Investment Authority will review the application and, if approved, will authorise all the required licences and permits to be issued. Only a limited number of investment licences have been granted since the enactment of the Investment Law, partly due to the fact that the investment licence is not required in order to do business in Iraq.

2.3 Commitments Required From Foreign Investors

The authorities require foreign investors to meet certain conditions, such as a higher minimum capital for certain sectors and a minimum percentage of locals to be hired. Investors must also keep proper audited records in accordance with

Iraqi laws, and records of the investment project's duty-free imported materials, specifying their depreciation value. Furthermore, investors are expected to comply with the timeline of execution of the project submitted to the National Investment Commission and to notify the latter of the project's commencement, budget, progress and other information stipulated in the Investment Law.

According to Article 14 of the Investment Law, the investor must also commit to protect the safety of the environment and comply with laws related to security, health, public order and the values of Iraqi society.

2.4 Right to Appeal

The Investment Law addresses dispute resolution mechanisms and the applicable law, including disputes between the investor and the Investment Authority, which are to be resolved in an Iraqi civil court. However, the parties may also resort to Iraqi or international arbitration.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The entities most commonly registered by persons conducting business in Iraq are limited liability companies (LLCs) and branches of foreign companies.

Limited Liability Company

LLCs are required to hold at least 51% Iraqi shareholding capital in Federal Iraq. In the Kurdistan Region, 100% foreign shareholding is still permissible, as the amendment to the Companies Law has not yet been passed by the Kurdistan Parliament. An LLC may be established by a maximum of 25 shareholders, who may be legal entities or individuals, or a combination of both. The minimum capital for an LLC is IQD1 million. Public subscription of shares in an LLC is prohibited. The general assembly of shareholders appoint and determine the powers of the managing director, who may be a foreign national.

Branch of a Foreign Company

Another commonly registered entity is the branch of a foreign company. The commercial activity of a branch is limited to the registered activity of the foreign company; thus, the foreign company would be liable for the branch. For the registration of a branch in Federal Iraq, the foreign company must have been established at least two years earlier. Any managerial changes must be approved through a shareholders' resolution by the parent company.

3.2 Incorporation Process

The application submitted to the Companies Registrar should include a set of documents, including but not limited to the shareholder resolutions, a bank letter, the passports of the shareholders and directors, the lease agreement for the company premises in Iraq, and the incorporation documents of the foreign company in the case of a branch.

Timeline

It takes approximately six to ten weeks to register an LLC in Iraq (due to required security checks), and approximately four to eight weeks to register a branch.

3.3 Ongoing Reporting and Disclosure Obligations

Shareholder meeting decisions should be noted in the minutes of meeting and sent to the Companies Registrar within four days of being implemented. Copies of all final accounts, the annual plan and related reports must also be sent. Any managerial changes must be approved through

a shareholders' resolution by the parent company and then submitted to the Registrar.

The Registrar is entitled to obtain any document from the company for the purpose of carrying out its responsibilities under law.

3.4 Management Structures

The general assembly of shareholders comprises the members of the company and is the highest authority of the company. The general assembly may remove and determine the wages and powers of the managing director, and must also approve the LLC's budget, final accounts and annual plan. The managing director carries out the day-to-day business operations of the LLC, and may be a foreign national. In the case of a joint-stock company, which is also a possible entity option in Iraq, a board of directors appoints and dismisses the managing director and is responsible for the administrative, financial and organisational duties of the company.

3.5 Directors', Officers' and Shareholders' Liability

Directors and officers have a duty to serve the company's best interests and are liable to the general assembly in carrying out these duties. They must also disclose any direct or indirect interests regarding any transactions with the company. They will be held liable if such duties are proven to be violated. The inspectors would be appointed by the Companies Registrar, who in turn would inform the relevant authorities so that the appropriate action may be taken in case of a breach. The company would be guided by the Companies Registrar based on the findings of the inspection report.

4. Employment Law

4.1 Nature of Applicable Regulations

Employment relationships are governed by Iraqi Labour Law No 37 of 2015. The Labour Law takes a particularly employee-friendly stance and makes it difficult to terminate employment agreements. The Kurdistan Region still uses the old labour law, as the new one has not yet been passed by the Kurdistan Parliament.

Collective bargaining agreements are regulated by the Labour Law and include negotiations between the employer or group of employers or their associations on one hand and one or more worker associations or elected representatives on the other. The purposes of these collective bargaining or negotiations are set out in the Labour Law as follows:

- co-operating between the workers' associations and the employers or the employers' associations in order to achieve the workers' social development;
- improving the work terms and conditions;
- regulating the work relationships between workers and employers;
- regulating the relationship between the employers or their associations and the workers' associations; and
- settling labour disputes that may arise between workers and employers.

4.2 Characteristics of Employment Contracts

An employment contract may be concluded in verbal or written form. If the employment contract is not concluded in writing, the employer and the employee shall both have the burden to prove the existence of such contract and any rights or claims based thereon.

The Labour Law provides for both definitive and indefinite employment agreements, but it does not determine a maximum or minimum duration for the employment contract.

The employment contract must specify the following:

- the employer's and employee's details;
- the type of project;
- the type of work to be performed, and its duration and start date;
- working hours;
- wages;
- bonuses and allowances to be paid; and
- the date, place and method of payment.

It must be in Arabic (other than in the Kurdistan Region, where the contract may be in Kurdish), although a bilingual contract may be used for ease of reference. In case of conflict, the Arabic (or Kurdish) version would prevail.

4.3 Working Time

According to the applicable labour law in Iraq, working hours must not exceed eight hours per day or 48 hours per week, except for in special circumstances listed in the law. Employees are entitled to at least one day of rest per week. As such, a limit of 40 working hours per week would allow for a two-day weekend due to the cap of eight working hours per day.

Working hours may be extended by the employer in certain circumstances in order to prevent an imminent hazard, such as in the case of force majeure, in which case the Ministry of Labour and Social Affairs' approval is required. The hours may also be extended up to 56 hours per week if the work circumstances so require and the right to a day off during the week is not affected. In addition, the Ministry of Labour and Social Affairs shall determine the maximum hours for overtime on a case-by-case basis when approving exceptions to working hours.

The working hours may also be extended for the following reasons:

- to manage an exceptional increase in work at the time of festivals, seasonal work or for other justifiable reasons;
- to repair or maintain devices, tools and machinery which, if they become inoperative, will affect the employer's operations or result in a considerable number of employees being unable to perform their duties;
- to avoid the deterioration of substances or products; and
- to establish annual inventory and accounts, prepare for sales or open for the season.

There are a few limitations on overtime work, with the following two being particularly noteworthy:

- in regular work environments, the maximum total overtime hours should not exceed four hours per day; and
- employees may not work 40 hours of overtime in 90 days or 120 hours of overtime within one year.

The wage for overtime must be increased by 50% or 100%, depending on the type and nature of the work. Normally, an employee working overtime is entitled to a 50% increase on normal hourly wages for any work considered as overtime. In the case of night, arduous or hazardous work, employees must receive a 100% increase on normal hourly wages for work considered as overtime.

4.4 Termination of Employment Contracts

The Labour Law sets out severe restrictions for employers terminating employment relationships. An employment agreement may only be terminated for the following reasons listed in the Labour Law:

- death of the employee;
- if the employee is sentenced, by a final court decision, to imprisonment of more than one year;
- death of the employer, if the employment relationship was based on personal considerations and the contract may not be continued with their heirs;
- liquidation of the project by virtue of a final court decision, or in case of voluntary liquidation or closure, provided that prior ministerial approval is obtained;
- the written mutual agreement of the employer and the employee;
- expiry of the contract (for fixed-term contracts);
- the completion of the work or provision of the service, if the contract is concluded for a specific work or service;
- employee's resignation with prior 30 days' notice (if resignation was without notice or with a notice of less than 30 days, the employee shall pay the employer compensation equivalent to the wage of notice term or the remaining part thereof); and
- in case of force majeure.

Termination by Employer

The Labour Law stipulates cases where the employer may unilaterally terminate the employment, upon giving 30 days' prior written notice to the employee. If the employer fails to notify the employee in advance, the employee shall be compensated for the notice period. These cases are as follows:

- employee's illness causing incapacity to work, lasting for more than six months as evidenced by an official medical report;
- employee's disability of no less than 75% with incapacity to work as evidenced by an official medical report;
- employee reaching retirement age;
- if the work exigencies required downsizing the project, with prior ministerial approval;
- breach of contractual obligations;
- if the employee assumed a false identity or submitted false documents;
- if the employee was on probation and had not shown efficiency during this period (provided that the employee is notified seven days prior to termination); and
- if the employee has committed, by virtue of final judgment, a grave mistake causing heavy loss to work, workers or production.

As part of the disciplinary action, the Labour Law provides for termination in case of the employee's unsatisfactory performance. This case may be applied when the employee has received the necessary work instructions, was notified in writing of the unsatisfactory performance and continued to perform the work in an unsatisfactory manner 30 days after being warned.

As a general rule, the employee shall be entitled to severance pay of two weeks for each year of service in case of termination for the causes listed above. However, they shall not be entitled to this compensation if termination was for one of the following cases:

- employee sentenced to imprisonment;
- employee breaches contractual duties;

- employee assuming a false identity or submitting false documents; and
- employee committing grave error, causing loss to the employer.

4.5 Employee Representations

Employees (except for civil servants) are allowed to create or join a trade union or workers' association, but this is rarely practised in Iraq. For any employment-related issues, the union would usually meet with the Ministry of Labour and Social Affairs to try to reach a resolution. Once a decision is agreed upon with the employer, it shall take immediate effect.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Income tax in Iraq is governed by Income Tax Law No 113 of 1982 as amended. Entities are required to withhold the income tax from their employees' wages, regardless of the type of entity and of whether or not it is tax exempt. The law imposes taxes on the income of a resident Iraqi individual who earns it inside or outside Iraq, irrespective of the place of payment. The income tax rate for wages ranges between 3% and 15% of the total wages received, with 10% being for wages of IQD1 million and above. This does not apply to freelancers, who are subject to and liable for payment of their own income tax.

Iraq recently enacted the new Social Security Law No 18 of 2023, under which employers operating in Iraq are also required to remit social security contributions for all their employees working in Iraq. Although in practice foreign employees are often not registered in the Iraqi social security system, it is becoming increasingly difficult to forego this requirement as foreign employees may not opt out of this by law. The contributions are to be paid on a monthly basis to the social security office. Social security is 17% of a local employee's monthly wages; 12% is paid by the employer and the remaining 5% is deducted from the employee's wages. For foreign employees, the rate is 25% (5% deducted from the employee's salary and 20% paid by the employer).

5.2 Taxes Applicable to Businesses

Where applicable, the corporate tax rate is 15%. If there is no profit, no tax is levied. In practice, the tax authorities work on the basis of estimating a company's gross income from a contract without taking account of any expenses (even though the law allows this in theory). They then levy a percentage charge (eg, 15%) on the estimated gross income as being the tax payable. Therefore, it is becoming increasingly attractive for western companies to apply for an investment licence under Iraqi Investment Law No 13 of 2006 (if they meet the conditions set out under the law), which enables tax breaks to be given.

Iraq has no VAT but sales tax is imposed on alcohol and tobacco, cars, travel tickets, internet and mobile recharge cards, and first class hotels and restaurants. With regard to withholding tax, private contracts do not normally apply such obligations, which are usually only applied in public contracts.

5.3 Available Tax Credits/Incentives

The Investment Law offers tax incentives for holders of an investment licence. Investors may benefit from tax exemptions for a period of ten years from the date of commencement of operations, subject to the development plan approved by the Council of Ministers. This exemption may be extended up to 15 years in cases where Iraqi investors' shareholding capital exceeds 50%.

A licensed investment project is also exempted from:

- import duties on any item imported for the purposes of the investment project for three years from the date the investment licence is granted;
- import duties on any item imported for the purposes of expanding, developing or modernising the investment project for three years from the date the Investment Authority is notified of the intended expansion; and
- import duties on all spare parts imported for the purposes of the project, if the value of these parts does not exceed 20% of the fixed asset value.

5.4 Tax Consolidation

To date, tax consolidation is not regulated under Iraqi law.

5.5 Thin Capitalisation Rules and Other Limitations

There are no particular thin capitalisation rules applicable in Iraqi legislation.

5.6 Transfer Pricing

Transfer pricing rules are not defined in the Iraqi legal system and there is no specific regulation.

5.7 Anti-evasion Rules

No specific anti-evasion law or regulation has yet been enacted in Iraq.

As a general rule, companies must report financial statements and pay taxes in the time and manner specified. Companies may be subject to inspection by the Companies Registrar if there has been a violation related to their filings. Questionable findings shall be reported to the relevant authorities for the appropriate action to be taken. In the meantime, the company's file will be suspended, along with possible fines. The Registrar is entitled to see the company's records by law; if it is prevented from seeing such documents, the company would be subject to heavy fines and possible imprisonment for the person responsible.

6. Competition Law

6.1 Merger Control Notification

Mergers and acquisitions are not subject to notification in Iraq; only the signing of a resolution and a sales and purchase agreement would be required. For mergers, this would include signing the merger contract and the resolution. The announcement of such merger must be published in a daily newspaper.

6.2 Merger Control Procedure

Merger notifications are not required under Iraq law.

6.3 Cartels

Fair Competition and Antitrust Law No 14 of 2010 (Competition Law) protects and ensures free and fair trading in Iraq. The law provides for a Fair Competition and Antitrust Council attached to the Council of Ministers, which supervises Iraqi markets. Consumer Protection Law No 1 of 2010 gives consumers the right to be fully informed about consumer goods. Most notably, Iraqi Product Protection Law No 11 of 2010 aims to protect local Iraqi products from unfair competition in international trade. It remains to be seen whether these laws will be applied in a protectionist manner.

6.4 Abuse of Dominant Position

The Competition Law generally prohibits practices that aim to harm competition. There is no

specific legal framework that governs unilateral conduct and economic dependency.

The Competition Law contains a list of anti-competitive practices that are prohibited. For example, it is prohibited to sell a product at a price that is less than its actual purchase price if it is done so to harm competition, or to buy a product or service to the extent that it leads to higher market prices or to prevent any decrease thereof. Furthermore, the law prohibits the merging of two or more companies if such a merger would result in one entity controlling at least 50% of the total production or sales of a product or service.

7. Intellectual Property

7.1 Patents

Patents are regulated in Iraq by Law No 65 of 1970 on Patents and Industrial Designs (Patent Law) as amended by Law No 28 of 1999 and CPA Order No 81. According to Article 2 of the Patent Law, patents protect inventions that are applicable to industry, are novel or involve an innovative step and concern new industrial products, new industrial methods or new applications of known industrial methods.

The following persons may apply for patents:

- Iraqi nationals and citizens of Arab countries;
- foreigners residing in Iraq;
- foreigners belonging to a state having a reciprocal agreement with Iraq concerning patent registration;
- public departments; and
- companies and establishments organised and existing in Iraq or in a state having a reciprocal agreement with Iraq concerning patent registration.

Iraq is a member of the Convention establishing the World Intellectual Property Organization (WIPO) and the Paris Convention for the Protection of Industrial Property.

Patents are protected for 20 years from the date of the filing. They may not be renewed or extended.

Registration

Patent applications must be submitted in Arabic, contain a detailed description of the invention, and be accompanied by a number of documents. Each application will be examined for conformity with formal requirements and patentability according to the Patent Law, and amendments may be requested. The application will be refused in cases of non-compliance with the required amendments within the given deadline.

7.2 Trade Marks

Trade marks in Iraq are governed by Iraqi Trade Mark Law No 21 of 1957, which was amended pursuant to CPA Order No 80 on 26 April 2004. According to Article 1 of the Trade Mark Law, any mark that can be graphically represented and is suitable for distinguishing goods and services from other goods and services may be protected by a trade mark. The term “mark” includes trade marks, service marks, collective marks and certification marks.

Trade mark protection by registration may be obtained for ten years, and may subsequently be renewed every ten years.

Registration

Applications must be submitted in Arabic and accompanied by a number of documents. Use of trade marks is not a requirement for the filing of applications for registration. Application fees will be charged for each class. The registrar may

impose any limitations or modifications it considers necessary in respect of the form, mode or place of use of the mark to prevent confusion between the mark and a similar registered mark, or for any other reason it may consider appropriate.

7.3 Industrial Design

Industrial design is regulated in Iraq by Law No 65 of 1970 on Patents and Industrial Designs (Patent Law) as amended by Law No 28 of 1999 and CPA Order No 81. It is defined as "every new arrangement of lines and shapes, coloured or uncoloured, used in industrial production".

The term of protection of industrial designs is ten years from the date of issue of the certificate.

Registration

Every industrial design must be separately applied for. An application must be submitted to the registrar of patents and industrial designs, containing a detailed description of the design. The application will be rejected in case of non-compliance with the conditions stipulated by law, but the applicant may appeal the decision within 30 days thereof.

7.4 Copyright

Copyright Law No 3 of 1971 as amended by CPA Order No 83 governs Iraqi copyright and related rights. The Copyright Law protects the authors of original literary, artistic and scientific works. No registration is required to obtain protection.

The protection covers works expressed in writing, sound, drawing, painting or movement, including:

- written works of all types;
- computer programs, whether in source or object code, which are protected as literary works;
- works conveyed orally, such as lectures, lessons, speeches and sermons;
- works conveyed by drawing and painting with lines and colours, engraving, sculpture and architecture;
- dramatic works and musical plays;
- works performed by artistic movement or steps, and that are materially prepared for production;
- musical works, whether or not accompanied by words;
- photographic and cinematographic works;
- works prepared for radio and television;
- charts, drawings and scientific three-dimensional figures;
- public recitals of the Quran;
- sound recordings; and
- compilations of data.

The author's economic rights are protected throughout the lifetime of the author and for 50 years from the date of their death.

7.5 Others

In addition to the protection of inventions by patents and industrial designs, the Patent Law, as amended by CPA Order No 81, grants protection for undisclosed information, integrated circuits and plant varieties.

Iraq is a member of the Paris Convention on the Protection of Industrial Property (Stockholm Act).

8. Data Protection

8.1 Applicable Regulations

Iraqi legislation does not currently have a specific data protection or privacy law in place. In the absence of such a law, certain general provisions from the civil and penal codes involving privacy would apply.

8.2 Geographical Scope

Since there are no specific data protection laws in place, its applicability to foreign companies is not regulated.

Although there are no compliance measures in this case to be taken into consideration from existing legislation, there are general provisions that may be used to challenge any data used or disclosed. For instance, Article 437 of the Iraqi Penal Code penalises anyone who has access to confidential information and discloses or uses such information unless otherwise required by law. However, it also states that there would be no penalty if such disclosure is intended to report a felony or misdemeanour.

8.3 Role and Authority of the Data Protection Agency

In the absence of a data protection law, violations of data protection rules would be addressed by the judiciary, who would apply Iraqi Civil Code No 40 of 1951 and Iraqi Penal Code No 111 of 1969.

9. Looking Forward

9.1 Upcoming Legal Reforms

No major legislative reforms are expected in the near future for Iraq.

IRELAND

Law and Practice

Contributed by:
Philip Tully, Trevor Glavey, Emma Doherty, Geraldine Carr, Simon Shinkwin and Carlo Salizzo
Matheson LLP

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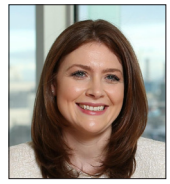
Contributed by: Philip Tully, Trevor Glavey, Emma Doherty, Geraldine Carr, Simon Shinkwin and Carlo Salizzo, **Matheson LLP**

Matheson LLP is the law firm of choice for internationally focused companies and financial institutions doing business in and from Ireland. Established in 1825 in Dublin, Ireland, and with offices in Cork, London, New York, Palo Alto and San Francisco, 860 people work across Matheson's six offices, including 122 partners and tax principals and over 560 legal, tax and digital services professionals. The firm's expertise is spread across more than 30 practice groups. Its clients include over half of the world's 50 largest banks, seven of the world's ten largest asset managers and seven of the top ten global technology brands, and it has advised the majority of the Fortune 100 companies.

Authors

Philip Tully is a partner in Matheson's tax department and is a member of the firm's international business group and US business group. He advises multinational corporations doing business in and from Ireland on all aspects of corporate tax. His main focus is on cross-border reorganisations, inward investment projects and cross-border tax transactions, as well as transfer pricing matters and tax disputes. He is a member of the Law Society of Ireland, the Irish Tax Institute and the International Bar Association.

Trevor Glavey is a senior associate in Matheson's tax department and is both an Irish qualified lawyer and chartered tax adviser. He advises leading companies across all industries with respect to all aspects of Irish corporate and international tax. In particular, he advises on the taxation and structuring of complex international arrangements and on tax authority audits, tax risk management and multi-jurisdictional tax controversies. He is a member of the Law Society of Ireland and the Irish Taxation Institute, and currently sits on the global committee of the Young International Fiscal Association Network (YIN).



Emma Doherty is a corporate partner at Matheson and works with international companies to establish, expand and operate their businesses in Ireland. She also advises clients on the complex legal issues arising in international transactions involving Irish subsidiaries of foreign companies. She regularly leads group-wide multi-jurisdictional international restructuring projects. In addition, she provides ongoing corporate advice and strategic counselling to clients, including advice concerning corporate governance and complex cash repatriation strategies. She is a member of the Company Law Review Group, an expert body that advises on the review and development of company law in Ireland. She is also a member of the Law Society of Ireland and the Irish Tax Institute.

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Geraldine Carr is a partner in the employment, pensions and benefits group at Matheson. She advises clients across various industries in the public and private sectors on all aspects of the employment relationship, from recruitment to termination of employment, dispute resolution and mediation. She has extensive experience in relation to the management of employees, senior executive appointments and terminations, background checks, outsourcing and insourcing, and the transfer of undertakings, restructurings, change management and industrial relations. She has represented clients before the Workplace Relations Commission, Labour Court, Circuit Court and High Court and frequently provides training workshops for clients and speaks at external conferences.

Simon Shinkwin is a senior associate in the EU, competition and regulatory law group at Matheson. His practice focuses on heavily regulated sectors and clients, particularly on merger control and foreign investment screening, behavioural competition issues and sectoral regulation. As part of his regulated sector practice, he advises on compliance with telecommunications, media, technology, life sciences, food and beverage and FMCG products on all aspects of the sector. He is a tutor in the Law Society of Ireland for trainee solicitors and contributes articles to leading international legal publications.

Carlo Salizzo is a partner in the technology and innovation group at Matheson. He specialises in data protection, technology outsourcing, product regulatory and intellectual property. He is also experienced in managing the legal response to urgent and critical incidents including personal data breaches and contentious data subject access requests, both in terms of internal responses and managing interactions with regulators. He also advises on issues relating to electronic signatures, Irish gambling legislation and export control. He is a member of the Irish Funds fintech working group and has lectured at Trinity College and with the Law Society of Ireland on technology law issues.

Contributed by: Philip Tully, Trevor Glavey, Emma Doherty, Geraldine Carr, Simon Shinkwin and Carlo Salizzo, **Matheson LLP**

Matheson LLP

70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2000
Fax: +353 1 232 3333
Email: dublin@matheson.com
Web: www.matheson.com

1. Legal System

1.1 Legal System and Judicial Order

The judicial system in Ireland is established by the Constitution and the principal courts are the district courts and circuit courts (with limited jurisdiction), the High Court (with unlimited jurisdiction in civil and criminal matters), the Court of Appeal (with appellate jurisdiction) and the Supreme Court (which usually exercises final appellate jurisdiction only). The judiciary is independent of the legislature and the executive.

Ireland is a member state of the EU and of the UN. The Irish legal system is similar in many respects to that of the UK and the US. Irish law is based upon the common law, statute and the Constitution. The EU also represents an important source of Irish law, and decisions of the Court of Justice of the European Union (CJEU) exercise significant influence over Irish law.

Ireland is the only EU common law jurisdiction, making it an attractive jurisdiction to establish operations and litigate international commercial disputes in. Other factors, such as the ease of doing business and the fact that it is the only Eurozone country in which English is the main language spoken, make Ireland one of the best destinations for foreign direct investment (FDI).

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

The FDI Screening Regulation

The EU Investment Screening Regulation (Regulation (EU) 2019/452, the "FDI Screening Regulation") came into force in October 2020. The FDI Screening Regulation sets out rules which enable scrutiny of investment ventures pursued within the EU by third countries.

Individual member states retain discretion as to whether they implement a screening system, but any such system must then meet basic criteria concerning confidentiality, transparency and the application of review timeframes.

The Screening of Third Countries Transactions Act 2023

The Screening of Third Country Transactions Act (the "Screening Act") was signed into Irish law on 31 October 2023 and is expected to come into force in September 2024. The Screening

Act provides for a new FDI screening regime, as mandated by the FDI Screening Regulation.

The regime provided for in the Screening Act is suspensory (with criminal sanctions) and involves very low thresholds. It covers a wide variety of sectors (eg, critical utilities and infrastructure sectors, hi-tech and personal data focused businesses and media businesses) and needs to be considered in parallel with other foreign investment regimes as well as Irish and international merger control rules.

2.2 Procedure and Sanctions in the Event of Non-compliance

Under the Screening Act, a new mandatory notification to the Minister for Enterprise, Trade and Employment (the "Minister") would be required for certain transactions that involve third-country or foreign-controlled undertakings that are parties to a transaction if the following conditions are met:

- a third-country undertaking or a connected person is a party to the transaction;
- the value of the transaction is at least EUR2 million;
- the transaction relates to critical infrastructure and technologies, natural resources, sensitive data or media; and
- the transaction relates to change of control of an asset or a defined change in share or voting rights in an undertaking in the state.

A failure to correctly notify the Minister will be a criminal offence and parties could be liable to: (a) on summary conviction, a fine of up to EUR5,000 and/or six months' imprisonment; or (b) on conviction on indictment, a fine of up to EUR4 million and/or five years' imprisonment.

2.3 Commitments Required From Foreign Investors

Irish authorities currently impose no specific commitments on foreign investors in relation to their investments.

2.4 Right to Appeal

The parties to a transaction may appeal a screening decision to an adjudicator within 30 days. Adjudicators' decisions may be appealed further within 30 days to the High Court on points of law only. These appeal proceedings would not be held in public due to the sensitivity of the issues involved.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The Companies Act 2014 (the "Companies Act") provides for the creation of various types of corporate vehicles in Ireland. A company of any type may be incorporated with a single shareholder.

Company Limited by Shares (LTD)

The LTD is the model form of private company limited by shares and the most common form of corporate vehicle used by foreign investors. The LTD has the same unlimited legal capacity as an individual. It has a single document constitution, and its internal regulations may be set out in simplified form in that constitution. An LTD is prohibited from offering equity or debt securities to the public.

Designated Activity Company (DAC)

The DAC is an alternative form of private limited company. A key distinction between a DAC and an LTD is the existence of an objects clause in the DAC constitution. A DAC may be a suitable vehicle where an objects clause is needed (eg, to restrict the corporate capacity of a joint venture

vehicle) or for companies listing debt securities on a stock exchange.

Unlimited Company

The Companies Act recognises three distinct types of unlimited company, which are:

- a private unlimited company with a share capital (ULC);
- a public unlimited company with a share capital (PUC); and
- a public unlimited company without a share capital (whose liabilities are guaranteed by its members) (PULC).

Members of an unlimited company may be held liable on an unlimited basis for the debts of the company in the event of it entering insolvent liquidation. ULCs may not offer for sale or list any new securities, but a PUC and PULC may list debt securities.

Public Limited Company (PLC)

The key distinction between PLCs and private companies is that only PLCs may list their shares on a stock exchange and offer them to the public. PLCs must have a minimum issued share capital of EUR25,000. A *Societas Europaea* (SE), the European model company, is regarded as a PLC under the Companies Act.

Guarantee Company (CLG)

A CLG does not have a share capital and is a popular type of company for charities, sports and social clubs, and property management companies. The members' liability is limited to the amount they undertake to contribute to the assets of the CLG in the constitution of the company in the event of its winding-up.

3.2 Incorporation Process

To incorporate a company in Ireland, certain documents, including the company's constitution, must be filed with the Companies Registration Office (CRO). Incorporation papers must contain the company name, registered office, directors' and secretary's details, subscriber details, the company's principal activity and the place in Ireland where it proposes to carry on that activity. The incorporation form includes a declaration that the Companies Act requirements have been complied with.

Under an express incorporation scheme, a company can be incorporated within five working days. Otherwise, it may take two to three weeks to incorporate a company. On incorporation, the CRO will issue the company with a certificate of incorporation. CRO fees are EUR50, and the process is completed online.

3.3 Ongoing Reporting and Disclosure Obligations

Documents Presented at the AGM

Irish companies must generally present audited financial statements to the annual general meeting (AGM) and then publicly file a copy with the company's annual return in the CRO (including certain disclosures concerning directors' remuneration). A directors' report on the state of affairs of the company and its subsidiaries must be attached to the balance sheet presented before the AGM. For all LTDs and other company types with one member (other than PLCs), a written procedure is available in place of an AGM. Small and micro companies are subject to fewer public disclosures and more relaxed reporting requirements.

Directors' Additional Disclosures

Directors may need to make additional disclosures to the company if, for example, they

hold shares representing more than 1% of the company's share capital. Directors of companies with assets exceeding EUR12.5 million and a turnover exceeding EUR25 million must also make a prescribed form of compliance statement in their directors' report.

Internal Register on Ultimate Beneficial Owner

Most Irish companies must maintain internal registers on individuals considered under law to be their ultimate beneficial owners. The EU (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 also require in-scope entities to file their beneficial ownership details on a central beneficial ownership register to which there is currently greatly restricted public access. Where the company has no beneficial owner or the beneficial owner cannot be identified, details of the company's senior managing officials (directors) must instead be provided.

Filings in Regard to Changes

CRO filings must be made in respect of changes to:

- the company name;
- the directors or company secretary;
- the registered office; and
- the share capital or the company constitution.

Details of mortgages or charges made regarding a company must also be filed with the CRO.

3.4 Management Structures

Irish companies are managed by a single-tier board of directors. All companies, other than LTDs, must have a minimum of two directors. The secretary may be one of the directors of the company. An LTD may have one director but there must be a separate company secretary in that case. A body corporate may act as secretary to another company, but not to itself. A body corporate may not act as a director.

At least one of the directors of an Irish company must be a resident of a member state of the European Economic Area (EEA) unless:

- the company posts a bond to the value of EUR25,000, which, in the event of failure by the company to pay a fine imposed in respect of an offence under company law or a penalty under tax legislation, will be used in the discharge of the company's liability; or
- the company holds a certificate from the CRO confirming that the company has a real and continuous link with one or more economic activities carried on in Ireland.

3.5 Directors', Officers' and Shareholders' Liability

Directors' common law fiduciary duties are codified in the Companies Act and include the duty to:

- act in good faith in what the directors consider to be in the interests of the company;
- act in accordance with the company's constitution and only use their powers for the purposes allowed by law;
- avoid conflicts of interest between the director's duty to the company and their other interests (including personal interests) unless the director is released from this duty; and
- exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both the knowledge and experience that may reasonably be expected of a person in the same position as the director and with the knowledge and experience that the director possesses.

An additional duty, to have regard to the interests of creditors, may apply in certain cases (eg, on insolvency).

Where a breach of duty by a director is proved, they may be required to account to the company for any personal gain made and indemnify the company for any loss or damage resulting from the breach. Generally, parent companies are not liable for the acts of limited liability subsidiaries, but they may be liable under parent company guarantees.

Directors' duties are owed (to varying degrees) to the company, the shareholders, the company's employees, the company's creditors and any appointing shareholder. Directors may be found criminally liable for certain breaches of the Companies Act and other offences including in respect of environmental, data protection, health and safety, and tax law.

However, subject to certain limitations in the Companies Act, a company is permitted to indemnify a director in respect of liability incurred in defending proceedings, whether civil or criminal, in which judgment is given in the director's favour or the director is acquitted, or where the High Court, in an application for relief, declares that the director has acted reasonably and honestly. In practice, the directors of Irish subsidiaries of multinational companies benefit from group-wide D&O insurance policies.

4. Employment Law

4.1 Nature of Applicable Regulations

Employment protection laws in Ireland apply to all employees working in the country, irrespective of the employee's nationality.

Employment law is primarily governed by:

- the Constitution;
- statutes and EU law;
- judicial precedents;
- common law (including contract law);
- statutory mechanisms put in place by the state to regulate certain sectors, including Sectoral Employment Orders (SEOs) which require acceptance by the Minister of State at the Department of Enterprise, Trade and Employment following a recommendation from the Labour Court;
- collective bargaining agreements; and
- custom and practice in the workplace and workplace or industry rules.

The primary legislation regulating employment relationships includes:

- the Unfair Dismissals Acts 1977 to 2015;
- the Employment Equality Acts 1998 to 2021;
- the Redundancy Payments Acts 1967 to 2022;
- the National Minimum Wage Acts 2000 and 2015 and the Payment of Wages Act 1991;
- the Terms of Employment (Information) Acts 1994 to 2014;
- the Maternity Protection Acts 1994 to 2022 (and other protective leave legislation);
- the Minimum Notice and Terms of Employment Acts 1973 to 2005;
- the Fixed Term Workers, Part Time Employees and Agency Workers Protection legislation;
- the Organisation of Working Time Act 1997; and
- the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003.

4.2 Characteristics of Employment Contracts

The Employment (Miscellaneous Provisions) Act 2018

Under the Employment (Miscellaneous Provisions) Act 2018, which was updated by the European Union (Transparent and Predictable Working Conditions) Regulations 2022, employers must notify employees in writing, within five days of commencement of employment, of the following core terms of employment:

- the full names of the employer and the employee;
- the address of the employer;
- the expected duration of the contract in the case of a temporary contract, or the end date if the contract is for a fixed-term;
- the rate or method of calculation of the employee's pay;
- any terms or conditions relating to hours of work, including overtime and the number of hours the employer reasonably expects the employee to work per normal working day and normal working week;
- the place of work, or where there is no fixed or main place of work, a statement stating that there are various places or that the employee is free to set their own place of work or to work at various places;
- the date the employment started;
- the job title, grade or nature of the work; and
- the duration and conditions relating to the probation period (if any).

The Terms of Employment (Information) Act 1994

Under the Terms of Employment (Information) Act 1994, all employers are obliged, within one month of commencement of employment, to provide their employees with a written statement setting out certain fundamental terms of their employment, such as pay intervals, paid leave (including annual leave and sick pay entitlement), pension and pension schemes, notice requirements, details of any collective agreements, any training to be provided, the identity of the recipient agency for social security contributions and any protection relating to social security arrangements. In addition to the above, if the work pattern is entirely or mostly unpredictable, the employer must provide the employee with information about the number of guaranteed hours, the hours and days the employee may be required to work and the minimum notice of a work assignment. For temporary agency contracts, the employer must also provide the identity of the person or firm hiring the agency worker. The statement must be signed by both the employee and the employer. Any change to the statutory particulars must be notified to the employee, in writing, no later than the day on which the change takes effect.

4.3 Working Time

An employer may not permit any employee to work for more than an average of 48 hours per week over a particular reference period (usually four months). This reference period varies depending on the type of employment in question. Working time should only take account of time spent working (ie, it should exclude rest and meal breaks).

Employees cannot opt out of the 48-hour average working week. However, there is a particular exemption for senior or specialist employees, who can determine their own working time, such that they are not subject to the restriction. The contracts of these employees should expressly provide that they are exempt from the 48-hour average working week.

Overtime

Generally speaking, there is no statutory entitlement to overtime under Irish law or payment for overtime. Employees will only be entitled to overtime pay if such an entitlement is contained in their employment contract or established by custom and practice in the employment concerned. However, employers that require employees to work on Sundays are required to compensate them for doing so, whether in terms of paying a Sunday premium or specifically considering that they may be required to work on a Sunday in calculating the rate of pay.

4.4 Termination of Employment Contracts

An employer can, under common law, terminate an employment contract without cause, provided this is in accordance with the terms of the contract. Notwithstanding any express contractual right to terminate, employees are afforded statutory protection against unfair or discriminatory dismissal. Under the Unfair Dismissals Acts 1977 to 2015 (UDA), an employer cannot lawfully dismiss an employee unless substantial grounds exist to justify termination.

An employer must also be able to establish that fair procedures have been followed before the dismissal. Subject to certain exceptions, employees must have at least 12 months' continuous service to qualify for protection under the UDA.

Generally, a dismissal will only be justified if it is based on one of the following grounds.

- The capability, competence or qualifications of the employee for the work concerned.
- The conduct of the employee.
- The redundancy of the employee.
- The employee is prohibited by law from working or continuing to work (eg, not holding a valid work permit where one is required).

If one of these grounds cannot be established, there must be other substantial grounds to justify the dismissal.

Ending a Contract of Employment

Where an employee or an employer wishes to end a contract of employment, minimum periods of notice apply where an employee has been in continuous service for at least 13 weeks. The notice period to be given by an employer depends on the employee's length of service. It varies from one week, applicable where an employee has been employed for up to two years, to eight weeks', applicable where an employee has been employed for 15 years and more. Employees, on the other hand, are only obliged to give notice of one week, irrespective of their length of service. However, these are only the minimum periods.

A contract of employment may specify a longer notice period on either side, and it generally does, with notice periods typically ranging from one to six months depending on the seniority of the role. There is no requirement to pay an employee severance in the event of dismissal unless it arises because of redundancy.

PEA procedures

The Protection of Employment Acts 1977 to 2014 (PEA) prescribe the procedures to be followed in a collective redundancy. Employers must initiate consultation at the earliest opportunity and, in any event, at least 30 days before the first notice of dismissal is given. Where an employer effects collective redundancies, they must, with a view to reaching an agreement, initiate consultation with employee representatives

in relation to matters such as the possibility of avoiding or reducing the proposed redundancies and the basis on which it will be decided which particular employees will be made redundant.

The PEA require employers to provide employee representatives and the Minister for Enterprise, Trade and Employment with certain written information, such as the proposed number of redundancies and a description of the employees the employer proposes to make redundant. The Minister must also be notified of the proposals at least 30 days before the first notice of redundancy is given.

Statutory redundancy pay

Statutory redundancy pay is currently two weeks' pay for each year of service, plus one extra week's pay. A week's pay for these purposes is currently subject to a ceiling of EUR600 a week. For both ordinary dismissals and collective redundancies, it is commonplace for employers to offer employees an ex gratia payment upon termination of employment in exchange for the employees signing a compromise agreement that waives all employment law claims against the employer.

4.5 Employee Representations

The concept of employee representation under Irish law relates to both unionised and non-unionised employees and is derived from a number of statutory and non-statutory sources.

Trade Union Representation

Any employee has the right to join a trade union, although trade unions may not legally compel employers to recognise and negotiate with them. The degree to which trade unions may embark upon industrial action is regulated principally by the Industrial Relations Act 1990. Employee representatives are appointed by way of a secret ballot.

Information and Consultation Representation

In addition to any local representation arrangements (whether with trade unions or otherwise), employees may be entitled to representation in certain circumstances as a matter of statute. This form of representation can arise in transfers of undertakings, in collective redundancy situations or where the employees are covered by a local or European-level works council.

The Transnational Information and Consultation of Employees Act 1996 (as amended) (the "1996 Act") requires undertakings with at least 1,000 employees in the EU and 150 or more employees in each of at least two member states to set up European works councils to inform and consult with their employees on a range of management issues relating to transnational developments within the organisation. Under the 1996 Act, a special negotiating body (SNB) is established to negotiate with the employer. The duration and functions of the SNB will be subject to the terms and purpose of the works council agreement put in place.

The Employees (Provision of Information and Consultation) Act 2006 obliges employers with at least 50 employees to enter into a written agreement with employees or their elected representatives setting down formal procedures for informing and consulting with them. The legislation will only apply if a prescribed minimum number of employees request it. The legislation is silent on how employee representatives are elected, and it will be up to the employees to determine how this is conducted, but usually, it is by way of a secret ballot.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

The primary Irish taxes applicable to employees and employers in the context of an employment relationship are income tax, pay-related social insurance (PRSI) and the universal social charge (USC).

Income Tax

Irish tax law generally imposes income tax on an individual where they are resident or ordinarily resident in Ireland in the year of assessment or if employment is exercised in Ireland in the year of assessment.

An individual will be considered resident in Ireland in a year of assessment if they are present in Ireland for at least 183 or 280 days in that year and the preceding year when taken together (provided that the individual has been present for at least 30 days in each of these two years). An individual will be regarded as ordinarily resident in Ireland for tax purposes if the person has been resident in Ireland for three consecutive years immediately preceding the year of assessment.

Different income tax rate bands apply depending on an employee's circumstances. The current standard rate of income tax is 20%, which applies to the first EUR42,000 per year earned by a single person without children and to the first EUR51,000 per year earned by a married person or a person in a civil partnership. A higher 40% rate is applied to any remaining balance.

PRSI

PRSI is Ireland's equivalent of social insurance or social security contributions. Subject to certain limited exceptions, anyone employed in Ireland is generally subject to PRSI and payments are generally collected by the employer through the PAYE system. The amount of PRSI paid by an employee depends on the employee's income and the PRSI class of the employee.

The most common PRSI class for private sector employees in Ireland is Class A (employees in industrial, commercial and service-type employment with gross earnings of EUR38 or more in a week). A Class A employee's PRSI contribution will generally be 4% of all "reckonable earnings" (including employee share-based remuneration and any benefit in kind). The employer must separately make a PRSI contribution of 8.8% on weekly earnings up to EUR441 and 11.05% on weekly earnings over EUR441. From 1 October 2024, the rate of PRSI (employer and employee) will increase by 0.1%.

USC

Employees in Ireland are also subject to a further tax payable on total income, known as USC. For 2024, the first EUR12,012 of an individual's aggregate annual income will be taxed at a rate of 0.5%, the following EUR13,748 at 2%, the following EUR44,284 at 4% and the remaining balance at 8%. An additional surcharge of 3% applies to individuals who are self-employed or whose non-employment-related income exceeds EUR100,000 in a year.

5.2 Taxes Applicable to Businesses

The primary Irish taxes applicable to businesses are corporation tax on income and chargeable gains, VAT, withholding tax and stamp duty.

Corporation Tax

A company resident in Ireland for Irish tax purposes will be subject to corporation tax on its worldwide profits and gains regardless of where those profits arise. A company that is not tax resident in Ireland is liable to corporation tax in

Ireland if it carries on a trade in Ireland through a branch or agency.

A non-Irish tax resident company may be subject to corporation tax on gains realised on the disposal of Irish-situated assets used for such a trade carried on in Ireland or realised on the disposal of certain specified Irish assets, including Irish land or buildings or shares in a company that derive the greater part of their value from Irish land or buildings. Where a non-Irish tax resident entity sells Irish patent rights in return for a capital sum, a charge to Irish tax at a rate of 25% can also arise.

A company will generally be considered tax resident in Ireland if it is centrally managed and controlled in Ireland, regardless of where it is incorporated. If a company is incorporated in Ireland, the general rule is that the company will be Irish tax resident unless it is tax resident in another country under the terms of a double tax treaty.

The rate of corporation tax payable on a company's profits will depend on whether the profits arise from trading (broadly, operational activities) or non-trading (eg, passive investment) activities. A low rate of 12.5% applies to trading profits, with a 25% rate applying to non-trading income. The question of whether a company is carrying on a trade is primarily one of fact to be decided on a case-by-case basis, although Irish Revenue is willing to provide an opinion as to whether a particular activity constitutes the carrying on of a trade in certain circumstances.

Losses incurred by a company in respect of trading operations can generally be carried forward indefinitely for use against future profits of that trade. Losses can also be surrendered to other companies within a group for Irish corporation tax purposes.

OECD Pillar Two Minimum Tax

Ireland has implemented the OECD's Two-Pillar solution to address the tax challenges arising from the digitalisation of the economy in line with the EU Implementing Directive. The Directive obliged EU member states, including Ireland, to introduce a minimum tax rate of 15% for multinationals with annual revenue over EUR750 million. Ireland introduced its legislation in Finance (No 2) Act 2023 and came into force on 31 December 2023.

Ireland has implemented a qualifying domestic minimum top up tax (QDMTT) to top-up Irish tax paid by in-scope entities to 15% (on profits computed in accordance with the OECD Pillar Two rules and the EU Directive).

The existing 12.5% corporation tax rate continues to apply to multinationals and domestic businesses operating in Ireland that do not exceed the EUR750 million group revenue threshold. As a result, there has been no change in the 12.5% corporation tax rate for the majority of businesses in Ireland which remain outside the scope of the minimum tax.

Chargeable Gains

Chargeable gains realised by an Irish tax resident company on the disposal of a capital asset are generally subject to corporation tax at an effective rate of 33%, where relief or exemptions are not available. A non-Irish resident company will be subject to corporation tax in a similar manner on gains realised on the disposal of specified Irish assets (broadly, Irish branch assets and Irish land and buildings, Irish minerals and exploration rights, or shares deriving their value from such assets or Irish branch assets).

VAT

Supplies of goods and services in Ireland are generally subject to VAT. The standard rate of VAT in Ireland is 23%. Reduced rates ranging from 0% to 13.5% may apply to supplies of certain specified goods and services, and full exemptions apply to certain goods or services. A business engaged in an activity subject to VAT should typically be entitled to recover the VAT it incurs on purchases, subject to certain exceptions.

The obligation to account for VAT on supplies made by a company may arise for the supplier or customer, depending on the relevant circumstances, such as whether the supply involves a cross-border element. Businesses are generally obliged to register for VAT in Ireland.

Withholding Tax

Ireland imposes withholding tax on payments of distributions and dividends by Irish-resident companies at a rate of 25% and payments of interest, patent royalties and certain annual payments at 20%. However, there are broad exemptions from these withholding requirements. As a result, withholding tax will generally not arise on payments made to persons resident in another EU member state or in a jurisdiction with which Ireland has agreed a double taxation treaty.

Stamp Duty

Irish stamp duty applies to certain documents that transfer property and are executed in Ireland, relate to property situated in Ireland (such as Irish real estate or shares in Irish companies), or relate to a matter or thing done or to be done in Ireland.

However, there are various exemptions and reliefs from Irish stamp duty, including an exemption for transfers of certain IP rights and broad reliefs for intra-group transfers and group reorganisations and mergers. Where an exemption is not available, stamp duty generally applies at a rate of 1% to transfers of shares and 7.5% for transfers of commercial property.

5.3 Available Tax Credits/Incentives

There are a number of tax credits and incentives available in Ireland, including research and development tax credits and capital allowances for capital expenditure incurred to acquire certain intellectual property. In the Finance Act 2022, a new digital games tax credit was introduced to incentivise developers to produce digital games that contribute to the promotion and expression of Irish and European culture. The credit is available on expenditure incurred in the design, production and testing stages of the development of qualifying digital games, provided certain conditions are satisfied, including that the qualifying expenditure is not less than EUR100,000.

Research and Development Tax Credit

Irish tax legislation provides a tax credit regarding certain expenditures on research and development activities, buildings and plant and machinery. Credit is available for 30% of the allowable expenditure (in addition to a general tax deduction at 12.5%).

A number of conditions must be satisfied for the credit to be available, including a requirement that the research and development seeks to achieve scientific or technological advancement and involves the resolution of scientific or technological uncertainty.

Ireland recently increased the rate of its R&D tax credit to 30% to ensure that this regime remains best in class and is regarded as a “qualifying refundable tax credit” for the purposes of the OECD’s Pillar Two rules.

Capital Allowances Regime for Capital Expenditure on the Provision of Certain Intellectual Property

A special capital allowances (tax depreciation) regime is available for capital expenditure incurred to acquire certain categories of intellectual property (known as "specified intangible assets") for a company's trade. Specified intangible assets for these purposes include patents, trade marks, brands, copyrights or computer software, among other categories of IP.

Capital allowances on qualifying expenditure may either be claimed: (i) in accordance with amortisation charged to the profit-and-loss account of the company; or (ii) on a straight-line basis over 15 years at the rate of 7% for the first 14 years and 2% in the final year. Capital allowances are available to offset taxable profits earned from the specified intangible assets subject to an 80% cap.

Revenue will expect a robust valuation report to support the arm's length nature of the capital expenditure, and taxpayers must maintain documentation and records used to prepare the intellectual property valuation.

5.4 Tax Consolidation

Tax consolidation is not available under Irish tax law, and a company subject to corporation tax must prepare and file its tax return for corporation tax purposes for each assessment period. However, Irish tax law does provide for group relief, which permits companies within the same corporate group to surrender certain losses to other profitable group companies.

5.5 Thin Capitalisation Rules and Other Limitations

Ireland does not have any specific thin capitalisation rules, but there are a number of circumstances where interest payments may be considered non-deductible in calculating the taxable profits of a company.

For instance, interest paid by a company may be recharacterised as a non-deductible distribution where interest is paid for securities that are convertible into shares, where interest is dependent on the company's results, or where it represents more than a reasonable commercial rate.

Ireland has introduced anti-hybrid rules and anti-reverse-hybrid rules, in accordance with the EU Anti-Tax Avoidance Directive (ATAD). These rules can deny tax deductions in respect of certain arrangements between associated enterprises, giving rise to tax mismatches as a result of hybrid instruments or entities. The rule can also apply to treat certain transparent Irish entities as subject to tax.

Ireland has also implemented interest limitation rules in accordance with EU ATAD. These rules apply to cap deductions for interest at 30% of earnings before interest, taxes, depreciation and amortisation (EBITDA) in certain circumstances.

Ireland introduced defensive measures in respect of certain outbound payments made after 1 April 2024. These measures operate to remove exemptions from withholding taxes on certain outbound payments of interest, royalties and distributions to an associated entity who is resident in a "zero-tax" or "no-tax" jurisdiction or in a jurisdiction listed on the EU Blacklist.

There is grandfathering from these measures until 1 January 2025 for arrangements which were in place on or before 19 October 2023. There are also a number of exceptions from these defensive measures where the outbound payment is subject to a CFC tax, a qualifying Pil-

lar Two tax or is paid out of income that has been subject to tax in certain circumstances.

5.6 Transfer Pricing

Irish transfer pricing rules apply the arm's length principle to trading transactions between associated enterprises. In this context, "arm's length" is to be construed in accordance with OECD guidelines. The Irish transfer pricing rules were significantly amended from 1 January 2020 to align with the 2017 OECD guidelines, including enhanced documentation requirements. The Finance Act 2022 ensured that, in line with international developments, Ireland's transfer pricing rules are to be construed in accordance with the 2022 version of the OECD guidelines.

Broadly, Ireland's transfer pricing rules require that if the actual consideration payable or receivable by a trader in a transaction with an associated enterprise is other than at arm's length, then any understatement in the trader's profit will be reversed so that the full arm's length profit of the trader will be taxed.

The Irish rules were updated from 1 January 2020 to apply to non-trading transactions (save for certain non-trading transactions between two Irish residents) in addition to trading transactions. The Irish transfer pricing rules can now also apply to capital transactions where the market value of the asset exceeds EUR25 million.

5.7 Anti-evasion Rules

Ireland has strict anti-evasion rules that impose criminal sanctions on those who fraudulently evade tax and anyone who facilitates such evasion. Anyone found guilty of an offence may be fined and/or imprisoned.

Anti-avoidance Rule

Ireland also has a general anti-avoidance rule that applies in respect of tax-avoidance transactions. Broadly, a tax avoidance transaction in this context is a transaction which gives rise to a tax advantage and is undertaken primarily to claim a tax advantage and not for bona fide commercial reasons. In such cases, Revenue may deny or withdraw the relevant tax advantage. In determining whether a transaction is a tax avoidance transaction, regard will be given to:

- the form of the transaction;
- the substance of the transaction and any other transaction(s) directly or indirectly related to or connected with that transaction; and
- the final outcome of the transaction and any related transaction.

As such, genuine commercial arrangements undertaken with a view to making a profit should generally not be subject to the general anti-avoidance rule.

Exit Charge

Ireland introduced an ATAD-compliant exit tax in October 2018. The exit tax is charged at a rate of 12.5% and applies to unrealised capital gains inherent in assets where:

- a company migrates its place of residence from Ireland to any other jurisdiction; or
- assets or a business of an Irish permanent establishment (PE) are allocated from the PE back to its head office or to a PE in another jurisdiction (this limb of the charge only applies in respect of companies that are resident in an EU member state other than Ireland).

The exit charge does not apply to assets that remain within the Irish tax charge. A higher 33%

exit charge can apply where the transaction forms part of an arrangement to subsequently dispose of the relevant assets.

Where the relevant company/assets have been migrated to an EU/EEA country, the exit charge may be deferred and, in such circumstances, is payable in instalments over five years. If the exit charge is unpaid, Revenue may pursue any other Irish-resident group company or a director who has a controlling interest in the company subject to the charge.

6. Competition Law

6.1 Merger Control Notification

The Irish merger control regime applies to "any merger or acquisition" defined by Section 16(1) of the Competition Acts 2002 to 2022 (the "Act"), as amended, including transactions where:

- two or more undertakings, previously independent of one another, merge;
- one or more individuals who already control one or more undertakings or one or more undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
- the acquisition of part of an undertaking, although not involving the acquisition of a corporate legal entity, consists of acquiring assets that constitute a business to which a turnover can be attributed (here, "assets" include goodwill).

Turnover Thresholds

Mergers and acquisitions that meet the turnover thresholds set out in Section 18(1) of the Act are subject to mandatory notification to the CCPC, where, for the most recent financial year:

- the aggregate turnover within Ireland of the undertakings involved is not less than EUR60 million; and
- the turnover within Ireland for each of two or more of the undertakings involved is not less than EUR10 million.

The simplified merger notification procedure can be used for transactions that meet the financial thresholds for notifications but pose no risk of substantial lessening of competition in Ireland, for example, where there is no horizontal or vertical overlap between the undertakings involved, where the combined market shares are less than 15% in cases of horizontal overlap and 25% in cases of vertical overlap, or where there is a change from joint to sole control in a pre-existing joint venture.

Where these requirements are not met, mergers may still be notified to the CCPC on a voluntary basis under Section 18(3) of the Act. The CCPC can also investigate mergers falling below the turnover thresholds, (and "call in" such mergers) where they believe the merger could present competition issues.

Joint Ventures

Only full-function joint ventures (ie, those which perform, on a lasting basis, all the functions of an autonomous economic entity) constitute a merger for the purposes of the Irish merger control regime. The CCPC, which is primarily responsible for the enforcement of the Irish merger control regime, adopts an approach mostly consistent with the European Commission in identifying whether joint ventures are subject to Irish merger control law.

Where a joint venture does not qualify as full-function, the CCPC may assess it under Section 4 of the Act, based on Article 101 of the

Treaty on the Functioning of the European Union (TFEU). Typically, the CCPC will have regard to the European Commission's Guidelines on Horizontal Cooperation Agreements and the Guidelines on Vertical Restraints when undertaking such an assessment.

6.2 Merger Control Procedure

A filing must be submitted to the CCPC prior to implementing the merger and may be made as long as the undertakings involved demonstrate a good faith intention to conclude an agreement.

Phase I

A Phase I clearance determination must be issued by the CCPC within 30 working days of the "appropriate date", which means the date on which a complete filing by the merging parties is made unless either the CCPC has used its power to "stop and restart the clock" by issuing a formal requirement for information (RFI). This has the effect of resetting the clock and only restarting it when the RFI is complied with or when the parties and the CCPC commence negotiating remedies, in which case, the Phase I period is extended to 45 working days. The CCPC also issues "informal" requests for information that do not stop and restart the clock.

Phase II

A Phase II clearance determination must be issued by the CCPC within 120 working days of the appropriate date. If the CCPC issues a formal RFI in the first 30 working days of the Phase II period, this has the effect of stopping and restarting the clock in the same way as in Phase I. If the parties and the CCPC are negotiating remedies, the Phase II period is extended to 135 working days.

Obligations and Failure to Notify

A suspensory obligation is included in the Act. Section 19(1) of the Act imposes a prohibition on the merging parties putting a merger that has been notified (both mandatorily and voluntarily) into effect prior to the issuing of a clearance determination.

Under Sections 18(9) and 18(10) of the Act, failure to notify a merger that meets the turnover thresholds is a criminal offence punishable by fines of up to EUR250,000, plus EUR25,000 per day for a continued breach. The CCPC can now also impose administrative fines or could also seek (with the Director for Public Prosecutions) criminal sanctions.

6.3 Cartels

Anti-competitive agreements and practices are prohibited under Section 4 of the Act based on Article 101 of the TFEU. Section 4 prohibits agreements, decisions and/or concerted practices that have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in Ireland or any part of Ireland. The Act applies to businesses operating in Ireland and international businesses where an agreement is found to restrict competition in Ireland.

Section 4 sets out a non-exhaustive list of agreements that are prohibited, such as those that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading partners (thereby placing them at a competitive disadvantage); or

- make the conclusion of contracts subject to acceptance by other parties of supplementary obligations that by their nature or according to commercial usage have no connection with the subject matter of the contracts.

Section 6 of the Act makes it a criminal offence to enter into or implement an agreement, decision or concerted practice prohibited under Section 4. The CCPC operates a Cartel Immunity Programme with the Director of Public Prosecutions and a separate Leniency Programme which provides for the possibility of immunity or leniency from prosecution or civil action for the company/business to come forward to report certain competition offences.

6.4 Abuse of Dominant Position

Abuse of a dominant position is prohibited by Section 5 of the Act and Article 102 of the TFEU. Section 5 of the Act mirrors Article 102 of the TFEU, except that it refers to the abuse of a dominant position in trade for any goods or services in Ireland or any part of Ireland. While the Act refers to trade in goods and services in the state, its provisions are also likely to apply to international businesses/trade that are/is found to be dominant and where there is an effect on trade in Ireland.

Definition of Dominance

There is no definition of dominance within the Act. The Irish courts and the CCPC have adopted the definition formulated by the CJEU in case 27/76, United Brands v Commission [1978] ECR 207: "[a] position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".

Section 5(2)(a) to (d) of the Act also sets out several examples of what constitutes abuse of dominance. These are:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations that according to commercial usage have no connection with the subject of such contracts.

Remedies

As in the case of cartels, the Act makes abuse of a dominant position a criminal offence that can be prosecuted before the Irish courts and is punishable by financial penalties. The Act also includes specific provisions for aggrieved persons and the CCPC to take civil proceedings before the Irish courts seeking remedies for abuse of a dominant position. The remedies available in civil proceedings include a court declaration, damages, imposing structural measures and an injunction.

7. Intellectual Property

7.1 Patents

Definition

Any inventive product/process is patentable under Irish law if it:

- is susceptible to industrial application;
- is new; and

• involves an inventive step.

Certain inventions are specifically excluded under Irish law, including a discovery or scientific theory, computer programs and methods of doing business.

Length of Protection

Patent protection lasts for up to 20 years from the date of the application, subject to the payment of renewal fees. Irish law also provides for the extension of full-term patents for pharmaceuticals for human or animal use for up to five years.

Irish law also provides for short-term patents, which have a ten-year duration. The test of inventiveness for a short-term patent is lower than for a full-term patent. Short-term patents may be converted to full-term patents where they meet the requirements for a full-term patent.

Registration

Applications for Irish patents are filed at the Intellectual Property Office of Ireland (IPOI). The specification forming part of the application must include the title of the invention, description of the invention and claim or claims and drawings, if any, referred to in the description.

It is also possible to file a patent application at the European Patent Office (EPO) under the European Patent Convention (EPC) or at the World Intellectual Property Organisation (WIPO) under the Patent Cooperation Treaty (PCT) and to designate Ireland for patent protection. The EPC and the PCT both facilitate the application for patents in a number of jurisdictions, but these are effectively a bundle of applications to a number of states.

There are plans to reform both registration and enforcement under the Unified Patent Court Agreement. This reform consists of two pillars: (i) the creation of a new European patent with unitary effect; and (ii) the establishment of the Unified Patent Court.

The Agreement on a Unified Patent Court was signed in February 2013 by 25 EU member states, including Ireland. An amendment to Article 29 of the Irish Constitution is required before Ireland can ratify the agreement, as it entails a transfer of jurisdiction in patent litigation from the Irish courts to an international court. On 23 January 2024 the Government approved a proposal to hold a constitutional referendum in June 2024. However, this has since been postponed with no alternate date chosen.

Enforcement and Remedies

Patents in Ireland are enforced through civil claims against infringing parties. A patent owner can prevent direct or indirect use of their invention by third parties in Ireland without consent.

The courts have a wide range of civil remedies available to them to compensate aggrieved owners. These include a declaration of the validity of a patent and that it has been infringed, damages for infringement, injunctive relief and orders to account for profits, and to seize, destroy and/or hand over infringing goods to the patent holder. This will be subject to change upon ratification of the Unified Patent Court Agreement.

7.2 Trade Marks

Definition

A trade mark under Irish law is any sign capable of both:

• being represented graphically; and

- distinguishing the goods or services of one undertaking from those of other undertakings.

A trade mark may consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.

Unregistered trade marks have a limited protection in Ireland through the law of passing off, in a manner similar to that applying in other common law jurisdictions.

Length of Protection

Registered trade marks (be they national Irish marks, Madrid Protocol marks or EU trade marks) are registered initially for ten years but, uniquely among intellectual property rights, this term can be renewed indefinitely for successive ten-year terms on payment of a renewal fee.

A trade mark registration will only remain valid to the extent that the mark is used by the owner in respect of the goods/services for which it was registered.

Registration

There are three options open to trade mark proprietors carrying on business in Ireland.

An application for an Irish trade mark at the IPOI

An IPOI examiner scrutinises the application to ensure that it can be considered a trade mark under Irish law and generally examines the application to see if its use would infringe pre-existing Irish/EU trade marks or if it otherwise falls within a prohibited form of trade mark. If satisfied with the application, the IPOI publishes it in the Official Journal. Third parties then have three months to oppose the application by filing a notice of opposition.

If there is no opposition, the application will proceed to registration on payment of the registration fee.

An application for an EU trade mark at the European Union Intellectual Property Office (EUIPO)

EU trade marks are filed with the EUIPO and undergo an examination, publication and opposition procedure prior to registration, similar to that described for Irish trade marks above. An EU trade mark is a unitary European-wide property right and protects the trade mark proprietor in all member states of the EU.

An international application designating certain states, including Ireland, under the Madrid Protocol

On request, the IPOI will forward a trade mark application or registration to the International Bureau of the WIPO in Geneva. The Irish trade mark application or registration serves as a base on which the proprietor may designate the mark for registration in other Madrid Protocol countries, eg, the UK and the US. The International Bureau notifies the trade mark offices designated in the international filing, which, in turn, decide whether to accept the application for registration in their territory.

A Madrid Protocol filing can be a cost-effective and efficient way to obtain trade mark protection in multiple jurisdictions.

Enforcement and Remedies

An infringement will occur where a mark that is the same as or similar to a registered mark is used in relation to the same or similar goods or services as the registered mark. Where the mark used by a third party is not identical to the registered trade mark, the proprietor needs to

show that there is a likelihood of confusion on the part of the public.

The reliefs available for trade mark infringement include damages, injunctions and orders for an account of profits, and the destruction or delivering up of infringing goods.

An unregistered trade mark can be enforced through the vehicle of "passing off". To succeed in an action for passing off, the plaintiff must show that the defendant made a misrepresentation in the course of trade to prospective customers calculated to injure the business or goodwill of the plaintiff and that caused or was likely to cause the plaintiff damage.

7.3 Industrial Design

Definition

Under Irish law, a "design" is defined as the appearance of the whole or part of a product resulting from the features of a product or its ornamentation, including the lines, contours, colour, shape, texture or materials of the product itself or its ornamentation. In order to be registerable, a design must be "new" and have "individual character". Unregistered designs are also granted a level of protection under Irish law.

An EU regulation entered into force in November 2023 which requires member states to put in place a legal framework for geographical indication (GI) protection for craft and industrial products. The Regulation will apply from 1 December 2025. Ireland is required to enact implementing legislation in advance of this date.

Length of Protection

The total term of protection for designs under Irish law is 25 years, renewable at five-year intervals.

An unregistered design exists for three years from the date the design is first made available to the public within the EU, where the disclosure could reasonably have become known to those in the sector concerned, operating within the EU.

Registration

Designs are registered with the IPOI. An application for a Registered Community Design is made with the EUIPO.

Enforcement and Remedies

The reliefs available for industrial design infringement include damages, injunctions and orders for an account of profits.

An unregistered design does not confer a monopoly, unlike a registered design, and infringement can take place only if copying can be established.

7.4 Copyright

Definition

Copyright is an intellectual property right which features mainly in but is not exclusive to the cultural, arts and information technology sectors. It is the legal form of protection used by the creators or authors of such works to protect the tangible form of all or part of their individual works. Irish law specifically recognises copyright in computer software as a literary work.

Length of Protection

The duration of copyright protection varies according to the format of the work.

- For literary, dramatic, musical and artistic works and original databases, copyright protection expires 70 years after the death of the author/creator.
- For films, copyright protection expires 70 years after the last to die out of: the director,

the author of the screenplay, the author of the dialogue of the film, or the author of the music composed for use in the film.
- For sound recordings, copyright protection expires 50 years after the sound recording is made or, if the recording is made available to the public, then 70 years from the date it was made available to the public.
- Copyright protection for broadcasts ends 50 years after they are first transmitted.
- Copyright protection for computer-generated works ends 70 years after the date they are first made available to the public.

There are some exceptions under Irish law which reflect instances where the wider public interest, or the interests of particular groups, make it necessary to restrict or limit the rights granted to copyright owners.

Registration

There are no registration formalities in Ireland for obtaining copyright protection. Copyright arises automatically on the creation of an original work.

Enforcement and Remedies

Copyright in Ireland is enforced by way of both civil and criminal liability. Copyright holders may bring actions for damages, injunctive relief, search and seize orders, and orders for an account of profits. Infringements that may occur include:

- unauthorised copying of the work;
- performing the work;
- making the work available to the public; and
- adaptation of the work.

The District Court and the Circuit Court now have jurisdiction to determine intellectual property claims, including claims in relation to copyright infringement.

7.5 Others

Databases

Irish law provides protection for both original databases and "non-original" databases where substantial investment has been incurred in obtaining, verifying or presenting the contents of the database. Original databases are those in which the contents constitute the original intellectual content of the author. The protections for databases under Irish law prevent the unlawful extraction or re-utilisation of a substantial part of the database.

Where a copyrighted work is included in a database, copyright will continue in that work and the separate database protections.

The protection of databases under Irish law expires 15 years from the end of the calendar year in which the making of the database was completed.

Trade Secrets

Irish law provides for the protection of trade secrets. Trade secret protection is afforded without registration and can last without limitation in time, generally as long as confidentiality is maintained. In order for something to qualify as a trade secret, it must satisfy three requirements.

- The information must not generally be known or readily accessible in the relevant industry.
- The information must have commercial value because it is secret.
- The information must be subject to reasonable steps, under the circumstances, to keep it secret.

Where a trade secret is unlawfully used, various remedies under Irish law, including injunctions, corrective measures such as recall or destruction of infringing goods and damages, are avail-

able to protect the trade secret owner. A person who contravenes or fails to comply with court orders commits an offence and is liable to a fine and/or imprisonment for up to six months.

The EU (Protection of Trade Secrets) Regulations 2018 gave effect to the EU Trade Secrets Directive and came into force on 9 June 2018 by way of SI No 188/2018. The Regulations provide civil remedies in circumstances where a trade secret is unlawfully used and allow for measures limiting access to court hearings and documents to ensure the confidentiality of trade secrets in court proceedings, including making it a criminal offence to contravene such measures.

8. Data Protection

8.1 Applicable Regulations

Principal Data Protection Laws

The principal data protection legislation in Ireland is Regulation (EU) 2016/679 (the General Data Protection Regulation or GDPR), as supplemented by the Irish Data Protection Acts 1988 to 2018 (DPA) as amended.

Irish law-specific nuances, as permitted or required under the GDPR, are set out in the DPA. These include restrictions on processing personal data relating to criminal convictions and offences, the setting of the so-called digital age of consent, certain narrow derogations from data subject rights, and the administrative powers and procedures of the local supervisory authority, the Data Protection Commission.

The GDPR has general application to the processing of personal data in the EU, setting out extensive obligations on controllers and processors and providing strengthened protections for data subjects. The GDPR carries the potential for large fines of up to 4% of a firm's worldwide annual turnover from the preceding financial year, or EUR20 million (whichever is higher).

In May 2023, the CJEU judgment of UI v Osterreichische Post AG (Case C-300/21) confirmed that a mere infringement of the GDPR does not give rise to the right to compensation in itself but that there must be a breach, some damage and a causal link between the two, as in most negligence cases. Claimants do have to prove damage of some kind in order to recover compensation for non-material loss following a GDPR infringement. The decision does not confirm what proof of non-material damage is required other than there is no threshold of seriousness and further consideration of this question is anticipated by the Irish courts.

On 10 January 2024, the Commercial Court awarded damages in Nolan & Ors v Dildar & Ors [2024] IEHC 4 despite no factual material or non-material damage being found. Damages were awarded "to mark the fact that their rights had been infringed". The case arose from a breach in 2013 and the Court considered the scope of data controllers' liability to data subjects for infringement of their rights under the 1988 and 2003 Data Protection Acts.

While the breach predated the GDPR and the Data Protection Act 2018, the judgment indicated the potential quantum and heads of damages that may be awarded to data subjects bringing compensation claims for damage suffered due to data protection violations under the new regime.

The European Commission is required to conduct a review of GDPR rules every four years and it is anticipated that the results of this review will be published in mid-2024. Major changes are not expected although the Commission will likely

look at problematic areas identified, such as the exercise of Data Subject Access Requests, the applicability of GDPR to SMEs, and international data transfers.

Other Relevant Legislation

Ireland has transposed the ePrivacy Directive via SI No 336/2011 – European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (the "ePrivacy Regulations"). The ePrivacy Regulations deal with security and data breach reporting obligations for certain telecommunications companies and, more generally, electronic direct marketing rules. The same implementing legislation addresses the local Irish requirements around obtaining consent for the use of cookies and similar technologies.

Social welfare legislation such as the Social Welfare Act 2005 strictly prohibits the use of the Irish Personal Public Services Number (PPSN) for purposes other than dealing with specified government bodies.

8.2 Geographical Scope

The GDPR applies to the processing of personal data by controllers and processors established in the EU (regardless of whether the processing itself takes place in the EU).

The GDPR also applies to controllers and processors not established in the EU, where the organisation's processing activities involve either the offering of goods or services to data subjects in the EU or the monitoring of the behaviour of data subjects in the EU.

8.3 Role and Authority of the Data Protection Agency

The Irish Data Protection Commission (DPC) is the independent authority responsible for enforcing the GDPR and the DPA in Ireland. The DPC has investigative powers to examine complaints from individuals in relation to potential infringements of data protection law and can order corrective measures where necessary. The DPC has extensive investigative and information-gathering powers.

The DPC co-operates with other European supervisory authorities and will act as the lead supervisory authority in respect of cross-border processing of personal data by organisations that have their main establishments (from a data processing perspective) in Ireland.

9. Looking Forward

9.1 Upcoming Legal Reforms

There have been a number of recent developments in Irish and EU law, with certain legislative reforms expected in the near future.

Digital Services Act (DSA)

The Digital Services Act (DSA) became EU law in November 2022 and the majority of its provisions became directly applicable in February 2024. Irish implementing legislation was enacted in February 2024. The DSA contains new rules ensuring greater accountability for online intermediary service providers and regulating how they moderate content, advertise and use algorithmic processes. The DSA imposed additional obligations on very large online platforms (VLOPs) and very large online service engines (VLOSEs) which have 45 million or more average monthly active recipients of the service in the EU.

Digital Markets Act (DMA)

The Digital Markets Act (DMA) became law on 1 November 2022 and the majority of its provi-

sions became effective on those entities designated as "gatekeepers" in March 2024. The aim of the DMA is to ensure that large online platforms behave fairly in online environments and that digital markets are contestable by smaller players. The DMA established a set of narrowly defined objective criteria for qualifying a large online platform as a "gatekeeper". Gatekeepers have a number of obligations, which include offering interoperability and ensuring that users have the right to unsubscribe from core platform services and to inform the European Commission of mergers and acquisitions (regardless of whether the relevant transaction is mandatorily notifiable).

Some other developments of note are summarised below.

Corporate Law

The Companies (Corporate Governance, Enforcement and Regulatory Provisions) Bill is listed for priority publication on the summer 2024 government legislation programme. The general scheme has been published and contemplates reform in the areas of corporate governance, company law enforcement and supervision, administration and insolvency. On governance, in addition to addressing a number of technical issues arising from the Companies Act 2014, companies can expect to see virtual shareholder and creditor meetings put on a permanent statutory footing.

The Corporate Sustainability Reporting Directive ((EU) 2022/2464) (CSRD) had to be transposed into domestic law by 6 July 2024. Irish transposition measures are currently being formulated. CSRD will require in-scope companies to make ESG-related disclosures against common EU reporting standards. The first set of companies must report in 2025 based on 2024 data. An EU-wide audit requirement for reported sustainability information will apply, initially on a limited basis.

The proposed Corporate Sustainability Due Diligence Directive (CSDDD) was approved by the European Parliament in April 2024. CSDDD will subject those in-scope companies to due diligence obligations relating to human rights adverse impacts and environmental adverse impacts within their own operations, the operations of their subsidiaries and their "value chains" and impose liability for violations of it. CSDDD must be endorsed by the Council of the EU next and signed and published in the EU Official Journal.

Ireland will then have two years to transpose the new rules into national law and the obligations will apply on a phased basis.

Tax Law

Ireland plans to introduce a participation exemption for foreign dividends and distributions in 2025. In April 2024, the Department of Finance published its latest consultation document that included a strawman proposal setting out a potential approach to the key building blocks of the participation exemption. While this strawman proposal is not definitive of the final rules, it does indicate the current thinking of the Department of Finance.

These are some of the key points to note from the proposed strawman.

- In order to qualify for an exemption 5% shareholding must be satisfied for an uninterrupted period of 12 months up to the date of the dividend (dividends in respect of new shares may also qualify, if subsequently held for 12 months).

- Dividends received from companies resident in the EU/EEA or from companies in jurisdictions with which Ireland has a double tax agreement (DTA) will qualify.
- There will be no restriction to dividends derived from trading profits.
- Relief is proposed to be available in respect of dividends and distributions received in accounting periods commencing on or after 1 January 2025.
- The participation exemption will apply on an opt-in basis with an election required that applies for a three-year period.

A further feedback statement is expected in mid-2024 that should contain draft legislation. It is anticipated that the final legislation will be included in Ireland's Finance Bill 2024 which is expected to be published in October.

Competition Law

The Competition (Amendment) Act 2022 which was signed into law in June 2022 and commenced on 27 September 2023, is expected to revolutionise the Irish competition regime. The Act implements the provisions of Directive 2019/1 (the "ECN+ Directive"), which seeks to harmonise the enforcement of EU competition law across the EU and bolster the enforcement powers of national competition authorities.

EU Foreign Direct Investment Screening Regulation

A new proposed EU Foreign Direct Investment Screening Regulation while unlikely to enter into force until 2026 at the earliest, would overhaul the current EU Regulation from 2019 by bolstering the requirements of national FDI screening regimes and enhancing cooperation and information sharing requirements amongst member states and the Commission.

Employment Law

Automatic Enrolment Retirement Savings Systems Bill 2024

Ireland is introducing a system of automatic enrolment for retirement savings. The draft legislation to implement this system, the Automatic Enrolment Retirement Savings System Bill 2024, was published in April 2024. Automatic enrolment will apply to all employees aged between 23 and 60, earning over EUR20,000 per annum and who are not members of qualifying occupational pension arrangements. Applying to annual earnings of up to EUR80,000, employers of in-scope employees will initially be required to make a contribution of 1.5% of an employee's annual earnings, rising gradually to 6% by year 10 of the system being in place.

Other employer obligations include calculating, deducting and remitting employer and employee contributions. It is important to note that the automatic enrolment system operates on an opt-out basis, meaning that where employees meet the criteria, they will automatically be enrolled (with a right to opt out at defined, future points in time). Failure by an employer to fulfil certain duties under the system can be a criminal offence punishable by up to six months in prison and/or a fine of EUR5,000. The system is currently due to come into force on 1 January 2025.

Employment Permits Bill 2022

The Employment Permits Bill 2022 was introduced in October 2022 and aims to improve and modernise the employment permit system. The proposals include a new type of employment permit for seasonal workers, revision of the labour market needs test, allowing subcontractors to make use of the employment permit system and additional eligibility conditions for certain employment permits to be specified.

EU Pay Transparency Directive

The aim of the Directive is to promote greater pay transparency and fairness in the workplace and to reduce the gender pay gap within EU member states. The Directive introduces significant pay transparency obligations on employers to strengthen the application of the principle of equal pay. It came into force in June 2023, and Ireland has until June 2026 to implement the new rules. The government is currently seeking to transpose some of the requirements of the Directive via the Remuneration Information and Pay Transparency Bill 2023 which is currently going through the legislative process.

General Scheme of the Employment (Restriction of Certain Mandatory Retirement Ages) Bill 2024

The recently published General Scheme of the Employment (Restriction of Certain Mandatory Retirement Ages) Bill 2024 seeks to introduce measures which allow, but do not compel, an employee to stay in employment until pensionable age. The objective of the Bill is to align mandatory retirement ages in existing and future employment contracts with the state pension age of 66. The aim of the measure is to restrict the enforceability of mandatory clauses in employment contracts where the employee wishes to continue in employment.

Technology and Data Protection Law

ePrivacy Regulation

The European Commission issued a proposal for a Regulation on Privacy and Electronic Communications to replace the existing legislative framework in 2017. The aim of the new regulation is to reinforce trust and security in the digital world. This regulation would have direct effect across the EU member states. The most recent draft of this proposal was published in February 2021. The draft proposal provides for ePrivacy rules for all electronic communications including:

- rules that will apply to new forms of communication, not solely traditional telecoms operators;
- privacy will be guaranteed for communications content and metadata;
- streamlined rules regarding cookies; and
- protection against spam.

EU Data Act

The EU Data Act became law on 11 January 2024, and it will become applicable in September 2025. The Data Act is a key part of the European data strategy of 2020, alongside the Data Governance Act and EU General Data Protection Regulation (GDPR).

The overarching goal of the Data Act is to facilitate reliable and secure access to data, fostering its use in key economic sectors and areas of public interest, and to remove the power imbalance between providers and customers in the cloud market through increased transparency.

Key features include transparency requirements, regulation of smart contracts, interoperability, and new rules relating to virtual assistants, switching cloud services, and the Internet of things (IoT).

EU AI Act

The EU AI Act was endorsed by all member states in February 2024. The Official Journal of the EU was predicted to publish the Act between May and July 2024. The law will become applicable on a phased basis between late 2024 and summer 2027.

It imposes differing obligations according to the classification of the AI system, with four catego-

ries: (a) unacceptable risk (prohibited); (b) high-risk; (c) limited risk; and (d) minimal risk. The obligations on "Providers" and "Users" (business users rather than end-users) of AI systems range from transparency to risk management and data governance.

JAPAN

Law and Practice

Contributed by:
Junichi Ueda, Etsuko Hara, Nobuto Shirane, Takahiro Hayase, Yutaka Shimoo and Miki Goto
Anderson Mōri & Tomotsune

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Anderson Mōri & Tomotsune

Anderson Mōri & Tomotsune is a full-service law firm with more than 600 professionals, which is best known for serving overseas companies doing business in Japan since the early 1950s. The team's combined expertise enables it to deliver comprehensive advice on all legal issues that may arise in the course of a corporate transaction (including those related to M&A, finance, capital markets and restructuring/insolvency) and litigation/arbitration. Most Anderson Mōri & Tomotsune lawyers are bilingual and experienced with communicating, drafting and negotiating across borders and around the globe. The firm's main office in Tokyo is supported by offices in Osaka, Nagoya, Beijing, Shanghai, Singapore, Hanoi, Ho Chi Minh City, Bangkok, Jakarta, Hong Kong, London and Brussels. The firm's associate, Tomomi Yoshikawa, helped write this article.

Authors

Junichi Ueda is a partner at Anderson Mōri & Tomotsune and has nearly 20 years' experience in the fields of labour and employment law, dispute resolution, data protection law, and general corporate and commercial transactions, with an emphasis on various labour and employment matters. Junichi graduated with an LLM degree from Vanderbilt University in 2012 and from University College London in 2013. He was admitted to practice law in Japan in 2004 and in New York in 2013. Junichi is also a member of Japan's Management Lawyers Council (Keiei Hoso Kaigi).

Etsuko Hara is a partner at Anderson Mōri & Tomotsune and has broad experience in the antitrust field, including multi-jurisdictional merger filings and arrangements for strategic alliances. She is also experienced in cross-border distribution, licensing and franchise agreements. Etsuko graduated with an LLM degree from Columbia Law School and was admitted as a lawyer in Japan in 2001 and in New York in 2007.

Nobuto Shirane is a partner at Anderson Mōri & Tomotsune and represents clients in transactions driven by IP rights and technology, including technology licences, joint ventures, strategic alliances and joint development agreements. He also has significant experience with IP litigation and proceedings before courts, the patent office and customs offices. Nobuto graduated with an LLM degree from Columbia Law School and was admitted to practice law in Japan in 2010 and in New York in 2018.

Takahiro Hayase is a partner at Anderson Mōri & Tomotsune and has a thorough knowledge of a variety of domestic and cross-border corporate matters and fields, especially executive compensation and employee incentive plans. He also has broad experience in commercial dispute resolution and corporate crisis management. Takahiro has an LLM degree from Harvard Law School and was admitted as a lawyer in Japan in 2010 and in New York in 2018.

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Anderson Mōri & Tomotsune

Yutaka Shimoo is a partner at Anderson Mōri & Tomotsune and focuses on a wide range of domestic and international tax practice areas, including tax controversy and wealth management. He also has wide expertise in dispute resolution and crisis management. Yutaka was admitted as a lawyer in Japan in 2006 and as a certificated tax accountant in Japan in 2020.

Miki Goto is a partner and IP/IT specialist at Anderson Mōri & Tomotsune and leads the firm's data privacy and digital practices, advising clients on legal issues in privacy, data, e-commerce, digital marketing, cloud computing, internet of things, AI, 3D printing, cookies, electronic signatures, intermediary liability and automated objects. With an exceptional academic background both in science and in engineering, his practice also covers a wide range of complex IP-related and technology-related matters, including disputes concerning patents, licensing, trade secrets, trade marks, and various data privacy/protection issues.

Anderson Mōri & Tomotsune

Otemachi Park Building
1-1-1 Otemachi
Chiyoda-ku
Tokyo
100-8136
Japan

Tel: +81 3 6775 1000
Fax: +81 3 6775 2088
Email: etsuko.hara@amt-law.com
Web: www.amt-law.com

ANDERSON MŌRI & TOMOTSUNE

Contributed by: Junichi Ueda, Etsuko Hara, Nobuto Shirane, Takahiro Hayase, Yutaka Shimoo and Miki Goto,
Anderson Mōri & Tomotsune

1. Legal System

1.1 Legal System and Judicial Order

In general, Japan is a civil law jurisdiction. Most of Japan's modern legal systems are based on continental European civil law systems. However, the end of World War II also saw the introduction of some Anglo-American legal influences.

Under the Constitution, judicial power is held by the courts, which are expressly guaranteed as being independent from other branches of the government. The Japanese court system can broadly be categorised into three tiers, as follows.

- In the first tier, district courts are the main court of first instance for most cases. However, summary courts may act as the court of first instance for small civil claims and minor criminal offences. This tier also broadly includes family courts, which hear family and juvenile delinquency matters. District courts also act as the first level of appeal for some summary court matters.
- In the second tier, there are eight high courts. These act as the general appellate court for district court cases, as well as for some summary court matters.
- In the third tier is the Supreme Court. The Supreme Court will generally only hear appeals of cases that involve specific questions of law.

Cases are generally determined by professional judges. However, in some serious criminal cases (eg, offences that carry a capital sentence), there is a limited use of a jury of laypersons at the court of first instance. As a civil law system, there is no principle of binding judicial precedent in Japan. That being said, Supreme Court decisions are considered to be strongly persuasive and are usually taken into consideration where appropriate.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

There is no general requirement for approval of all forms of foreign investment. However, along with certain actions against invested companies by investors, some foreign investments will require prior notification to the authorities (ie, the Minister of Finance and the competent minister). For foreign investments, investors will generally have to wait for 30 days while the authorities examine the investment. These foreign investments include:

- investments from countries with which Japan does not have existing treaties regarding inward direct investments, such as Iraq and North Korea; and
- foreign investments in certain industries, such as agriculture, fishery, manufacturing, infrastructure projects, telecommunications and IT-related industries.

There are several types of exemptions from the prior notification requirement, which depend on the category of investor (ie, qualified financial institutions or not), the category of industries and companies invested in (ie, listed or not), acquired ratio, etc.

During these 30 days, the authorities can issue a legally binding order for the investment to be modified or suspended in particular cases, as explained in **2.2 Procedure and Sanctions in the Event of Non-compliance**. Therefore, the requirement for prior notification is, in practice, a form of approval.

2.2 Procedure and Sanctions in the Event of Non-compliance

If an investor is required to provide prior notification, the notification should be made from six months to 30 days prior to the intended commencement of the investment.

The authorities will examine the investment from the perspective of national security and the potential effect of the investment on the domestic economy. The authorities may recommend a modification or cancellation of the investment. The investor will still have the discretion to accept or reject the recommendation. However, should the investor reject the recommendation, the authorities can issue a legally binding order for the investment to be modified or suspended.

If an investor is required to provide prior notification but fails to do so, that investor is generally liable to a sentence of imprisonment of up to three years and/or a fine that will be calculated based on the total value of the investment. However, where the investor is a corporation, a sentence of imprisonment is not applied. The authorities also have the power to order the investor to perform all acts necessary to undo an illegal investment, including disposing of any capital the investor acquired as a result of the illegal investment.

2.3 Commitments Required From Foreign Investors

There are no typical conditions. However, as previously mentioned in **2.2 Procedure and Sanctions in the Event of Non-compliance**, if an investor is required to provide prior notification, the authorities may recommend a modification or cancellation of the investment and – should the investor reject the recommendation – the authorities can issue a legally binding order for the investment to be modified or suspended.

2.4 Right to Appeal

An affected investor can challenge a decision of the authority that negatively affects or suspends the investment to the higher authorities or in court. The challenge to the higher authorities can be made within three months of the date on which the investor becomes aware of the decision of the authorities and within one year of the date on which the decision of the authorities is made. The challenge in the court can be made to the district court within six months of the date on which the investor becomes aware of the decision of the authorities and within one year of the date on which the decision of the authorities is made.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The most common types of corporate vehicles in Japan are the stock company (*kabushiki kaisha*) and the membership company (*mochibun kaisha*). A stock company is the vehicle that is typically used. In a stock company, the liability of shareholders is limited to the value of their shares and there is generally no assumption of additional liability by the shareholders to creditors of the stock company.

In order to establish a stock company, there is no specified minimum amount of share capital or a minimum number of shareholders. There is also generally no limitation on the purposes for which a stock company can be established to the extent it is commercial, and a stock company can be established for more than one purpose.

As for membership companies, there are three types in Japan:

- the general partnership company (*gomei kaisha*);
- the limited partnership company (*goshi kaisha*); and
- the limited liability company (*godo kaisha*).

The general partnership company and the limited partnership company are less commonly used. The most common membership company is the limited liability company.

In the case of a limited liability company, the liability of the members of the company is limited in the same way as a stock company. The main difference between a limited liability company and a stock company is that, in the case of a limited liability company, only members of the company can hold positions of management – whereas the management of a stock company is not exclusive to members of the company.

3.2 Incorporation Process

The main steps involved in the incorporation of a stock company are:

- preparation of the articles of incorporation and the certification of the articles by a notary public;
- determination of the share issuance, share subscription and shareholders at the point of incorporation;
- determination of the appointment of key organs such as the directors and the company secretary; and
- registration of the stock company for incorporation with the relevant authorities.

There are two ways in which share subscription can be done when incorporating a stock company. The party or parties incorporating the stock company may subscribe to all the shares at the time of incorporation, or they may only partially subscribe to the shares, with the remainder of the shares being subscribed to by external investors. Share subscription that involves external investors typically involves more stringent procedures, in order to provide some degree of protection for the external investors.

3.3 Ongoing Reporting and Disclosure Obligations

A stock company must provide, for the inspection of shareholders, the annual financial statements of the stock company at its head office and branch offices at least two weeks before its annual shareholders' meeting. In addition, changes of management and amendments to certain items in articles of incorporation must be registered with the relevant authorities.

A listed stock company has more stringent disclosure obligations, namely:

- financial statements must be disclosed on a quarterly basis; and
- material corporate information such as a change of the representative director and the declaration of dividends must also be disclosed from time to time.

3.4 Management Structures

Although it is possible for a stock company without a board of directors to make decisions concerning the organisation, operations and management via director(s) or the shareholders' meetings, many stock companies have a board of directors that is in charge of making the day-to-day decisions of the company. Depending on the stock company, it may also have other responsibilities, such as appointing:

- company auditor(s);
- a board of company auditors;
- accounting auditor(s);

• accounting adviser(s); and
• other committees.

The company's management structures will be set out in the articles of incorporation.

A shareholders' meeting can make decisions on the operation, etc, of the company. A company must hold at least one shareholders' meeting in a year.

For companies with a board of directors, the types of decisions that can be made by a shareholders' meeting are limited to those that are stipulated in the Companies Act and the articles of incorporation. In general, decisions relating to the management of the company should be decided by the board of directors.

The board must consist of at least three directors, who are to be elected at the shareholders' meeting. Resolutions of the board must be passed via a majority vote of the directors present at the meeting.

There must be at least one representative director. Representative directors have the power to represent the company – for example, they may execute documents as a representative of the company with third parties.

The company should be audited by the company auditor(s), the board of the company auditors, or external auditors (as the case may be), who will also audit the directors' execution of duties.

3.5 Directors', Officers' and Shareholders' Liability

The directors of the stock company have a legal duty of care to execute their duties according to the standard of a reasonably prudent manager. The directors also owe a duty of loyalty to the stock company and must comply with the relevant laws and regulations when executing their duties.

If the directors neglect their duties, they may be liable to the company for the damages caused as a result of the neglect. A director can be exempt from liability via a unanimous vote of all shareholders. There are no articles in the Companies Act that state directors may be liable to the company for damages arising from the performance of the directors' functions, where the performance does not amount to a neglect of duties.

While there is some recognition of piercing the corporate veil in Japan, this is not founded on statutory law and only exists as a matter of judicial precedent.

4. Employment Law

4.1 Nature of Applicable Regulations

There are many labour-related and employment-related laws and regulations in Japan, all of which were enacted to embody the fundamental principles and rights contained in the Constitution. In particular, the Labour Standards Act (LSA) and the Labour Contracts Act (LCA) provide for the fundamental principles of individual employment relationships, whereas the Labour Union Act (LUA) provides for the fundamental principles of collective labour relationships.

Japan is a country with a civil law system, in which judicial precedents do not have legally binding force. However, in the field of labour and employment law, judicial precedents are considered very important, as it is often difficult to make decisions based solely on the laws and regulations. This is because most of the provi-

sions under those laws and regulations only provide for the basic rules and are therefore abstract in nature.

4.2 Characteristics of Employment Contracts

Form of Employment Contract

An employment contract may be executed verbally. However, to avoid any misunderstandings regarding major working conditions, the LSA and other applicable laws and regulations require an employer to prepare a document clearly describing those major working conditions and to deliver it to a new employee upon entering an employment contract (eg, Article 15 of the LSA). Examples of major working conditions include:

- the term of employment;
- the location of the workplace (including whether and to what extent the location of the workplace may be subsequently changed);
- the job description (including whether and to what extent the job description may be subsequently changed);
- the working hours;
- whether overtime work or work on holidays will be necessary;
- a description of holidays;
- the leave policy;
- the wages to be paid; and
- the grounds and procedures for termination of employment.

In addition, if an employer usually employs ten or more employees, the employer must establish the rules of employment, which consist of a set of documents stipulating the specific details of the working conditions. A copy of the rules of employment must also be submitted to the Labour Standards Inspection Office together with a written opinion regarding the rules of employment from either:

- a trade union to which a majority of the employees of the workplace concerned belong (majority trade union); or
- if such a union does not exist, an employee representing a majority of the employees at the workplace concerned (employee representative) (Articles 89 and 90 of the LSA).

The contents of the rules of employment must be made available to the employees at all times for inspection (Article 106 of the LSA).

Duration of Employment Contract

The two main types of employment contract that exist in Japan are:

- those with a fixed term; and
- those with an indefinite term.

In practice, regular employees are usually hired for an indefinite term.

Under the LSA, the maximum duration of each fixed-term employment contract is three years. However, the maximum duration of each fixed-term employment contract is five years for:

- certain specialists; and
- employees who are 60 years of age or older (Article 14 of the LSA).

Although the maximum duration of each fixed-term employment contract may not exceed three years (or five years in the case of employees who are 60 years of age or older and certain specialists), the employer may renew the fixed-term employment for more than the maximum duration.

There is no explicit minimum duration for a fixed-term employment contract. However, the LCA provides that an employer must not set a shorter

term than is necessary (Article 17, paragraph 2 of the LCA).

Under the LCA, a fixed-term contract employee who has been, or is expected to be, employed by their employer for more than five years is allowed to convert their employment contract to an indefinite-term employment contract upon request to their employer (Article 18 of the LCA). In addition, even if a fixed-term contract employee has not been (or is not expected to be) employed by their employer for more than five years when the employer decides not to renew the fixed-term employee's contract upon its expiry, the employer must have an "objectively legitimate and socially justifiable cause" (see **4.4 Termination of Employment Contracts**) for such non-renewal if:

- the status of the fixed-term employment contract is not substantively different from an employment contract without a definite period (eg, as a result of repeated renewals of the contract); or
- the fixed-term contract employee has a reasonable expectation that their fixed-term employment contract will be renewed (Article 19 of the LCA).

4.3 Working Time

Basic Working Time Regulations

As a general rule, employees' working hours may not exceed eight hours per day or 40 hours per week (Article 32 of the LSA). Any work exceeding eight hours per day or 40 hours per week is recognised as statutory overtime work.

A rest period of at least 45 minutes must be granted during working hours to employees who work for more than six hours per day and a rest period of at least 60 minutes must be granted to employees who work for more than eight hours per day. As a general rule, the employer must grant all of its employees a simultaneous rest period (Article 34 of the LSA).

Employees are also entitled to take at least one day of holiday per week (statutory weekly holiday) (Article 35 of the LSA).

Article 36 Agreement

In order to have employees perform statutory overtime work or work on a statutory weekly holiday, the employer is required to execute a labour management agreement (*saburoku kyotei*, or "Article 36 agreement") with the majority trade union (or, if such a union does not exist, with the employee representative) and submit it to the Labour Standards Inspection Office prior to having the employees commence any statutory overtime work or work on statutory weekly holidays (Articles 32, 35 and 36 of the LSA). In addition, the employer must refer to the possibility of statutory overtime work and work on statutory weekly holidays in the rules of employment (if any) in advance of requiring the overtime or holiday work.

Extra Wages

When an employee has performed statutory overtime work or work on a statutory weekly holiday, the employer must pay extra wages for that work calculated at the rate of:

- 125% of the normal salary per hour of statutory overtime work for up to 60 hours per month and 150% thereof if the statutory overtime work hours exceed 60 hours per month; or
- 135% of the normal salary per hour of work on a statutory weekly holiday (Article 37 of the LSA).

In addition to the above-mentioned extra wages, an employee working between 10pm and 5am is entitled to an extra payment in accordance with a late-night work compensation at the rate of at least 25% of the normal salary per late-night working hour (Article 37 of the LSA).

Employees in Managerial Positions

Employees in managerial positions are entitled to receive an extra wage for late-night work but are not entitled to receive extra wages for statutory overtime work and work on statutory holidays (Article 41 of the LSA). Whether an employee is in a managerial position depends on various factors, such as:

- the actual content and nature of the work performed by the employee;
- the authority, responsibility and manner in which work is performed; and
- the salary and other compensation.

The scope of employees in managerial positions is generally quite narrowly interpreted based on judicial precedents.

4.4 Termination of Employment Contracts

Unilateral Dismissal in General

When an employer unilaterally dismisses an employee, the employer must have an "objectively legitimate and socially justifiable cause" for the dismissal (Article 16 of the LCA). Otherwise, the dismissal is deemed to be an abuse of right and would therefore be null and void. There is no doctrine of employment at will in Japan. It is generally understood that the following five reasons constitute an "objectively legitimate and socially justifiable cause" for a unilateral dismissal:

- inability of the employee to offer their labour to an employer, mainly because of physical or mental disability or extremely poor performance;
- infringement of the disciplinary rules in the workplace by the employee's serious misconduct;
- redundancy;
- termination due to an agreement with a trade union; or
- termination due to an employer's liquidation if an employer is a corporate entity.

In addition, the employer must give the employee at least 30 days' prior notice of the unilateral dismissal or make payment in lieu of the notice (LSA, Article 20). Except as agreed in an employment contract or the rules of employment, an employee is not entitled to any other monetary compensation upon a unilateral termination of employment.

Redundancy

A unilateral dismissal due to redundancy may occur where an employer wishes to continue business operations in Japan with a reduction in the number of employees. In this case, the employer must demonstrate an "objectively legitimate and socially justifiable cause" for the dismissal by satisfying all of the following factors.

- The shedding of employees is justified by a strong financial or business necessity, such that it would be extremely difficult for the employer to continue its business without implementing a reduction in the number of employees (and not merely the fact that the employer would be more profitable if the employees were dismissed).
- The employer has already endeavoured to take all reasonable means to avoid dismissal of employees, such as facilitating intra-company transfers (or, in some cases, associated-

company transfers), offering voluntary resignation with a certain amount of severance compensation, and reducing other operating costs.
- The selection of employees for termination was conducted in a fair manner and in accordance with a reasonable and objective standard established by the employer. In other words, the selection criteria must be fair and rational, and must not be based on the employees' gender, membership of a trade union, race, creed, or any other discriminatory reason.
- Sincere attempts at discussion or negotiation were undertaken, either with employees or their representatives (including a trade union, if applicable), but were unsuccessful.

The regulations regarding notice period and monetary compensation are the same as those applicable to unilateral dismissal due to redundancies.

4.5 Employee Representations

Employee Representative

As explained in **4.2 Characteristics of Employment Contracts**, when an employer establishes the rules of employment, the employer must obtain a written opinion of the majority trade union (or, if such a union does not exist, of the employee representative). Similarly, if an employer intends to execute certain labour management agreements (eg, an Article 36 agreement), these agreements must be executed with the majority trade union (or, if such a union does not exist, with the employee representative). An employee representative must be elected by a majority vote or majority consent of the employees.

Trade Union

Under the Constitution, workers have the right to:

- form and join unions;
- bargain collectively through the unions to which they belong; and
- engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection (Article 28 of the Constitution).

A union may represent its members' interests in bargaining with their employer(s) in relation to their working conditions or other treatment of those members. A union does not need authorisation from administrative agencies to represent its members in bargaining with their employer(s).

If a union requests a collective bargaining session, the employer may not reject that request without a reasonable cause (Article 7, item 2 of the LUA).

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Employees are subject to income tax and local inhabitant tax in relation to their salary, and their employers must pay the taxes to national and local governments.

For the purpose of Japanese income tax, an individual (including an employee) is categorised as:

- a permanent resident;
- a non-permanent resident; or
- a non-resident.

A resident is defined as any individual who has their residence (*jusho*) in Japan or who has had their temporary residence (*kyosho*) in Japan for more than one year. A permanent resident is defined as a resident other than a non-permanent resident (as defined below) and is subject to income tax with regard to all of their income (including salary, hereinafter the same in this section) accrued inside and outside Japan.

On the other hand, a non-permanent resident – who is defined as any individual who is a resident of Japan, but who is not a Japanese national and who has had residence in Japan or temporary residence in Japan for five years or fewer in total during the past ten years – is subject to income tax only with regard to income other than foreign-sourced income and any amount of foreign-sourced income that is paid in or transmitted to Japan. A non-resident (ie, any individual other than any type of resident) is subject to income tax only with regard to domestic (Japan)-sourced income. This type of income includes salaries received for work or personal services carried out in Japan or, if outside Japan, by a person acting as an officer of a Japanese corporation.

For the employment earnings of a permanent resident or a non-permanent resident who has submitted a certain application and whose individual income does not exceed JPY20 million per year, such an employee will only be subject to withholding tax and need not file their own tax return. Instead, the employer will be responsible for the calculation and payment of the employees' taxes. This system, especially the year-end recalculation procedure of the system, is called the "year-end adjustment system" (*nenmatsu chousei*) of tax payment. The income tax rates are progressive and the maximum rate is 45% (excluding local income tax).

In addition, reconstruction special income tax will be imposed on income tax at a rate of 2.1% from 2013 to 2037. Please see the following progressive income tax rates (including reconstruction special income tax):

- 5.105% (for the portion of taxable income of JPY1.95 million or less);
- 10.21% (for the portion of taxable income of more than JPY1.95 million to less than JPY3.3 million);
- 20.42% (for the portion of taxable income of JPY3.3 million to less than JPY6.95 million);
- 23.483% (for the portion of taxable income of JPY6.95 million to less than JPY9 million);
- 33.693% (for the portion of taxable income of JPY9 million to less than JPY18 million);
- 40.84% (for the portion of taxable income of JPY18 million to less than JPY40 million); and
- 45.945% (for the portion of taxable income of JPY40 million or more).

Employees and their employer jointly contribute in equal parts to employee social expenses, such as national health insurance premiums and employees' pension insurance premiums.

In addition, if an employee dies, their heirs would be subject to inheritance tax. In general, inheritance tax is imposed both on domestic and foreign assets. However, depending on the nationalities and residence period of the decedent and their heirs in Japan, the taxable assets may be limited to domestic ones in some situations. By way of example, in cases where foreign individual Japanese residents with certain types of working visas die in Japan, their heirs without Japanese nationality would be subject to inheritance tax only on domestic assets, as long as they:

- are not Japanese residents at the time of the decedent's death; or
- have lived in Japan with certain types of visas for a period not exceeding ten years in the past 15 years before the decedent's death.

5.2 Taxes Applicable to Businesses

A company doing business in Japan is subject to various taxes.

Corporate income tax must be paid where a company has its head office or principal office in Japan (such a company is a domestic corporation). If a company does not have its head office or principal office in Japan (such a company is a foreign corporation), the company must only pay corporate income tax on domestic-sourced income. As for some categories of income, such as dividends and interest, income tax will be withheld at the time of payment but corporations can credit the amount of such income tax from the amount of corporate income tax subject to certain limitations.

Inhabitant tax and enterprise tax must be paid if a company has its head office or principal office in Japan or has its permanent establishment in Japan.

Consumption tax, which is a type of VAT, must be paid if a company conducts certain kinds of transactions, such as:

- sales of goods, leases of goods and provisions of services in Japan;
- certain categories of digital services provided to Japan; and
- importation transactions.

Notwithstanding the foregoing, with some exceptions (eg, where a company's capital is JPY10 million or more), consumption tax will be exempted if the amount of taxable sales in the base period – which is the fiscal year two years prior to the current fiscal year – is less than JPY10 million. Under the qualified invoicing system, a buyer who claims an input (purchase) consumption tax credit is required to receive and retain invoices that are issued by a registered seller and include certain types of information.

In addition to the foregoing, there are other taxes, including:

- fixed property tax;
- stamp duty;
- registration tax; and
- real estate acquisition tax.

Regarding Pillar Two of the OECD's Two Pillar solution, the Income Inclusion Rule (IIR) has been implemented under the 2023 tax reform in Japan and came into force on 1 April 2024. The IIR specifically applies to the ultimate parent corporation of a multinational corporation group, the consolidated revenue of which is equivalent to no less than EUR750 million in two or more accounting business years in the four most recent consolidated accounting business years. The IIR has a certain exemption that is equivalent to the de minimis rule. In addition, there are transitional safe harbours according to the content of country-by-country (CbC) reporting – for example, the de minimis test, simplified effective tax rate test and routine profits test.

5.3 Available Tax Credits/Incentives

Corporations can credit the amount of income tax withheld at source from the amount of corporate income tax imposed. Income tax withheld at source is theoretically recognised as corporate income tax that is collected in advance and therefore this amount can be deducted from the final tax amount.

Domestic corporations are eligible to credit the amount corresponding to corporate income taxes paid in foreign countries from the amount of corporate income tax imposed in Japan – although the amount of this credit is subject to certain limitations. The purpose is to avoid the multiple imposition of tax in different countries on the same income. Foreign corporations that have permanent establishments in Japan are also allowed to claim foreign tax credit with regard to income, which is attributable to their permanent establishments in Japan and taxable status in Japan.

There are also various tax exemptions or tax reductions that encourage investments and R&D in Japan. By way of example, companies that file a blue form tax return are eligible to credit a certain percentage of R&D expenditure from the amount of corporate income tax.

5.4 Tax Consolidation

There are two regulatory frameworks in Japan in respect of a group taxation scheme: the full controlling interest framework and the group calculation framework.

The full controlling interest framework is mandatory and applies to intra-group transactions (including transactions involving transfers of assets, losses, dividends and interest) where all companies in the group are wholly owned (whether directly or indirectly) by the ultimate parent of the group, regardless of whether the ultimate parent is a foreign or domestic company or individual, provided that the parties to the relevant transaction are domestic companies. Under this regulatory framework, taxation on intra-group profits from transfers of certain kinds of assets – such as fixed assets, securities, monetary claims and deferred assets ("qualifying assets") – is deferred until those assets are transferred outside the group.

Additionally, intra-group contributions, donations and dividends are disregarded. If the full controlling interest framework is applied, certain tax incentives to which corporations with stated capital of JPY100 million or less are normally entitled would no longer be available to an SME that is fully controlled by a large corporation with a stated capital of JPY500 million or more.

On the other hand, the group calculation framework – if approved by the Commissioner of the National Tax Agency (NTA) – is only applicable to groups in which all companies are wholly owned (whether directly or indirectly) by the ultimate parent of the group and where the companies of the group consist only of domestic companies. Under this framework, corporate income tax is calculated on a group-wide basis (ie, offsetting profit and loss among the group corporations), but is payable by each group corporation.

For group corporations, unrealised profits and losses of qualifying assets will not be imputed to taxable income or losses, as long as certain requirements (which are consistent with those of tax-qualified reorganisation) are met (eg, where these subsidiaries are expected to remain directly or indirectly wholly owned). The Certain Net Operating Loss (NOL) Limitation or Japanese Separate Return Limitation Year Rule is also applied to group corporations.

In addition, under the group calculation framework, taxation on profits from intra-group transfers of assets is deferred until those assets are transferred outside the group. Intra-group contributions, donations and dividends are also disregarded under the group calculation framework.

5.5 Thin Capitalisation Rules and Other Limitations

Japanese tax law includes thin capitalisation rules. Under these rules, if interest is paid to a foreign controlling shareholder by a domestic corporation while the payer's average interest-bearing debt to the foreign controlling shareholder in the financial year exceeds three times the value of the foreign controlling shareholder's equity interest in the payer in the said financial year, the interest income related to the excess debt will not be deductible from the payer's taxable income.

However, a domestic corporation may apply a different debt-to-equity ratio (instead of three times) if it can prove that a different ratio is appropriate in light of the debt-to-equity ratio of similar corporations. A domestic corporation may also benefit from the safe harbour provision if the average aggregate debt in the financial year does not exceed three times the value of the equity interest in the payer in said financial year.

In addition, under the earnings-stripping rules – with some exceptions – when interest payments (excluding those that are included in the taxable income of a recipient under Japanese tax laws) exceed 20% of the statutory adjusted income of the payer, the portion of interest payments exceeding 20% of the statutory adjusted income of the payer is generally not deductible from the payer's taxable income in the financial year. The earnings-stripping rules are also applicable to the calculation of a foreign corporation's Japan-sourced income, even if such income is not attributable to the permanent establishment of the foreign corporation in Japan or if the foreign corporation has no permanent establishment in Japan.

However, the excess portion is carried forward for seven financial years and can be used as deductible expenses until the total amount of deductible expenses reaches a 20% threshold in each of the following seven financial years.

5.6 Transfer Pricing

Under Japanese transfer pricing rules, a domestic corporation that transacts with related foreign entities (such as a foreign parent corporation) will – if the transaction involves non-arm's length consideration – be liable for tax calculated based on an arm's length consideration imputed on the transaction. In calculating the appropriate arm's length consideration, the tax authority will apply the most suitable statutory method of calculation available.

The tax authority will typically request further information from the taxpayer in order to help the authority calculate an appropriate arm's length consideration. Where a taxpayer fails to adequately respond to these requests, or does not promptly provide this information, the tax authority will have the right to determine the arm's length consideration as it deems fit based on reasonable assumptions applicable to the relevant statutory method of calculation.

In addition, in terms of transfer price documentation, four types are required:

- a Notification for Ultimate Parent Entity (NUPE) form;
- a CbC report;
- a master file; and
- a local file.

Of these, the former three types of documentation are applicable to subsidiaries or branches in Japan that are constituent entities of a specified multinational enterprise (MNE). The local file is

applicable to all corporate taxpayers engaging in transactions with foreign affiliates.

5.7 Anti-evasion Rules

Japanese tax laws contain general avoidance rules such as the disallowance of acts or calculations:

- by family-owned corporations;
- in relation to organisational restructuring;
- by corporate groups of the group calculation framework; and
- regarding foreign entity profits that are attributable to a permanent establishment.

These anti-evasion rules have recently been applied especially to several corporate intra-group reorganisations. Those cases subsequently developed into tax disputes.

6. Competition Law

6.1 Merger Control Notification

Prior notification is required for share acquisitions, mergers, splits, joint share transfers and acquisitions of business or assets, etc, that meet certain criteria.

The filing thresholds are different for each of these transactions. The major transactions and their thresholds are as follows.

- For share acquisitions:
  - (a) the total sales in Japan of the acquiring company and other companies within the same combined business group as the acquiring company must exceed JPY20 billion;
  - (b) the total sales in Japan of the acquired company and all of its subsidiaries must exceed JPY5 billion; and
  - (c) the ratio of voting rights of the acquiring company upon the acquisition must newly exceed 20% or 50%.
- For mergers:
  - (a) the total sales in Japan of at least one party to the merger and other companies within the same combined business group as the party must exceed JPY20 billion; and
  - (b) the total sales in Japan of at least one other party to the merger and other companies within the same combined business group as the other party must exceed JPY5 billion.
- For acquisitions of business or assets, etc:
  - (a) the total sales in Japan of the acquiring company and other companies within the same combined business group as the acquiring company must exceed JPY20 billion; and
  - (b) the total sales in Japan attributable to the business or assets to be acquired by the acquiring company must exceed JPY3 billion.

Please note that the "combined business group" of a party refers to a group consisting of the ultimate parent company of the party and the subsidiaries of the ultimate parent company. No filing is required for a transaction within the same combined business group.

For joint ventures, it is necessary to analyse whether each step of a transaction to establish a joint venture constitutes one of the above-mentioned types of transactions that would be subject to the prior notification requirement, and whether the relevant filing thresholds are met.

Even where a contemplated transaction is not subject to the prior notification requirement, if the transaction would substantially restrain com-

petition in any relevant market, the transaction would be prohibited under the Antimonopoly Act.

According to the Policies Concerning Procedures of Review of Business Combination (as amended in 2019), the Japan Fair Trade Commission (JFTC) recommends voluntary filing for transactions that do not meet the mandatory filing thresholds only because the acquired company does not satisfy the monetary thresholds, but that have an acquisition value exceeding JPY40 billion, if one or more of the following factors are met:

- the business base or R&D base of the acquired company is located in Japan;
- the acquired company conducts sales activities targeting Japanese consumers, such as providing a website or a pamphlet in Japanese; or
- the total sales in Japan of the acquired company and its subsidiaries exceed JPY100 million.

6.2 Merger Control Procedure

If a contemplated transaction is subject to the prior notification requirement, the relevant enterprises are prohibited from closing the transaction for a period of 30 calendar days after formal filing (Phase I review period). If the JFTC forms the view that the transaction does not give rise to concerns about competition, the JFTC issues a clearance within the Phase I review period. However, if the JFTC forms the view that a more detailed review is required, the review process moves into a Phase II review.

At the beginning of the Phase II review, the JFTC will request additional information and the Phase II review will continue for 120 calendar days from the formal filing or 90 calendar days from the date of the receipt of all the additional information requested – whichever is the longer period.

Parties planning to file a notification may consult the JFTC not only on the descriptions of the notification form, but also on substantive issues such as market definition and competitive assessment at the pre-notification stage. In practice, unless the transaction is very straightforward without any potential substantive issues, it is common to go through the pre-notification consultation, and the JFTC commences its review of the market situation and the potential substantive issues at the pre-notification stage.

If it is evident that the transaction would not restrain competition in any relevant market and the notifying parties request the JFTC to shorten the waiting period in writing, the JFTC may shorten the waiting period.

6.3 Cartels

Certain anti-competitive agreements and practices such as price fixing and bid rigging are prohibited as an unreasonable restraint of trade under the Antimonopoly Act. Unreasonable restraint of trade is defined as business activities by which any enterprise, in concert with other enterprises, mutually restricts or conducts their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing a substantial restraint of competition in any relevant market.

As for the interpretation of the elements of unreasonable restraint of trade, it is worth noting that – although "substantial restraint of competition" is one such element – the JFTC can easily prove that such a requirement is satisfied in the case of extreme cartel behaviour such as price fixing

and bid rigging. It would therefore be difficult to justify extreme cartel behaviour in practice.

Major methods of enforcement against unreasonable restraint of trade are cease and desist orders and surcharge payment orders. However, criminal penalties are also available. The amendment to the surcharge payment system came into effect on 25 December 2020. The amount of surcharge is calculated by multiplying the amount of sales of the target products or services during the period in which the unreasonable restraint of trade occurred (the maximum period is ten years) by the surcharge percentage rate. The rate is 10% in principle but can be lower, depending on the size of the alleged violators, or higher if there are aggravating factors (such as repeated violation).

A leniency system for an unreasonable restraint of trade is available in Japan. The surcharge reduction rate, which was amended on 25 December 2020, is determined in accordance with the order of application for leniency as well as the degree of co-operation by the offender with the JFTC. In addition, a determination procedure was introduced on 25 December 2020 to protect attorney–client communications in respect of legal advice regarding the alleged violations to which leniency is applicable (the "Specified Communication"). The scope of the protection under the determination procedure is limited compared to that which is available in similar circumstances in the USA or the EU. The requirements for qualifying for protection under the determination procedure include that:

- the fact that the contents of the Specified Communication are recorded is indicated on the document itself (eg, "Specified Communications under JFTC Investigation Rules" is written or printed on the cover);
- the documents are stored separately from other documents that are not subject to the determination procedure; and
- the company submits an application form for the determination procedure as well as a privilege log that states an outline of the relevant documents.

A recent Supreme Court decision confirmed that, even where the alleged price cartel occurred outside Japan, the Antimonopoly Act can apply if the cartel impedes competition in the Japanese market.

6.4 Abuse of Dominant Position

Certain types of unilateral conduct and economic dependency are prohibited as private monopolisation and unfair trade practices under the Antimonopoly Act.

Private monopolisation is defined as any conduct that excludes or controls the business activities of other enterprises, thereby causing a substantial restraint of competition in any relevant market. The methods of enforcement against private monopolisation include:

- cease and desist orders;
- surcharge payment orders; and
- criminal punishment.

Various types of conduct are designated as unfair trade practices, such as:

- refusal to trade;
- unjustly low-priced sales;
- resale price restrictions; and
- abuse of superior bargaining positions.

Under economic dependency regulations, abuse of superior bargaining positions is the major type of misconduct to be considered, and enterprises

are prohibited from imposing terms and conditions that are disadvantageous to other enterprises by unjustly leveraging their superior position over other enterprises.

All types of unfair trade practices can be subject to cease and desist orders. However, the surcharge payment order and/or criminal penalties are only applicable to certain types of unfair trade practices.

For conduct to be considered as private monopolisation, it is necessary to prove that it results in a substantial restraint of competition. On the other hand, a tendency to impede competition is all that is required for conduct to fall within the scope of unfair trade practices. In other words, it can be said that a higher threshold (regarding detrimental effect) needs to be satisfied in order to show the existence of private monopolisation, in comparison to unfair trade practices.

Although extraterritorial applicability of regulations on private monopolisation and unfair trade practices is not such a prominent topic of discussion, it nevertheless appears the same approach is taken towards unreasonable restraint of trade as is likely to be taken in relation to private monopolisation.

The commitment procedure, which is a scheme for voluntarily resolving suspected violations via mutual consent between the JFTC and the relevant enterprise, came into effect in December 2018. As of May 2024, 19 cases regarding private monopolisation and unfair trade practices have been resolved through the commitment procedure.

7. Intellectual Property

7.1 Patents

The Intellectual Property Basic Act of Japan recognises the importance of IP protection as well as the idea of creating a vibrant economy and society by creating new IP. In Japan, IP is mainly protected by:

- the Patent Act;
- the Utility Model Act;
- the Trademark Act;
- the Design Act;
- the Plant Variety Protection and Seed Act;
- the Act on the Circuit Layout of Semiconductor Integrated Circuits;
- the Copyright Act; and
- the Unfair Competition Prevention Act.

Patent rights, etc, are granted by registering with the Japan Patent Office. The Copyright Act, on the other hand, protects copyrights without requiring any special formalities. Although there is no property right attached to trade secrets, the Unfair Competition Prevention Act protects trade secrets as “legally protected interests”.

Japan is a party to:

- the Patent Cooperation Treaty;
- the Paris Convention for the Protection of Industrial Property;
- the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks;
- the Hague Agreement Concerning the International Registration of Industrial Designs;
- the Berne Convention;
- the International Convention for the Protection of New Varieties of Plants; and
- other major IP-related treaties.

A person that invents an invention with industrial applicability is entitled to obtain a patent for that invention. "Invention" in the Patent Act is defined as a highly advanced creation of technical ideas utilising the laws of nature.

A person applying for a patent must submit a written application to the Japan Patent Office. A description, scope of claims, required drawings and a summary must be attached to the application. The legal requirements for obtaining a patent are:

- industrial applicability;
- novelty; and
- inventive step.

A patent right will become effective upon successful registration. The duration of a patent right, in principle, expires after a period of 20 years from the filing date of the original application. The patent holder has an exclusive right to commercially exploit the patented invention.

As for remedies for infringement, the patent holder may file a claim for:

- an injunction;
- disposal of infringing compositions, etc;
- damages;
- restoration of credibility; or
- restitution of unjust enrichment.

There are presumptive provisions regarding the amount of damages that may arise as a result of the infringement of patent rights.

Acts of importing products that infringe patent rights are subject to border control measures under the Customs Act. Any intentional infringement of a patent right is also subject to criminal penalties.

7.2 Trade Marks

An applicant may apply to register a trade mark to be used in connection with goods or services pertaining to the business of the applicant. "Trade mark" in the Trademark Act is defined as:

- any character, figure, sign or three-dimensional shape or colour, or any combination thereof;
- sounds; or
- anything else specified by cabinet order that can be perceived by people.

A person requesting a trade mark registration must submit a written application to the Japan Patent Office. Upon filing an application, one or more goods or services for which the trade mark will be used must be described in the written application. The legal requirements for the registration of a trade mark are that:

- the trade mark is to be used in connection with the goods or services for which the trade mark is registered;
- the trade mark is capable of distinguishing itself from other goods or services; and
- the trade mark is not unregistrable for reasons of public interest.

A trade mark right will become effective upon successful registration. The duration of a trade mark right is ten years from the date of registration, but may be renewed by the holder of the trade mark right by filing an application for registration of renewal.

The holder of a trade mark right will have an exclusive right to use the registered trade mark in connection with the designated goods or designated services. The holder of the trade mark right may also prohibit a third party from using a

trade mark that is similar to the registered trade mark.

As for remedies for infringement, the holder of a trade mark right may file a claim for:

- an injunction;
- disposal of infringing compositions, etc;
- damages;
- restoration of credibility; and
- restitution of unjust enrichment.

There are presumptive provisions regarding the amount of damages that may arise as a result of trade mark infringement.

Acts of importing goods that infringe trade mark rights are subject to border control measures under the Customs Act. Any intentional infringement of a trade mark right is also subject to criminal penalties.

7.3 Industrial Design

A creator of a design that is industrially applicable may be entitled to obtain a design registration for that design. "Design" in the Design Act is defined as:

- the shape, patterns or colours – or any combination thereof – of an article (including a part of an article) or a building (including a part thereof); or
- a graphic image on a screen (including a part thereof; but such protection of a graphic image or a part thereof is limited to those for use in the operation of a device or those displayed as a result of a device performing its functions) that creates an aesthetic impression through the eye.

Building interior designs are also eligible for a design registration under the Design Act.

A person requesting a design registration must submit a written application to the Patent Office. Drawings, photographs, models or specimens must be attached to the written application. The legal requirements for obtaining a design registration are:

- industrial applicability;
- novelty; and
- that the design is innovative and without precedent.

A design right will become effective upon registration. The duration of a design right, in principle, expires 25 years from the date of the application for design registration. The holder of a design right has the exclusive right to commercially exploit the registered design and designs similar thereto.

As for remedies for infringement, the holder of a design right may file a claim for:

- an injunction;
- disposal of infringing compositions, etc;
- damages;
- restoration of credibility; or
- restitution of unjust enrichment.

There are presumptive provisions regarding the amount of damages that may arise as a result of an infringement of design rights.

Acts of importing products that infringe design rights are subject to border control measures under the Customs Act. Any intentional infringement of a design right is also subject to criminal penalties.

7.4 Copyright

A person who creates a work (the author) enjoys the moral rights of an author and the copyright

with regard to the work. "Work" in the Copyright Act is defined as a creatively produced expression in which thoughts or sentiments are expressed and that falls within the literary, academic, artistic or musical domain.

The moral rights of authors include:

- the right to make a work public;
- the right to attribution; and
- the right to integrity.

The copyright includes the right of:

- reproduction;
- stage performance and musical performance;
- on-screen presentation;
- public transmission;
- recitation;
- exhibition;
- distribution;
- transfer;
- rental; and
- adaptation.

Certain neighbouring rights are also granted to performers, producers of phonograms, broadcasters, and cable-caster organisations.

There are no formalities that have to be met in order to enjoy legal rights under the Copyright Act.

The duration of a copyright begins at the time the work is created. A copyright subsists for a period of 70 years after the death of the author.

The copyright does not prohibit (and hence does not restrain other persons from):

- the reproduction of the work for private use;
- the exploitation of works concerning incidental subjects;
- work in the course of consideration; and
- any other exceptions separately provided for in the Copyright Act.

In recent years, a number of more flexible exceptions have been introduced to promote the use of AI and big data.

If the ownership of copyright is transferred to another person, the licensee has the right to continue to use the work as a matter of course.

As for remedies for infringement, the author, the copyright holder, the holder of the right of publication, the performer or the holder of the neighbouring rights may file a claim for:

- an injunction;
- disposal of infringing compositions, etc;
- damages;
- restoration of credibility; or
- restitution of unjust enrichment.

There are presumptive provisions regarding the amount of damages that may arise as a result of an infringement of copyrights.

Acts of importing products infringing copyrights are subject to border control measures under the Customs Act.

Any intentional infringement of a copyright is also subject to criminal penalties. A copyright infringement is, in principle, a crime subject to prosecution after a complaint has been made. However, following the conclusion of the Trans-Pacific Partnership Agreement, distributing pirated copies of movies over the internet has become a crime in and of itself, and no longer requires a complaint.

7.5 Others

Devices relating to the shape or structure of an article or a combination of articles are protected by the Utility Model Act without any requirement for a substantial examination to be conducted.

Computer programs contained in software are mainly protected by the Copyright Act as copyrighted works of program. Software-related inventions may also be granted patents, provided that they involve hardware control or process-using hardware. Designs, flowcharts and manuals contained in software are protected by the Copyright Act as copyrighted works of language or of diagrams.

No sui generis database right exists in Japan. Copyright protection extends to databases if they constitute a creation by reason of the selection or systematic construction of information contained therein.

Trade secrets are protected by the Unfair Competition Prevention Act. "Trade secret" in this Act is defined as technical or business information useful for business activities, such as manufacturing or marketing methods, that are kept secret and that are not publicly known. A trade secret infringement may give rise to a suit for an injunction, a claim for damages or a claim for recovery of credit, etc.

There are presumptive provisions regarding the amount of damages that may arise as a result of an infringement of trade secrets. In a lawsuit for the infringement of business interests by unfair competition, if a court decides that it is necessary to maintain the secrecy of trade secrets held by a party to the lawsuit, a confidentiality protective order or a suspension of disclosure (including omitting an examination of the parties) may be issued. A trade secret infringement with a high degree of illegality is also subject to criminal penalties.

New plant varieties are protected by the Plant Variety Protection and Seed Act.

The circuit layout of semiconductor integrated circuits is protected by the Act on the Circuit Layout of Semiconductor Integrated Circuits.

8. Data Protection

8.1 Applicable Regulations

The Act on the Protection of Personal Information (APPI) is the main piece of legislation governing the handling of personal information by business operators (information handlers) in Japan. Examples of APPI regulations with which information handlers are required to comply are as follows.

Purposes of Use

An information handler must specify the purposes for which it will process personal information and must not process personal information beyond the scope of the specified purpose without first obtaining the consent of the relevant data subject (Articles 17 and 18 of the APPI).

An information handler must not process personal information in manners that could facilitate or lead to illegal or improper activities (Article 19 of the APPI).

Collection of Personal Information

An information handler must not collect personal information using fraudulent or other unjust means. In principle, an information handler must not acquire certain sensitive personal information without obtaining the data subject's prior consent (Article 20 of the APPI).

If personal information is collected, an information handler must promptly notify the relevant data subject of or announce the relevant purposes of use (Article 21 of the APPI).

Limitation on Transfer of Personal Data to Third Parties

In principle, an information handler must not transfer personal data to third parties, including its affiliated companies, without the prior consent of the data subject (Article 27 of the APPI). An information handler must also obtain the prior consent of the relevant data subject before providing their personal data to a third party in a foreign country and provide certain information to the relevant data subjects when obtaining their consent (Article 28 of the APPI).

An information handler must keep records regarding the transfer and receipt of personal data (Articles 29 and 30 of the APPI).

Security Measures

An information handler must take reasonable steps to keep personal data as accurate and up to date as is necessary to achieve the purposes of use and must endeavour to delete the personal data without delay when it becomes unnecessary to use the data (Article 22 of the APPI). An information handler must also take all necessary and proper measures to ensure that personal data is kept secure from loss and from unauthorised access, use and disclosure (Article 23 of the APPI).

In addition, an information handler must exercise necessary and appropriate supervision of its employees who handle personal data and of its data management outsourcing entities to ensure they implement and comply with security measures (Articles 24 and 25 of the APPI).

Data incidents, such as leakages of, loss of or damage to personal data, must be reported to the Personal Information Protection Commission (PPC) and the relevant data subject must be notified thereof when the incident reaches a certain threshold (Article 26 of the APPI).

Data Subject's Right

Upon the request of a data subject, an information handler must inform them about the purposes their personal data was used for, grant access to it, correct or delete it, or take other appropriate measures (Articles 32 to 39 of the APPI).

8.2 Geographical Scope

The APPI regulates the processing of personal information by information handlers in Japan. Foreign companies doing business in Japan must therefore comply with the APPI when they process personal information.

In principle, the APPI does not apply to the processing of personal information outside Japan. However, if a foreign company that does not have an office in Japan processes personal information of a data subject in Japan in relation to sales of goods or provision of services to individuals or entities in Japan, the foreign company is required to comply with the APPI even if personal information of that data subject is processed outside Japan (Article 171 of the APPI).

8.3 Role and Authority of the Data Protection Agency

The PPC is the primary authority with oversight over the APPI. The PPC is an independent administrative commission that ranks at a national administrative level similar to that of the JFTC and the National Public Safety Commission. The PPC is composed of a chairperson and eight members, as well as a secretariat.

An information handler must notify the PPC about data incidents. The PPC can request a report from an information handler or conduct an on-site inspection, if necessary, for compliance with the APPI. If an information handler breaches the provisions of the APPI, the PPC will first advise the information handler to cease or correct the violation. If this advice is not followed, the PPC will then issue a formal order to take the action requested in the earlier advice if the violation of important individual rights is imminent. An information handler who fails to comply with the formal order may be subject to a fine of up to JPY1 million and/or a prison sentence of up to one year (in the case of an individual) and to a fine of up to JPY100 million (in the case of a corporation) (Articles 148, 178 and 184 of the APPI).

9. Looking Forward

9.1 Upcoming Legal Reforms

No information provided in this jurisdiction.

Trends and Developments

Contributed by:
Norihiro Sekiguchi, Daisuke Mure, Yuki Kuroda and Ryosuke Sogo
Oh-Ebashi LPC & Partners

Oh-Ebashi LPC & Partners is a full-service law firm with over 160 attorneys and its main offices are in Tokyo and Osaka. It was originally established in Osaka in 1981 but now has an equivalent-sized operation in Tokyo. It was the first Japanese law firm to open an office in China and together with its Nagoya office, currently has offices in four locations. Its legal practice covers a broad range of fields, including corporate/M&A, risk management and compliance, IP law, life sciences, restructuring/insolvency, competition and antitrust/consumer protection, dispute resolution, finance and insurance, employment law, administration/regulatory law and tax law, It also provides an international practice, a China/Asian practice, a private practice and a pro bono practice.

Authors

Norihiro Sekiguchi is a partner at Oh-Ebashi LPC & Partners, with broad experience in M&A. He has handled cross-border M&As representing non-Japanese acquirers in various jurisdictions and has been involved in numerous private equity transactions, including the Toshiba Memory acquisition. He served as one of the examiners of the Japanese National Bar Examinations. He graduated from Waseda University (LLB) in 1994 and received an LLM degree from the University of Virginia School of Law in 2003. He is admitted to the Bars in Japan and the State of New York. He was a partner at Baker & McKenzie in Tokyo from 2006 to 2014 and then joined Oh-Ebashi.

Daisuke Mure is a partner in charge of labour and employment law at Oh-Ebashi LPC & Partners. His clients are involved in various areas including pharmaceuticals, telecoms, electronics, trading, transportation, airlines, energy, real estate, food and entertainment, educational enterprises and medicine. His clients include Japanese subsidiaries of global enterprises. He was admitted to practice law in Japan and joined Oh-Ebashi in 2000. He graduated from the University of Tokyo (LLB) in 1998 and received his LLM degree at the University of Michigan Law School in 2007. In 2008, he was admitted to practice law in the State of New York.

Contributed by: Norihiro Sekiguchi, Daisuke Mure, Yuki Kuroda and Ryosuke Sogo, **Oh-Ebashi LPC & Partners**

Yuki Kuroda is a partner at Oh-Ebashi LPC & Partners and is in charge of data protection and data security issues. He has handled a number of law and technology cases throughout his career. His practice includes Japanese and international data protection cases, and he regularly guides clients on various issues including planning a new data-intensive business and implementing a robust data protection/security compliance programme. He received a PhD degree from Kyoto University Graduate School of Informatics in 2023, an LLM degree from the University of California, Berkeley in 2015 and a J.D. degree from Osaka University in 2008. He is licensed to practice law in Japan and New York.

Ryosuke Sogo is a partner in the finance practice group at Oh-Ebashi LPC & Partners. He has broad experience in project finance, acquisition finance and real estate finance. He has overseen the project financing of various infrastructure, renewable energy, storage battery and hydrogen projects. He has a proven track record of assisting in the acquisition of target companies in M&A and advising lenders and borrowers on LBOs and MBOs. He has also advised on various domestic and overseas real estate finance matters such as residences, offices, hotels and commercial facilities.

Oh-Ebashi LPC & Partners

Kishimoto Building 2F
2-2-1 Marunouchi, Chiyoda-ku
Tokyo 100-0005
Japan

Tel: +81-3-5224-5566
Fax: +81-3-5224-5565
Email: general_toiawase@ohebashi.com
Web: www.ohebashi.com/en

M&A

Key developments in M&A law and regulation

In the last few years, a lot of progress has been made in M&A law and regulations in Japan partly due to the following events.

- The publication of the Guidelines on Fair M&A by the Japanese government in June 2019 (the "2019 Guidelines") which cover best practices for management buyout transactions relating to public companies (MBOs) and acquisitions of a controlled public company by the controlling shareholder.
- The publication of the Guidelines for Corporate Takeovers by the Japanese government in August 2023 (the "2023 Guidelines") which, among other things, cover a code of conduct for directors in share transactions involving a change of control of a listed company.

When directors of a target company receive an acquisition proposal, the 2023 Guidelines suggest that the directors should promptly submit or report the matter to the board of directors so that the board can give "sincere consideration" to a "bona fide offer". In determining whether the acquisition proposal is a "bona fide offer", the board will consider whether the proposal is specific, for a legitimate purpose and feasible.

When the board of directors agrees to the acquisition, they should make reasonable efforts to obtain the best available transaction terms for the shareholders. If the board makes an exceptional decision to endorse a proposal that is not sufficiently priced, they should explain the reasonableness of their decision fully.

For two-step acquisitions, the Supreme Court has ruled that if the major shareholders of a target company jointly set up a tender offer and conduct a two-step takeover with squeeze-out and the tender offer was made through procedures generally recognised as fair to eliminate conflicts of interest and a subsequent back-end squeeze-out was made at the same price as the tender offer price, the squeeze-out price should be respected.

However, the Tokyo District Court in a decision on 23 March 2023, recognised a dissenting shareholder's request to have their shares purchased at an amount larger than the tender offer price, because the squeeze-out, which was made at a price equal to the tender offer price under the Supreme Court's decision, was not determined through fair procedures (the "Family Mart case").

Family Mart, the target company, established a special committee following the 2019 Guidelines, which examined whether the tender offer price was appropriate based on an outside valuation advisor's advice regarding the appropriate share value range. However, when the acquirer offered an amount lower than the suggested range and Family Mart's management agreed, the special committee accepted this offer without providing any reasoning.

Considering this fact, the Tokyo District Court concluded that the special committee could not be considered to have sufficiently fulfilled its task of eliminating arbitrariness in the target company's decision-making process from an independent standpoint.

When a buyer conducts a going-private transaction constituting an MBO, a target company is expected to follow the 2023 Guidelines and implement the measures recommended by the 2019 Guidelines, including establishing a special committee in the target company. However, considering the Family Mart case, it is not suf-

ficient to merely establish a special committee. A special committee must fulfil its role in a truly independent way, without pandering to the buyer and the target company.

Finally, an amendment to the Financial Instruments and Exchange Act made in May 2024, coming effective within two years, will revise the rules regarding tender offers and will be the most important development in recent years. In December 2023, the Financial Services Agency suggested the main following revisions to the rules.

- Lowering the one third threshold of mandatory tender offer to 30% in line with that of other major jurisdictions.
- Mandatory application of tender offer for the acquisition of shares that exceed a certain threshold (ie, 30%), even in market trades, which are currently not subject to tender offer.
- Introduction of new measures against coercion due to partial tender offers (tender offers with an upper limit).

Recent trends in the M&A market

Private equity (PE) investments are booming in Japan. The Japanese government has stuck with its policy of low interest rates and commercial banks continue to actively provide acquisition financing. The largest buyout by a PE firm during 2023 was the acquisition of Toshiba by a Japan-based PE firm, Japan Industrial Partners. It was completed in September 2023 (total purchase price of approximately JPY2 trillion).

The second largest buyout led by a PE firm was the acquisition of JSR by Japan Investment Corporation (JIC), which was announced in June 2023 (total purchase price of approximately JPY900 billion) followed by the acquisition of Shinko Electric Industries by JIC and Dai Nippon Printing and Mitsui Chemicals, which was announced in December 2023 (total purchase price of approximately JPY680 billion).

These buyouts were all led by Japan-based PE firms and Japanese strategic buyers and appear to be restructurings aimed at strengthening Japan's global competitiveness in the semiconductor industry.

Apart from PE deals, large outbound acquisitions by Japanese strategic buyers were notable in 2023, including the acquisition of US Steel by Nippon Steel (total purchase price of approximately JPY2 trillion) and the acquisition of Iveric Bio by Astellas Pharma (total purchase price of approximately JPY800 billion).

Although the yen has been weakening since 2022, some Japanese companies made M&A decisions based on business strategic needs, such as the acquisition of specific technologies and seemed to be less concerned about the exchange rate.

ESG-driven deals such as the acquisition of Rockcliff Energy by Tokyo Gas (total purchase price of approximately JPY400 billion) and the acquisition of Green Power Investment by NTT and JERA (total purchase price of approximately JPY300 billion) are also noteworthy.

Project Finance

Requirement for information sessions or prior briefing measures in FIP/FIT approval procedures

In April 2024, the Act on Special Measures Concerning Promotion of Utilisation of Renewable Energy Electricity was amended to establish a requirement for information sessions or prior briefing measures for local residents, among other things. A lack of communication between

operators and local residents has caused trouble in the introduction of renewable energy power generation facilities, as well as in business transfers or changes in ownership.

In principle therefore when a new FIT/FIP certification is obtained or certain important matters are changed therein, information sessions or prior briefing measures for local residents are required.

For high-voltage power sources (output of 50kW or more but less than 2,000kW) and special high-voltage power sources (output of 2,000kW or more), information sessions are required. For low-voltage power sources (output of less than 50kW), it is considered sufficient to conduct prior briefing measures, such as posting information or conducting individual visits, with certain exceptions.

The information sessions or prior briefing measures are generally required to be held at least three months prior to the application for FIT/FIP certification, so the schedule for application must be adjusted accordingly. In addition, in secondary transactions, it is necessary to adjust the transaction schedule as well as negotiate the closing and post-closing conditions under the transfer agreement.

Storage batteries

In May 2022, the Electricity Business Act was amended to clarify that businesses that discharge electricity from grid storage batteries, which are storage batteries that are directly connected to the grid rather than being attached to power plants or substations, will fall under "electricity generation" under the Electricity Business Act if they meet certain requirements, such as exceeding 10,000kW in total.

In addition, storage battery facilities that meet certain requirements are newly defined as "power storage stations" under the ministerial ordinance that establishes technical standards concerning electrical equipment and are subject to security regulations in the same manner as conventional solar power plants.

With the clarification of how storage batteries are treated under the Electricity Business Act, investment and financing for storage batteries, including project finance, have been attracting attention. One possible business model for storage batteries is arbitrage, in which the batteries are charged at a low price and discharged at a high price in the wholesale electricity trading market and the difference between these prices is earned as profit.

However, both charging and discharging are affected by the volatility of market prices, so the profit is not stable. Alternatively, to eliminate this price volatility, a power purchase agreement at a fixed price may be executed with retail electricity suppliers outside of the wholesale electricity trading market.

Another method that is attracting attention as a means of ensuring stable cash flows over the long-term is the long-term decarbonisation power source auction, which includes new establishment and replacement of certain types of storage batteries. A successful bidder in the long-term decarbonisation power source auction enters into a capacity reservation contract, with the Organisation for Cross-regional Coordination of Transmission Operators, JAPAN (OCCTO) and in principle will receive the value of the contract for 20 years.

In addition, the operator should refund approximately 90% of the revenue from other markets,

such as wholesale markets and non-fossil markets, to OCCTO and retain approximately 10% of the revenue. In other words, the downside risk will be mitigated by the payment of the value of the capacity reservation contract, and it is expected that approximately 10% of the revenue will be retained as the upside.

The long-term decarbonisation power source auction ensures a long-term and stable cash flow and is therefore an attractive area for project finance.

Agrivoltaics

In Japan agrivoltaics have been attracting attention in recent years with the goal of balancing agriculture and renewable energy projects. Agrivoltaics refers to a power generation initiative in which permission to temporarily convert a limited portion of farmland is obtained, simple structures and easily removable poles are erected on this portion and photovoltaic power generation equipment is installed above while farming continues on the land below.

As solar power generation projects have spread in Japan over the last decade or so, land other than farmland that is suitable for new solar power generation projects has become scarce. It was previously necessary to obtain permission to convert entire farmland to land for power generation under the Cropland Act, but now, in the case of agrivoltaics, it is sufficient to obtain permission for temporary conversion only for the support pole portion, on the assumption that the farmer will continue farming underneath.

The possibility for farmers to earn a stable income from solar power generation or to use the electricity generated on the farmland for farming while continuing to farm, is attracting attention. However, in principle, the period of permission for temporary conversion is limited to three years (or ten years in certain conditions). There is a question mark over whether further permission for temporary conversion can be obtained if the farmer intends to implement agrivoltaics after the initial period.

Labour and Employment

Overview

The *mondai* or political issue of 2024 is how to cover labour shortages in the construction and driving operation industries. This problem has become a hot topic as regulations on working hours and overtime limits for these industries, which had been postponed, came into force on 1 April 2024 as scheduled.

Other recent major topics relevant to labour and employment are as follows.

Supreme Court LGBT decision

On 11 July 2023, the Supreme Court issued the first precedent regarding LGBT rights in a case involving a transgender woman who challenged the illegality of a restriction by her employer (the ministry of economy, trade and industry) that forced her to use the female restroom two floors above and below her office floor to avoid making her direct coworkers uncomfortable.

The Supreme Court held that "the social life of an individual in accordance with his or her true self-identified gender is protected under the National Compensation Act as an important legal interest".

In addition, the Supreme Court held that the treatment of the woman was illegal. It stated that "managers of facilities in the workplace who are confronted with this kind of problem have an obligation to give full consideration to the posi-

tion of transgender people and to make sincere adjustments and treatments".

With the enactment of the Act for the Promotion of Understanding of LGBT on 16 June 2023, understanding of the diversity of sexual orientation and gender identity has increased and there is growing momentum in Japan to reject discrimination based on these grounds.

The Freelance Protection Act

The Freelance Protection Act (the "Act concerning the Proper Treatment of Transactions with Specified Fiduciary Business Operators") enacted in 2023 is scheduled to come into force on 1 November 2024 and drafts of the enforcement order, ordinances of enforcement and guidelines providing details of the regulations were issued for public comment until 11 May 2024.

Freelancers who are eligible for protection under the Act are defined as "business operators who are the counterparty of outsourcing and do not use employees". The regulations to the Act are divided into two parts. The first part contains provisions which are similar to the Act against Delay in Payment of Subcontract Proceeds, etc to Subcontractors (eg, an obligation to clearly state transaction terms in writing or by electronic means).

The other part contains provisions which are similar to those in other labour and employment laws. These laws specifically state, under certain circumstances, that there is an obligation to:

- accurately display recruitment information;
- give consideration to balancing work with childcare, nursing care, etc;
- take measures such as establishing a system for consultation to ensure that the working environment is not impaired by harassment; and
- give 30 days' prior notice to the termination or non-renewal of a contract with a freelancer.

Amendments to the notice of working conditions

Membership-based employment, where emphasis is placed on an employee's membership in the company, has historically been mainstream in Japan. However, job-based employment, where emphasis is placed on an employee's specific job, is gradually increasing and traditional notions of unilateral changes in job description and work location (mandatory transfers) are becoming less favoured.

Until now, in the notice of working conditions that the employer has to present to the employee at the time of concluding an employment contract, it was only necessary to state the initial place of employment and the nature of the work. However, the law was revised, and the amendments came into force on 1 April 2024.

Under these amendments, which were introduced to reflect public opinion, notice in writing now has to be presented to employees at the time of execution of the employment contract. It must clearly state the scope of the change in the nature of their work and the place of work during the term of the employment.

Protection of trade secrets

Even in Japan, which has long been characterised by lifetime employment, mobility of human resources is increasing, especially among younger workers and the number of workers changing jobs is increasing. The Unfair Competition Prevention Act has been revised to address the issue of the outflow of corporate trade secrets caused by employees changing companies.

As it is difficult for a company to prove how a trade secret was used by another company hiring ex-employees of the first company, the Act specifically makes a provision for a presumption that the trade secret was improperly used by the second company if the first company can prove that:

- the trade secret was improperly obtained; and
- the second company manufactures products that can be produced using the trade secret.

This presumption was extended to cases where the trade secret was improperly obtained by a former employee of the company. This change will require companies to exercise more caution than ever before when hiring workers who are changing jobs.

Personal Information Protection

Enforcement

The Personal Information Protection Commission (PPC), which enforces Japan's Act on the Protection of Personal Information, publishes the enforcement cases it considers particularly serious on its website. From April 2023 to March 2024, the PPC published 13 enforcement actions (recommendations or guidance). Many have highlighted insufficient information security measures in the context of data breaches.

The businesses subject to the actions included Toyota Motor Corporation, NTT Group (the largest telecommunication provider in Japan) and LY Corporation (operator of the most common SNS in Japan).

The increase in published enforcement actions stemming from data breaches can be attributed to the fact that, after April 2022, businesses must inform the PPC of data breaches that meet certain criteria. As in other countries, it has become clear in Japan that investigations are initiated based on data breach notifications to the supervisory authority, leading to serious enforcement actions.

Another important point is that the content of these public announcements has become very detailed compared to just a few years ago. Until the financial year 2022, the public announcements of enforcement by the PPC were only two to three pages long, providing a very brief overview. In some cases, the statements did not even sufficiently clarify what the violations were.

However, looking at the public announcements from the last financial year, some were over 20 pages long and contained detailed and extensive content. This change suggests that the PPC has developed its investigative capabilities and is confident in its enforcement. Businesses should therefore be aware that, in the case of serious incidents, they are more likely to be subject to detailed investigations by the PPC than before.

Triennial review of the Personal Information Protection Law

When the substantially amended Personal Information Protection Law was enacted in 2017, it was decided that a review would be conducted every three years. After the first triennial review, the amended law was passed in 2020 and enacted in 2022. In addition to this triennial review, there was also a major amendment in 2021, which was enacted in 2023.

The PPC is currently in the middle of the second triennial review and is inviting stakeholders to hearings and the agenda materials provide insight into the issues being raised in the review.

Some of the issues relate to the processing of biometric data, the processing of information by platform owners and enormous businesses with a power imbalance over individuals and special provisions in the medical field. Among these issues, introducing an administrative fine system is attracting attention as an issue that relates to all businesses.

Until now, under Japan's Act on the Protection of Personal Information (APPI) the basic enforcement actions by the PPC against non-compliance with the APPI were:

- providing a business with guidance to comply; and
- issuing recommendations to comply.

According to the statistics issued by the PPC, approximately 100 to 300 guidance cases and several recommendations are recorded annually. The PPC also has the authority to order a business that does not comply with a recommendation to take the measures stated in the recommendation and to request the imposition of criminal penalties if the business violated the order. However, these orders have rarely been issued so far.

In contrast, in other countries, including across Europe, it is already common for substantial administrative fines to be imposed for violations of personal information protection systems. The introduction of administrative fines was therefore also raised as an issue during the first triennial review process leading up to the 2020 amendment, but it was ultimately not formally proposed.

However, looking at the Commission's recent meeting materials, it appears the Commission is treating the introduction of administrative fines as a more serious issue than it did in the past. If fines are introduced in the next amendment, it will undoubtedly be a significant turning point for Japan's Personal Information Protection Law.

KUWAIT

Law and Practice

Contributed by:
Sam Habbas, Luis Cunha, Hisham Al-Quraan and Mustafa Sayed
ASAR – Al Ruwayeh & Partners

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ASAR – Al Ruwayeh & Partners is a Tier 1-ranked corporate law firm and has operated in Kuwait for over 35 years. As one of the region's premier law firms to both domestic and foreign companies, it has a strong network of contacts throughout the MENA region. With its team of lawyers, its expertise extends over a wide range of areas that cater to the needs of local and foreign multinational corporations, banks and investment companies, industrial conglomerates, governments and state authorities, and private clients. Its work cuts across various sectors and includes IPOs, capital markets, M&A, banking and finance, real estate, government projects, securities, taxation, construction, corporate and commercial matters, franchising, commercial litigation and arbitration. ASAR is also regularly retained by leading international law firms and has won numerous awards for legal services rendered. The firm has multilingual capabilities, including being able to provide services in English, Arabic and French.

Authors

Sam Habbas is the senior partner at ASAR and has more than 30 years of experience in Kuwait. He had the primary responsibility for building and developing the firm's international department in Kuwait and Bahrain. Sam is an accomplished corporate lawyer and both advises and acts as lead counsel to a host of local and foreign multinational clients on a wide range of commercial, corporate and finance-related matters, in both the private and public sectors.

Luis Cunha is a partner in ASAR's corporate and commercial department. He is based in the Kuwait office and specialises in M&A transactions in the MENA region, as well as regularly assisting local and foreign clients with their establishment and structuring in Kuwait. Luis's clients operate in various areas of business including in the energy, fintech, manufacturing, construction, retail, chemical, military and pharmaceutical sectors. He has previously worked as a lawyer in both New Zealand and South Africa, and is also admitted to the roll of solicitors in England and Wales.

Hisham Al-Quraan is a partner in ASAR's commercial litigation department, for both Kuwait and Bahrain. He has represented local and international clients in various litigation matters involving banking and finance, Islamic financing, construction and agency matters. Hisham holds a Bachelor of Laws degree (LLB) from the Applied Science University in Jordan and a Master of Laws degree (Commercial and International Law) (LLM) from the University of Buckingham, England.

Mustafa Sayed is an associate in ASAR's corporate and commercial department. Mustafa's practice is focused on advising on and assisting with the restructuring of companies, the acquisition and sale of businesses, and the regulatory compliance issues associated with such matters. The clients Mustafa has assisted operate in various sectors, including the oil, retail, pharmaceutical and health sectors. Mustafa holds a Bachelor of Laws degree (LLB) from Cairo University in Egypt and has been admitted to the Egyptian Bar Association since 2015. Mustafa's practice languages are English and Arabic.

ASAR – Al Ruwayeh & Partners

Assima Towers
Floor 37
Othman Bin Affan Street
Mirqab
Kuwait City

Tel: +965 2292 2700
Fax: +965 2245 3597
Email: asar@asarlegal.com
Web: www.asarlegal.com

Contributed by: Sam Habbas, Luis Cunha, Hisham Al-Quraan and Mustafa Sayed,
ASAR – Al Ruwayeh & Partners

1. Legal System

1.1 Legal System and Judicial Order

Kuwait is a civil law jurisdiction, and the judiciary of Kuwait is structured in three levels: the Court of First Instance, the Court of Appeals and the Court of Cassation. The structure of the judicial system is briefly as follows.

The Court of First Instance

The Court of First Instance is made up of several circuits/divisions, each with its separate jurisdiction. These circuits/divisions include:

- the Small Claims/Summary Court;
- the Administrative Court;
- the Civil and Commercial Government Court;
- the Civil and Commercial Court;
- the Labour Court;
- the Court of Rent;
- the Criminal Court;
- the Court of Personal Matters; and
- the Court of Minors' Affairs.

The Court of First Instance also has three important support divisions:

- the Authentication Department, which authenticates signatures, etc;
- the Experts Department, which reviews any technical and complicated matters that the court may refer to it, etc; and
- the Execution Department, which is tasked with executing the judgments of the court.

The Court of Appeals

The jurisdiction of the Court of Appeals is generally limited to the review of issues being appealed from the Court of First Instance, but it is empowered to make a de novo review of appealed cases as well. The Court of Appeals regularly conducts trials de novo. Judgments rendered in the Court of Appeals are final, except for those appeals taken to and accepted by the Court of Cassation.

The Court of Cassation

The Court of Cassation may be viewed as the supreme court of Kuwait. It has final jurisdiction over matters relating to the proper application, interpretation and enforcement of Kuwaiti law, and rectifies procedural and substantive defects committed by the courts below it. The Court of Cassation is divided into commercial, civil and criminal divisions, and its judgments are typically respected and followed, even though they are not legally binding on the lower courts (ie, Kuwait is a civil law jurisdiction without binding court precedents).

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Certain restrictions may apply, depending on the nature and extent of the foreign investment being made (including in relation to foreign ownership limitations).

As a general premise, but subject to certain limited exceptions, Article 23 of Law No 68 of 1980 (the "Commercial Code") requires that foreign entities conducting business in Kuwait do so either through a local agent or through a Kuwaiti "partner" (typically facilitated through the establishment of a Kuwaiti company with Kuwaiti or GCC participants owning at least 51% of the capital). Significantly, Article 24 of the Commercial Code was amended (under Law No 1 of 2024) to allow for the establishment of a Kuwaiti branch of a foreign business (an "Article 24 Branch"). Under these reforms, a foreign entity can, strictly speaking, operate in Kuwait

without the need for a Kuwaiti sponsor or an agent (assuming they operate through a branch). In this regard, the authorities are currently in the process of formulating new regulations setting out the relevant practices and rules for its implementation and the establishment of such an Article 24 Branch. At present, these reforms are not being implemented in practice.

Also of possible significance, another exception to these conduct of business rules is the establishment of a company or branch under Law No 116 of 2013 (the "Foreign Direct Investment Law" – FDIL). The primary purpose of the FDIL is to improve the overall investment climate in Kuwait with respect to foreign investors, and to encourage foreign investment in Kuwait by offering certain benefits to foreign investors (owning up to 100% of a Kuwaiti entity, tax credits, etc). The Kuwait Direct Investment Promotion Authority (KDIPA) was also established under the FDIL, and has regulatory oversight over matters relating to the FDIL. To obtain an investment licence from KDIPA, the prospective foreign investor must satisfy the criteria set out under Article 29 of the FDIL (see **2.2 Procedure and Sanctions in the Event of Non-compliance**).

Certain activities are excluded from benefiting under the FDIL but these are narrowly defined activities relating to certain sectors, such as the extraction of petroleum and natural gas, security and investigative services and the manufacture of fertilisers.

GCC individuals and GCC companies wholly owned by GCC nationals may also establish branches of their businesses in Kuwait and/or own more than 51% of the shares of a Kuwaiti company (see Ministerial Resolutions No 141 of 2002 and No 237 of 2011 – the "GCC Exemption"). Except in limited instances, GCC nationals are afforded the same rights to establish and to do business in Kuwait as Kuwaiti nationals.

2.2 Procedure and Sanctions in the Event of Non-compliance

Any approvals that may be required will depend on the nature of the investment and how it will be made. As a general premise, the following may be of significance.

Requirements to Open a Wholly GCC-owned Company Under the GCC Exemption

GCC nationals and GCC companies wholly owned by GCC nationals may take advantage of the GCC Exemption to open a Kuwaiti company or a Kuwaiti branch of their operations. The process and timing will vary, depending on various factors such as the desired corporate form and the relevant activities to be undertaken.

During the establishment process, the authorities will also seek to confirm that the relevant investor is a GCC national or a GCC company wholly owned by GCC nationals. This is typically evidenced by the relevant identification documents in the case of GCC nationals (ie, the passport of the GCC national, etc) and/or the constitutional documents of the GCC company (including the shareholder details). See also **3.2 Incorporation Process** for details of the process generally followed to establish certain Kuwaiti companies.

Requirements to Open a Branch Under the GCC Exemption

Foreign investors must satisfy the following conditions in order to open a branch under the GCC Exemption.

- The relevant GCC entity must be wholly owned by GCC nationals, whether directly or indirectly. If at any time a non-GCC share-

holder acquires an interest in the relevant GCC entity, the Ministry of Commerce and Industry (MOCI) may cancel the branch licence.
- The relevant GCC entity must have been in existence for at least three years before the submission of the branch establishment application to the MOCI.
- The activities of the relevant GCC entity must be permitted in the GCC region, and the Kuwaiti branch activities must be covered under the relevant GCC entity's licensed activities.
- The establishment of a GCC branch in Kuwait should be completed within one to two months from the date all required documents are submitted to the MOCI. Generally, the documents required for submission are the MOCI establishment application form, the constitutional documents of the foreign entity and the details of its partners/shareholders. The identification documents must be attested and legalised at the Kuwaiti Embassy in the country of issuance and then attested and legalised in Kuwait before being submitted to the MOCI.

Requirements to Obtain an Investment Licence From KDIPA

To qualify for an investment licence under the FDIL, the foreign entity has to satisfy certain special requirements set out in the FDIL and its executive regulations. As a key factor, the foreign entity has to demonstrate that its activities will benefit Kuwait as a whole and satisfy the criteria set out in Article 29 of the FDIL (that the activities will result in the transfer of technology, modern methods of governance and practical/technical experience to Kuwait; create employment opportunities and training for national labour; enhance the use of national products, etc). KDIPA will also take into account 15 sub-criteria pursuant to Decision No 329 of 2019, which elaborates on the criteria as set out in Article 29.

The steps to obtain the investment licence are as follows.

- Application request: The submission of the application request online through the KDIPA portal is the first formal step in the application to be licensed under the FDIL. The application request should briefly summarise the proposed investment/project that the foreign party wishes to undertake in Kuwait under the FDIL. Once the application request is finalised and submitted, KDIPA will review the application and will typically respond to the applicant within a week regarding the success of the preliminary application.
- Formal application: If KDIPA believes that the investment/project as set out in the application request complies with and addresses the points required under the FDIL, the applicant will proceed to the second stage of the application process. As part of this process, the applicant will have to submit an application form appropriate to the vehicle it will use to pursue the project.
- Consultation: KDIPA and the relevant applicant discuss and consult on the application and the supporting documents (which will include a business study/plan); KDIPA may require additional information on particular aspects of the project that should be addressed.
- Consideration: Once the application and business study are finalised and formally submitted along with the attested, legalised and translated constitutional documents of the applicant, KDIPA is to respond to the applicant within 30 days regarding the success or failure of the application.

- KDIPA approval and investment licence: If the application is approved, the necessary formal steps to give effect to the investment/project are put in place, and an investment licence is issued by KDIPA following the completion of the incorporation process and the issue of the trading licence by the MOCI. If the application is rejected, a written explanation will be given. The applicant may challenge this decision within 30 days.

2.3 Commitments Required From Foreign Investors

Certain commitments may be required by KDIPA in order for it to issue an investment licence, as set out under **2.2 Procedure and Sanctions in the Event of Non-compliance**. Such commitments are typically agreed on the basis of the relevant business plan. If the agreed commitments are not adhered to, this may have an impact on the investor's licence and the benefits being enjoyed under the FDIL.

2.4 Right to Appeal

See **2.2 Procedure and Sanctions in the Event of Non-compliance**.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

Law No 1 of 2016 (the "Companies Law") provides for several types of companies that may be established. The more common forms used by foreigners when investing into Kuwait are the Single Person Company (SPC) or the With Limited Liability Company (WLL).

SPCs and WLLs are largely subject to similar rules/regulations, with a significant difference being that an SPC may only have a single shareholder while a WLL is required to have between two and 50 shareholders. If an SPC has more than one shareholder, it is automatically converted into a WLL. WLLs are the most common form of corporate entities established by foreign parties in Kuwait.

The objects of an SPC/WLL have to be selected from a pre-approved list issued by the MOCI. An entity is not authorised to undertake activities that are not consistent with its objects as listed in its memorandum of association (MOA). The minimum required share capital of an SPC/WLL is currently KWD100 per licensed activity, which will be cumulative: the minimum share capital of each registered object (ie, licensed activity) will be added together to reach the required minimum share capital of the relevant SPC/WLL. The capital amount is usually dependent on the objects selected and approved by the MOCI for inclusion in the MOA of the SPC/WLL.

The liability of shareholders of an SPC/WLL is limited to the extent of their share capital contribution in the company. However, in relation to an SPC, the owner may also be liable for the debt of the SPC if the shareholder:

- liquidates the SPC in a mala fide manner before its expiry or the realisation of its objectives; or
- does not separate the financial rights and obligations of the SPC from its other activities to the prejudice of bona fide third parties.

Investors may also establish a Kuwaiti Joint Stock Company (KSC). There are two types of KSCs: Public Joint Stock Companies (KSCPs) and Closed Joint Stock Companies (KSCCs). KSCCs are more common than KSCPs but, given that KSCs are subject to certain additional taxes (such as Zakat and contributions to the Kuwait Foundation for Advancement of Science) and

increased regulation, and have greater minimum capital requirements compared to an SPC/WLL (the minimum required capital is KWD10,000 for KSCCs and KWD25,000 for KSCPs), investors prefer to establish SPCs/WLLs unless the particular project requires a KSC. SPCs/WLLs are also easier to set up and administer, are subject to less stringent regulations and are relatively cheaper to establish and operate than a KSC. In light of this, what follows in this chapter does not address issues in relation to KSCs, focusing instead on SPCs/WLLs.

3.2 Incorporation Process

As a high-level summary, in order to incorporate an SPC/WLL an application must be made to the MOCI on a standard Arabic application form accompanied by the required documentation/information. This is submitted online to the MOCI through its website. Certain information will have to be provided as part of the online application, including the names of the shareholders/manager, the capital amount, the manager's authority, the company name, etc.

The MOCI should provide its approval regarding one of the proposed names. The online application should thereafter be referred to the Ministry of the Interior (the MOI) for its approval regarding the partners and manager of the SPC/WLL. After obtaining the MOI's approval, the MOA of the company should be signed by all partners (or their representatives) before the Notary Public at the Ministry of Justice. Following the signing of the MOA, the MOCI will issue a certificate confirming the registration of the SPC/WLL on the Commercial Registry.

Once the above is completed, an online application should be made to the MOCI to register the ultimate beneficial owner (UBO) of the entity. Under Article 5.1 of the Resolution No 4 of 2023 on the Procedures for the Identification of the Actual Beneficiary (the "UBO Resolution"), the actual beneficiary of a corporate entity is the party that directly or indirectly owns or controls, in a final manner, the corporate entity through the ownership of shares or parts thereof which represent 25% or more of the capital or voting rights of the entity or that otherwise has such rights which allow the appointment and removal of the majority of the board of directors. Where it is not possible/practical to identify the UBO as aforesaid, then the UBO would be such person having the actual control over the relevant corporate entity, and where this is not possible/practical, then it would be the person in charge of the management of the relevant corporate party.

After completing the UBO application, an online application should be submitted to the MOCI in connection with the issuance of the SPC's/WLL's trading licence. At this point, the lease agreement and rent receipt of the SPC's/WLL's premises should be submitted to the MOCI. During this process, the approvals of the Municipality and Fire-Fighting Administration should also be obtained, whereafter the trading licence should be issued for the SPC/WLL. Additional approvals may also be required, depending on the business of the SPC/WLL.

The incorporation of the SPC/WLL should take approximately four weeks (from the date all required documentation and information is submitted), provided that no substantial changes are made to the standard MOA proposed by the MOCI.

3.3 Ongoing Reporting and Disclosure Obligations

Companies are subject to various ongoing reporting/disclosure obligations after estab-

lishment. While the particular obligations will depend on the company itself and the activities it undertakes, examples of what may be required include:

- changes of management must be registered with the MOCI, as well as any amendments to a company's constitutional documents;
- financial statements must be submitted to the MOCI annually for review/approval;
- any change in the shareholding (and, in certain cases, that of the ultimate beneficial shareholder) must be registered with the MOCI;
- if the company is licensed under the FDIL, KDIPA will require ongoing disclosures evidencing compliance with commitments made during the licensing process; and
- the UBO and any update thereto must be registered with the MOCI.

3.4 Management Structures

An SPC is managed by its owner, but such owner may appoint one or more managers to manage the company on its behalf. A WLL is managed by one or more managers (and not by a board of directors, which are typically charged with managing KSCs). Managers can be of any nationality, but must have a Kuwait civil ID card and be a resident of Kuwait.

The MOA of the company sets out the powers of the managers. In the absence of any provisions regarding the powers of the managers, the managers have the full power to act on the SPC's/WLL's behalf (it is common to provide in the MOA that the manager has full authority to act on behalf of the WLL) but this can be restricted in the company's MOA or by the ordinary general meeting of the partners. In relation to a WLL, if the manager is named in the MOA, their termination/replacement should be approved by an extraordinary general meeting. The manager would be considered an employee of the company, so their relationship with the company would be subject to Law No 6 of 2010 (the "Labour Law").

3.5 Directors', Officers' and Shareholders' Liability

Managers are jointly liable towards the company, the partners and third parties for breaches of the law or the MOA, or for mismanagement (Article 105 of the Companies Law).

4. Employment Law

4.1 Nature of Applicable Regulations

Generally speaking, all employers/sponsors in the private sector in Kuwait are required to comply with the provisions of the Labour Law regarding matters such as working hours, overtime, rest days, sick leave, annual leave, holidays, etc, and other statutory benefits, regardless of whether or not such benefits have been waived in an employment contract. In this regard, the Labour Law provides for the minimum rights for employees in Kuwait, but employment contracts can provide for more beneficial rights.

The Ministry of Social Affairs and Labour (MOSAL) regulates employment matters in Kuwait and issues regulations, which should be complied with by employers/sponsors in addition to those in the Labour Law (eg, in respect of the minimum wage). While the Labour Law provides certain express protections for unions and collective bargaining arrangements, in practice these are quite rare and are typically only seen in certain sectors where Kuwaitis, rather than foreigners, form the majority of the sector's workforce.

4.2 Characteristics of Employment Contracts

The employment contract is used to obtain the necessary work permits, residence visas and any other government approvals required for an employee, and the Labour Law sets out the basic information required to be included in employment contracts. According to Article 28, the employment contract should be in writing (although an employment relationship can be evidenced through all means of proof) and must include the contract date (both the date of conclusion and the date of validity), the wage payable and the duration of the contract (if a fixed-term contract). The employment contract must also be filed with the MOSAL.

The duration of an employment contract can be either fixed (ie, for a specific period) or indefinite. Depending on the applicable duration, this affects notice periods to be afforded prior to termination, end-of-service benefits payable upon conclusion of the contract, etc.

4.3 Working Time

As a general premise, Article 64 of the Labour Law provides that employees are not to work more than eight hours per day or 48 hours per week, except as specified in the Labour Law. Article 66 stipulates that workers may work overtime if the necessity arises, provided that the overtime work does not exceed two hours a day, three days a week, 180 hours a year or 90 days a year. Workers are entitled to a 25% increase on their original remuneration for the period of overtime worked, and employers must maintain overtime records detailing the dates, overtime hours and wages.

Employees are also afforded certain rest periods under the Labour Law. In this regard, during the month of Ramadan, the working hours should not exceed 36 hours per week (Article 64). In addition to public holidays, employees are entitled to a one-hour break after working for five consecutive hours (Article 65) and to at least one 24-hour rest day every six days (Article 67). If employees are required to work on a rest day or holiday, then employers must pay such employee an additional 50% for rest days or an additional 100% for holidays, and must afford the employee an alternative rest day/holiday, as applicable.

4.4 Termination of Employment Contracts

Kuwait is not an employment-at-will jurisdiction. Under Article 41(a) of the Labour Law, an employer may terminate the services of an employee without notice, compensation or benefit if:

- the employee has committed a mistake that resulted in a significant loss for the employer;
- the employee obtained employment through cheating or fraud; or
- the employee divulged secrets related to the establishment that caused or could have caused real losses.

Article 41(b) provides that an employer may dismiss an employee (subject to the payment of the employee's end-of-service benefits) if the employee:

- has been found guilty of a crime that relates to honour, trust or morals;
- has committed an act against public morals at the work site;
- has assaulted one of their colleagues, the employer or their deputy during work or for a work-related reason;

- breached or failed to abide by any of the obligations imposed on them by contract or under the Labour Law; or
- is found to have repeatedly violated the instructions of the employer.

Employees also have the right to terminate their employment contracts without notification and shall be entitled to their end-of-service benefits if:

- the employer does not abide by the terms of the contract or the provisions of the law;
- the employee was assaulted by either the employer or their deputy;
- continuing work will endanger their safety and health pursuant to the decision of the medical arbitration committee at the Ministry of Health;
- the employer or their deputy committed an act of cheating or fraud with regard to work conditions upon signing the contract;
- the employer accused the worker of committing a punishable act and the final verdict acquitted the worker; or
- the employer or their deputy commits an act against the employee that violates public morals (Article 48).

If the term of the work contract is not specified (ie, an indefinite-term contract), both parties have the right to terminate by providing three months' prior notice of termination (assuming the employee is paid on a monthly basis – this notice period is one month for contractors paid on another basis (Article 44)). In relation to fixed-term contracts, Article 47 of the Labour Law provides that, where the contract is unlawfully terminated prior to the expiry date, the terminating party shall compensate the other party for damages suffered, provided that the amount of compensation does not exceed the remuneration of the worker for the remaining period of the contract. The damage suffered is typically determined in light of trade custom, the nature of the work and the unexpired portion of the contract. All amounts due to the other party may be deducted from the value of the compensation.

Except in limited instances (eg, termination under Article 41(a) of the Labour Law), employees are generally entitled to certain end-of-service benefits following the conclusion of the relevant employment relationship. In this regard, according to Article 51 of the Labour Law, employees paid on a monthly basis are entitled to 15 days' salary for each of their first five years of service and 30 days' salary for each subsequent year. Other employees (eg, employees paid on a commission basis or an hourly, daily or weekly basis, etc) are entitled to ten days' salary for their first five years of service with the employer and 15 days' salary for each subsequent year. The total end-of-service indemnity is based on the latest monthly salary (including all regular, customary and ordinary payments made to the employee, such as regular benefits, allowances and grants) and should not exceed one and a half years' salary. Other factors that affect the calculation of the end-of-service benefits include whether the employee was on a fixed-term contract, the term of employment and whether the employee resigned.

4.5 Employee Representations

Articles 98 to 132 of the Labour Law address employees' rights to organise/form unions, collective employment contracts and collective labour conflicts. Such issues are rarely encountered in practice unless an employment field is populated primarily by Kuwaiti employees, and such arrangements are by no means mandatory.

Article 109 of the Labour Law requires employers to provide their employees with copies of all laws and regulations relating to their rights and duties. Additionally, Article 35 of the Labour Law requires employers to inform employees in advance of the penalties to which they may be subject.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

Natural persons are not generally subject to tax in Kuwait. As such, no taxes are typically payable in the context of an employment relationship. However, with respect to the employment of Kuwaiti nationals, such persons and their employers are subject to the Social Security Law of Kuwait and are obliged to make certain social security contributions (ie, 10.5% of the employee's salary from the employee and 11.5% from the employer).

5.2 Taxes Applicable to Businesses

Under Decree Number 3 of 1955 (the "Tax Law"), each corporate body carrying on business in Kuwait should pay tax on its Kuwait operations. In practice, tax is imposed on non-Kuwaiti corporate bodies only. However, GCC nationals and corporate bodies incorporated within GCC countries are granted the same treatment as Kuwaiti companies, and are thus not presently subject to income tax. Kuwaiti and non-Kuwaiti individuals are not subject to income tax.

The Department of Income Tax (DIT) also seeks to tax foreign corporate bodies in their capacity as shareholders in a Kuwaiti company by taxing their percentage interest. The DIT would likely seek to apply the same practice to foreign corporate shareholders of GCC companies operating in Kuwait and/or where a foreign corporate shareholder appoints an individual nominee to hold its shares in a Kuwaiti company on its behalf.

While, strictly speaking, there is currently no "withholding" tax in Kuwait, there is a requirement under the Tax Law for government agencies and private entities in Kuwait to notify the DIT of all contracts entered into by them, and to retain 5% of the contract value (in practice, this is achieved by retaining 5% of all payments made to the counterparty) until the counterparty provides a tax clearance certificate. This procedure is sometimes loosely referred to as a tax withholding, but it is in essence a retention to secure the satisfaction by the counterparty of its Kuwait income tax obligations and not a tax as such.

While it has not yet done so, Kuwait is expected to introduce a 5% value added tax (VAT) in line with a GCC Framework Agreement on VAT that was signed in 2016. As briefly mentioned in **3.1 Most Common Forms of Legal Entity**, KSCs may be subject to additional taxes (Zakat, etc) compared to other corporate forms such as WLLs.

5.3 Available Tax Credits/Incentives

Given the restricted scope of taxes in Kuwait (relatively low flat tax rates, etc), there is limited scope for additional tax credits and incentives.

It is of particular significance, however, that several tax credits are provided to parties operating under the FDIL. These tax credits are related to the commitments made to KDIPA and are set out below (with the figures given being the set percentage/multiplier value for calculating annual benefits).

- Technology transfer: specialised equipment cost – 20% of the value of the specialised equipment cost.
- Creating job and training opportunities for Kuwaiti nationals:
  (a) total expenditure on salaries paid to Kuwaiti employees – five times the annual salaries paid to the Kuwaiti employees in excess of the percentage covered under the applicable laws; and
  (b) total number of Kuwaiti employees – KWD36,000 for each Kuwaiti employee.
- Expenditure on training of Kuwaiti employees – ten times the annual expenditure on training of Kuwaiti employees.
- Utilisation of local resources:
  (a) rental of the local head office of the investment entity – equivalent to the value of the annual contracts with local suppliers;
  (b) contracts with local suppliers (especially including SMEs) for the provision of local products and services – equivalent to the value of the annual contracts with local suppliers; and
  (c) raw material and other material from local sources – double the annual value of inputs used from local sources.

Article 8 of the executive regulations to the Tax Law is also significant, as it provides that the profits accrued by corporate bodies from trading on the Kuwait Stock Exchange are exempt from taxation.

5.4 Tax Consolidation

While there is no express rule restricting tax consolidation, the Tax Law provides that every taxpayer must file an income tax declaration (Articles 1 and 8 of the Tax Law) and this rule is applied in practice by the DIT.

5.5 Thin Capitalisation Rules and Other Limitations

The Tax Law does not expressly address thin capitalisation (where a company is primarily financed by debt rather than equity) or the tax consequences thereof; however, it is of possible significance that Executive Rule No 38 provides that the DIT may scrutinise financial costs/expenses to detect whether a taxable transaction has occurred (considering, amongst other things, the necessity of loans/interest in relation to loans from banks and related parties, and the surrounding documents, inter-group interest charges and interest paid in relation to foreign financing). Executive Rule No 38 provides as follows (informal translation).

First: Bank Interest

The interest locally paid on bank facilities and loans used in the main activity of the incorporated body shall be accepted after ensuring the necessity of the loan and also the supporting documents. The interest on the loans utilised in financing the capital operations shall be capitalised and added to the asset value.

All interest charged by the head office for its current account in the incorporated body's branch in the State of Kuwait shall be discarded. The same applies to the interest charged by the agent.

The interest paid abroad shall be discarded unless it is proved that such interest has been paid for loans and bank facilities to finance the incorporated body's activities in the State of Kuwait.

Second: Letter of Guarantee's Commission Paid Abroad

This commission shall be allowed if it is only paid to a foreign bank to issue a letter of guarantee

from a local bank and the letter of guarantee is related to a taxable project in Kuwait. Commissions related to a letter of guarantee where the revenue is not taxable shall not be allowed.

5.6 Transfer Pricing

Save for certain limited guidance in the executive regulations (see Article 5) and the Executive Rules, little is expressly provided in the tax laws/regulations on how taxes should be treated between a branch and its head office.

That being said, Executive Rule No 38 does provide that no interest charged by a head office in relation to its account with the Kuwaiti branch shall be deductible. In practice, however, such interest charges may be allowed if the Kuwaiti tax authorities are satisfied that the interest is a legitimate charge that relates to a Kuwaiti project. Also of significance, Executive Rule No 49 provides that the tax authorities may inspect intergroup transactions to ensure that such transactions are not concluded for illegal tax purposes. Executive Rule No 49 goes on to provide that each entity is responsible for its own taxes but that, in special cases, related entities can be treated differently after consulting with the tax authorities.

It is also understood that, in practice, the DIT applies limits on the deductibility of expenses incurred outside Kuwait in relation to a head office, related entities and third parties to varying degrees. The following are provided as examples:

- costs of imported materials to be resold in Kuwait – deductions cannot exceed 85–95% of the related value;
- design costs incurred outside of Kuwait – deductions cannot exceed 75–85% of the related value; and
- foreign consulting expenses – deductions cannot exceed 70–80% of the related value.

Depending on an entity's status (ie, whether it is a head office, a related party or a third party), the applicable deduction allowed may be greater or lower within the range provided.

5.7 Anti-evasion Rules

See **5.6 Transfer Pricing** regarding the scrutinisation of related party transactions. Where there are reasonable grounds to believe that a taxpayer will not comply with its tax obligations, Article 35 of the executive regulations to the Tax Law empowers the DIT to make preliminary attachments (and potentially seek to dispose of the assets) and to ban the relevant management of the taxpayer from travelling. The following may also be of possible relevance.

- See **5.2 Taxes Applicable to Businesses** in relation to the 5% tax retention required to be made from payments being made to counterparties.
- Under Executive Rule No 57, the authorities can institute precautionary attachments when the Tax Department becomes aware that the taxpayer intends to:
  (a) leave the country forever;
  (b) cease its activity; or
  (c) dispose of its assets with the aim of evading the tax due.
- Under Article 36 of the executive regulations to the Tax Law, if the final and payable taxes and penalties are not paid on the required date, the Tax Administration may approach the courts to attach the property of the taxpayer (including such assets of the taxpayer as may be in the possession of a third party). With respect to penalties, Article 34 of the executive regulations to the Tax Law provides that a penalty of 1% per month (calculated

on the taxes due) shall be imposed for failing to submit a tax return as from when the tax return was meant to be filed, and a further 1% per month (calculated on the taxes due) for failing to actually pay taxes as from when the tax was due to be paid.

Under Article 44 of the executive regulations to the Tax Law, the Tax Administration may cancel any agreement or procedure that has the intention of tax avoidance.

6. Competition Law

6.1 Merger Control Notification

Kuwait has recently overhauled its competition regulatory regime, with a new Competition Law (No 72 of 2020) promulgated during November 2020. The Competition Protection Authority (CPA) has been tasked with implementing the Competition Law and regulating competition matters generally in Kuwait. The CPA issued implementing regulations, which were published during July 2021 (under CPA Resolution 14 of 2021) and which have since been supplemented; these regulations give further effect to the Competition Law. The Competition Law and its implementing regulations have brought about a number of significant changes to M&A, which should be accounted for going forward.

When acquiring or merging with another business, certain reporting obligations and approval requirements arise in the context of what is considered to be an "economic concentration". Such economic concentration is defined under the Competition Law to include "a permanent change of control in the relevant market, arising by way of merger or acquisition". Such control may also be exercised in concert with other persons, whether directly or indirectly.

Article 10 of the Competition Law provides that such economic concentration is deemed to be present in the following instances:

- the merger of two or more persons or parts of their businesses that results in control or an increase of control;
- the acquisition of direct or indirect control over another one or more persons through acquiring, amongst other things, assets, equities, usufruct and/or shares; or
- the existence of a partnership between two or more persons that leads to a permanent and independent economic or commercial activity, whatever the legal form or activity that is practised.

Article 10 of the Competition Law has been drafted in broad terms and is largely duplicated in the implementing regulations. However, the definition of what is to be considered an economic concentration provides that there should also be a change of control of a particular market. Also of significance is the fact that, while the previous and now repealed Competition Law (No 10 of 2007) provided that control would be established where a person (or group of persons), directly or indirectly, controls 35% or more of a particular market, this has not been carried over into the current Competition Law or its implementing regulations. However, Article 12 of the Competition Law does provide that such reporting obligations would be triggered where the value of the underlying registered assets or annual sales in Kuwait subject to the economic concentration exceeds certain thresholds. These thresholds are set out in CPA Resolution No 26 of 2021 on Controls of Aggregate and Individual Thresholds. The reporting thresholds have been set rather low, giving rise to a significant added reporting/approval regulatory burden in relation to M&A activity in Kuwait.

Given the novelty of the Competition Law (and its implementing regulations), there is a lack of precedent and guidance from the authorities on how economic concentration and control over a market would be applied in practice. The issues involved are amplified when the transaction involves a sale abroad with only a limited impact in Kuwait – the authorities have thus far failed to clarify the level of impact required. While the CPA has not rigorously implemented requirements under the competition laws in the past, it has recently begun taking a more active approach in applying the requirements under the Competition Law.

6.2 Merger Control Procedure

As indicated in **6.1 Merger Control Notification**, the Competition Law provides that the participants of an economic concentration situation are required to obtain the approval of the CPA before completing such economic concentration. A CPA application is required only if the relevant registered assets or annual sales in Kuwait exceed the applicable thresholds.

The application to be submitted to the CPA should include confirmation of the payment of an administration fee in an amount equal to 0.1% of the paid capital or the aggregate value of the assets of the relevant persons in Kuwait, whichever is less, subject to a maximum of KWD100,000. The CPA should then examine the application to determine the possible negative consequences of the economic concentration on free competition. Given the timelines afforded to the CPA in evaluating such application, this process may take several months to complete, but currently, in practice, this would take two months.

6.3 Cartels

The Competition Law guarantees the freedom of exercising economic activity in a manner that does not affect free competition for all in Kuwait. The Competition Law also contains a general prohibition on acting in an anti-competitive manner (by stating that all agreements, practices, etc, that are harmful to free competition are prohibited) and elaborates on particular agreements/practices that are restricted. The Competition Law provides that it shall apply to all acts perpetrated abroad that affect competition in Kuwait.

The Competition Law has introduced the concepts of horizontal relationships and vertical relationships into Kuwaiti law.

Persons are in a horizontal relationship when they are on the same level of production/distribution level in a particular market, whereas a vertical relationship exists when they are on different levels of a production or distribution chain of a particular market.

In a horizontal relationship, parties are restricted from:

- setting the prices of products, either directly or indirectly, whether by increasing, decreasing, fixing the price or imposing any commercial restrictive requirements relevant to the sale or distribution of commodities or the provision of service or any other form contrary to ordinary market forces;
- dividing the product markets according to areas, volume of sales or purchases or products being sold in any other manner;
- fixing the quantity of production, distribution or sale for commodities or determining a specific method or means for the provision of a service;

- restricting the technical development or investment in connection to the production, distribution or sale of a commodity or provision of a service; and
- colluding in submitting bids or offers for the sale, purchase or provision of any commodity.

Significantly, the Competition Law provides that the CPA is to provide further guidance on what is permitted/restricted in relation to persons in vertical relationships; such guidance remains outstanding.

6.4 Abuse of Dominant Position

See **6.1 Merger Control Notification** and **6.3 Cartels**.

7. Intellectual Property

7.1 Patents

Law No 71 of 2013 (the "Patent Law") addresses patent protection issues in Kuwait. Although the Patent Law does not expressly define the word "patents", Article 3 provides what should not be considered as a patent, including:

- discoveries, scientific theories, mathematical methods and computer programs;
- schemes, rules and methods of doing business, practising pure mental activities, and playing a game;
- plants and animals and the biological processes used to produce plants or animals, with the exception of microbiology processes and the products of these processes; and
- methods for treating the human or animal body surgically or therapeutically, and methods of diagnosing disease applied to the human or animal body, with the exception of products that are used in any of these methods.

The Patent Law does not protect plant varieties and animal species.

According to Article 15, patents are valid for a period of four years, but can be renewed for cumulative periods of up to 20 years.

At present, the Patent and Trademark Office (PTO) processes applications for industrial designs, while other patent applications are directed to the GCC Patent Office in Riyadh, Saudi Arabia. When approved, a registration in the GCC Patent Office in Riyadh may be enforced in Kuwait.

An owner or rights holder of a patent, a drawing, a design or a utility model may file a complaint under the Patent Law to protect their rights. During a civil or criminal lawsuit, a rights or title holder may ask the court to issue an order to take precautionary measures, which may include the seizure of the contravening goods and the equipment and machines used for committing the offence. Where necessary, the order issued for taking such measures may require the appointment of an expert and other court officers to assist in its execution.

Unlike under Law No 13 of 2015 (the "TM Law" – see **7.2 Trade Marks**) and Law No 75 of 2019 (the "Copyright Law" – see **7.4 Copyright**), which specifically allow a rights or title holder to seek an order from a Kuwait court for the enforcement of precautionary measures prior to the filing of a substantive infringement action (and on an ex parte basis when necessary) to prevent patent infringements and violations, the Patent Law grants such a right only after the substantive claim for patent infringement or violation of the Patent Law has been filed.

The 1970 Patent Cooperation Treaty (as amended) (PCT), an international patent law treaty, is also of significance, and was ratified by the State of Kuwait on 9 September 2016. The PCT makes it possible to seek patent protection for an invention simultaneously in a number of countries by filing an "international" patent application; such an application may be filed by anyone who is a national or resident of a contracting state with the national patent office of the contracting state or, at the applicant's option, with the International Bureau of WIPO in Geneva. However, it should be noted that the PCT application does not itself result in the automatic granting of a patent, and the granting of a patent is at the discretion of each national or regional authority. In other words, a PCT application establishes a filing date in all contracting states but must be followed up on by entering into national (or regional) efforts to obtain one or more patent registrations.

7.2 Trade Marks

Trade mark protection is regulated under the TM Law, which is largely based on a treaty between the various GCC states. The TM Law defines "trade marks" as "anything which takes a distinct form or style in the form of names, words, signatures, letters, symbols, numbers, titles, stamps, drawings, graphs, inscription or combination of same, or any signs or group of signs if used or intended to be used to distinguish such products or services of an organisation or entity relevant to such products or services from products or services of other entities or to indicate the performance of a service or to control or check such products or services" (informal translation).

Trade marks, service marks, logos and trade names may be registered in Kuwait under the TM Law in accordance with international classification standards, except those relating to certain prohibited items (ie, alcohol and pork products) and certain restricted activities (such as gambling). These registrations are valid for up to ten years from submission of the application for registration, and may be renewed for similar periods. When foreign marks are to be used in Kuwait, the owner thereof is typically recommended to consider registering them locally in accordance with the TM Law as this affords the mark owner more protection than when the marks have not been registered.

In the case of an infringement of a registered trade mark, the remedies available to the trade mark owner under the TM Law include:

- filing a criminal action (see Articles 2, 3 and 4 of the TM Law);
- seeking injunctive relief, which may take the form of confiscating infringing items, impounding the tools used in infringing the mark and/or the destruction of unlawful marks and property (see Article 40 of the TM Law);
- if the infringing party manages to register the infringing mark, filing a case to de-register the trade mark of the infringing party (see Articles 22 to 24 of the TM Law);
- seeking damages (see Article 41(1) and (2) of the TM Law); and
- filing an application with the Customs Department to prevent the entry of counterfeit goods (see Article 38 of the TM Law).

Of significance, a complainant should file a substantive action with the relevant court within 20 days of the granting of a precautionary order/injunctive relief.

7.3 Industrial Design

Industrial designs are also protected in Kuwait (but not separately defined, strictly speaking) under Law No 4 of 1962 (the Patent, Designs and Industrial Models Law), Article 35 of which provides that "any arrangement of lines or any type of figure, whether coloured or uncoloured, designed for use in industrial production by a mechanical, manual or chemical process shall be considered a design or industrial model" (informal translation). Although industrial designs are regulated similarly to patents, they are subject to certain different rules. For example:

- the initial protection period for industrial designs is ten years from the application date;
- industrial designs may be renewed for one further period of five years; and
- industrial models are registered with the PTO on the Register of Designs and Industrial Models.

7.4 Copyright

The Copyright Law governs copyright issues and defines a "work" as "any creative literary, artistic or scientific work of whatever kind, expression, importance or purpose" (informal translation), and provides for the protection thereof. Article 23 of the Copyright Law provides that copyright protections will typically endure for the lifetime of the author and for 50 years after the author's death; additional considerations may apply, depending on the nature of the work and the author involved (joint works, juristic entities, etc). Certain limited exceptions from the copyright protection are provided for (copying short portions for educational purposes, etc).

A party seeking to protect its copyright does not need to register the copyright locally in order for it to be granted protection under the Copyright Law; however, it may wish to apply and file a request with the Kuwait National Library (KNL) to deposit works sought to be protected in order to enhance the ability to evidence the author's entitlement to copyright protection. The KNL is authorised to accept applications for the deposit of works from authors or creators, their descendants or their official representatives. Only one classification of work will be allowed for each application. If the material is accepted for deposit, the KNL will classify the material and issue a certificate indicating the serial number, the date of deposit and an international classification.

Under Article 35 of the Copyright Law, a complainant may petition a court to grant interim relief (an order restricting the publication, presentation, performance or copying of the work for a certain period of time, seizure of the revenue generated from the exploitation of the work, etc) when there is a violation of any rights stipulated under the Copyright Law. Significantly, a complainant should file a substantive action with the relevant court within 15 days of the granting of the interim relief.

7.5 Others

While certain laws protect trade secrets (eg, the Companies Law restricts directors from sharing company secrets), there is no formal registry for such information.

While a database can enjoy protection under the Copyright Law, depending on its nature, the authorities have not issued a directive as to the basis on which software is protected. Depending on the type/format of the software, possible arguments can be made that it should be protected under copyright or as a patent. In this regard, the Copyright Law expressly provides for the protection of "computer programs" but, as provided in **7.1 Patents**, the Patent Law states

that patents "shall be granted in accordance with the provisions of this Law for any new invention which is utilisable in industry, whether it concerns a new industrial product, original industrial process and techniques or a new application of know industrial process or techniques" (informal translation), and it is conceivable that certain software could also satisfy this language in the Patent Law.

8. Data Protection

8.1 Applicable Regulations

Data protection considerations and restrictions are addressed in various laws of Kuwait, including:

- the Kuwaiti Constitution;
- the Electronic Transactions Law (the "ET Law");
- Law No 37 of 2014 on the Establishment of the Communications and Information Technology Regulatory Authority (CITRA);
- the Evidence Law;
- the Right to Access Information Law and its implementing regulations;
- Law No 9 of 2019, Concerning the Exchange of Credit Information and its implementing regulations;
- various resolutions/regulations issued by CITRA, such as:
  (a) CITRA Resolution No 26 of 2024 on the Regulations of Data Privacy Protection (DPR); and
  (b) the Cloud Computing Regulatory Framework ("Cloud Regulations") issued by CITRA;
- Decree No. 37 of 2022 regarding the establishment of the National Cyber Security Center (NCSC); and
- various resolutions/regulations issued by the NCSC, such as:
  (a) Resolution No 7 of 2023, "Concerning the Classification of the Electronic Data"; and
  (b) Resolution No 35 of 2023, "Concerning the National Framework for Cybersecurity Governance".

With respect to data protection generally, the ET Law applies to all records and information recorded electronically relating to civil, commercial and administrative transactions, unless the parties agree otherwise. Regarding the collection, use and disposal of personal information, the ET Law provides that, except as otherwise authorised, all government and private entities may not unduly or illegally disclose any personal data documented in electronic form unless and until it has been agreed to by the data subject. These restrictions on the collection, use and disposal of personal data and items that may be considered as personal data are further expanded upon in the provisions of the DPR and the Cloud Regulations. However, the DPR and Cloud Regulations are more specific in the application and considered sectoral resolutions that apply only to regulated entities which are operating in the telecommunications sector (mobile network operators, ISPs, cloud service providers, etc).

8.2 Geographical Scope

Companies that are doing business "in" Kuwait are typically required to abide by Kuwaiti laws, regardless of whether or not they have a physical presence in Kuwait; such laws include the ET Law. While this is decided on a case-by-case basis, the likelihood of the foreign entity being subject to Kuwait's laws increases according to the strength of the link between the activities of the foreign entity and Kuwait. Having noted this, there are restrictions on the export of certain government and sensitive information (although

these points are currently being looked into and new reforms are expected).

8.3 Role and Authority of the Data Protection Agency

There is no particular agency in Kuwait that is specifically charged with and dedicated to enforcing Kuwaiti data protection rules. The agency that may have jurisdiction will depend on the specific data protection rules that are being contravened. For instance, CITRA would be the authority in charge of overseeing the application of the DPR and Cloud Regulations when it is related to a company which is licensed by CITRA to conduct telecommunication services, while the Central Bank of Kuwait would be the primary authority in relation to entities which it may regulate (such as banks).

9. Looking Forward

9.1 Upcoming Legal Reforms

With respect to business reforms in 2024 and beyond, it is expected that a number of reforms will be issued which would facilitate foreign parties seeking to do business directly in Kuwait. Perhaps the most significant of these are the regulations which are to be issued which will allow the establishment and operation of an Article 24 Branch.

As touched on in **8. Data Protection**, the authorities have recently issued a number of laws and regulations that impact data privacy, and more are understood to be in the pipeline. These laws and regulations will impact not only e-commerce but also how businesses in general treat the information of their customers, employees and contractors. In this regard, we are aware of a number of rules and regulations which are in the pipeline to further clarify the issues involved which address, amongst other things, the classification of data, which would in turn impact the obligations relating to breach of applicable data privacy rules as well as the export of data generally to outside of Kuwait.

There have also been discussions on overhauling the laws which regulate public-private partnerships as well as the residency permits regime for expats in Kuwait, but these are tentative at this stage.

MALDIVES

Law and Practice

Contributed by:
Shaaheen Hameed, Hassan Maaz Shareef, Aminath Amathulla, Mohamed Azmee, Nazahath Ahmed and Isha Ali Raoof
Premier Chambers LLP

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Premier Chambers LLP is a full-service law firm and was established in the early 1990s. It has a dedicated team of foreign and locally-trained lawyers who are qualified to and experienced in tackling complex legal matters. The firm's core expertise lies in banking and finance transactions, corporate and commercial matters, real estate, IP and tax disputes. The firm's recent work includes drafting necessary security agreements and advising Doha Bank on a USD200 million loan transaction and engaging with Nations Trust Bank, Sampath Bank and Seylan Bank of Sri Lanka on multiple cross-border transactions valued at more than USD60 million.

Authors

Shaaheen Hameed is the founder and managing partner of Premier Chambers. With over 30 years of experience, he is a leading figure in the Maldivian legal community. He has extensive expertise in banking and finance, corporate and commercial matters, foreign investments and real estate transactions and is frequently retained by prominent domestic and international corporations, including banks and other business entities. He has been involved in various high-profile litigation and international arbitration. He is ranked by Chambers and Partners, under Band 1 and as a leading lawyer in the area of general business law in the Maldives.

Hassan Maaz Shareef is a senior partner at Premier Chambers and has over 20 years of experience. He has expertise in banking and finance, corporate and commercial matters, foreign investment, IP and tax disputes. He regularly advises major foreign and local companies and other corporate bodies engaged in various businesses on a wide range of corporate and commercial issues, including tax disputes. He also has considerable experience in the field of Islamic banking and finance. In addition to providing legal advice, a significant portion of his practice is dedicated to his extensive litigation portfolio.

Contributed by: Shaaheen Hameed, Hassan Maaz Shareef, Aminath Amathulla, Mohamed Azmee, Nazahath Ahmed and Isha Ali Raoof, **Premier Chambers LLP**

Aminath Amathulla joined Premier Chambers in 2012 and is a senior associate. She is well versed in corporate, commercial and employment matters. Her areas of practice also include banking and finance, tourism-related acquisitions, litigation and dispute resolution. She assists, advises and represents various foreign and local clients before the tribunals and courts in the Maldives. She also provides legal advice and assistance to clients in general commercial matters. She has been involved in drafting, vetting and finalising complex commercial contracts too.

Mohamed Azmee joined Premier Chambers in 2020 and is an associate at the firm. He frequently advises foreign and local businesses on legal requirements, corporate compliance and best practices in commercial, corporate, land and real estate matters. His areas of expertise include corporate and commercial, banking and finance, foreign investment, land and real estate, employment and labour, family matters and litigation and dispute resolution. He currently manages a substantial caseload in the Maldivian courts and tribunals, with a focus on resolving contractual, corporate and commercial disputes.

Nazahath Ahmed joined Premier Chambers in 2024 as an attorney and engages in multi transactional work. Primarily focusing her practice in the areas of corporate and commercial law, she has previously acted as counsel for banks and financial institutions in connection with corporate transactions and regulatory matters. She is well versed in litigation and dispute resolution and has extensive experience in tax and enforcement matters and has represented the Maldives Inland Revenue Authority in the courts and tribunals during her tenure there.

Isha Ali Raoof is a legal researcher at Premier Chambers and provides invaluable support in corporate law, with a particular focus on resolving shareholder disputes under the guidance of managing partner, Shaaheen Hameed. She also engages in litigation primarily in the areas of civil and employment law and has consistently contributed to successful case outcomes. She passed the Bar in 2022 and obtained her licence to practice in 2023.

Contributed by: Shaaheen Hameed, Hassan Maaz Shareef, Aminath Amathulla, Mohamed Azmee, Nazahath Ahmed and Isha Ali Raoof, **Premier Chambers LLP**

Premier Chambers LLP

Alidhooge, 1st Floor
Shaheed Kudanevi thuththumaniku
Hingun, Machangoalhi
Malé 20194
Republic of the Maldives

Tel: +960 3314377
Fax: +960 3314378
Email: admin@premier-chambers.com
Web: www.premier-chambers.com

1. Legal System

1.1 Legal System and Judicial Order

The legal system of the Maldives is a combination of civil and common law traditions aligned with the principles of Islamic law. Under Section 10 of the Constitution of the Maldives, Islam is the state religion and all laws are based on it. This means no law which is inconsistent with the principles of Islam may be enacted. This hybrid system has enabled the Maldives to preserve its Islamic ethos while modernising its legal framework. While much of the legal framework is now covered by statutes, where there is a gap, it may be supplemented by either Islamic law or common law, with precedence given to Islamic law.

The judicial system of the Maldives is organised into three tiers. The Supreme Court of the Maldives is the highest court in the country and has original jurisdiction, inherent jurisdiction, appellate jurisdiction and advisory jurisdiction. The Supreme Court's decisions are final and binding on all other courts. Under the Supreme Court Regulation 2020, a Supreme Court decision may be reviewed in limited circumstances, where an applicant is able to show there has been a blatant disregard for the law or there has been a gross injustice.

The High Court of the Maldives is below the Supreme Court and has original jurisdiction and appellate jurisdiction. The High Court hears appeals from superior and lower courts and tribunals.

The third tier of the judicial system consists of first instance superior and lower courts along with tribunals. These include the Civil Court, the Criminal Court, the Family Court, the Juvenile Court, the magistrate courts, the Employment Tribunal and the Tax Appeal Tribunal. All courts apart from the magistrate courts have specific jurisdictions. The magistrate courts have jurisdiction to hear civil, family and criminal matters.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Approval of Foreign Investments

Under the Law on Foreign Investments in the Maldives (Law 25 of 1979) (the "FI Act"), all foreign investments require prior approval, with the

primary mandate being granted to the ministry of tourism in respect of foreign direct investments (FDIs) in the tourism industry, and the ministry of economic development and trade (MED) for all other foreign investments. With 100% foreign ownership permitted in the tourism resort development, operation and management, the current FDI Policy issued by the MED on 11 February 2020 sets out the permitted proportion of foreign investment ownership in all other areas and extensively addresses the guidelines, requirements and application processes relating to FDIs in the Maldives.

The FDI Policy describes the entry requirements for all types of investments and highlights the areas which are open, closed and negotiable for FDIs. However, the requirement to obtain approval applies to all FDIs regardless of the nature or type of investment. The FDI Policy establishes:

- the automatic approval route for sectors and activities in which the criteria are set out in the FDI Policy; and
- the sectors and activities that require negotiation for approval based on the criteria described in the FDI Policy.

Any foreigner interested in investing in a business activity that is not addressed in the FDI Policy must seek government approval to determine if the proposed investment may be allowed. FDIs are not permitted in retail trade in the Maldives.

Prior Approval

Approval for the FDIs must be obtained prior to the foreign investor engaging in business in the Maldives. Upon approval being granted, the foreign investor must register the business in line with the Business Registration Act of the Maldives (Law 18 of 2014) (the "Business Registration Act") before business commences. A foreign corporate entity may establish its presence by way of re-registration of the foreign company or incorporation of a new company under the new Companies Act of the Maldives (Law 7 of 2023) (the "Companies Act").

Additional incentives for FDI are offered through the Special Economic Zones Act of the Maldives (Law 24 of 2014) (the "SEZ Act") which outlines special rights and incentives for investing in areas declared as special economic zones.

Approval Criteria

A foreign person or entity seeking to make an investment in the Maldives must have their financial status confirmed by a bank or an institution acceptable to the government of the Maldives. A letter of financial credibility issued by a financial institution licensed by the Central Bank of the applicable jurisdiction for the shareholders must be submitted for each shareholder. This step is required for both individual and legal entities.

The FDI Policy specifies the minimum initial investment requirement amounts for all areas of investment for a period of five years, starting from USD250,000 and going up to USD5 million. The policy also specifies minimum shareholding percentages, foreign investment agreement duration and the entry routes for FDIs.

Minimum shareholding requirements, initial investment values, duration of agreement and entry routes depend on the investment sector and activities. There are several sectors where the above-mentioned criteria are not specified and have to be negotiated when obtaining approval.

2.2 Procedure and Sanctions in the Event of Non-compliance

The routes for investments in various sectors are specified in the FDI Policy, which also provides maximum percentages of shareholdings, minimum initial investment requirements and maximum foreign investment agreement duration. The automatic approval route available for applications which reflect a commitment to meet the investment requirements and shareholding percentages provided in the FDI Policy is fairly straightforward and fast. Where the government approval route applies, the approval is not guaranteed due to sensitivities involved in the proposed investment sector.

The approval of a foreign investment application takes two to 14 working days from the date of submission of completed documents, depending on the route of application. Business registration after obtaining the approval takes one business day.

Steps

There are certain stages involved in obtaining approval for a foreign investment along with a registration process to establish a business entity under the regime governed under the FI Act.

- Filing a foreign investment application – a foreign investment application must be filed at the MED. Investors who wish to discuss their proposal prior to submitting the application may do so via walk-in meetings.
- Receiving approval for foreign investment – an approval will be granted for the requested proposal in consultation with relevant stakeholders and in accordance with applicable laws and regulations. The MED issues an acceptance letter to foreign investment approval applicants.
- Registration of the business entity – a decision on the type of business must be made at the stage of filing the foreign investment application in order to register the business which is subject to getting approval for the proposed business.
- Signing the foreign investment agreement – once the foreign investment is registered as a business entity, the foreign investment agreement outlining the terms and conditions relating to carrying out the proposed business in the Maldives must be signed with the ministry of economic development & trade.
- Obtaining licenses and permits – operating licences or permits may need to be obtained depending on the business activities undertaken.

Fees

An administrative fee is required to be paid to the Maldives Inland Revenue Authority (MIRA) upon receiving approval and before signing the investment agreement.

Non-compliance

Although specific penalties are not imposed for different acts of non-compliance, under the FI Act, where a foreign investor fails to comply with the laws of the Maldives, the government may close the investment and terminate the investment agreement. The capital belonging to an investment which is closed by the government will be permitted to be taken abroad in a manner determined upon negotiation between both parties.

Additionally, as foreign investments are required to obtain prior approval under the Business Registration Act, a foreign investor who fails to comply with this requirement will be subject to a fine of between MVR1,000 and MVR10,000.

2.3 Commitments Required From Foreign Investors

Minimum Investment Requirements

Capital requirements for FDIs are based on the nature of the investment and are specified in the FDI Policy. Investors need to meet the initial investment requirements depending on the business activity intended to be undertaken. There are various business activities with set minimum initial investment values ranging from USD250,000 to USD5 million. Business activities which do not have a set initial investment amount are available for negotiation.

Foreign Shareholding

The maximum foreign shareholding percentage also depends on the business activity. The percentages of foreign shareholdings range from 40% to 100% based on the proposed business activities by the investors. Activities that do not have a specified minimum initial investment value do not have a maximum percentage of foreign shareholding determined and the shareholding percentage for these activities may be negotiated.

Investors proposing to conduct multiple business activities are required to maintain the lowest percentage of foreign shareholding among the approved class details and must ensure that the total amount of initial investment requirement is met within the first five years.

2.4 Right to Appeal

Neither the applicable law nor the FDI Policy address the possibility of appealing a decision to reject a foreign investment application. To date, there are no precedents available on this issue. However, there is a legal right to seek judicial review of any administrative decision, if legal recourse is desired by a prospective investor.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

In the Maldives, the most common forms of corporate vehicles are companies and partnerships. Another form of vehicle used for conducting business is a cooperative society. Any person who wishes to conduct any business in the Maldives must register their business under one of these types of corporate structures. Unlike all other forms of corporate structures, which can be utilised to conduct any type of business, cooperative societies can only be formed to achieve common economic and social needs shared by a group of individuals within a society.

Companies registered in the Maldives, including re-registered foreign entities are regulated by the Companies Act. Partnerships are regulated by the Partnership Act of the Maldives (Law 13 of 2011). There are regulations made under the relevant Act which also regulate matters relating to each corporate entity. There is a distinct law relating to cooperative societies as well.

Companies

The following types of company can be incorporated in the Maldives.

Private companies

Private companies are companies where shares are privately held and the selling of shares to the public is prohibited. The minimum number of shareholders in a private company is one and the maximum number is 50. There is no minimum share capital requirement for private companies.

Public companies

The general public have the right to subscribe to shares, debentures or bonds in publicly traded companies. The number of shareholders in a

public company is unlimited. There is also no minimum share capital requirement for public companies. However, if the public company is going to be listed on the Stock Exchange before listing, they must have an issued and paid up capital of at least MVR10 million.

State-owned companies

State-owned companies are companies incorporated under a Presidential Decree or by legislation and where all the shares are owned by the government.

Local authority companies

Local authority companies are companies incorporated by local councils to conduct business activities which benefit citizens under the purview of the secretariat.

Foreign investment companies

Any company where one or more shares are held by a foreign individual or a foreign company or a partnership is considered a foreign investment company in the Maldives. A foreign investment company can be a private or public company. Foreign investment companies are subject to the FI Act. Certain designated sectors are open for foreign investment companies to conduct business with 100% foreign shareholding, while restrictions such as foreign shareholding percentage apply in other areas.

Re-registered companies

Foreign registered companies including foreign registered cooperations, charities, foundations and other types of entities can re-register in the Maldives and conduct business operations. Like foreign investment companies incorporated in the Maldives, re-registered companies are subject to the same restrictions regarding the areas in which they can operate. Every re-registered company is required to appoint an agent in the Maldives who is accountable to the Registrar of Companies in relation to fulfilling all obligations under the Companies Act. Additionally, the agent will bear personal responsibility for all actions taken against the re-registered entity under the Companies Act.

Liability of Members of Company

The shareholders of the company are only required to be liable towards the company:

- to the extent of the value of any unpaid shares held by them;
- in a manner clearly specified in the constitutional documents of the company; and
- any other manner specified in the Companies Act.

Directors

Only Maldivians are eligible to be directors in companies, with the exception of foreign investment companies, State-owned companies and public companies with government shareholdings.

At least one director must be resident in the Maldives. A person is deemed as generally residing in the Maldives if that person resides in the Maldives for 183 days or more within a 12-month period.

Partnerships

The following types of partnerships can be incorporated in the Maldives.

- General partnership – the liability of the partners is unlimited and the members are liable for all losses and debts of the partnership. In this form of partnership only individuals can become partners.
- Limited liability partnership – the liability of the partners is limited to the extent of any

unpaid capital of the shares which they have subscribed to. Both individuals and corporate entities can become partners in this type of partnership.

In both general and limited liability partnerships, there are no legislative restrictions on the number of partners. The maximum number of partners will be determined in the partnership agreement.

3.2 Incorporation Process

To incorporate a private company or partnership, a name for the business needs to be reserved and relevant documents specified in the relevant Act and regulations lodged with the Registrar of Companies.

The incorporation process can be completed online. If all requirements are satisfied, the registration will be completed within one to two business days and a certificate of registration will be issued which will be conclusive evidence of the registration in accordance with the applicable laws of the Maldives.

3.3 Ongoing Reporting and Disclosure Obligations

Reporting

All private companies in the Maldives are required to report the following changes to the Registrar of Companies to register the changes in the register maintained by the Registrar.

- Amendments to the memorandum or articles of association of the company – within 30 days of adoption.
- Changes to the directors and managing director of the company – within 15 days of such change.
- Changes to the authorised share capital of the company – within 30 days of such change.
- Transfer of shares of the company, allotment of shares and any changes to the shareholding of the company – within 15 days of such change.
- Charge over the shares of the company – within 30 days of such creation.
- De-registration of the charge over the shares – within 30 days of release of the charge.

The directors report and financial statements of the company need to be submitted to the Registrar within 15 days of the date of the annual general meeting of the company or within another deadline determined by the Registrar.

Disclosure Obligations

The shareholders of the company must provide the details of the beneficial owner of the shares to the company. The company has to verify the accuracy of this information and maintain a register of beneficial owners of the shares of the company.

Significant beneficial owners are considered members of the company and are considered to hold a minimum 25% shareholding in the company, whether directly or indirectly and possess voting and dividend rights corresponding to that shareholding. Anyone who has the right, whether directly or indirectly, to exert influence and control over financial and strategic decisions of the company will also be considered to be a significant beneficial owner.

The company also has to submit details of the significant beneficial owners to the Registrar of Companies within 30 days of the receipt of the information.

3.4 Management Structures

Private Companies

Private companies registered in the Maldives are managed by the board of directors of the company. All companies are required to appoint a managing director from among its directors. The managing director will be a full-time officer of the company and will be responsible for the management of the company under the guidance of the board of directors.

The directors can use their discretion to delegate their powers, duties and responsibilities to a director's committee, an individual director or an employee of the company, in a manner determined by the board of directors, provided the delegation is not prohibited by the company's constitutional documents. Even with the delegation of the powers, the directors will still remain accountable for the actions of the delegate.

Partnerships

In all partnerships registered in the Maldives, a managing partner has to be appointed. The managing partner is responsible for managing and overseeing all matters relating to the partnership according to the partnership agreement.

3.5 Directors', Officers' and Shareholders' Liability

Companies registered in the Maldives after registration acquire separate legal personality distinct from its members, directors and officers. However, this is not absolute and the Companies Act provides that if the company has committed a fraud and dishonest actions and if the shareholders, directors or officers of the company have used the company for personal gains, the corporate veil of the company may be pierced and the directors, shareholders and officers of the company may be held personally liable.

Specific responsibilities are imposed on the directors of a company under the Companies Act. If the directors fail to comply with those responsibilities, they commit an offence and can be penalised.

There is also an obligation on the shareholders to disclose the beneficial owners and if they fail to disclose these details, they are deemed to commit an offence and can be penalised.

The Companies Act also recognises situations where the company will be considered to be committing a criminal offence. These circumstance are where the company submits false information, submits forged documents to the Registrar of Companies or obstructs an inspection conducted by the Registrar of Companies or someone delegated by the Registrar.

4. Employment Law

4.1 Nature of Applicable Regulations

Laws

Employment Act

The law that determines the fundamental principles relating to employment in the Maldives, the rights and obligations of employers and employees and all other matters relating to employment is the Employment Act of the Maldives (Law 2 of 2008) (the "Employment Act" as amended). The Employment Act applies to both private and public sector employees. The Employment Act also provides that it will not apply to any other persons exempted from it by any other statute. At the time of writing, the only parties exempted from the Employment Act are the police and armed forces.

Other related laws

Other laws relating to employment are as follows.

- The Industrial Relations Act of the Maldives (Law 1 of 2024) (the "Industrial Relations Act") – this Act lays out a detailed framework relating to the formation of trade unions and employer organisations participating in these trade unions as well as mediation between workers, employees and employers. It applies to both public and private sector employees and employers, except for the parties exempted from the Act by any other statute and the police, armed forces and Presidential appointees.
- The Occupational Safety and Health Act of the Maldives (Law 2 of 2024) (the "Occupational Safety and Health Act") – this Act provides for matters relating to safeguarding workplaces and workers, and employee health and safety. The Act provides that except for the parties exempted from the Act by any other statute, it is applicable to both public and private sector employees, employers and independent contractors.
- The Prevention of Sexual Abuse and Harassment Act (Law 16 of 2014) – this Act outlines what constitutes sexual abuse and harassment and the responsibilities of employers in preventing these acts in the workplace.

Regulations

There are regulations enacted pursuant to the Employment Act which have the force of law. They provide more details regarding specific matters. The regulations currently in force are as follows.

- General Regulation on Employment (Regulation 2021/R-63) – this provides details relating to redundancy, working hours and overtime of employees as well as salary payment and wages.
- Expatriate Employment Regulation (Regulation 2023/R-111) – this provides details relating to the employment of expatriates.
- Employment Agency Regulation (Regulation 2022/R-63) – this provides details relating to employment agencies.
- Service Charge Regulation (Regulation 2021/R-41) – this provides details relating to the collection of a service charge from businesses and the distribution of a service charge among employees.

Precedents

The precedents set by higher courts in the Maldives relating to employment cases are considered the authority for deciding subsequent cases with similar facts. They also play a key role in determining the relevant employment relationship rules when the law or regulations are silent on the issue.

Employment Contract

The Employment Act requires the execution of an employment contract between the employer and employee. The employer may grant the rights to a greater extent than provided for in the Employment Act. Any provision in the employment contract that prevents or impedes any rights or benefits conferred to an employee by the Employment Act will be void.

Collective Bargaining Agreements

The recently enacted Industrial Relations Act allows for trade unions to initiate collective bargaining with employers by appointing representatives. Collective agreements reached after the collective bargaining must be registered with the director-general of industrial relations and the terms of the agreements are binding on

the parties to the agreements and are legally enforceable.

4.2 Characteristics of Employment Contracts

Form of Employment Contracts

The law of the Maldives requires a written employment contract to be executed between employers and employees. The Employment Act stipulates certain provisions have to be included in the employment contract.

Types of Employment Contracts

Employers in the Maldives may enter any of these types of employment contract.

- Indefinite term contract.
- Definite term contract.
- Specific to a certain type of work, or project-based.

Duration of Employment Contracts

The duration of a definite term employment contract will not exceed a maximum period of two years. If a definite term contract is extended so that the total duration of employment is more than two years, or if it can be deemed from the actions of both parties that such a renewal or extension has occurred it will be deemed an indefinite term employment contract.

An employment contract of definite term or specific to a certain type of work is also deemed an indefinite term employment contract if the objective or result of the employment agreement is such that the employee is required to continue carrying out duties and responsibilities which are usually and normally carried out at the place of work on a permanent basis.

4.3 Working Time

Working Hours

The normal working hours of an employee must not exceed 48 hours per week. The normal working hours do not include any overtime an employee works. The Employment Act specifies certain categories of employees exempt from the normal working hour limitations.

Employees employed in certain specific sectors specified in the Employment Act, may have to work two additional hours per day beyond the normal working hours limitation, as outlined in the employment agreement, provided they are compensated for the additional hours as overtime.

There is no limitation on the maximum number of hours an employee may be required to work per day. However the minister designated to oversee the implementation of the Employment Act has the discretion to formulate a regulation that imposes a maximum number of hours an employee may be required to work per day. As of now, no such regulation has been formulated.

The general rule is that employers are prohibited from requiring an employee to work for more than six consecutive days without granting a break of 24 hours. However, there are exceptions to this rule where employees working in certain sectors may be required to work for more than six consecutive days without a break, provided they are granted rest days in lieu of every day worked beyond the six consecutive days which can be accumulated and utilised thereafter.

Overtime

Employers are prohibited from requiring employees to work overtime unless it is specified in the employment contract. Any work carried out as

overtime must be paid at the following hourly rates.

- Overtime on a normal working day – 1.25 times an employee's regular hourly wage.
- Overtime on a Friday or a public holiday – 1.5 times an employee's regular hourly wage.

4.4 Termination of Employment Contracts

Termination of Employment Contracts

After the Employment Act came into force in 2008, the Maldives abolished employment at will. Currently, for an employment contract to be terminated, there must be a reasonable cause. There are three types of dismissals recognised in the Maldives.

- Dismissal with notice – this type of dismissal is allowed after showing appropriate cause as to failure to maintain work ethics or inability to carry out employment duties and responsibilities related to the proper functioning of their place of work even after measures have been taken to discipline the employee or upgrade skill deficiencies.
- Summary dismissal – this is where an employee is dismissed without notice when an employee's work ethics are deemed unacceptable and further continuation of employment is likely to be detrimental to the employer or to the workplace.
- Redundancy – this is considered as a reasonable cause for dismissal of an employee in the following circumstances:
  (a) closure of the business and services of the employer;
  (b) redundancy due to restructuring of the business; and
  (c) financial distress.

In the case of dismissal, the onus is always on the employer to show the cause.

Severance Pay and Notice of Termination

Severance pay does not have to be paid to employees in the event of dismissal from employment. In the event of dismissal with notice, the employer has to give notice to the employees based on the employee's length of service and the employer has the discretion to terminate the employment immediately by paying the employee's salary in lieu of any required period of notice together with any accrued holiday pay up to the date notice is given.

In the case of redundancy, no obligatory compensation or redundancy pay has to be paid to the employees who are made redundant. However, the Employment Act obliges the employer to give notice of dismissal to the employees being made redundant based on the employee's length of service. The employer is granted discretion to pay the employee's salary in lieu of the required notice.

Based on the employment duration, the notice period or payment in lieu of notice period is as follows.

- Less than one year – one month.
- Between one year and four years – a minimum of two months.
- More than four years – a minimum of three months.

Collective Redundancies

In the Maldives, the laws and regulations do not differentiate between collective redundancies and individual redundancies. The same procedure laid down in the relevant laws and regulations needs to be followed in conducting

redundancies if it's a single person redundancy or collective redundancy.

The Maldives High Court has set a precedent on the matter stating that as there are no laws or regulations that provide that redundancy procedures are different for individual redundancies and collective redundancies, unless limited by a law or by the employment agreement, the procedures laid out in the laws and regulations need to be fulfilled regardless of the number of persons being affected by redundancy.

Before terminating any employees for redundancy, the employer has to first notify the employees that there might be circumstances where an employee or employees might have to be made redundant or the decision to make the employees redundant has been made. This notification will include the policy relating to the determination of the employees who will be dismissed. Before the dismissal of any employees for redundancy, the employer has to take measures to avoid termination or to minimise the number of employees affected, as much as the circumstances allow.

The employer is also required to establish a policy outlining the criteria for determining the employees who will be made redundant and this policy has to be communicated to the employees. This policy, at the very least, has to consider:

- the service duration of the employee;
- the employee's skills, education and experience required for the job;
- the employee's attendance and disciplinary records; and
- the criteria for fulfilment of job duties or staff appraisal.

The employees that will be made redundant must be determined according to the policy and in good faith and in a fair manner.

4.5 Employee Representations

There is no law in the Maldives that stipulates it is mandatory for employees to be represented in employment related matters. However, the Industrial Relations Act provides that employees can register trade unions and that they have the right to take part or not take part in the activities of the trade unions including the implementation of collective bargaining or strikes through the unions.

The trade unions have the right to commence collective bargaining with employers and initiation will not be aimed at securing rights or gaining advantage for a particular individual in the union. Generally, unions are restricted from utilising unions in a manner that is not in the interests of members or where members have conflicting interests.

The employers have to commence collective bargaining negotiations if the union making the request represents the majority of the employer's employees.

The Employment Act only mandates for employees to be informed by the employer in the event of a redundancy situation.

The Occupational Safety and Health Act mandates employees have to be informed by the employer in the following circumstances.

- Any health and safety policy amendments.
- Regularly updating the employees on safety measures relating to machinery, equipment, plants and other instruments used in the workplace by employees.

There are no circumstances where it is mandated for the employers to consult employees.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

Employee Withholding Tax

Under the Income Tax Act of the Maldives (Law 25 of 2019) (the "Income Tax Act"), employee withholding tax is applicable where an employer pays remuneration to an employee, whether in cash, annuities, in-kind benefits or any other form. Employers must deduct employee withholding tax from the gross amount of each payment made monthly at the following rates:

- 5.5% (if remuneration is more than MVR60,000 but less than MVR100,000);
- 8% (if remuneration is more than MVR100,000 but less than MVR150,000);
- 12% (if remuneration is more than MVR150,000 but less than MVR200,000); and
- 15% (if remuneration is more than MVR200,000).

Social Charges

Under the Pensions Act (Law 8 of 2009), both employers and employees have to contribute to the Maldives Retirement Pension Scheme. Both have to contribute a minimum of 7% of the pensionable wage (basic salary).

Participation in the Maldives Retirement Pension Scheme is mandatory for all local employees aged between 16 and 65. Foreign employees within the same age bracket have the option to voluntarily register and contribute to the Maldives Retirement Pension Scheme.

5.2 Taxes Applicable to Businesses

Taxes Applicable to Businesses

Income tax

Under the Income Tax Act, entities other than banks and individuals, resident in the Maldives are required to pay income tax. For income tax purposes, a company is deemed resident if it is incorporated, has its head office, or central management and control in the Maldives. Partnerships are deemed resident if it is incorporated and has its head office in the Maldives.

Entities other than banks and individuals, are taxed at the rate of 15% where taxable income exceeds MVR500,000.

Non-resident withholding tax

Under the Income Tax Act, income derived from the Maldives by non-residents is subject to a tax rate of 10% on the gross amount of income received by them. Non-resident withholding tax is payable on rent in relation to immovable property situated in the Maldives, royalties, interest, dividends, fees for technical services, commissions paid in respect of services supplied in the Maldives and insurance premiums paid to insurers.

Payments to non-resident contractors are subject to withholding tax at the rate of 5%.

Employee withholding tax

See **5.1 Taxes Applicable to Employees/ Employers**.

Goods and services tax

Under the Goods and Services Tax Act (Law 10 of 2011), businesses operating in the general sector are currently required to pay goods and services tax (GST) at the rate of 8% to MIRA and businesses operating in the tourism sector are

required to pay a tourism goods and services tax (T-GST) at the rate of 16% to MIRA.

Businesses importing goods to the Maldives and suppliers of tourism goods and services are required to register for goods and services tax. Businesses that do not fall within the criteria are only obliged to register where the value of their supplies exceed MVR1 million per annum.

Green tax

Under the Tourism Act of the Maldives (Law 2 of 1999) (the "Tourism Act"), the green tax, as mandated by the Tourism Act, applies to tourists staying at various types of accommodations such as tourist resorts, integrated tourist resorts, resort hotels, tourist hotels, hotels, tourist guesthouses and tourist vessels. It is the responsibility of the establishment operator to collect the green tax from tourists and remit it to MIRA.

Tourists staying at tourist resorts are required to pay USD6 per day. Tourists staying at hotels and tourist guesthouses that are located on inhabited islands and have less than 50 rooms are required to pay USD3 per day.

OECD Two Pillar solution

The Maldives is a member of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPs). The Maldives has committed to implementing the OECD Two Pillar solution too but has not yet done so.

5.3 Available Tax Credits/Incentives

Tax Incentives Under the Special Economic Zone Act

The SEZ Act classifies various zones, including industrial estates, export processing zones, free trade zones, enterprise zones, free ports, single factory export processing zones, centres providing offshore financial services and high technology parks as special economic zones. Under the SEZ Act, zone developers are guaranteed the following incentives:

- relief from import duty on capital goods;
- relief from goods and services tax for the first 10 years; and
- relief from withholding tax for the first 10 years.

The SEZ Act provides similar concessions to individuals investing in SEZs, with the extent of these benefits depending on the industry and type of investment.

Special Exemptions Provided Under the Income Tax Act

Under Section 12-1 of the Income Tax Act, the President, under specific circumstances, can exempt income from certain business projects or industries from tax.

The determination of eligible projects or industries is made by the President, with advice from the Cabinet of ministers and published in the government gazette.

Exemptions are granted for a specific period and take factors such as revenue impact, economic and social impact and the attainability of objectives into account.

A list of exempted persons and the reasons for exemption need to be published in the government gazette.

Foreign Tax Credit

Under Section 72 of the Income Tax Act, residents paying taxes abroad can deduct either the amount of foreign tax paid or the tax payable in the Maldives on the net foreign sourced income, whichever is lower.

Deductions are applied separately with respect to each type of income and each country or territory from which each type of income was derived.

Deductions must be claimed within two years after the end of the accounting period and adjustments can be made within two years of any tax payable adjustments.

Tax Treaties

Tax credits are also applicable under any double tax avoidance agreement (DTAA) and are deducted in accordance with the provisions of the Tax Administration Act of the Maldives (Law 3 of 2010) (the "Tax Administration Act").

The Maldives has signed a DTAA with the United Arab Emirates, effective from 1 January 2017. The Maldives is also a party to the SAARC Limited Multilateral Agreement on Avoidance of Double Taxation and Mutual Administrative Assistance in Tax Matters, which came into force on 1 January 2012 in the Maldives.

The DTAA between Maldives and Bangladesh will come into force on 1 July 2024, while the DTAA with Malaysia which was signed last year has not yet come into force.

5.4 Tax Consolidation

Tax consolidation for the purposes of tax calculation and deduction by a group entity is not available under tax laws in the Maldives.

Parent companies are required to submit consolidated accounts including their subsidiary companies, as they are considered group entities under the Income Tax Regulation. However, under the Income Tax Act, group entities are required to divide the tax-free threshold of MVR500,000 among themselves, for the purpose of determining the tax bracket for taxable income as a group. Companies within a group therefore cannot benefit from the tax-free threshold as individual companies, as they are grouped together to calculate the taxable bracket.

Under the Income Tax Regulation, each entity in the group is required to prepare and submit separate income tax returns.

5.5 Thin Capitalisation Rules and Other Limitations

Thin capitalisation rules are implemented under Section 71 of the Income Tax Act.

Where the total amount of interest paid, exceeds the interest capacity of a person (30% a person's tax EBITDA) for that period, the excess amount cannot be deducted in the computation of taxable profit of that person for that period, except where interest is paid to a bank licensed under the Banking Act of the Maldives (Law 24 of 2010) (the "Banking Act") or to an insurance business or finance leasing business or housing finance business licensed under the Monetary Authority Act of the Maldives (Law 6 of 1981) (the "Monetary Authority Act").

The following taxpayers are exempt from thin capitalisation rules.

- Commercial banks licensed under the Banking Act.
- Insurance businesses or finance leasing businesses or housing finance businesses or non-banking financial institutions licensed to conduct financing business under the Monetary Authority Act.
- Persons categorised as micro, small or medium-sized businesses under the Law on Small and Medium Enterprises (Law 6 of 2013).

- State-owned enterprises (SOEs), of which the government of the Maldives directly holds a majority of the ordinary share capital.

5.6 Transfer Pricing

Under Section 67(a) of the Income Tax Act, where an arrangement or transaction is entered into between parties under the following circumstances, the taxable income will be computed in accordance with the arm's length terms, irrespective of the actual terms of the arrangement or transaction.

- The arrangement or transaction was entered into between two persons who were associates.
- The terms on which the arrangement or transaction was entered into between the persons were not arm's length terms.
- If the income of one person involved in the transaction would be higher than under arm's length conditions.
- If any deduction allowed to one person would be lower than under arm's length conditions.
- If any loss incurred by one person would be less than under arm's length conditions.
- If any tax credits available to one person would be less than under arm's length conditions.

5.7 Anti-evasion Rules

General Anti-Avoidance Rule (GAAR)

Section 66(a) of the Income Tax Act grants the Commissioner General of Taxation the authority to invalidate any arrangement or transaction, where the Commissioner has reasonable grounds to suspect that an arrangement or transaction was entered into for the purpose of tax avoidance or reducing tax liability either by issuing an assessment under Section 39 of the Tax Administration Act or by other means.

Reasonable grounds for action by the Commissioner General highlighted under Section 128-1 of the Income Tax Regulation (Regulation 2020/R21) include:

- carrying out of a transaction which lacks a bona fide commercial purpose;
- carrying out of a transaction which lacks economic substance;
- abuse of organisational form; and
- recharacterisation of an arrangement or transaction.

6. Competition Law

6.1 Merger Control Notification

The Maldives introduced a Competition Act (Law 11 of 2020) (the "Competition Act") in 2020 and it officially came into force on 31 August 2021. The Competition Act defines "merger" as:

- the merger of two or more legal entities that were previously independent; and
- the acquisition of direct or indirect control over all or part of the assets and goodwill of an entity through a joint venture agreement.

The Competition Act requires the criteria to determine whether a merger infringes the principles of mergers under the Competition Act to be formulated and published by the ministry of economic development and trade within six months from the date on which the Competition Act came into force. However, to date the ministry has not published any such criteria, leaving uncertainty over what the ministry considers an anti-competitive merger either in terms of revenue or market share.

6.2 Merger Control Procedure

Unlike other jurisdictions, the current legal framework for merger control in the Maldives does not mandate notification of mergers to the minister of economic development and trade or provide an option for voluntary notification of mergers. However, this may change once the necessary regulation for merger control is published by the ministry.

Where a merger contravenes the Competition Act's provisions, the minister of economic development and trade has the authority to issue an order to amend a merger agreement and levy a fine of between MVR10,000 and MVR100,000. Following the order by the minister, the Registrar of Companies reserves the right to deny any service to the parties involved that could aid the execution of the merger agreement.

6.3 Cartels

The Competition Act prohibits business agreements or conduct that hinders, limits or distorts competitive practices within a market. The Competition Act considers the following types of agreements or conduct as anti-competitive practices:

- price fixing;
- market divisions and customer allocations;
- intentional limitation in production of goods and development of technology;
- refusal to sell or deal with certain parties; and
- control of investments.

If the ministry of economic development and trade determines that a business has exploited or abused its dominant position in the market, the ministry has the authority to impose a fine of between MVR10,000 and MVR100,000.

The ministry of economic development has not taken any enforcement action against businesses for an anti-competitive agreement or practice to date.

6.4 Abuse of Dominant Position

The Competition Act assesses whether or not a party holds a dominant position based on the nature of the market it is operating in, its share and power in the market and the significant control it has over the market. Actions such as predatory pricing, imposing unfair prices, refusing to deal with certain parties, limiting production of goods or development of technology to the detriment of consumers, imposing unnecessary obligations which have no commercial use or are not material to the subject of the contract or imposing differing conditions to trading parties to block their entry or operation in the market could all amount to abuse of a dominant position.

If the ministry of economic development and trade determines that a business has abused its dominant position in the market, the ministry may impose a fine of between MVR10,000 and MVR100,000.

However, these enforcement powers are yet to be used by the ministry.

7. Intellectual Property

7.1 Patents

There is no patents legislation in place in the Maldives. Therefore there is currently no process by which a patent owner can register their patent in the Maldives.

7.2 Trade Marks

There is no trade mark specific legislation in place in the Maldives at the moment although a trade mark bill is currently being developed by the ministry of economic development and trade. Despite this, a limited system of registration of trade marks is practiced in the Maldives.

Limited System of Registration

As a matter of practice, a business may register a trade mark with the ministry of economic development and trade of the Maldives (MED) on the basis of a business name registered by the business prior to registering the trade mark. However, only businesses incorporated or re-registered in the Maldives may register these trade marks in the Maldives.

Under Section 12(a) of the Business Registration Act, any business activity may only be undertaken in the Maldives by a registered business entity after registering a business name under which the business activity will be undertaken. Under the Business Registration Act, the Registrar of Business has discretion to refuse to register any name in the following situations.

- The name is already registered to another business or the name is believed to be similar to a name already registered.
- The name is registered as a trade mark by another party.
- The name is a famous name outside the Maldives and registration of the business name may mislead the public into believing wrongfully that the name is associated with the famous business carried on outside the Maldives.
- The name contravenes acceptable community standards.
- The name, without using any additional word or phrase, depicts only a matter, place or thing that cannot be owned by a single party.
- The name as determined by judgment of a court of law is prohibited from use as a business name.
- The name is reserved to another party.
- The name is a type of name that cannot be registered for reasons prescribed in regulation.

Given that the registration of a business name must precede the registration of a trade mark, these restrictions will apply when registering a trade mark as well.

Registration Process

Applications can be made online to reserve a business name and then to register a business name via the oneGov portal (one.gov.mv) after payment of the prescribed fee. The current prescribed fee is MVR100 per business name registered. The process of registration usually takes one to two business days. The registration of the business name will be valid for the entirety of the business entity's registration.

Applications can be made online to register or renew a trade mark via the oneGov portal (one.gov.mv) after payment of the prescribed fee. Trade marks may be registered for the period specified in the application, provided that the minimum period is 12 months. Currently, a non-refundable fee of MVR50 per month is payable. The process of registration usually takes one to two business days.

Publication of Cautionary Notices

As a matter of practice, international businesses and trade mark owners and parties that are not incorporated nor re-registered in the Maldives in accordance with the Business Registration Act,

from time to time publish a trade mark cautionary notice, announcing to the general public in the Maldives that a particular trade mark is owned by the business or trade mark owner and caution against trade mark infringement. Even though this is a very common practice, this itself does not afford legal protection against infringement or guarantee protection from unauthorised use of the trade mark in the Maldives. Publication of cautionary notices is not the same as registering a trade mark.

However, publication of trade mark cautionary notices can be used as evidence to support complaints made by trade mark owners/licensees to the MED under the Business Registration Act, against a business entity registered in the Maldives that has registered, or is using, a business name in contravention of the rights of the trade mark owner or licensee.

Remedies

If a business entity registered in the Maldives has registered, or is using, a business name in contravention of the rights of a trade mark owner/licensee, the Business Registration Act provides an opportunity for concerned parties to submit a complaint to the MED requesting it change the business name if the period of using the business name after registration of the business entity has not exceeded 12 months. If the Registrar of Business gives notice to the party to which a business name is registered or reserved to change the name, the party must do so within a period of one month from the date of notice.

If the party does not abide by the notice, the Registrar of Business has discretion to cancel the business registration of the party.

7.3 Industrial Design

There is no specific industrial design legislation in place in the Maldives. However, designs are generally believed to be protected under the Copyrights and Related Rights Act of the Maldives (Law 23 of 2010) (the "Copyrights Act"). Please see **7.4 Copyright**.

7.4 Copyright

The Copyrights Act and the Regulation on the Registration of Copyright and Related Rights of the Maldives (Regulation 2011/R-16) (the "Copyright Registration Regulation") protects copyrights and related rights in the Maldives and stipulates actions and penalties against copyright infringement.

Application

The Copyrights Act protects works produced in the Maldives as well as works produced by parties protected under any international convention ratified by the Maldives.

Protection

The following types of works are protected under the Copyrights Act.

- Literary and artistic works, particularly:
  - (a) books, pamphlets, articles and other writings;
  - (b) academic, literary and artistic speeches and addresses;
  - (c) drama, musicals, stage performances, choreography, steps and other presentations and other works for stage productions;
  - (d) poems, songs, tunes and other musical products;
  - (e) feature films, documentary films, drama, video songs and other video-visual presentations and works;
  - (f) works of art and architecture;

(g) photographic works;
(h) works of applied arts;
(i) illustrations, charts, plans, sketches and three-dimensional works related to geography, topography, architecture or science; and
(j) computer programs (even if represented as source code or object codes).

- Derivative works such as translations, adaptations, arrangements and other transformations or modifications of works, as well as collections of works, collections of data (databases) in whatever form and collections of expressions of folklore that are original by selection or arrangement.

Under the Copyrights Act, works are protected by the sole fact of their creation, irrespective of their mode or form of expression, or their content, quality and purpose. Protection under the Copyrights Act will only extend to originally created products or works. The following are not protected.

- Any idea, procedure, system, method of operation, concept, principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work.
- Any official text of a legislative, administrative or legal nature as well as any official translation of those documents.

Copyright Duration

Generally, the economic and moral rights over works are protected for the life of the author plus 50 years after the death of the author.

In the case of co-authorship, or joint authorship, the economic and moral rights are protected for the life of the last surviving author plus 50 years after the death of the last surviving author.

For collective works, other than works of applied art and audio-visual work, the economic and moral rights are protected for 50 years from the date on which the work was either made, first made available to the public or first published, whichever date is latest.

For works published anonymously or under a pseudonym, the economic and moral rights are protected for 50 years from the date the work was either made, first made available to the public or first published, whichever is the latest date.

For works of applied art, the economic and moral rights are protected for 20 years from the making of the work.

Registration of Copyright

It is not compulsory under the Copyrights Act to register the works with the relevant government authority in order to gain protection. However, parties may apply to register the works with the ministry of economic development and trade. The benefit of registration is to assist a copyright holder in legal proceedings to prove that the work in question is their creation.

Copyrights may be registered after submission of the prescribed application form to the ministry of economic development and trade and payment of the prescribed fee. Currently, a non-refundable fee of MVR1,000 is payable. The process of registration usually takes two business days.

Remedies

Right to file complaints

Under the Copyright Registration Regulation, any party may submit a complaint to the ministry of economic development and trade objecting to the registration of any products or works under the Copyright Registration Regulation.

If the complainant provides evidence that the product or work registered is not the work of the registered party, the ministry of economic development and trade has the right to cancel the registration. If the ministry does not accept the evidence submitted by the complainant, the complainant may escalate the matter with the relevant courts.

Payment of fines

In the case of deliberate or inadvertent infringement of any rights protected under the Copyrights Act, the courts have the authority to levy a fine of between MVR50,000 and MVR300,000. The amount of the fine will be determined based on the damages suffered by the copyright holder or the damages that are foreseen to have been incurred on the copyright holder. If the same infringer commits a subsequent infringement within five years of the first infringement, the courts have the authority to levy a fine of up to MVR600,000.

Payment of damages

Copyright owners are entitled under the Copyrights Act to seek damages through the courts for the loss of property and the prejudice sustained as a consequence of infringement of copyright as well as the payment of expenses suffered by the copyright owner, including legal costs. The determination of the amount to be paid as damages will depend on the extent of loss suffered by the copyright owner as well as the profits attributable to the infringing party as a result of the infringement.

Court orders and injunctions

The courts have the authority to make the following orders and injunctions.

- An order for infringing copies to be destroyed in a manner which does not harm the copyright owner.
- An order for infringing material to be returned to the copyright owner.
- An order for the acts of infringement to be stopped. If the order is not respected, the courts have the authority to levy a fine of between MVR10,000 and MVR300,000, depending on the extent of the violation.
- An order for copies of works or sound recordings suspected of being made or imported without the authorisation of the copyright owner to be impounded.
- An injunction to prohibit the committing or continuation of committing of infringement of any right protected under the Copyrights Act.

Action by government authorities

The relevant government authorities are authorised to check, investigate and take necessary actions as per the civil and criminal procedures of the Maldives where there is reason to suspect infringement of the rights protected under the Copyrights Act.

7.5 Others

As explained in **7.4 Copyright**, software and databases are already protected under the Copyrights Act. There are currently no laws in the Maldives that cover other forms of IP.

8. Data Protection

8.1 Applicable Regulations

Section 24 of the Constitution of the Maldives states that everyone has the right to have their personal and family life, their home and their private communications respected. It also states every one must respect these rights. Apart from this fundamental right enshrined in the Constitu-

tion, the Maldives hasn't enacted general legislation on privacy and personal data protection to date.

8.2 Geographical Scope

See **8.1 Applicable Regulations**.

8.3 Role and Authority of the Data Protection Agency

See **8.1 Applicable Regulations**. There is no legal entity charged with data protection at the moment.

9. Looking Forward

9.1 Upcoming Legal Reforms

The government proposed a bill to amend the Copyrights Act on 28 February 2024.

The bill is currently being reviewed at committee stage and proposes the following amendments.

- As well as protecting traditional forms of creative expression, there is a proposed amendment to include copyright protection on digital platforms and broadcasting mediums, such as for sound recordings and broadcasts via satellite, internet or cable.
- Extending copyright duration from 50 to 70 years for both economic and moral rights after the author's death.
- Extending protection for works of applied art from 25 to 50 years.
- Giving owners of copyrighted works the right to seek damages, including the benefits acquired from the infringement of the copyright by the infringing party.

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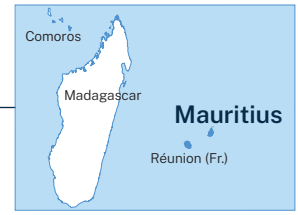

Law and Practice

Contributed by:
Sameer K Tegally, Sonia Xavier and Ashvan Luckraz
Venture Law

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Venture Law is a leading independent firm that has been established in Mauritius for nearly ten years. The firm was amongst the first few law firms to be registered in 2008 under the Law Practitioners Act of Mauritius. Its ability to respond quickly and efficiently has earned it a reputation for innovative and flexible advice on cross-jurisdictional matters. Venture Law has a broad client base, including FTSE 100 and Fortune 500 companies, international financial institutions, development financial institutions and fund managers. The firm's experienced team advises clients on matters including corporate/commercial; corporate structuring; M&A; banking and finance; funds; capital markets; asset finance, including shipping and aircraft finance; litigation and dispute resolution; insolvency and restructuring; private client and trust; and insurance and reinsurance. The team regularly acts for institutional and non-institutional clients based around the globe on a wide range of transactions, including structuring investments involving the emerging markets of Africa and Asia.

Authors

Sameer K Tegally is a partner at Venture Law whose practice covers corporate, banking and finance (including Islamic finance), and trusts/foundations. He advises leading multinationals and international banks on their cross-border investments, financing and trading, particularly with Asia, Africa and the Middle East. Sameer also advises institutional and private clients on all aspects of non-contentious Mauritius trusts and foundations law. He has contributed several articles in renowned global publications in the fields of corporate law, Islamic finance and trusts. Sameer earned an Islamic finance qualification from the UK Chartered Institute for Securities & Investment in 2009 and is admitted to the Bar in Mauritius and Bermuda.

Sonia Xavier is a partner at Venture Law who advises major institutional clients as well as global business companies, private equity firms and investment funds, amongst others. She has a broad corporate and commercial practice that covers M&A, joint ventures, private equity, capital markets and corporate finance. Sonia's expertise extends to assisting in the structuring, formation and management of private equity funds, and she has acted for a range of investment managers, from well-established to start-up managers. Sonia also has extensive experience with project financing, private placements and public offerings, as well as securitisation. She was admitted to the Bar in Mauritius in 1997.

Ashvan Luckraz is a partner at Venture Law whose practice covers civil/commercial litigation and arbitration, with an emphasis on insolvency, contractual matters, shareholder disputes and urgent interim relief. He is experienced in all aspects of corporate and commercial law, particularly finance, M&A and investment funds. He advises a wide variety of clients, including financial institutions, corporate service providers, international and local businesses, and high net worth individuals. Ashvan, who earned an LLM degree from the London School of Economics and Political Science in 2005, has experience as a legal counsel at an international wealth management group, as an associate at a major US law firm in London and as an English barrister.

Venture Law

Level 3
Tower 1
NeXTeracom Building
Ebene
Mauritius

Tel: +230 404 9900
Fax: +230 404 9901
Email: office@venturelawltd.com
Web: www.venturelawltd.com

1. Legal System

1.1 Legal System and Judicial Order

Type of Legal System

Originally a French and a British colony, Mauritius has developed a unique legal system that is a hybrid of civil and common law traditions.

The Basic Organisation of the Judicial Order

Sources of Mauritian law

The primary sources of law in Mauritius emanate from:

- the written Constitution, which is the supreme law of the country;
- the legislature; ie, the Parliament, which enacts laws in accordance with its power to make laws under the Constitution;
- the executive, which administers the laws enacted by Parliament;
- the judiciary, which interprets the laws; and
- judicial precedent, legal customs, equity and doctrine.

The Mauritian court system

The Mauritian judicial system consists of two tiers: the Supreme Court and the subordinate courts.

At the apex of the Mauritian court system is the Supreme Court. Under the Constitution, the Supreme Court has been empowered to declare any other law that is found to be inconsistent with the Constitution as null and void, and has been conferred with the power to determine any civil or criminal proceedings, with complete independence and impartiality.

When sitting in its original jurisdiction as a court of first instance, the Supreme Court is composed of various divisions, such as the Family Division, the Master's Court, the Commercial Division, the Criminal Division and the Mediation Division. The Financial Crimes Division is a new division of the Supreme Court.

When sitting in its jurisdiction as an appellate jurisdiction, the Supreme Court hears appeals from subordinate courts and from decisions of the Supreme Court sitting in its original jurisdiction. Hence, the Appellate Division of the Supreme Court sits as the Court of Civil Appeal or the Court of Criminal Appeal.

Additionally, any appeal against a decision of the Court of Civil Appeal or the Court of Criminal Appeal must be lodged with the Judicial Committee of the Privy Council in England.

The subordinate courts comprise various courts, such as the Intermediate Court, the Industrial Court, the District Courts, the Bail and Remand Court, and the Court of Rodrigues.

The main rules regulating proceedings before the Supreme Court and the subordinate courts are contained in several pieces of legislation, including the Courts Act 1945, the Court of Civil Appeal Act 1963, the Criminal Procedure Act 1863 and the Supreme Court Rules 2000.

The Supreme Court

The Supreme Court is a superior court of record that has original jurisdiction to hear and determine civil and criminal matters, to interpret the Constitution, to act as a court of equity and to exercise general powers of supervision over all the subordinate courts.

Recently, the Judicial and Legal Provisions (Amendment No 2) Act 2018 (the "2018 Act"), which came into force on 3 January 2019, has amended the jurisdictions of the Supreme Court, the Intermediate Court and the District Courts in

civil matters. Hence, when sitting in its original jurisdiction, the Supreme Court has jurisdiction to hear and determine the following civil matters, where the value of the claim exceeds MUR2 million:

- divorce and matrimonial proceedings;
- petitions for insolvency;
- all matters of a commercial nature;
- admiralty matters; and
- claims for Constitutional relief.

The Commercial Division of the Supreme Court

The Commercial Division of the Supreme Court was set up by the Chief Justice by way of an administrative notice in 2009. It has jurisdiction to hear and determine matters arising under the Insolvency Act 2009 and the Companies Act 2001; disputes relating to banking, bills of exchange, offshore business, patents and trade marks or passing off; disputes between traders and related matters; and generally deals with anything that is of a commercial nature.

The Intermediate Court

Following recent legislative amendments, the Intermediate Court now has jurisdiction in all civil cases where the claim or matter in dispute ranges between MUR250,000 and MUR2 million.

The District Court

Under the 2018 Act, the District Court now has jurisdiction to hear civil cases where the claim or matter in dispute does not exceed MUR250,000.

The Children's Court

There is now a specialised court known as the Children's Court, which consists of a protective and criminal division. This court ensures that appropriate arrangements are made in the best interest of children. Proceedings are conducted in simple and comprehensible language, taking into account the age and level of maturity of any child.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Foreign investors may invest in a number of fields, such as:

- agro-industry;
- aqua-culture and ocean economy;
- education;
- financial services;
- healthcare;
- hospitality;
- property development and smart cities;
- ICT-BPO (information and communications technology, and business process outsourcing);
- life sciences;
- logistics;
- manufacturing; and
- media and creative industries.

Depending on the nature of the field, most activities would require prior approval from the Economic Development Board (EDB) and/or other relevant authorities.

Businesses engaged in unregulated activities may start operations immediately after registering with the Corporate and Business Registration Department.

Investors should ensure that they hold the appropriate licence before starting a regulated activity.

Investing in Certain Regulated Activities

- Banking – licence from the Bank of Mauritius.
- Freeport activities – Freeport Certificate issued by the Economic Development Board.
- Tourism-related activities – licence from the Tourism Authority.
- Telecommunications operations – licence from the Information and Communication Technologies Authority.
- Education and training – certificate of registration/licence from the Early Childhood Care and Education Authority, the Private Secondary Education Authority and/or the Tertiary Education Commission.
- Healthcare activities – licence from the Ministry of Health and Wellness.
- Gambling and gaming activities – licence from the Gambling Regulatory Authority.
- Offshore petroleum activities – licence/permit from the Department for Continental Shelf, Maritime Zones Administration and Exploration.

Investing in Financial Services

Entities intending to carry out financial services in Mauritius must, as a rule, obtain the relevant licences from the Financial Services Commission (FSC) or the Central Bank (in the case of banking activities) to be able to carry out such services.

Moneylending was previously regulated by the Bank of Mauritius. It will now fall under the purview of the FSC.

A digital bank must be licensed under Section 7(5) of the Banking Act 2004 to carry on exclusively digital banking business. Digital banking business is defined as “banking business carried on exclusively through digital means or electronically”. Accordingly, an entity intending to conduct the regulated activity of digital banking business must apply and be licensed by the BoM to do so.

The Bank of Mauritius Act 2004 was amended to allow the Bank of Mauritius to raise loans by itself or through its subsidiary, or, acting as an agent of government, by issuing securities to invest in projects or companies that promote the sustainable economic development of Mauritius, including the blue economy and green economy.

The Bank of Mauritius may now – by itself, through a subsidiary or any other legal entity – establish a credit scoring services agency for the purpose of providing credit scores on such terms and conditions as it may determine.

The powers of the conservator have widened, such that the conservator now has all the powers of the shareholders, directors and officers of the financial institution and may operate the financial institution in its own name unless otherwise specified by the board of directors of the central bank.

The Virtual Asset and Initial Token Offering Services Act 2021 was enacted on 16 December 2021 to provide a legal framework for any virtual asset service provider, and to any issuer of initial token offerings, that carries out business in or from Mauritius.

Mauritius, on its continued journey toward sustainability, marked a significant milestone by officially listing its first Green Bond.

Tax exemption on interest earned by collective investment schemes and closed end funds has been increased from 80% to 95%.

Investing in Property Development

Under the Non-Citizens (Property Restriction) Act 1975, a non-citizen cannot hold immovable property, including leasehold or freehold property, without an authorising certificate from the Prime Minister's Office (PMO).

However, no authorisation is required in the following cases:

- when holding immovable property for industrial and commercial purposes under a lease agreement not exceeding 20 years;
- where there is a deed of concession under the Fisheries and Marine Resources Act 2007;
- when purchasing luxury villas, apartments, penthouses or other similar properties under the Invest Hotel Scheme, Property Development Scheme and Smart City Scheme;
- where an investor has approval from the Economic Development Board to acquire property for use in business; and
- when purchasing or otherwise acquiring an apartment used, or available for use, as a residence, in a building of at least two floors above the ground floor level, provided the purchase price is not less than MUR6 million or its equivalent in any other hard convertible foreign currency with prior authorisation of the Economic Development Board after approval of the Minister of Internal Affairs.

The law is more flexible for non-citizens who are residents in Mauritius. Such residents are eligible to acquire a residential property of a minimum value of USD500,000 for personal residence.

The resident non-citizens who are eligible are as follows:

- a main holder of a Permanent Residence Permit;
- a main holder of a residence permit issued by virtue of the purchase of an immovable property under the Integrated Resort Scheme (IRS), Real Estate Scheme (RES), Property Development Scheme (PDS), Invest Hotel Scheme (IHS), Smart City Scheme (SCS) or apartment located in ground +2 building;
- a main holder of an occupation permit as investor, professional, self-employed;
- a main holder of a short-term occupation permit;
- a main holder of a family occupation permit; and
- a main holder of a residence permit as retired non-citizen.

Investing in Securities

Foreign investors may invest in any securities listed on a securities exchange. However, the Securities (Investment by Foreign Investors) Rules 2013 provide that a foreign investor cannot acquire interests in a Mauritian sugar company listed on a securities exchange without prior written consent of the FSC where, as a result of such investment, 15% would be held by foreign investors.

2.2 Procedure and Sanctions in the Event of Non-compliance

Other Regulated Activities

An application for authorisation has to be made to the relevant authority.

Financial Services

An application for a licence must be made to the FSC prior to setting up and must be accompanied by:

- a business plan;
- fees as specified in the FSC Rules;
- other information required by the Commission to determine the application; and

- particulars and information relating to promoters, beneficial owners, controllers and proposed directors.

Property Development

An application on the prescribed form must be filled in and submitted to the EDB.

Consequences of Investing Without Approval

Financial services

Any person who operates without securing an FSC licence shall commit an offence and shall, on conviction, be liable to a fine of up to MUR500,000 and to imprisonment for a term of up to five years.

Property development

In the case of a property that is acquired by a foreigner, without an authorising certificate, the curator shall take possession of the property and cause it to be sold.

2.3 Commitments Required From Foreign Investors

Conditions Attached to an FSC Licence for Financial Services

The FSC shall not grant an application unless it is shown to its satisfaction that:

- the application complies with the provisions of the law;
- the criteria for the licence are met;
- the applicant has adequate resources, staff with appropriate competence and experience to carry out the activity for which the licence is sought;
- the applicant and each of its controllers and beneficial owners are fit and proper persons to carry out the business for which the licence is sought; and
- the applicant has adequate arrangements for proper supervision of everything done under the licence to ensure compliance with the law.

Conditions Attached to an Acquisition of Property

Conditions attached to an acquisition under the Non-Citizens (Property Restriction) Act are as follows:

- The non-citizen shall not use the apartment for any purposes other than those for which the authorisation has been granted.
- The non-citizen shall not transfer or dispose of the apartment without authorisation and under such conditions as may be imposed.
- The non-citizen shall not engage in any property speculation whatsoever and an authorisation shall be valid for six months.
- Any non-citizen acquiring an apartment shall not be eligible to make an application for the status of resident in Mauritius.
- The land duties and taxes shall be paid on the present market value of the immovable property, which may be subject to review by the Registrar General.
- The shares of the company (where applicable) shall not be disposed of, in any manner, without prior approval under the Non-Citizens (Property Restriction) Act.

Conditions attached applicable to resident non-citizens in Mauritius are as follows:

- The residential property may be used as a personal residence only and not for any other purpose.
- Only one residential property may be purchased or acquired.
- The property purchased should not exceed 0.5276 hectare (1.25 arpent).

- Where a plot of serviced land/bare land is acquired, the residential property must be built on the land within a period of five years from the date of its acquisition.
- The property cannot be disposed of without the authorisation of the Prime Minister's Office, and in accordance with the applicable legislation, and upon such conditions as may be imposed.
- The non-citizen shall not engage in any property speculation whatsoever.

2.4 Right to Appeal

EDB

There is no review on non-authorisation from the EDB. An authorisation will be granted if the criteria are met.

FSC

A Review Panel conducted by the FSC has been established; however, it shall not hear an application relating to a decision on not granting a licence, approval or authorisation for the conduct of a financial services activity.

Immovable Property

An action can be brought before the Supreme Court on disputes relating to immovable property.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The corporate vehicles available in Mauritius include:

- companies;
- partnerships (*sociétés*);
- limited partnerships;
- trusts; and
- foundations.

Companies

Companies may be private or public. A company is deemed to be a public company unless it is stated otherwise in its application form for incorporation or its constitution. A private company cannot have more than 50 shareholders and cannot offer its shares to the public.

A company may be set up as follows:

- limited by shares (most common);
- limited by guarantee;
- limited by shares and guarantee;
- unlimited; or
- limited life (common for private equity funds and suitable for joint ventures or projects).

Except for the fourth point above, the liability of the shareholders is limited to the amount payable on the shares issued to them; for the second point, liability of the members is limited by the constitution to such amount as the members may respectively undertake to contribute to the assets of the company in the event of it being wound up.

A company set up as a limited life company has an initial life not exceeding 50 years, subject to the alteration of its constitution extending the duration of the company to such period or periods not exceeding an aggregate of 150 years. A limited life company may have categories of interests in the company, such as an interest in the profits of the company, an interest in the capital of the company, or an interest in the management of the company.

A company limited by shares may be incorporated with one shareholder and with one share (no minimum share capital amount); typically share capital would start at MUR1.00 or USD (or any foreign currency) 1.00.

Partnerships (Sociétés)

Partnerships in Mauritius are referred to as *sociétés* and are governed by the Commercial Code and Civil Code. The life of a partnership is limited to a maximum of 99 years.

Liability of each partner in a general partnership (*Sociétés en Nom Collectif*) is unlimited, whereas in a limited partnership (*Sociétés en Commandite Simple*), there are two categories of partners: limited partners (*les associés commanditaires*) and unlimited, or general, partners (*les associés commandites*). Limited partners enjoy the benefit of liability limited to the extent of their respective contributions to capital, whereas unlimited partners are liable to contribute, in full, to the debts and liabilities of the limited partnership.

Limited Partnerships

Whilst limited partnerships may be formed under the Commercial Code and Civil Code, they may also be created under the Limited Partnerships Act 2011 (LPA). A distinguishing feature is that at the time that the limited partnership is registered, the partners of the limited partnership may elect that the partnership has legal personality.

Similar to partnerships organised under the Commercial Code and Civil Code, the partners in a limited partnership under the LPA are of two types: general partners or limited partners. General partners are jointly and severally liable for all the debts of the limited partnership without limitation, whilst limited partners (subject to the partnership agreement) are not liable for any debts of the limited partnership beyond the amounts contributed or agreed to be contributed.

Trusts

Trusts are governed by the Trusts Act 2001. A trust (other than a purpose trust) is limited to a duration of 99 years from the date of its creation. In the case of a purpose trust, an enforcer and a successor to the enforcer must be appointed when the trust is established, the duty of the enforcer/successor to the enforcer being the enforcement, if necessary, of the terms of the purpose trust. A trust is governed by the terms of its trust deed and the Trusts Act 2001.

Foundations

Foundations may be set up under the Foundations Act 2012. Contrary to popular belief that foundations are for charitable purposes only, foundations are increasingly used for non-charitable purposes; for example, wealth management, estate planning or purely business purposes. A foundation is run by a council (similar to the board of a company). The foundation is governed by its charter (and articles, if applicable), subject to the Foundations Act 2012.

Variable Capital Company

A variable capital company (VCC) is set up as a company under the Companies Act 2001 and needs to be authorised by the FSC, the regulator for financial services in Mauritius, to operate. The VCC's primary object is to operate as a fund; it can be set up as a standalone fund or may conduct its business through different sub-funds or special purpose vehicles (SPVs). The sub-funds and SPVs may choose to have a separate legal entity from the main fund.

The VCC has many advantages for the fund industry in as much as different types of fund structures can be regrouped under one entity – both collective investment schemes and closed-end funds can be set up under the same VCC. A VCC further allows for cross sub-fund and SPVs investment in that a sub-fund of a VCC is also allowed to invest in other sub-funds of the same VCC, provided such sub-fund or SPV has not

previously invested in it. In terms of the protection of its investment portfolios, the assets and liabilities of the sub-funds and SPVs are segregated and ring-fenced, and are thus protected in the event of a winding-up, administration or receivership of the sub-funds, SPVs or the VCC.

3.2 Incorporation Process

Application for incorporation is made to the Registrar of Companies in a prescribed form, signed by the applicant and accompanied by the following documents:

- consent to act as director or secretary;
- certificate that the director/secretary is not disqualified to act as such;
- in the case of a company having a share capital, consent to being a shareholder and to taking the class and number of shares noted in the application, as well as a statement of the consideration for the issue of those shares;
- in the case of a company limited by guarantee, a guarantee document signed by each member;
- notice of reservation of name, if any;
- the constitution of the company, if one is being specifically adopted; and
- under certain circumstances, a declaration regarding the beneficial ownership.

3.3 Ongoing Reporting and Disclosure Obligations

The Companies Act 2001 prescribes several filings to be made with respect to a private company, including filing in relation to changes in directors, secretary and shareholding. Filing is also required with respect to:

- a constitution (ie, equivalent to the memorandum and articles of association) adopted by the company or any amendment made thereto;
- a charge created over any asset of the company;
- change in registered office;
- financial statements (with auditor's report, if applicable) or financial summary;
- annual report, if applicable; and
- annual return, if applicable.

3.4 Management Structures

Management of Company

Companies in Mauritius commonly have a unitary board structure. The business and affairs of a company are managed by, or under the direction or supervision of, the board.

Subject to modifications, adaptations, exceptions or limitations to the extent contained in the Companies Act 2001 or in the constitution of the company, the board has all the powers necessary for managing, directing and supervising the management of the business and affairs of the company.

The amendments to the Companies Act 2001 introduce the requirement of the board of directors of a public company to include, at all times, at least two independent directors and ensure that a minimum of 25% of the board members are women.

3.5 Directors', Officers' and Shareholders' Liability

A director is liable, whether to the company or a shareholder, for breach of any statutory duty set out in the Companies Act 2001. Furthermore, there may be instances where a director may be liable to third parties such as creditors. The Act also imposes personal liability on directors in certain circumstances; for example, continuing to trade whilst the company is insolvent.

The duties of directors have been extended to include the duty to act in a manner that is not oppressive, unfairly discriminatory or unfairly prejudicial to shareholders.

There are limited circumstances where the courts may lift the corporate veil and these are:

- when the court is construing a statute, contract or other document;
- when the court is satisfied that a company is a "mere facade" concealing the true facts; and
- when it can be established that the company is an authorised agent of its controllers or its members, corporate or human.

4. Employment Law

4.1 Nature of Applicable Regulations

In Mauritius, the employment relationship is governed mainly by legislation, case law, employment agreements and collective agreements within certain industries. The main laws governing the employment relationship in Mauritius are the Workers' Rights Act 2019 (the "Act") and the Employment Relations Act 2008 (ERA).

The Act regulates the employment relationship of workers and employers, where a worker is defined as a person whose basic wage or salary is at a rate exceeding MUR600,000 per annum except in cases of discrimination, work-from-home regulation, equal pay, payment of remuneration, deduction of salary, juror's leave, leave to participate in an international sports event, maternity/paternity benefits, medical facilities, termination including reduction of workforce, the portable retirement gratuity fund, eligibility to the Workfare Programme Fund compensation and violence at work, where the Act is applicable for all employees, notwithstanding their salary range.

4.2 Characteristics of Employment Contracts

Under the laws in Mauritius, a contract of employment may be for a determinate or indeterminate duration, subject to the nature of the work. An agreement made verbally will also be considered a duly formed agreement.

However, every employer has to provide to every worker engaged for more than 30 consecutive working days a written statement of particulars within 14 days of the completion of the first calendar month, a copy of which has to be submitted to the supervising officer of the Ministry responsible for labour and employment relations. The main particulars of an employment contract are catered for in the Act and include the following:

- name of the employer;
- national pensions registration number of the employer;
- business registration number of the employer;
- address of the employer;
- nature of activity carried out by the employer;
- name of the worker;
- gender of the worker;
- national identity card number/passport number of the worker;
- date of birth of the worker;
- address of the worker;
- date of commencement of agreement;
- place of work;
- grade, class or category of employment;
- rate and particulars of remuneration;
- interval at which remuneration is to be paid; and
- normal hours of work.

The above constitute the basic conditions of the contract of employment. However, they are not exclusive and many other conditions may be agreed upon between the employer and the employee in accordance with the specificities of the business.

4.3 Working Time

Employees may be employed on a full-time or part-time basis in Mauritius. The normal working hours for a full-time worker (other than a caregiver (*garde malade*) and a part-time worker) are 45 hours of work, excluding time allowed for meal and tea breaks, allocated as follows.

- Where the worker is required to work five days a week:
  (a) nine hours' work on any five days of the week, other than a public holiday.
- Where the worker is required to work six days a week:
  (a) eight hours' work on any five days of the week other than a public holiday; and
  (b) five hours' work on one other day of the week other than a public holiday.

No worker, other than a caregiver, shall, except in special circumstances and subject to any other enactment, be required to work for more than 12 hours per day.

Under the Act, where a worker works on a public holiday, the employer shall remunerate him/her in respect of any work done:

- during normal working hours, at not less than twice the rate at which the work is remunerated when performed during the normal hours on a weekday; or
- after normal working hours, at not less than three times the rate at which the work is remunerated when performed during the normal hours on a weekday.

The Act was amended in 2023 to introduce the concept of a four-day work week. An employer may now, with the consent of a worker, require the worker to work for the stipulated hours, in any week, on a four-day week basis, provided a notice of at least 48 hours is given to the worker ahead of the new compressed hours. On the other hand, a worker may make a request to his/her employer to work for the stipulated hours on a four-day week basis and the employer must, subject to their operational requirements, grant the request.

The Act also provides for certain qualifications in the conversion of work from full-time to part-time.

In line with the climate changes, the law now recognises that, during periods of extreme weather conditions, where an order is issued by the National Crisis Committee requiring any person to remain indoors, or a state of disaster is declared, an employer cannot require a worker to work or continue to work, as such situations could place the worker in danger.

4.4 Termination of Employment Contracts

In the case of a fixed-term contract, the contract comes to an end on the last day of the agreement.

An employment contract may also be terminated by the employer for the employee's poor performance or misconduct (including misconduct subject to criminal proceedings). In such cases the employer needs to provide the employee with an opportunity to answer any charge that has been levelled against the employee within

the statutory timeline. Moreover, a notice of not less than 30 days must be given to the employee. Alternatively, the employee may be paid remuneration in lieu of the said notice.

The employee, on the other hand, may treat the employment agreement as terminated if they have been ill-treated by the employer, in cases of non-payment of remuneration, where the employer fails to provide work and to pay remuneration under an agreement or if the employee is made to resign by fraud or duress.

Collective redundancies are implemented in cases of economic, technological, structural or any other similar reasons. The newly implemented Redundancy Board (the "Board") is the entity that deals with all cases of reduction of workforce and closure of enterprises. Where the Board finds that the reasons for the reduction of the workforce or the closing down are unjustified, the Board shall order the employer to pay the worker severance allowance at the rate of three months' remuneration per year of service. The employee may, however, consent to be reinstated in their former employment with payment of remuneration from the date of termination of their employment to the date of their reinstatement.

The Social Contribution and Benefits Act of 2021 has repealed the *contribution sociale generalisee* which was introduced in 2020. These contributions, which are now called "social contributions", are calculated on the basis of the full remuneration of the worker for the year instead of only his/her basic salary and self-employed people are now required to contribute in accordance with their income level instead of the flat rate which was originally applicable.

The mandatory end-of-year bonus section in the Act has been qualified to apply only to those workers who draw a monthly basic wage or salary of not more than MUR100,000.

4.5 Employee Representations

Employee representation occurs at two levels: employee representation by the employee's representative in the event of a disciplinary hearing and employee representation at the level of trade union and collective bargaining with regard to the employer's management.

Representation in the Event of a Disciplinary Hearing

An employee must, prior to the termination of his/her agreement, be given the opportunity to answer and explain any charge that has been levelled against him/her. This opportunity may take the form of a disciplinary hearing, in which case the employee may be accompanied by a representative of their trade union or a legal representative.

The employee may also have recourse to representation by a labour officer. Such labour officer is an officer designated by the permanent secretary of the Ministry of Labour, Industrial Relations, Employment and Training whose main role is to look into labour complaints and disputes.

Employee's Representation at the Level of Trade Union in the Employer's Management

An employee's representation at the level of trade union is a constitutional right in as much as, except with his/her own consent, he/she shall not be hindered in the enjoyment of his/her freedom of assembly and association. An employee's representation at this level is governed by the ERA, which focuses on the right of employees to freedom of association with a view to promoting good employment relations,

granting of negotiating rights to employees through their union representatives and assisting employers and union representatives to bargain effectively.

According to the ERA, an employer cannot interfere with the establishment, functioning or administration of a trade union of workers or promote or give assistance to a trade union of workers in order to place or maintain the trade union under their control. Union representatives are responsible for negotiating the rights of employees as per employment legislation and rights to participate in collective bargaining; that is, in relation to the terms and conditions of employment or rights pertaining to any procedure agreement.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

A resident of Mauritius is taxable on worldwide income, except an individual, whose foreign-source income is taxable only if it is remitted to Mauritius. Thus, income is deemed to be derived when the income is derived from Mauritius, regardless of whether that person was resident in Mauritius or elsewhere.

Equally, a non-resident is taxable on income derived from Mauritius; for instance, income derived from any business carried on wholly or partly in Mauritius.

Employees

As of 1 July 2023, a progressive tax system has been introduced. Individual's income will be taxed incrementally; ie, the chargeable income will be divided into different revenue brackets. Each bracket will have a specific tax rate starting at 0% and will be capped at a maximum of 20%.

An individual (employed or self-employed) has to file income tax returns for the preceding income year, declaring their income and deductions to the Mauritius Revenue Authority (MRA).

Employers are required to operate a cumulative system of pay as you earn (PAYE) whereby tax withheld from emoluments that are made available to an employee has to be remitted to the MRA within 20 days.

If tax is underpaid under the PAYE system, the unpaid balance becomes payable on or before 30 September following the end of the income year. If tax is overpaid, a refund of the excess tax is made to the taxpayer.

Every month, every employer shall pay the amount of contribution to the MRA in respect of every employee who was employed during the preceding month.

The CSG and National Solidary Fund (NSF) contributions are payable at the prescribed rate on an employee's basic wage/salary.

An employer is required to contribute 2.5% of remuneration to the NSF and to pay a monthly rate of 1.5% of the basic salary of every employee.

Under the CSG:

- employees earning MUR50,000 or less monthly will be subject to a contribution of 1.5%, and 3% for the employers;
- employees earning more than MUR50,000 monthly will be subject to a contribution of 3%, and 6% for the employers;

- a public sector employee earning MUR50,000 or less monthly will not be subject to the contribution, and 4.5% for the employers;
- a public sector employee earning more than MUR50,000 monthly will not be subject to the contribution, and 9% for the employers; and
- an employee who is in domestic service earning MUR3,000 or less monthly, from one or more employers, shall not be subject to the contribution, and 3% for the employers.

The solidarity levy has been abolished effective as from the year of assessment 2023/24.

5.2 Taxes Applicable to Businesses

A corporation resident in Mauritius is subject to tax on its worldwide income. A non-resident corporation is liable to tax on any Mauritius-source income, subject to any applicable tax treaty provisions. Corporations are liable to income tax on their net income, currently at a flat rate of 15%.

Partnerships

Limited partnerships are tax transparent and are therefore not taxable under the laws of Mauritius, unless they hold a GBL, in which case they can elect to be taxpayers. Where a limited partnership is tax transparent, only the partners who are residents of Mauritius are liable to pay tax in Mauritius at the rate of 15% (subject to any available tax credit or exemption). Limited partners who are non-residents of Mauritius are only liable to 15% tax on income that is derived in Mauritius but have no tax liability on foreign-source income.

Trusts and Foundations

The income tax laws make a distinction between resident and non-resident trusts and between a resident foundation and a non-resident foundation. A non-resident trust is a trust of which the settlor and the beneficiaries are not resident in Mauritius, or in the case of a purpose trust, where such purpose is carried out wholly outside Mauritius. Such trusts are not subject to taxation in Mauritius.

A foundation will be non-resident when the founder is a non-resident and all the beneficiaries appointed under the terms of a charter or a will are, throughout an income year, non-resident in Mauritius. A non-resident foundation is exempt from taxation in Mauritius. A non-resident trust or foundation has to file a declaration of "non-residency" on an annual basis with the MRA.

Charitable trusts and foundations are also exempt from income tax in Mauritius. A non-charitable trust, a non-charitable foundation or a non-charitable institution that is tax resident in Mauritius is taxable on its chargeable income at the rate of 15% per annum, although it will be entitled to tax credits on foreign tax paid or a partial exemption of 80% of the Mauritius tax liability on certain specific types of income.

Export of Goods

Companies engaged in the export of goods are liable to be taxed at the rate of 3% on the chargeable income attributable to that export based on a prescribed formula.

The benefit of the reduced income tax rate of 3% has been extended to freeport operators and private freeport developers engaged in the re-treating of used tyres and recycling of waste meant for the local market.

Société

Resident société

A resident *société* is not liable to tax. Instead, every associate of the *société* is liable to tax on his/her share of income, whether distributed or not.

Non-resident société

A non-resident shall be liable to income tax as if the *société* were a company and shall pay income tax on its chargeable income at a rate of 15%.

Companies Holding a Global Business Licence (GBL)

GBL-holding companies are taxed at the normal rate of 15%, except for an income tax exemption of 80%, which applies to foreign dividends, foreign-source interest income, profit attributable to a permanent establishment of a resident company in a foreign company, foreign-source income derived from a collective investment scheme (CIS), closed-end funds, CIS managers, CIS administrators, investment advisers or asset managers licensed or approved by the FSC and income derived by companies engaged in ship and aircraft leasing.

Corporate Social Responsibility (CSR)

Every year, a company has to set up a CSR fund equivalent to 2% of its chargeable income of the preceding year.

Value-Added Tax (VAT)

VAT shall be charged at the standard rate of 15% on all taxable goods and services, except certain food items that are zero-rated.

A person who makes taxable supplies in the course of their business and whose annual turnover exceeds or is likely to exceed MUR6 million is required to register for VAT on a compulsory basis.

Additionally, certain service providers (eg, accountants and auditors, attorneys and solicitors, consultants, surveyors, valuers) must be VAT registered irrespective of their turnover.

The Finance Act introduced the arm's-length principle to VAT.

The reverse charge provision on supply of services received from abroad has been amended such that it is now applicable only if:

- the taxable supply performed or utilised in Mauritius is made by a person who does not belong in Mauritius and is not VAT registered; and
- the recipient of the supply is a VAT-registered person.

The supply of digital or electronic services by a foreign supplier to a person in Mauritius will be subject to VAT.

Where a VAT-registered person is engaged in a project spanning several years and the MRA is of the opinion that the apportionment of input tax between taxable supplies and exempt supplies on a prorated basis is not appropriate, it may require the registered person to apply an alternative basis of apportionment for input tax.

Local Income Taxes

Local income taxes levied by a local administration, such as urban councils, do not exist in Mauritius.

Corporate Withholding Taxes

There are no withholding taxes (WHTs) in Mauritius for payments made by GBL companies to non-residents not carrying out any business in Mauritius. There is no WHT on dividends received from resident companies or on payments made by a company having an annual turnover of less than MUR6 million.

The following withholding tax rates are applicable to certain other income streams:

- interest payable by any persons (other than banks or non-bank deposit-taking institutions operating under the Banking Act) to individuals and non-resident companies – 15%;
- royalties payable to (i) residents – 10%, and (ii) non-residents – 15%;
- rent payable to (i) residents – 5%, and (ii) non-residents – 10%;
- payments to contractors and subcontractors – 0.75%; and
- payments to providers of services (accountant/accounting firm, architect, attorney/solicitor, barrister, dentist, doctor, engineer, land surveyor, legal consultant, project manager in the construction industry, quantity surveyor, property valuer, and tax adviser or representative) – 3%.

5.3 Available Tax Credits/Incentives

Mauritius has a credit system of taxation whereby foreign tax credit is given on any foreign-source income declared in Mauritius on which foreign tax of a similar character to Mauritian tax has been imposed.

No actual foreign tax credit is allowed on foreign-source income derived from a corporation issued with a Category 1 Global Business Licence on or before 16 October 2017, if they have claimed the 80% exemption.

5.4 Tax Consolidation

There are no group taxation provisions in the Mauritian tax legislation other than the transfer of losses by tax incentive companies, sugar factory operators, subsidiaries in Rodrigues and manufacturing companies upon their takeover.

5.5 Thin Capitalisation Rules and Other Limitations

Mauritius does not have specific thin capitalisation legislation; however, it does have other anti-avoidance provisions, as described below.

If a company has issued debentures to each of its shareholders, subject to the number, the nominal value, or paid-up value of the shares in that company, any interest paid on debentures and claimed as a deductible expense may be disallowed and treated as a dividend.

5.6 Transfer Pricing

Mauritius does not have any specific transfer pricing legislation. However, it does contain an arm's-length provision requiring transactions between related parties to reflect a commercially objective value, which would be the amount charged for the services were the parties not connected.

5.7 Anti-evasion Rules

There are no controlled foreign companies rules under Mauritian tax legislation.

Additionally, the Income Tax Act 1995 provides for certain measures relating to anti-avoidance provisions in relation to interest on debentures issued by reference to shares, excess of remuneration or share of profits, excessive remuneration to shareholders or directors, benefit to shareholders and excessive management expenses.

6. Competition Law

6.1 Merger Control Notification

Under the Competition Act 2007 (the "Act"), a merger situation is defined as "the bringing together under common ownership and control

of two or more enterprises of which one at least carries its activities, in Mauritius, or through a company incorporated in Mauritius."

Whilst there is no statutory obligation for parties to a merger to inform, notify or seek the approval of the Competition Commission of Mauritius (CCM), they are entitled under the Act to voluntarily inform and notify the CCM of a merger situation and to seek the CCM's guidance as to whether:

- the proposed transaction has created, or is likely to create, a merger situation;
- the enterprises that are party to the merger situation meet the statutory market share threshold in order to be subject to review by the CCM; and
- the existing or proposed merger situation has resulted in, or is likely to result in, a substantial lessening of competition in Mauritius.

Besides voluntary notification, the Act provides that merger situations shall systematically be subject to review by the CCM in any of the following circumstances:

- where all the parties to the merger, following the merger, will together supply or acquire 30% or more of all the goods and services on the market;
- where one of the parties to the merger alone and prior to the merger supplies or acquires 30% or more of the goods or services of any description on the market; or
- where the CCM has reasonable grounds to believe that the creation of a merger situation has resulted in, or is likely to result in, a substantial lessening of competition within any market for goods and services.

Hence, where a merger situation does not fall under the market share thresholds set under the Act and does not lead to a substantial lessening of competition, there is a possibility for enterprises to proceed with the merger without involving the CCM at all. On the other hand, the commissioners of the CCM may take action if they find that the merger results, or is likely to result, in a substantial lessening of competition. This includes the power to require divestments or to block the merger if need be.

Although it is not mandatory for merger parties to notify their anticipated merger, merger parties are strongly encouraged to conduct a self-assessment to ascertain if it is necessary to apply for such guidance. Businesses considering a merger would be well advised to seek the CCM's advice and possibly even undergo an investigation before going ahead with the merger, to avoid the costs of subsequently having to reverse the merger. The Act currently provides the possibility for any one of the enterprises that intends to be in a merger situation to apply to the CCM for guidance as to whether the proposed merger situation is likely to result in a substantial lessening of competition within any market for goods or services. An application for guidance usually contains the details laid down in the Competition Commission Rules of Procedure 2009.

6.2 Merger Control Procedure

Applications for guidance in relation to merger notifications are made by completing and filing a form known as "Form 1" with the CCM. Form 1 requires detailed information on the merger situation to be submitted to the CCM and this includes:

- the full name and address of the joint representative of the merger parties (where

appointed) in a joint application or the full name and address of all merger parties where a joint representative is not appointed;
- the nature of the merger, such as whether it is an anticipated merger, an acquisition of sole or joint control, a full-function joint venture, or a contract or other means of conferring direct or indirect control;
- the value of the transaction; ie, the purchase price or the value of all the assets involved, depending on the circumstances; and
- for each of the merger parties, the area of activity and turnover worldwide and in Mauritius for the financial year, and the parts of the business subject to the merger.

Prior to the lodging of the merger notification with the CCM, parties are encouraged to carry out pre-notification consultations with the CCM, as the latter may refuse to accept an application if it is incomplete, not accompanied by the relevant supporting documents, not substantially in the prescribed form or not in compliance with the Act. Pre-notification consultations with the CCM are usually carried out promptly, subject to the availability of the parties, and do not affect the timeframe for the assessment of the merger notification once it is submitted to the CCM.

Upon receipt of the complete merger notification, the CCM will conduct a preliminary assessment to determine whether there are reasonable grounds to believe that the merger situation results in, or is likely to result in, a substantial lessening of competition. The preliminary assessment may be completed within 30 working days, depending on the nature and complexity of the merger situation. In the affirmative, parties are informed of these concerns within 30 working days and an in-depth assessment is triggered. Otherwise, if the preliminary assessment demonstrates no substantial lessening of competition, the parties are informed accordingly and the matter is closed. On the other hand, in-depth assessments are usually carried out by the CCM over a period of six months.

Where the commissioners of the CCM determine, after review, that the creation of a merger situation has led, or is likely to lead, to a substantial lessening of competition, they may give the enterprise such directions as they consider necessary, reasonable and practicable to (i) remedy, mitigate or prevent the substantial lessening of competition; and (ii) remedy, mitigate or prevent any adverse effects that have resulted from, or are likely to result from, the substantial lessening of competition.

6.3 Cartels

Under the Act, "Agreement" means "any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Mauritius or in a part of Mauritius, and includes an oral agreement, a decision by an association of enterprises, and any concerted practice". "Concerted practice" is also defined in the Act as a "practice involving contacts or communications between competitors falling short of an actual agreement, but which nonetheless restricts competition between them".

The Act regulates various forms of agreements and practices, and prohibits collusive agreements and practices that have the object or effect of preventing, restricting or distorting competition. This includes restrictive practices such as horizontal agreements, non-collusive horizontal agreements, bid rigging, vertical agreements involving resale price maintenance and other vertical agreements.

It is not open to enterprises engaged in these practices to argue that they have no adverse effects, nor do the "off-setting benefits" provisions of the Act apply to such agreements to allow any argument that they have beneficial effects resulting in specific gains, which may outweigh the adverse effects caused by the said agreement or practice. Unlike the other breaches under the Act, collusive agreements and practices are the only breaches for which financial penalties can be levied by the CCM.

6.4 Abuse of Dominant Position

Section 46 of the Act relating to monopoly situations states that the CCM will have regard to whether a monopolist's actions "have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers". This clause relates only to adverse effects arising from the monopolist's actions.

Under Sections 60 and 61 of the Act, the CCM may also take action to remedy, prevent or mitigate detrimental effects on consumers and users. Where it is necessary to consider such adverse and detrimental effects, the CCM will generally seek to protect and promote consumer interest by fostering greater competition. The CCM will not, in general, intervene to provide consumers with a better product offering or price than might reasonably be expected to arise in a competitive market. The CCM can intervene only when there is a competition problem and only to promote the interests of affected consumers and users.

7. Intellectual Property

7.1 Patents

The Industrial Property Act 2019 (IPA) came into operation on 31 January 2022, replacing the Patents, Industrial Designs and Trademarks Act 2002, which is now repealed.

A patent will be registered if it relates to an invention that is new, involves an inventive step, and is industrially applicable.

The length of statutory protection granted to registered patents is 20 years, starting from the filing date of the application, subject to the payment of the annual prescribed fee.

The application for a patent has to be filed with the Director of the Industrial Property Office in the form set out in the administrative procedures and accompanied by the payment of a non-refundable fee. The application has to include:

- the name, address and nationality of the applicant;
- the name and address of the inventor;
- the name and address of the agent of the applicant (if any); and the signature of the applicant or their agent (if any), or a common representative where it is a joint application;
- the title, a description of the invention and the claims, including any drawing and an abstract;
- where the applicant is not the inventor, a statement justifying the applicant's right to the patent; and
- where the applicant's ordinary residence or principal place of business is outside Mauritius, an address within Mauritius for service of any document.

Mauritius has acceded to the Patent Cooperation Treaty (PCT) since 15 March 2023. Applicants and inventors in Mauritius can now file patent applications under the PCT to secure patent protection in PCT contracting states. Similarly, foreign innovators and companies can now use the PCT System to obtain patent protection for their inventions in Mauritius. With Mauritius' accession, the PCT now has 157 contracting states.

The Customs Act 1988 was amended to provide that any owner or authorised user of a patent may apply in writing to the Director General of the Mauritius Revenue Authority to suspend the clearance of any goods imported or being exported and detain any goods on the local market on the grounds that his patent, industrial design, collective mark, mark, copyright, utility model, lay-out design, breeder's right, trade name, or geographical indication is being or is likely to be infringed.

For enforcement, please see **7.3 Industrial Design**.

7.2 Trade Marks

A mark is a distinctive sign that differentiates particular goods and services provided by one entity from those of its competitors. In practice, any sign that helps distinguish one's goods or services from another may amount to a mark. This includes words, letters, numerals, drawings, pictures, audible signs, three-dimensional signs and olfactory marks.

The length of statutory protection granted to registered marks is ten years, starting from the filing date of the application and subject to the payment of an annual fee.

Applications for registration of marks must be filed with the Director of the Industrial Property Office in the form set out in the administrative procedures, and accompanied by the payment of a non-refundable fee of MUR6,000 for the first class and MUR2,000 for each additional class. The application for registration of a mark must include:

- the name, address, nationality and place of registration of the applicant, and where the applicant is represented by an agent, the name and address of the agent;
- where applicable, a statement indicating the type of mark and any specific requirements applicable to that type of mark;
- a representation of the mark; and
- a list of the goods or services for which registration of the mark is sought, grouped in accordance with the applicable class or classes of the International Classification.

The application shall also specify the goods and/or services in respect of which the registration of the mark is sought and has to be signed by the applicant or their agent (if any), or a common representative where it is a joint application.

For enforcement, please see **7.3 Industrial Design**.

7.3 Industrial Design

Industrial design ("Design") means the appearance of a product resulting from its features, particularly the shape, lines, contours, colours, texture or materials of the product, or its ornamentation.

The length of statutory protection granted to registered industrial designs is five years, starting from the filing date of the application, and is renewable for three further consecutive periods

of five years, subject to payment of a renewal fee.

An application for the registration of a Design has to be filed with the Director of the Industrial Property Office in the form set out in the administrative procedures and must contain a graphic representation of the Design, and be accompanied by a non-refundable fee of MUR4,000. The application has to be signed by the applicant or their agent (if any), or a common representative where it is a joint application. The application may contain a brief description, not exceeding 100 words, of the characteristic features of the Design, including any colours, and the features characterising the Design in accordance with its filed representation or specimen, but shall not refer to technical particulars related to the operation of the product incorporating the industrial design, its possible uses or the manufacturing material.

The performance of any act under the IPA in Mauritius by any person other than the owner of the title of protection or the licensee and without the agreement of the owner constitutes an offence, punishable, on conviction, by a fine not exceeding MUR250,000 and imprisonment for a term not exceeding five years. Acts of unfair practice may also give rise to a claim in damages and the Mauritius court may, in addition to damages, grant such other remedy or relief as it may consider appropriate. Any claim arising out of an unfair practice shall be prosecuted in accordance with the Protection against Unfair Practices (Industrial Property Rights) Act 2002 (the "2002 Act").

7.4 Copyright

According to the Copyright Act 2014 (the "CA 2014"), copyright means the economic and moral rights subsisting in a work and work is defined as "an artistic, literary or scientific work".

Hence, copyright law in Mauritius covers work transmitted by way of mass public communication, such as paintings, drawings, films, performances, music, literary works and even computerised systems for storage and retrieval of information.

Copyright protection is obtained automatically, without the need for registration, as soon as the work becomes fixed in some material form, irrespective of its mode or form of expression. There are specific durations for the protection of copyright under the CA 2014. For instance, authors enjoy protection for their whole lifetimes and 40 years after their death.

In the event of breach of copyright, a civil action may be initiated with the Supreme Court for an order granting any such remedies as the Court thinks fit. This covers remedies such as damages, injunction, or forfeiture of any infringing copy and/or any apparatus, article or thing used for the making of the infringing copy.

A copyright owner may also apply to a Judge in Chambers for an injunction or a *mesure conservatoire*, as is appropriate in the circumstances.

A copyright fee is now leviable in respect of every user of a work.

7.5 Others

IP such as trade secrets, software and databases may be protected under the 2002 Act.

According to Sections 5 to 9 of the 2002 Act, any act that is contrary to honest commercial practice and that (i) causes confusion with respect to another's enterprise or activities, (ii) damages

another's goodwill or reputation, (iii) misleads the public, (iv) discredits another's enterprise or activities, or (v) creates unfair competition with respect to secret information will be considered unlawful and will amount to a criminal offence leading to a fine not exceeding MUR250,000 and a term of imprisonment not exceeding five years.

The term "contrary to honest commercial practice" includes "breach of contract, a breach of confidence, an inducement to breach or the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that any such practice was involved in the acquisition".

Moreover, causing confusion with respect to another's enterprise or activities or damaging another's goodwill or reputation in relation to a trade mark, whether registered or not; a trade name; a business identifier other than a trade mark or trade name; the appearance of a product; the presentation of products or services; or a celebrity or a well-known fictional character is penalised under the 2002 Act.

8. Data Protection

8.1 Applicable Regulations

There is one governing piece of legislation for data protection in Mauritius, namely the Data Protection Act 2017 (the "Act"), which was passed on 8 December 2017 to comply with the EU General Data Protection Regulation 2016/679.

Two other pieces of legislation also provide additional safeguards to the right to privacy and data protection in Mauritius:

- Article 22 of the Mauritian Civil Code provides that "*Chacun a droit au respect de sa vie privée*" (ie, every person is entitled to the protection of their private life).
- Article 300 of the Mauritian Criminal Code makes it a criminal offence for certain categories of professionals, who have been entrusted with confidential information by their clients, to disclose information obtained in confidence.

The Act imposes strict duties on data controllers to ensure that all personal data is processed in compliance with the Act. Data controllers must be able to demonstrate that they have:

- explicit, specified and legitimate purposes for the processing of personal data;
- adopted policies to implement appropriate data security and organisational measures to protect personal data;
- only processed data that is adequate, relevant and limited to what is necessary;
- designated an officer responsible for data protection; and
- processed the personal data in line with the data subjects' rights.

A data controller is defined as "any person who or public body which, alone or jointly with others, determines the purposes and means of the processing of personal data and has decision-making power with respect to the processing".

The Act makes it a criminal offence for a data controller to disclose the personal data of its data subject(s) without any lawful excuse or where it is incompatible with the purposes for which the data was collected. Lawful excuses can be, for example:

- for compliance under the law;

- for the performance of a contract signed with the data subject; and
- to protect the vital interests of the data subject or another person.

At the heart of the new data protection legislation in Mauritius is the notion of consent. The Act imposes a duty on data controllers and "data processors" (ie, those who process personal data on behalf of data controllers) to seek and obtain the consent of persons whose data they wish to process, and empowers data subjects to give and/or withdraw their consent at any point in time.

A data subject is defined as a person who may be identified or may become identifiable by reference to features including their name, identification number, location data and physiological, genetic, mental, economic, cultural or social identity.

The consent given by data subjects should be free, specific, informed and unambiguous, and can be in the form of a statement or a clear affirmative action to signify their consent to the data controllers.

Under the Act, any local or foreign individual or organisation handling or processing the personal data of Mauritian data subjects must seek the consent of their data subjects and register themselves with the data protection commissioner of the Data Protection Office (the "Commissioner") in order to act as a data controller or processor in Mauritius.

With regard to the transfer of personal data outside Mauritius, a controller or a processor may transfer personal data to another country where any of the following conditions has been met:

- there is proof of appropriate safeguards;
- they have explicit consent from the data subject;
- they have a contract with the data subject;
- it is of public interest as provided by law;
- there are legal claims;
- it is of vital interest to the data subject; or
- there are compelling legitimate interests of the controllers or processors.

8.2 Geographical Scope

The Act applies to any data controllers or processors established in Mauritius and any data controllers or processors not established in Mauritius but using equipment in Mauritius for processing personal data of Mauritian residents.

In other words, the Act not only applies to organisations located within Mauritius but also applies to organisations located outside Mauritius if they offer goods or services to, or monitor the behaviour of, Mauritian data subjects.

In that scope, the Act imposes an obligation on such foreign controllers and processors to explain to Mauritian data subjects how their personal data will be processed, give details on the purposes of the processing and inform individuals of the right to withdraw their consent at any point in time.

8.3 Role and Authority of the Data Protection Agency

The Act established the Data Protection Office (DPO) in Mauritius, which is empowered to act with complete independence and impartiality.

The main roles and functions of the DPO are to ensure compliance with the Act, issue codes of practice and guidelines, maintain a register of controllers and processors, investigate com-

plaints and co-operate with supervisory authorities of other countries.

The DPO is headed by the Commissioner, who is given wide powers under the Act to:

- carry out periodical audits of information systems and security measures used by data controllers or processors;
- investigate any complaint or information that gives rise to a suspicion that an offence may have been, is being or is about to be committed under the Act;
- order any person to attend a hearing at a specified time and place for the purposes of being orally examined in relation to a complaint;
- apply to the Judge in Chambers in the Supreme Court for a preservation order where they believe the data is vulnerable to loss or modification;
- enter and search any premises with a warrant issued by a magistrate for the purpose of discharging any functions or exercising any powers under the Act;
- serve an enforcement notice, when they believe that a data controller or processor has contravened, is contravening or is about to contravene the provisions of this Act, requiring them to take such steps within such periods as may be specified in the notice; and
- take such measures as may be necessary to bring the provisions of the Act to the knowledge of the general public.

The registration as a controller or processor with the DPO will be for a period not exceeding three years and on the expiry of such period, the relevant entry will be cancelled unless the registration is renewed within three months of expiry of the licence.

Any controller who knowingly supplies false information while applying for registration will commit an offence and shall, on conviction, be liable to a fine of up to MUR100,000 and to imprisonment for a term of up to two years.

Any person or organisation who fails to attend a hearing or to produce a document when required to do so shall be liable to a fine of up to MUR50,000 and, in the case of a person, to a term of imprisonment of up to two years.

Additionally, in order to enforce the rules established under the Act, the Commissioner of the DPO has been empowered with enhanced powers with regard to the handling of complaints, such as the power to call the parties and encourage an amicable resolution of the dispute wherever possible.

Any person who considers themselves aggrieved by the decision of the Commissioner may, within 21 days of the date of the decision, appeal to the Information and Communication Technologies Appeal Tribunal (the "Tribunal") and the appeal will not be heard after the expiry of the period unless the aggrieved person demonstrates sufficient cause for not lodging same within that period.

Once an appeal is lodged, the Tribunal will endeavour to dispose of the appeal within six months of the date upon which the appeal was lodged.

9. Looking Forward

9.1 Upcoming Legal Reforms

The 2023–24 budget proposes certain measures:

- in recognition of the importance of the financial services industry to the country's economy, the announcement of a series of measures to maintain the International Financial Center on par with the highest levels of international standards and best practices, including amendments to the AML/CFT framework and the introduction of a Whistleblowing Act;
- introducing a unique identification number for a company;
- co-ordinating and ensuring implementation of reforms in line with the recommendations of the World Bank;
- continuing the overhaul of the legal framework to converge the domestic and global business regimes;
- introducing the Environmental Act 2024, where the main objective is to repeal the Environment Protection Act and replace it with a modern legislative framework with a view to ensuring better environmental protection, management and conservation; and
- introducing the Merchant Shipping (Liability And Compensation For Oil Pollution Damage) Act 2024, where the main object of the Act is to give the force of law to the International Convention on Civil Liability for Oil Pollution Damage (CLC), the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, and the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, which are maritime treaties dealing with pollution damage caused only by oil tankers that carry oil in bulk as cargo, and to which Mauritius is a party.

MEXICO

Law and Practice

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DLA Piper Mexico, S.C.

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DLA Piper Mexico, S.C. offers full-service business legal counsel to domestic and multinational companies with interests in and operations throughout the region. Its integrated approach to serving clients combines local knowledge with the resources of the DLA Piper global platform. With over 400 lawyers practicing throughout Argentina, Brazil, Chile, Mexico, Peru, and Puerto Rico, in addition to its US-based cross-border attorneys, its teams frequently work with its professionals throughout the LatAm region, the Iberian Peninsula, and around the globe. DLA Piper's global platform of 90+ offices in more than 40 countries enables it to serve all our clients' legal and business needs, whether they are based in Latin America or wish to do business there. For more information, visit Latin America | DLA Piper.

Authors

Kate Brown de Vejar is a partner and global co-chair of international arbitration and US head of international arbitration at DLA Piper, concentrating on international commercial and investor-state arbitration. An Australian- and New York-qualified attorney, resident in Mexico City since 2009, Kate is recognised for her experience handling complex high-profile disputes, notably in the energy and infrastructure sectors. She is a current member of the LCIA Court and President of the LCIA's Latin American and Caribbean Users' Council; a member of ICCA's Governing Board, and chair of ICCA's Initiatives Committee. She currently serves as Senior Vice Chair of the IBA's Arbitration Committee and will take the helm of the committee in 2026.

Gabriela Álvarez Ávila focuses her practice on international arbitration as well as international and investment law. She is experienced in complex and high-stakes transactions related to infrastructure projects, banking, electricity, telecommunications, and oil and gas. Gabriela has represented investors, states, governmental entities and state-owned companies in international arbitrations under numerous arbitration rules, including those of the ICSID, UNCITRAL, ICC, LCIA, and CAM. She has also acted as arbitrator or president of tribunals under the UNCITRAL, ICC, and CAM Rules. Gabriela was designated to the ICSID Panel of Arbitrators by Mexico and has been appointed a member of the ICC Court of Arbitration for Mexico.

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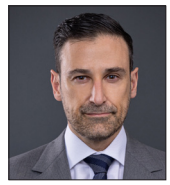
Guillermo Aguayo Garza provides tax advice on cross-border and domestic mergers, acquisitions, and corporate reorganisations. He also advises on tax matters related to all types of financing transactions and securities offerings, in addition to representing clients in tax audits, disputes, and negotiations with tax authorities, as well as advising on customs and foreign trade issues. Guillermo has led or co-led a variety of tax work in numerous sectors, including infrastructure, construction and transport, energy and natural resources, financial services, and technology. Before joining DLA Piper, Guillermo was a partner and practice head in Mexico for a global law firm with a presence in Mexico.



Antonio Cárdenas Arriola concentrates on administrative law, particularly litigation, bringing amparo proceedings and ordinary defence procedures in administrative matters, and acts as counsel in regulatory matters and government relations, with a focus on antitrust, transport, and TMT matters. He has vast experience in litigation and regulatory matters, and his constitutional and administrative litigation practice also includes proceedings relating to the oil and gas, poultry, decorative painting, aeronautical, financial, railway, and food and beverage industries, in which he has spearheaded strategies in the defence of various major companies. He also has experience in advising on anti-corruption and data protection from an administrative contentious regulatory perspective.

Alvaro Garza Galván is the co-managing partner of DLA Piper's Mexico City office. He advises domestic and international clients on a broad spectrum of matters and has a strong track record in mergers and acquisitions, banking and finance, and securities transactions. He offers authoritative advice on a wide variety of complex corporate and finance transactions in both Latin America and Europe.

Daniel González Estrada is a commercial litigation partner who focuses on complex litigation matters, cross-border disputes, class action litigation, tort actions, and related civil liabilities and damages litigation. His experience also includes civil, commercial, and bankruptcy litigation. He has participated in major commercial insolvency proceedings in Mexico, representing creditors before Mexican courts in credits recovery. Daniel's experience also includes enforcement of foreign judgments, arbitration awards, and annulment proceedings of arbitration clauses under Mexican law. He has experience in class actions and liability of internet intermediaries' disputes. He is a member of the Mexican Bar Association College of Lawyers and the International Association of Lawyers.

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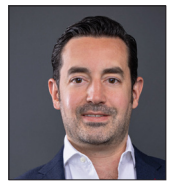
Diego Martínez is co-managing partner of DLA Piper Mexico and focuses on corporate matters, with an emphasis on M&A, corporate finance, and debt restructuring transactions. He has extensive experience in banking and securities financings. Diego represents Mexican and foreign banks and other lenders, counselling on credits and the creation and perfection of Mexican security packages. He is a member of the Mexican Bar Association, College of Lawyers, is the Chairman of the Legal Committee of Best Practices of Corporate Governances of the Entrepreneur Coordination Council (Consejo Coordinador Empresarial), and is a member of the Georgetown University Law Center Committee (CAROLA).

Mauricio Valdespino focuses on M&A, private equity, and corporate and commercial law. He represents buyers, sellers, boards of directors, and financial advisers in complex transactions, including M&A, spinoffs, joint ventures, strategic alliances, minority investments, and asset sales. Mauricio has represented foreign companies and investors in the sale or acquisition of their interests and business assets in Mexico and regularly handles corporate governance, financings, and other related work. He also advises on all aspects of corporate and business law relating to the incorporation, operation, and maintenance of Mexican companies for domestic and foreign clients operating in various sectors and industries within Mexico.



Roberto Ríos Artigas is a project development and finance lawyer with experience advising developers and financial institutions in the energy and infrastructure sectors, while maintaining a broad finance practice. He has participated in the development and financing of a wide range of projects, including toll roads, rail, water, oil and gas, power, and real estate projects. Roberto has represented financial entities, funds, and sponsors in connection with investment in infrastructure projects and in connection with public bidding related to government procurement and public works, concession titles, permits, engineering, procurement and construction contracts, and operation and maintenance contracts.

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DLA Piper Mexico, S.C.

Paseo de los Tamarindos
No 400 A, Piso 31
Bosques de las Lomas
05120 Mexico City
Mexico

Tel: +52 55 5261 1800
Email: dlapiperlatinamerica@us.dlapiper.com
Web: www.dlapiper.com

1. Legal System

1.1 Legal System and Judicial Order

Mexico has a rigid legal system in which codification is the first and main instrument, with the Federal Constitution being the pre-eminent source of law. Mexico is a federal republic, where the federation and the states have specific jurisdiction (*Competencia*) determined by the Federal Constitution.

The Federal Judicial Branch is organised with the Supreme Court of Justice at the top, followed by Circuit Courts, one magistrate court (appeal courts), and district courts (first instance).

The Supreme Court is a constitutional court and the direct interpreter of the Federal Constitution.

The states are organised with an executive, judicial, and legislative branch, each with their respective codes.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

As a rule, the Foreign Investment Law (FIL) allows foreign investors and Mexican companies controlled by foreign investors to do the following without prior approval:

- own up to 100% of the equity of Mexican companies;
- purchase fixed assets from Mexican individuals or entities;
- engage in new activities or produce new products;
- open and operate establishments; and
- expand or relocate existing establishments.

The only exceptions to this general rule are those expressly established in the FIL itself and certain limitations concerning the direct ownership of real estate in the country.

Such exceptions refer to economic activities that are:

- reserved to the Mexican State;

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- reserved to Mexican nationals or Mexican companies without foreign equity participation;
- subject to quantitative foreign investment limitations; and
- subject to prior approval if the foreign investor intends to own more than 49% of a company engaged in port services through vessels engaged in interior navigation, such as towing and mooring, naval companies using vessels exclusively for high-seas traffic, etc (as further explained below).

Activities Reserved to the Mexican State

The FIL reserves certain strategic development areas to the Mexican State. Thus, no private investor may engage in:

- exploration and extraction of petroleum and other hydrocarbons;
- planning and control of the national electricity system or the public service of transmission and distribution of electricity;
- nuclear energy generation;
- activities involving radioactive minerals;
- telegraph services;
- radiotelegraphy;
- mail service;
- the issuance of money;
- the control, supervision and security of ports, airports and heliports; and
- certain other activities expressly indicated under the corresponding legislation.

Activities With Foreign Investment Equity Limitations

The FIL establishes foreign ownership limits in certain companies, activities and types of shares, as set forth below:

- up to 10% in the production of co-operatives;
- up to 49% in the production and sale of explosives, firearms, cartridges, munitions, and fireworks, excluding the purchase and use of explosives for industrial and extractive purposes, and the preparation of explosive mixtures for use in such activities;
- the printing and publication of newspapers for exclusive distribution within Mexico;
- series “T” shares of companies owning agricultural, cattle-raising, and forest lands;
- freshwater and coastal fishing, and fishing in the exclusive economic zone, excluding aquaculture;
- comprehensive port management;
- piloting services for vessels engaged in interior navigation;
- shipping companies that operate commercial vessels for navigation in interior waterways and between domestic ports, excluding tourist ferries and the exploitation of dredges and naval devices for port construction, maintenance, and operation;
- the supply of fuel and lubricants for ships, airplanes, and railroad equipment;
- certain telecommunication services depending on the reciprocity that exists in the country of the ultimate parent of the potential investor; and
- domestic (regular and non-regular) and specialised air transport and air-taxi transport.

These limits may not be exceeded either directly or through any type of agreement or corporate structure or scheme, except through a particular type of shares, called “neutral” shares, which are regulated by the FIL.

Under the FIL, prior approval is required for foreign investors to own more than 49% of a company engaged in any of the following activities:

- port services to vessels engaged in interior navigation, such as towing and mooring;
- naval companies using vessels exclusively for high seas traffic;
- companies authorised to operate public airfields;
- private schools, at the preschool, primary, secondary, preparatory, and higher education levels;
- legal services; and
- the construction, operation, and exploitation of railways and public railroad transportation services.

Some of the limitations identified in this section may be overruled by express provisions in free trade or other commercial treaties entered into by Mexico.

2.2 Procedure and Sanctions in the Event of Non-compliance

Articles 8 and 9 of the FIL provide that prior authorisation from the Foreign Investments Commission must be obtained when foreign investors intend to participate, directly or indirectly, with more than 49% of the shares of a Mexican company whose assets exceed a certain amount determined each year by the Commission. At the time of writing, this amount is approximately MXN22.6 billion.

In order to obtain authorisation from the Commission, an application must be filed. The application mainly consists of a filing explaining the details of the underlying investment, together with responses to a standard questionnaire providing certain information to the Commission with respect to the type of investment to be made in Mexico, and evidence of the benefits for the Mexican economy. Certain support documentation must be enclosed with the application, such as:

- a copy of the foreign investor's annual tax report or the audited financial statements for the previous fiscal year;
- the incorporation documents (such as formation certificate, tax ID) of the foreign investor (in case of legal entities); and
- a copy of the receipt for payment of the filing fees.

After these documents have been filed, the Commission will issue a resolution within four months.

Parties that fail to notify and go on to implement a transaction without obtaining previous authorisation from the Commission are subject to fines ranging from MXN103,740 to MXN518,700 (approximately). In addition, pursuant to Article 37 of the FIL, transactions can be nullified and will not have any legal effects on the parties or third parties.

The Commission construes the obligation of obtaining this authorisation to apply only when foreign investment will participate in an entity for the first time. Thus, if the target company has foreign investment participating in excess of 49%, no authorisation is required for the transfer of such participation to another foreign investor.

On the other hand, if the foreign investor is seeking to acquire real property in a Mexican restricted zone through a trust agreement, approval from the Ministry of Foreign Affairs (*Secretaría de Relaciones Exteriores*) is required for banks to acquire, as trustees, rights to real estate located within the restricted zone – namely the zone within 100km of borders and 50km of the Mexican coast, when the main purpose of the trust is to allow the use and exploitation of such assets without constituting real estate rights over them, and the beneficiaries are (i) Mexican companies

without a foreigner's exclusion clause, and (ii) foreign individuals or foreign legal entities.

Also, all foreign investors and Mexican companies with foreign investment are subject to registration with the National Registry of Foreign Investment (*Registro Nacional de Inversiones Extranjeras* or RNIE). Upon registration with the RNIE, periodic reporting obligations arise, and failure to comply with these obligations may trigger the imposition of fines.

2.3 Commitments Required From Foreign Investors

Upon filing the required authorising documentation with the Commission, the target company must complete an application under which it commits to comply with the following obligations.

- The creation of a training and hiring programme, in which it must indicate the number of employees hired during the first three years of its operation in Mexico, with the following conditions:
  - (a) in this regard, Article 7 of the Mexican Labour Law establishes that at least 90% of employees hired by any entity (understood as Mexican entities or foreign entities with a permanent establishment) should be Mexican;
  - (b) in relation to professional and technical services, as a general rule, the target company shall only employ Mexicans;
  - (c) if, however, there are no Mexican qualified personnel to perform those professional or technical services, the target company may hire foreign employees, as long as the number of foreign employees does not exceed 10% of the company's professional employees.
- Complying with the relevant environmental legal and regulatory frameworks, and filing the applicable environmental licences and/or permits granted by the competent authorities.
- Complying with the Antitrust Law and, in the case of the sale of goods and services, offering fair prices in accordance with the applicable laws and regulations.
- Paying the applicable taxes (ie, income tax for Mexican companies or foreign companies with a permanent establishment in Mexico) to the Mexican tax authorities.

After the target company files the corresponding application containing the above-mentioned commitments, the Commission will either approve or deny the investment.

2.4 Right to Appeal

As a general rule, any entity (understood as natural or legal persons) who is established or located in Mexican territory can challenge any resolution issued by the Mexican authorities that constitutes a legal substantive or formal violation or a human rights violation.

The competent judicial or jurisdictional branch to resolve the dispute can be determined following a case-by-case analysis. The legal remedies which are available for the purposes of challenging denials of authorisations by the Commission are as follows.

Administrative Ordinary Remedies Before Federal Courts

Regarding federal administrative ordinary remedies, the affected party may file an appeal for revocation or an annulment trial, as follows.

- The affected party may decide to challenge the foreign investment denial resolution by filing a *recurso de revocación* (appeal for

revocation). This appeal shall be filed with the hierarchical superior authority of the authority that issued the negative resolution (*resolución materia de impugnación*), which should issue a new resolution that either revokes or declares the validity of such an administrative act within four months.
- Alternatively, the relevant resolution could be challenged before the Administrative Judicial Court of Law (such as the *Tribunal Federal de Justicia Administrativa*) through an annulment trial, as long as the investment denial constitutes any of the violations contained under Article 51 of the Federal Administrative Litigation Procedure Law (*Ley Federal de Procedimiento Contencioso Administrativo*).

Constitutional Appeal (Amparo) Procedure

If the investment denial resolution violated human rights/constitutional guarantees under the Mexican Constitution, the affected party can file a constitutional appeal (*amparo*) before the competent Collegiate Circuit Courts (*Tribunales Colegiados de Circuito*). The affected party can file the following extraordinary remedies.

- *Amparo directo* – this constitutional appeal may only be filed after the affected party has challenged the resolution by administrative ordinary remedies (*principio de definitividad*) and the resolution issued by the *Tribunal Federal de Justicia Adminsitrativa* still constitutes a human rights/constitutional guarantee violation.
- *Amparo indirecto* – the affected party may decide to either directly file this constitutional appeal or challenge the decision before the federal courts through an administrative ordinary remedy. However, if human rights/constitutional guarantees were violated, the relevant grounds for challenge will first be through *amparo indirecto*.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

In Mexico, the General Law on Commercial Companies (*Ley General de Sociedades Mercantiles* – GLCC) provides for several types of structures that may be adopted by a company. However, the main – and most commonly used – forms are:

- *Sociedad Anónima* (S.A.), which is a stock corporation;
- *Sociedad de Responsabilidad Limitada* (S. de R.L.), which is a limited liability company; and
- *Sociedad Anónima Promotora de Inversión* (S.A.P.I.), which is an investment promotion stock corporation regulated by the Securities Market Law (*Ley del Mercado de Valores*) and also by the GLCC (only with respect to matters not expressly regulated by the Securities Market Law).

Pursuant to the GLCC, each of the foregoing must be incorporated by at least two individuals or entities, each of whom/which must subscribe at least one share/partnership interest.

In addition, pursuant to the GLCC, each of the above-mentioned forms of companies may adopt the variable capital form, whose amount may be unlimited. Generally, adopting such modality will allow companies to increase and decrease their variable portion of the capital stock through an ordinary shareholders' or partners' meeting, as applicable, in which case an amendment to the by-laws would not be required.

As a general formality, the incorporation of a company is formalised by appearing before a Mexican notary public who attests to the incorporation (as briefly described in **3.2 Incorporation Process**). Pursuant to the GLCC, for each of

the above-mentioned forms of companies, the liability of the shareholders/partners and management are generally as follows.

- *Sociedad Anónima* (S.A.) – the shareholders' liability is limited to their shares or capital contribution. The management is entrusted to a sole administrator or a board of directors. The surveillance of the stock company is entrusted to an auditor or a surveillance committee, which will supervise the operations of the company.
- *Sociedad de Responsabilidad Limitada* (S. de R.L.) – the partners' liability is limited to the payment of their respective equity contributions. The management is entrusted to a sole manager or a board of managers, and in this form of company there is no legal requirement to appoint an auditor/surveillance committee.
- *Sociedad Anónima Promotora de la Inversión* (S.A.P.I.) – the shareholders' liability is limited to their shares or capital contribution; the management is entrusted to a board of directors and the surveillance to an auditor or a surveillance committee, which will supervise the operations of the company.

Together with the S.A., the S.A.P.I. is widely used as a vehicle to invest in Mexico because of its flexibility in corporate governance.

3.2 Incorporation Process

The main steps regarding the incorporation process of a company (the "NewCo") are as follows:

- requesting authorisation from the Ministry of Economy (*Secretaría de Economía*) to use the corporate name;
- choosing the type of entity (eg, S.A., S. de R.L., S.A.P.I.);
- preparing the bylaws of the NewCo, which include the following:
  - (a) the duration of the NewCo;
  - (b) the corporate domicile;
  - (c) the total capital stock/equity interest issued and paid;
  - (d) the corporate purpose;
  - (e) the appointment of the sole director/manager or a board of directors/managers;
  - (f) the appointment of the auditor/surveillance committee; and
  - (g) the overall corporate governance of the NewCo;
- identifying and requesting information in connection with the ultimate beneficial owner (*beneficiario controlador*, as defined in the Mexican Federal Tax Code) of the legal entity;
- obtaining the RFC (tax ID) for the NewCo;
- registering the NewCo in the RNIE, if applicable; and
- obtaining additional permits and registrations – a variety of post-incorporation registrations, authorisations, and permits may be needed depending on the nature of the activities to be performed by the NewCo, including registration with the Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social*), the Institute of the National Housing Fund for Workers (*Instituto del Fondo Nacional de la Vivienda para los Trabajadores*), and Local Payroll Taxpayers' Registries (*Padrones Estatales de Impuesto sobre la Nómina*).

Once the notary public has all the information requested (eg, KYC information), it could take roughly one to three weeks for the incorporation deed to be issued and recorded in the Public Registry of Commerce by the notary public.

3.3 Ongoing Reporting and Disclosure Obligations

As provided for in the GLCC, companies must hold an annual shareholders' or partners' meeting; for the SA and SAPI specifically, such annual

meeting should take place within four months following the end of each fiscal year (ie, from January through April of each year).

Likewise, as provided in the GLCC, the board of directors shall submit an annual report to the shareholders' meeting on the operations and the accounting policies observed by the NewCo and include financial statements at the end of each fiscal year.

Companies that have foreign investment need to be registered with the RNIE and comply with the annual economic report and quarterly report filings, if applicable.

From a tax perspective, non-resident shareholders of a Mexican resident company may use a generic tax identification number for purposes of shareholder registry records. In this case, the company must file the list of non-resident partners or shareholders who choose not to register before the Mexican Taxpayers Registry (RFC), within the first three months immediately following the close of each fiscal year.

Pursuant to the provisions of the Federal Fiscal Code (FFC) and the Miscellaneous Tax Ruling for 2024, when incorporating the NewCo, the identification of the controlling parties (as provided in Article 32 B quarter of the FFC) of the shareholders/partners of the NewCo is mandatory. In most of the corresponding cases, the person in charge of applying this rule will be the notary public, who will assist those who wish to incorporate a Mexican legal entity.

3.4 Management Structures

As a supreme body, the shareholders' or partners' meeting is empowered to elect, re-elect, and remove the sole director/manager or the board of directors/managers, as applicable. While management of an S.A. and an S. de R.L. may be entrusted to either a sole administrator or a board of directors, whose members may or may not be shareholders/partners of the company, management of a S.A.P.I. shall always be entrusted to a board of directors.

The sole director/board of directors may establish committees to support and aid the board in its various duties (eg, audit committee, compensation committee).

3.5 Directors', Officers' and Shareholders' Liability

In general terms, directors are bound to follow and implement the instructions received from the shareholders' or partners' meeting, and to comply with the duties imposed on them under the applicable law and the by-laws of the company. Directors have a general duty to perform their activities prudently and with the same care they would ordinarily take in their personal affairs. Any director who, in any given matter, has a conflict of interest in relation to the company must disclose the nature of the conflict to the other directors and refrain from participating in any resolution in connection therewith.

In addition, directors have confidentiality obligations with respect to non-public information of the company.

Regarding the corporate veil, any legal entity recognised by Mexican law has a different and independent legal personality and capacity, assets, and liabilities from those of its shareholders/partners or holding entity. However, a few judicial precedents suggest that the corporate veil might be pierced under certain specific circumstances.

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DLA Piper Mexico, S.C.

4. Employment Law

4.1 Nature of Applicable Regulations

The rules governing the employment relationship are enshrined in law, collective bargaining agreements and employment agreements.

4.2 Characteristics of Employment Contracts

Under the Mexican legal framework, an employment relationship can be established without the need for an employment contract, generating the same effects and consequences. An employment relationship can be established when there is a relationship of superordination and subordination, and when there is remuneration. An employment contract is a contract whereby a person agrees to work for another person in a subordinated manner, in return for remuneration.

Working conditions should be in writing, and the document should contain the following details, among others:

- the name, nationality, age, sex, marital status, Unique Code of Population Registration (CURP), RFC, and address of the employee and employer;
- whether the employment relationship is for specific work, a fixed period, a seasonal period, initial training, or an undetermined period and, if that is the case, whether the employment is subject to a trial period;
- the services that must be rendered;
- the place or places where the work should be provided;
- the duration of the working session (*jornada de trabajo*);
- the day and place of payment of salary; and
- other working conditions such as rest days, vacations, and any other condition stipulated by the employer and the employee.

It is important to emphasise that the lack of a written document containing the above-mentioned working conditions will not deprive the employees of the rights arising from the labour laws and the services rendered to the employer. In any case, the employer will be considered responsible for the lack of a written document.

An employment relationship may be for specific work, a fixed period, a seasonal period, or an undetermined period. It may also be subject to a trial period or initial training.

4.3 Working Time

The Federal Labour Law regulates working sessions (*jornada de trabajo*) of eight hours per day maximum, with the following stipulations:

- eight hours maximum for a daytime working session;
- seven hours maximum for a night-time working session; and
- seven-and-a-half hours maximum for a mixed working session.

It is important to note, however, that the law also contemplates the payment of a salary per worked hour.

Overtime hours should be paid at double the regular hourly rate of the working period.

4.4 Termination of Employment Contracts

The Federal Labour Law stipulates the following causes for the termination of an employment relationship:

- mutual consent of the employer and employee;
- death of the employee;

- termination of the specific work or expiry of the fixed period of work;
- physical or mental incapacity, or inability to render the required services;
- a force majeure or fortuitous event that is not attributed to the employer;
- inability to pay for the work;
- the depletion of the natural resource in the case of extractive industries; and
- bankruptcy and insolvency.

The employer or the employee may terminate the employment relationship at any time without responsibility only under the specific circumstances mandated by the Federal Labour Law. In this case, the employer shall pay the corresponding indemnification to the terminated employee.

- If the employment relationship is for a fixed period and less than a year, an amount equivalent to the salaries of half of the period of the services rendered to the employer is paid. If the employment relationship exceeds a year, an amount equivalent to the salaries of six months for the first year and 20 days for each of the following years in which the services were rendered to the employer is paid.
- If the employment relationship is for an undetermined period of time, the indemnification shall be for an amount equivalent to 20 days of salary for each year of service.
- In addition to the aforementioned indemnifications, the employee may request, before the conciliatory authority or tribunal, an indemnification for the amount of three months' salary.

If the employer terminates the employment relationship outside any of the specific circumstances contemplated by the Federal Labour Law, the employer must also pay outstanding salaries after the date of the termination, for up to a maximum period of 12 months.

The Federal Labour Law refers to collective redundancies as a consequence of the closing of businesses or the definitive reduction of a workforce. Pursuant to Article 434 of the Federal Labour Law, collective redundancies may occur in the event of a force majeure or fortuitous event that is not attributed to the employer, inability to pay, the depletion of the natural resource in the case of extractive industries, and bankruptcy and insolvency. In these cases, employees are entitled to receive an indemnification of three months' salary and the seniority premium.

4.5 Employee Representations

Employers are not obliged to consult employees regarding the organisation of the company, business model, etc. Nonetheless, employees must be informed of relevant decisions that may affect their job conditions, etc.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Income Tax

Individuals receiving income in the context of an employment relationship are subject to income tax at progressive rates that range from 0% to 35%.

Employers are required to withhold the corresponding tax from salary payments and remit it to the Mexican tax authority on a monthly basis.

Social Security Quotas

Employers and employees are required to make contributions to the social security system.

To that effect, employers must withhold the applicable quotas from salaries and remit such quotas to the Mexican Social Security Institute (IMSS) and the Institute of the National Fund for Workers' Housing (INFONAVIT).

These contributions are determined based on specific percentages applicable to items of social security coverage (ie, labour risks, maternity and illnesses, life and disability, retirement and severance due to old age, childcare and social benefits, and contributions to INFONAVIT) and daily salary amounts, which are subject to caps.

Local Payroll Taxes

Employers making payments to individuals under an employment relationship are obliged to pay a local payroll tax to the state in which the employment relationship occurs or labour is performed. Such tax is determined by the total salaries paid by the employer in the respective state. Payroll tax rates vary from 0.5% to 3%, depending on each state.

5.2 Taxes Applicable to Businesses

Mexican resident companies are required to pay a federal income tax on worldwide income, regardless of the location of its source. The current corporate income tax rate is 30%. There are no local or municipal income taxes.

Income tax is determined by applying the corporate tax rate to the company's tax result. The tax result is determined by subtracting the authorised deductions from all items of taxable income.

To be deemed as deductible, expenses must satisfy general substantive and formal requirements (ie, being "strictly indispensable" for the business activity of the taxpayer) and specific requirements based on the nature of each expense.

Authorised deductions include returns, discounts and rebates on sales, the cost of goods sold, expenses and capital expenditures (ie, depreciation or amortisation of fixed assets, deferred expenses, and deferred charges), among others.

Non-resident companies are required to pay income tax in Mexico on all income that is attributable to a permanent establishment located in Mexico or on all income obtained from Mexican source of wealth.

In general, Mexican source income obtained by non-Mexican tax residents is subject to withholding tax. In the absence of tax treaty provisions, the following withholding tax rates apply:

- dividends –10%;
- interest – 4.9%, 10%, 21%, 35% or exempted, depending on the personal characteristics of the recipient of the interest or of the payer of the interest as well as the characteristics of the loan or instrument generating the interest;
- capital gains – 25% on gross income or 35% on net gains;
- salaries:
  - (a) exempted for up to MXN125,900;
  - (b) 15% for up to MXN1 million; and
  - (c) 30% for more than MXN1 million;
- independent personal services – 25%;
- directors' fees – 25%;
- rental income – 25%; and
- royalties:
  - (a) 1% for the right to use certain aircraft;
  - (b) 5% for the right to use certain railroad cars and vessels;
  - (c) 25% for the right to use other goods and technical goods; and

(d) 35% for the right to use patents, trade marks, commercial names and others.

The income tax must be paid on an annual basis; however, taxpayers are obliged to submit monthly advanced income tax returns and payments, which are calculated based on the current year's revenues multiplied by a "profit factor" determined by the prior year's figures (taxable income/total revenues).

Once a corporation has paid the income tax, after-tax earnings may be distributed to the shareholders with no additional tax charge at the corporate level. However, if the distribution is made in favour of an individual or a non-Mexican tax resident, the payment will be subject to an additional 10% dividend tax, which must be withheld by the distributing company.

Net operating losses may be carried forward for a period of ten years. No carry-back is allowed.

On 1 January 2024, the Multilateral Instrument (MLI) developed by the Organisation for Economic Co-operation and Development (OECD) entered into force in Mexico, affecting the tax treaties entered with jurisdictions that have mutually covered the tax agreements and already have ratified and deposited the MLI.

On the other hand, as of the date writing, Mexico has not implemented nor introduced in its legislation the Pillar Two recommendations issued by the OECD or any other Global Anti-base Erosion Rules (GloBE).

Value-Added Tax (VAT)

Mexican VAT is a consumption tax that is applied to the importation of goods, the sale of goods, the rendering of independent services and the use of goods. The general VAT rate is currently set at 16%.

VAT is meant to pass along each phase of any good's production process. Thus, taxpayers will, in general terms, be entitled to credit the input VAT against the output VAT. VAT-favourable balances or VAT due must be submitted to the tax authority on a monthly basis by filing a VAT return. VAT-favourable balances may be requested in a refund or may be credited against future VAT collections.

Special Tax on Goods and Services

This excise tax sets forth a specific tax rate per each type of good, comprising the production, sale or import of goods, including tobacco, alcoholic beverages, certain fuels, pesticides, and food with high caloric content.

5.3 Available Tax Credits/Incentives

Incentives and tax credits are as follows.

- Northern Border Region incentive – taxpayers carrying out business activities in the Northern Border Region may apply an income tax credit equal to one third of their tax liability and a 50% VAT reduction to activities carried out within the border. This incentive is effective until 2024.
- Tax credits for contributions to certain projects – subject to specific limitations and requirements, taxpayers may obtain an income tax credit for contributions to investment projects related to movie production, theatrical productions, the publication of literary works, research and development, and investments in equipment for the supply of power to electric vehicles in public places.
- 100% deduction in investment in machinery and equipment for the production of energy from renewable resources.

- Exemption for capital gains realised by residents of countries that have entered into a tax treaty with Mexico on certain sales of shares and other equity instruments in the Mexican stock market.
- Isthmus of Tehuantepec incentive – taxpayers who obtain income from productive economic activities carried out within the Development Poles for Welfare (PBD) may obtain a tax credit equivalent to 100% of the income tax during their first three fiscal years of operations, a tax credit of 50% in the three subsequent years, and a 100% VAT credit for the payable VAT derived from its operations within the PDB.

5.4 Tax Consolidation

There is an optional income tax consolidation regime that allows a partial consolidation of income of corporate groups. However, due to its restrictions and limitations, most companies in Mexico do not elect to file consolidated tax returns.

5.5 Thin Capitalisation Rules and Other Limitations

There is a three-to-one debt-equity ratio limitation on the deduction of interest deriving from intercompany loans. Interest that exceeds such ratio is non-deductible.

In line with BEPS Action 4 (Limiting Base Erosion Involving Interest Deductions and Other Financial Payments), a fixed ratio rule applies in Mexico, limiting a company's net interest expense deduction to 30% of the company's EBITDA. Interest that is non-deductible pursuant to this rule may be carried forward for ten years. A de minimis rule applies under which this limitation is applicable only to annual net interest exceeding MXN20 million.

5.6 Transfer Pricing

As an OECD member, Mexico has adopted transfer pricing legislation recognising the arm's length principle. In general, Mexico has been an active adopter of the OECD's transfer pricing standards as set forth in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations and in BEPS Action 13 (Transfer Pricing Documentation and Country-by-Country Reporting).

5.7 Anti-evasion Rules

General Anti-avoidance Rule

The Mexican Federal Tax Code contains a general anti-avoidance rule, which sets forth a business purpose test as a standard to be applied by tax authorities in the tax review of transactions that generate tax benefits. Under this rule, tax authorities may recharacterise transactions that lack a business reason or may disregard such a transaction if they consider that it does not have real economic substance.

Mandatory Disclosure Requirements

Taxpayers and tax advisers are obliged to disclose certain transactions to tax authorities if they generate a tax benefit in Mexico and meet any of the hallmarks listed in the Federal Tax Code. The mandatory disclosure requirements are based on the European Union's DAC6, with significant differences.

6. Competition Law

6.1 Merger Control Notification

In Mexico, the Federal Competition Law (FCL) sets forth that a *Concentración* is a merger, acquisition of control, or any act by virtue of which companies, associations (JVs), shares, trusts, or assets in general are made between

competitors, suppliers, customers, or any other economic agent.

When certain parameters are reached, and before a merger is fully executed, the Antitrust Commission must approve the operation.

Pursuant to the FCL, the approval of the Antitrust Commission is required in the following scenarios:

- when the amount of the *Concentración* exceeds the threshold of 18 million times the UMA (Standard Unit of Measure);
- when the *Concentración* results in the accumulation of 35% of the shares or assets of an economic agent whose sales exceed 18 million times the UMA; and
- when the *Concentración* exceeds the amount of assets or shareholder equity by 8.4 million times the UMA, in the event of the annual sales of the economic agents being over the threshold of 48 million times the UMA.

6.2 Merger Control Procedure

The parties must file a petition with the Antitrust Commission, which must review the relevant market to rule out a possible anti-competitive effect. The Commission can request any information from the filing parties or even third parties regarding the *Concentración*. When all the information is rendered to the satisfaction of the Antitrust Commission, a ruling is approved with certain conditions, or a denial of the *Concentración* is rendered within 60 working days.

Once a *Concentración* is approved, the ruling will be valid for a period of six months, which can be extended once for the same duration.

6.3 Cartels

The FCL sets forth that any agreement between competitors is forbidden (competitors' agreement) and will be punished. The specific conducts covered are:

- fixing, raising, arranging, or manipulating the sale or purchase price of goods or services at which they are offered or demanded in the markets;
- establishing the obligation not to produce, process, distribute, market, or acquire, but only for a restricted or limited quantity of goods, or the provision or transaction of a restricted or limited number, volume, or frequency of services;
- dividing, distributing, allocating, or imposing portions or segments of a current or potential market of goods and services, through customers, suppliers, specific times, or spaces;
- establishing, agreeing, or co-ordinating positions or abstentions in tenders, contests, or auctions; and
- exchanging information with any of the objects or effects regarding the above-mentioned conducts.

It is important to point out that the legal framework sets forth that an anti-competitive agreement must be deemed unlawful per se. Thus, there is no room for an interpretation in favour of pro-competitive effects around an anti-competitive agreement (rule of reason).

The sanction for carrying out a competitor's agreement could be a fine of up to 10% of gross revenue in the specific year, or criminal and administrative sanctions for the individuals who committed or were instrumental to the competitor's agreement.

Contributed by: Kate Brown de Vejar, Gabriela Álvarez Ávila, Guillermo Aguayo Garza, Antonio Cárdenas Arriola, Alvaro Garza Galván, Daniel González Estrada, Diego Martínez, Roberto Ríos Artigas and Mauricio Valdespino,
DLA Piper Mexico, S.C.

6.4 Abuse of Dominant Position

Under the FCL framework, there will be an abuse of dominant position involving an economic agent with substantial market power (as determined on a case-by-case basis by the Antitrust Commission) in the event of:

- unilateral pricing or market segmentation;
- vertical restrictions on pricing for distributors or producers;
- an unlawfully conditional sale;
- tied sales;
- a unilateral refusal to sell to a specific person;
- boycotting;
- an abuse of the market power to sell services or goods under the average cost of production;
- the use of an economic position to offer a specific price to buyers in order to compel them to buy from another competitor;
- crossed subsidies;
- a price differentiation for two buyers under equivalent conditions;
- unilaterally or jointly raising the productive process to affect other competitors;
- unilaterally or jointly restricting access to an essential facility; and
- a narrowing of margins.

It is important to differentiate from the cartel or competitors' agreement where the sanctioning does not take possible efficiencies into consideration; in a case of abuse of market power, in order to avoid sanctions, the economic agent bears the burden of proof to show that its conduct provides efficiencies to the relevant market.

7. Intellectual Property

7.1 Patents

A patent confers on the patentee an exclusive right to use an invention and is granted for a non-renewable period of 20 years. The application for registration of a patent should be filed with the Mexican Institute of Industrial Property (IMPI), which will carry out an initial examination of the formal requirements of the application and will publish the application in the Official Gazette if it is approved and the corresponding fees are paid.

For a period of two months after the application is published, the IMPI may receive observations from any person regarding the compliance of the application with the requirements established in the law. Once the application is published, the IMPI will initiate a revision of the merits of the application, considering, if necessary, the information received as a result of the publication of the application.

Where there is no impediment, the IMPI will grant the patent to the patentee, which will be subject to the payment of the corresponding fees. Once granted, the patent will be published in the Official Gazette. The IMPI may initiate a Procedure of Administrative Declaration ex officio or upon the request of a party and impose sanctions. The Federal Tribunals will have jurisdiction over civil, commercial, or criminal controversies, without prejudice to the right of the parties to agree to an arbitration procedure.

7.2 Trade Marks

Trade mark holders are given the exclusive right to affix the trade-marked sign to the goods and offer them for sale or during trade. The registration will be valid for ten years and can be renewed for the same duration. To obtain the

registration, an application should be filed with the IMPI alongside the payment of the corresponding fees.

The IMPI will publish the application in the Official Gazette and grant a period of one month to receive observations or comments from any person regarding the application. When the deadline for observations and comments expires, the IMPI will analyse the merits of the application and grant a period of two months to the petitioner to state its position. Once the proceeding is concluded, the IMPI will issue a resolution granting or denying the trade mark. The resolution should be published in the Official Gazette.

The IMPI may initiate a "Procedure of Administrative Declaration" ex officio or upon the request of a party and impose sanctions. The Federal Tribunals will have authority over civil, commercial, or criminal controversies, without prejudice to the right of the parties to agree to an arbitration procedure.

7.3 Industrial Design

The holder of the registration of an industrial design has a temporary exclusive right to use the industrial design. The registration is valid for five years and renewable for up to 25 years.

The application for registration of an industrial design should be filed with the IMPI, which will carry out an initial examination of the formal requirements of the application and publish it in the Official Gazette if the application is approved and the corresponding fees are paid. Once the application is published, the IMPI will initiate a revision of the merits of the application. Where there is no impediment, the IMPI will grant the registration of the industrial design; once granted, it will be published in the Official Gazette.

The IMPI may initiate a "Procedure of Administrative Declaration" ex officio or upon the request of a party and impose sanctions. The Federal Tribunals will have authority over civil, commercial, or criminal controversies, without prejudice to the right of the parties to agree to an arbitration procedure.

7.4 Copyright

A copyright grants the author of a literary, artistic, or scientific work exclusive moral and economic rights over the work. The economic rights over the work will be valid during the author's life and for 100 years after the author's death and 100 years after being published. Moral rights are granted to the author in perpetuity.

The application for registration should be filed with the National Institute of Copyrights (INDAUTOR), which is in charge of the Public Registry of Copyrights. The INDAUTOR will determine the resolution of the application within 15 days. The inscription in the Registry is only declaratory and not constitutive of rights. Once the inscription is made, the applicant will have 30 days to request the corresponding certificate.

The INDAUTOR oversees the enforcement of copyrights. Federal Tribunals will have authority over copyrights; however, when controversies arise between private parties, they may choose State Tribunals or an arbitration procedure to solve the controversy. When the controversy relates to an official communication or act of the INDAUTOR, the Federal Tribunal of Administrative Justice will have authority.

7.5 Others

IP rights over software are protected by the Federal Law of Copyright under the same terms as for literary works. Unless otherwise agreed, economic rights over computer software belong

to the employer when the software is created by one or several employees in the performance of their functions or following the instructions of the employer. The holder of the economic rights of the software may, among others, authorise or prohibit:

- its permanent or provisional reproduction;
- translation, adaptation, or modification of the program;
- any form of distribution; and
- the public communication of the program.

Databases that constitute intellectual creations are protected by the Federal Law of Copyright under the same terms as compilations; such protection does not extend to the data and materials contained in the database. However, databases that do not constitute original work are protected in their exclusive use for a period of five years. The holder of economic rights over the database may, among others, authorise or prohibit:

- its permanent or provisional reproduction;
- translation, adaptation, or modification of the program;
- any form of distribution; and
- the public communication of the program.

Trade secrets are protected by the Federal Law for the Protection of Industrial Property. The person in control of the trade secret may convey the trade secret or authorise the use of it. The authorised person is obliged to maintain the confidentiality of the trade secret. A person or entity that obtains information containing a trade secret by any immoral or unlawful means will be held accountable.

8. Data Protection

8.1 Applicable Regulations

Article 6, Section A, Subsection II of the Constitution of Mexico recognises data privacy as a human right and protects all information that relates to a person's private life and personal data through the laws of Mexico.

Likewise, in Article 16, paragraph 2, the Constitution establishes that "every person has the right to the protection of their personal data, the access, rectification and cancellation of such data, and to express their opposition, in the terms established by law, which will establish the exceptions to the principles that govern the data processing, for reasons of national security, public order, public safety and health or to protect the rights of third parties".

However, the laws that regulate data privacy specifically are recent. Data protection is mainly regulated through two federal laws.

- First, the Federal Law for the Protection of Personal Data in possession of Private Parties (FLPPDPP) was issued in 2010. Article 5 of the FLPPDPP establishes that, in the absence of an express provision in the FLPPDPP, the Federal Code of Civil Procedures and the Federal Law of Administrative Procedures will be applied; for issues related to procedures for the protection of rights, verification, and the imposition of sanctions, the provisions contained in the Federal Law of Administrative Procedures will be applied.
- Second, the Federal Law for the Protection of Personal Data in possession of Regulated Entities (FLPPDRE) was issued in 2017. Article 9 of the FLPPDRE establishes that, "in the absence of an express provision in this law, the Federal Code of Civil Procedures and the

Federal Law of Administrative Procedures will be applied".

Mexico considers that the right to the protection of personal data includes the right of the owner of such data to access, rectify, cancel, and oppose their data. These are known as the ARCO rights.

- access refers to an individual's right to receive details about the handling of their data;
- rectification can be used if the data is inappropriate, and the owner has the right to request its correction;
- cancellation will apply when data is not being lawfully processed, and the owner will have the right to request the deletion of the information; and
- opposition refers to the user's right to object to the processing of their personal information.

8.2 Geographical Scope

The FLPPDRE only applies to Mexican regulated entities; as such, its purpose is to establish the basis and procedures for granting the right of protection of personal data in Mexico. A foreign company targeting customers in Mexico would not have to abide by this law. However, an international company that has business in Mexico and provides information to a Mexican regulated entity must comply with the FLPPDRE.

The FLPPDPP, conversely, and according to its rules of procedure, will apply to any company that:

- is in Mexico;
- processes information by software that works on behalf of a data processor located in Mexico; or
- uses means of processing located in Mexico.

Thus, any company that falls within the three above-described categories will have to abide by the FLPPDPP and will have to grant the right of protection of personal data in accordance with the ARCO rights.

8.3 Role and Authority of the Data Protection Agency

The National Institute for Transparency, Access to Information and Personal Data Protection (the INAI) is the autonomous constitutional agency that guarantees access to public information and the protection of personal data.

In relation to access to public information, the INAI guarantees that any federal authority, autonomous body, political party, trust, public fund or union, or any person who receives public resources or performs as an authority, delivers the public information to anyone who requests it. It also guarantees the proper use of personal data and the exercise and protection of the ARCO rights that anyone has in relation to their information.

The role and authority of the INAI is set forth in Chapter VI, Section I of the FLPPDPP.

Article 38 of the FLPPDPP provides that the INAI has the purpose of disseminating knowledge of the right of protection of personal data in Mexico, promoting its exercise, and monitoring the compliance of provisions set forth in the FLPPDPP and those that derive from it – particularly those related to the fulfilment of obligations by the entities regulated by this law.

Furthermore, Title 8 Chapter I of the FLPPDRE establishes the way in which the INAI should be organised, and the laws that regulate it. It provides that, "the integration, appointment procedure and operation of the Institute [the INAI] and

the Council shall be in accordance with the General Law of Transparency and Access to Public Information, the Federal Law of Transparency and Access to Public Information and any other applicable regulations".

9. Looking Forward

9.1 Upcoming Legal Reforms

Mexico will change its Presidency and Congress in 2024; however, none of the presidential candidates have included tax reform in their campaign proposals. In this regard, while tax-related legal reform is possible, important reforms are unlikely in 2024.

Trends and Developments

Contributed by:
Gloria Niembro, Arturo Revilla and Paulina Luis Castillo
Chevez, Ruiz Zumarripa

Chevez, Ruiz Zumarripa is a globally recognised, multidisciplinary law firm based in Mexico, with offices in Mexico City, Monterrey, and Querétaro, as well as in Madrid and Houston. The IP team has successfully supported companies in various endeavours, including enforcing their brands and content against infringement, licensing and exploiting their artworks and trade marks, handling disputes of intangible assets and auditing portfolios and participating in M&A deals. The IP practice has also advised clients in connection with the legal implications of digital worlds, negotiations with collective management organisations for copyright, transactions involving tax and regulatory issues with an important IP component. For example, the team has successfully assisted clients with trade mark research and registration, transactional matters involving IP, issuance of professional opinions regarding their work plans and trending topics, among many others.

Authors

Gloria Niembro has been a partner at Chevez since January 2023. Under her leadership, she has successfully built and steered a robust team capable of handling diverse intellectual property cases, encompassing prosecution, litigation, consulting services, contractual, and transactional matters. Gloria has handled several ground-breaking cases, and has been ranked by important publications, including Chambers. She is an active member of INTA, IBA and ABA, and a board member of the Mexican IP Association, AMPPI. Gloria holds an LLM from Cardozo School of Law and is admitted to practice law in New York.

Arturo Revilla graduated from an LLM programme in Germany focused on IP and privacy law and has several years of experience in the field. Before joining Chevez, he practiced in several top-tier, full-service and boutique law firms. He has handled both trade mark prosecution and litigation cases for transnational companies, across various industries. Arturo has successfully advised clients in the enforcement of their intangible rights, by prevailing in legal actions and seizing infringing goods. Likewise, he has thorough experience counselling clients regarding data protection law compliance and M&A and transactional work involving intangible assets.

Paulina Luis Castillo graduated from an LLM programme in Scotland in Intellectual Property and the Digital Economy. She also holds a Diploma in Intellectual Property from the Instituto Tecnológico Autonómo de México (ITAM). Before joining Chevez, she practiced IP in several top-tier, full-service and boutique law firms. She has handled complex trade mark prosecution cases for transnational companies. In addition, she has solid experience with non-traditional trade marks.

Chevez Ruiz Zamarripa

Vasco de Quiroga 2121
4° Piso,
Peña Blanca Santa Fe
C.P 01210
Mexico

Tel: + 52 55 5257 7000
Email: gniembro@chevez.com.mx
Web: www.chevez.com

Chevez
Ruiz
Zamarripa

Contributed by: Gloria Niembro, Arturo Revilla and Paulina Luis Castillo, **Chevez, Ruiz Zumarripa**

New technologies in Mexico – IP Overview

Introduction

In recent years, Mexico has emerged as a vibrant hub for technological innovation, witnessing cutting-edge advancements that are reshaping numerous sectors of its economy. From groundbreaking gadgets to innovative software solutions, the Mexican tech landscape is vibrant with creativity and potential.

Nevertheless, amidst this rapid technological evolution, the slow legislative process in Mexico has led to a lack of clear regulatory framework governing these innovations to date.

This article serves as an update to our publication from last year, offering new insights and perspectives for businesses interested in innovating or investing in new technologies in Mexico so they are aware of the latest IP trends in the jurisdiction. We will discuss the current efforts to regulate technological tools and examine how the associated issues are currently being addressed in the IP field.

Legislative breakthroughs in Mexico

In Mexico, a wave of legislative initiatives focusing on AI has emerged since mid-2023 and early this year. These initiatives encompass diverse sectors and aim to outline and integrate AI within specific contexts.

For example, in the public health sector, an ongoing initiative seeks to regulate AI's application in the medical industry, prioritising transparency, users' rights protection, and data privacy. Additionally, proposals to amend the Federal Penal Code address concerns like AI-generated content, such as child pornography and deep fakes. Efforts are also underway to refine and update copyright laws for AI-generated works, with delineations in certain sectors while safeguarding intellectual property rights ("IP rights").

There are also two pivotal initiatives centred on establishing governmental oversight bodies. The first proposes the creation of the Mexican Agency for the Development of Artificial Intelligence, entrusted with formulating a National Strategy on AI and advocating for national interests. The second advocates for regulation through official Mexican standards (a form of specific regulations) and proposes the creation of the Mexican Council of Ethics for Artificial Intelligence and Robotics, comprising multidisciplinary experts, to ensure adherence to governmental standards and ethical protocols.

Another noteworthy proposal is the Federal Law that Regulates Artificial Intelligence, currently under review by the Congress, which addresses AI systems' development, commercialisation, and consumer rights, drawing inspiration from the European Union's recently approved AI legislation. It categorises AI systems based on risk levels and introduces consumer notification requirements for AI interactions.

In terms of IP, there is an initiative that provides that any work made using artificial intelligence must be declared as such to the National Copyright Institute (INDAUTOR) when registration is sought. It also points out that AIs will only be able to train their language models with databases authorised by the owner of the IP rights. Unlike previous initiatives, this one designates the existing Federal Telecommunications Institute as the authority for deciding AI matters, suggesting the formation of a National Artificial Intelligence Commission inside such federal authority.

However, as finalised legislation is still being discussed by the Congress, stakeholders are encouraged to adhere to existing Mexican regulatory frameworks to resolve any disputes that may arise from the use of AI or any other technological tool. Therefore, in the following sections, we will analyse the guidelines that government entities such as the Mexican Intellectual Property Office (IMPI) and INDAUTOR, aligning with current legislation and international standards, have adopted to foster a favourable environment for businesses that develop and/or use AI and other ground-breaking technological tools in their operations.

Generative AI tools

AI tools have transcended mere replication of existing things, enabling the creation of content that blurs the line between reality and simulation, often mimicking human-like qualities. Among the most impressive achievements in this area is the development of generative algorithms capable of producing lifelike images and videos. Models such as BigGAN and StyleGAN have propelled image generation to unprecedented levels, crafting photographic portraits of fictional individuals and breathtaking landscapes seemingly plucked from the depths of imagination. Also, algorithms equipped with natural language processing capabilities have gained increasing favour among scholars and professionals, allowing them to generate written content in a matter of seconds.

While these tools can undoubtedly benefit businesses in terms of time and cost savings, the absence of regulation and the dilemma of copyright ownership paradigms around them may jeopardise or even cause them to face economic and legal problems.

The foregoing because generative AI algorithms typically draw content from extensive datasets of pre-existing content, raising concerns about potential copyright infringement. Instances have arisen where AI-generated content closely resembles existing works, precipitating disputes over ownership and originality. Furthermore, the ease with which AI replicates existing designs may cause apprehensions regarding the safeguarding of industrial designs and trade secrets. Additionally, the capacity of generative AI to fabricate persuasive counterfeit content poses risks of IP infringement. The proliferation of AI-generated counterfeit goods, for instance, may threaten to undercut the market for genuine products, inflicting economic losses upon companies and IP rights holders.

In Mexico, there have not been any significant cases of this nature yet, therefore we still do not have judicial precedents on the matter. Although existing regulations such as the Federal Law for the Protection of Industrial Property and the Federal Copyright Law may offer some guidance on how to handle potential infringement cases and establish that artwork created by AI is not subject to protection since by statutory mandate the creator can only be human, in practice, entities lack a clear means to differentiate with precision between AI-generated works and counterfeit products or works made with the assistance of or by AI in its entirety.

Based on the aforementioned challenges, it is advisable for entrepreneurs to proactively engage with legal experts specialising in IP to navigate the complexities surrounding AI-generated content and counterfeit detection. Developing robust strategies for monitoring and protecting IP Rights, alongside implementing advanced technological solutions for authenticity verifica-

tion, can help mitigate risks and safeguard business interests effectively.

Updates on the metaverse and its regulation in Mexico

The metaverse represents a virtual landscape where users interact with one another and with a multitude of digital elements, and where the digital realm emulates the physical and traditional environment. Within this expansive digital world, users have the capacity to craft and possess a diverse array of virtual assets, spanning from clothing and luxury items to artworks, weaponry, and even virtual real estate. These digital creations, manifested as encoded data, find existence within the virtual space upon execution by compatible hardware.

While the widespread embrace of the metaverse is still in early stages, there is a growing interest among Mexican enterprises, public figures, and individuals to be part of it. This increasing curiosity is driving them to seek information and explore opportunities within this virtual realm, yet it seems that there are more questions than answers at this stage. However, the advances that have been achieved are as follows.

Trade mark registration

As might be obvious, trade mark registration in the metaverse presents unique challenges compared to traditional trade mark registration in the physical world. In the digital realm, trade marks can encompass not only traditional brand names, logos, and slogans but also virtual assets, avatars, and other elements that contribute to a brand's identity within virtual environments.

One of the primary challenges in trade mark registration within the metaverse lies in defining the scope of protection for virtual assets and experiences. Traditionally, trade mark registration has focused on tangible goods and services, but in the digital realm, the lines between physical and digital assets blur, demanding a re-evaluation of traditional trade mark frameworks.

Furthermore, the global nature of the metaverse poses jurisdictional challenges for trade mark registration, as virtual environments transcend physical borders and traditional legal jurisdictions. Therefore, businesses operating in the metaverse must navigate varying legal frameworks and requirements across different jurisdictions to ensure comprehensive trade mark protection for their brands. For instance, in Mexico, the protection for virtual assets and experiences within the metaverse has been resolved by adopting a similar criterion as the one used by the United States: virtual goods or services should be registered under classes 09, 35 and 41. Class 09 is for downloadable virtual assets, such as footwear, clothing, hats, glasses, handbags, sports bags, backpacks, sports equipment, art, toys, and accessories for online use, while class 35 is for retail store services with virtual goods and class 41 for entertainment services, namely online virtual goods.

Trade mark infringements in the metaverse

Another important concern in the metaverse revolves around the potential infringement of IP rights. For example, if a user creates a virtual object that closely resembles or directly copies IP-protected forms from the physical world, such as trade marks or copyrighted works, does this constitute infringement? Or should the principles of freedom of expression and artistic creativity take precedence?

In the realm of Mexican legislation, the metaverse is acknowledged as a virtual marketplace where IP rights hold control, and competent authorities

are tasked with resolving any ensuing disputes. Moreover, prima facie, platforms hosting such content could face liability for facilitating the dissemination of infringing material, while users may themselves incur legal consequences for their actions.

Nevertheless, the absence of clarity and formal mechanisms has spurred self-regulation within the metaverse. Platforms within the metaverse, often referred to as "worlds", have taken it upon themselves to implement measures like notice-and-takedown, which empower IP owners to request the removal or disabling of infringing content in the digital sphere.

Therefore, companies should remain vigilant and proactive in protecting their IP rights in the metaverse. This includes not only utilising self-regulatory measures provided by digital platforms but also leveraging legal avenues available through the IMPI. By combining both approaches, businesses can better safeguard their creations and assets in the evolving digital landscape of the metaverse.

Copyright

The creative environment of the metaverse not only permits, but actively encourages users to generate unique virtual objects and spaces. From an IP standpoint, this dynamic raises questions about ownership rights over such creations. Specifically, does the user who crafts these virtual assets hold the rights to them, or could the platform itself, as the facilitator of the virtual world, claim ownership?

Under Mexican copyright law, only natural persons are recognised as authors of copyrightable works and maintain economic rights over their creations, unless explicitly stipulated otherwise. Consequently, users in the metaverse could theoretically assert ownership over their virtual creations, especially in the absence of any agreements to the contrary. However, this scenario becomes complicated by the fact that acceptance of the terms and conditions of the metaverse platform is typically required for participation in the virtual world.

Another aspect to consider is that the platform may change its terms and conditions at any time, or even cease to exist or merge with another platform. This could potentially result in the loss of users' creations or unauthorised uses thereof. Therefore, as the metaverse continues to evolve, it becomes crucial to clarify and establish clear guidelines regarding ownership rights.

Considering the above, companies developing their own virtual worlds must prioritise the rule of law, ensuring that it prevails and is enforced within the framework of the current Mexican legal system. Both service providers and users engaged in activities within the metaverse are obligated to adhere to and comply with applicable legal provisions, just as they would in the physical world.

NFTs

Non-fungible tokens (NFTs) are digital assets stored on a blockchain, a decentralised digital ledger ensuring secure and transparent transactions. NFTs are unique and indivisible, representing one-of-a-kind items that cannot be replicated or divided. While they've gained footing in the art world allowing companies to sell digital products as collectible items, NFTs also have applications across industries, including real estate.

Although still in its early stages in Mexico, some Mexican companies and artists have begun selling digital art and virtual goods through NFT

technology, securing the registration of these digital assets.

In Mexico, as well as in all countries that are members of the Nice Agreement, these virtual assets have been defined as authenticated downloadable digital files falling under and classified under Class 9. This implies that companies wishing to register a trade mark to distinguish this type of goods must seek registration within this class.

While the aforementioned represents significant progress, challenges persist in the practical implementation of copyright. The issue lies in distinguishing between digital ownership via NFTs and IP rights tied to the underlying physical elements. For example, when an NFT containing digital artwork is sold, questions arise regarding the buyer's ownership of the artwork's copyright. Likewise, in the case of a musician selling a song as an NFT, does the buyer obtain the song's copyright? Ongoing discussions revolve around whether the artist retains copyright ownership while granting the buyer certain usage rights.

These discussions will likely evolve as the NFT market expands rapidly, extending beyond art and entertainment to various businesses. Therefore, it is crucial for companies to remain vigilant and responsive to the changes that arise, ensuring adaptability and informed decision-making in this dynamic landscape.

Immersive technologies

In recent years, Mexico has witnessed a notable surge in the adoption and advancement of virtual reality (VR) applications. The increasing adoption of virtual reality has been propelled by several factors, including greater accessibility to VR devices. This accessibility has enabled more individuals to experience the immersive technology firsthand, driving its widespread adoption across different economic sectors.

For companies developing VR technologies, protection of their innovations is of great importance. Hardware components can be safeguarded through patents, provided they meet the criteria outlined in Article 41 of the Federal Law for the Protection of Intellectual Property. This entails ensuring that the invention is novel, non-obvious, and involves an inventive step. On the other hand, software components in Mexico are typically protected through copyright laws, which safeguard the expression of creative works.

While seeking protection for products of this type may appear straightforward, it is crucial for companies to adeptly navigate the legal framework to safeguard their IP rights while also fostering innovation within the rapidly expanding VR industry.

Conclusion

In conclusion, while the absence of specific national regulation for groundbreaking gadgets and innovative software solutions might create uncertainty, it does not mean a complete legal vacuum. It is crucial for all stakeholders to acknowledge and meet their obligations under Mexican law. Adopting a proactive approach, focused on prevention rather than solely depending on corrective measures, is prudent. By doing so, businesses and individuals can adeptly navigate the evolving digital landscape until a clear regulatory framework governing these innovations is established.

MONACO

Law and Practice

Contributed by:
Jean-Charles Gardetto and Alexandre Al Suleiman
Gardetto Law Offices

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Gardetto Law Offices is a Monaco-based law firm with a strong international dimension in terms of both the diversity of its clients and the nature of the cases it handles. It offers its clients – international companies and private individuals alike – a highly skilled and professional team that possesses all the competencies required to tackle a comprehensive range of legal issues, including both litigation and advisory work, and to resolve the most complex situations. The firm is regularly involved in international litigation, as well as international projects, and assists clients wishing to settle in the Principality of Monaco. Thanks to its network of overseas correspondents, the firm is in a position to offer clients services that are not confined to the Principality of Monaco.

Authors

Jean-Charles Gardetto was admitted in Monaco in 1988 and is the founder of Gardetto Law Offices. He is the former President of the Monaco Bar. Jean-Charles advises and represents international companies and private individuals, particularly in business law, banking and finance law, contracts, international private law, white-collar crime, family law and immigration to Monaco. He holds an LLM (1987) from Cornell Law School and a DESS (1985) from the University of Aix-Marseille III. He was Chair of the External Relations Committee of the Monaco Parliament (2003–13), and is also a TEP.

Alexandre Al Suleiman is an associate in business law, criminal law and family law. He lived in Poland and Italy for 16 years, and has professional and academic experience in France, Poland and the United States, where he has worked with civil and federal court judges, obtained an LL.M. in Comparative Business Law and passed the New York Bar. Alexandre speaks five languages, and his various diplomas allow him to intervene in complex and cross-cutting international issues, and in the context of sensitive negotiations and transactions. His responsiveness and determination enable him to respond effectively to the demands and difficulties of his prestigious clientele.

Gardetto Law Offices

Villa Marcel
19 Boulevard des Moulins
98000
Monaco

Tel: +377 9216 1617
Fax: +377 9350 4241
Email: jc.gardetto@gardetto.mc
Web: www.gardetto-monaco-lawyers.com

1. Legal System

1.1 Legal System and Judicial Order

Monaco is a principality where justice is independent of executive power. The administration of justice is under the responsibility of the Directorate of Judiciary Services, which was created in 1918, under the care of its director – the State Secretary for Justice.

Monaco is not an EU member but has been part of the European Community customs territory since 1968, given its customs union with France. Monaco is also part of the European VAT system.

The Principality is not a signatory to the Schengen Agreement, but holders of Monegasque residence permits have the right to move freely within the Schengen Area for stays lasting less than three months.

Monaco is also currently negotiating an association agreement with the EU.

Furthermore, the Principality is party to numerous treaties with other states and to international conventions, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Convention against Transnational Organized Crime and the Convention on International Trade of Endangered Species.

Monaco is a civil law jurisdiction where most laws are codified, although a number of laws concerning specific subjects (commercial leases, data protection, employment, etc) are not codified.

The Prince holds ultimate judicial power but delegates the full exercise of this power to the courts, which dispense justice in his name. The courts are organised as follows.

- Civil courts have three levels of jurisdiction:
  - (a) Jurisdictions of First Instance – Justice of the Peace, Court of First Instance and specialised courts (ie, the Labour Court, Rent Arbitration Commission and Arbitration Commission for Commercial Leases);
  - (b) Court of Appeal; and
  - (c) Court of Revision.
- Criminal courts also have three levels of jurisdiction.
- The Supreme Court has special jurisdiction in constitutional affairs and administrative affairs. It also rules on conflicts of jurisdiction.

Law No 1.511 of 2 December 2021 has recently modernised judicial proceedings before the civil courts.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

All new business activities in Monaco must be specifically authorised by the government. The applicants must file an official authorisation request. Some activities are sometimes denied because they are saturated or simply unwanted, and certain activities are subject to specific regulations in Monaco.

The following activities are subject to the prior obtaining of an agreement from the Commission for the Control of Financial Activities in application of Law No 1.338 of 7 September 2007 on financial activities and an authorisation of the company by the Monaco government:

- management of portfolios on behalf of third parties;
- management of undertakings for collective investment under Monegasque law;
- the receipt and transmission of orders on behalf of third parties;
- the provision of advice and assistance in the preceding matters;
- the execution of orders on behalf of third parties;
- the management of undertakings for collective investment under foreign law; and
- trading for own account (*compte propre*).

However, if a person or an entity would like to invest through an existing Monegasque structure, the rules mentioned above will not apply.

2.2 Procedure and Sanctions in the Event of Non-compliance

If the procedures are not respected, the company does not exist and cannot legally carry out its activity. In such a case, the person responsible can be prosecuted for the illegal exercise of an activity.

2.3 Commitments Required From Foreign Investors

Tax transparency and anti-money laundering measures have been stepped up in Monaco, so stronger commitments in that regard might be required.

2.4 Right to Appeal

When the applicant is not specifically authorised by the government to exercise their activity, they can appeal the decision before the Monaco Supreme Court.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The limited liability company (*société à responsabilité limitée*, or SARL) is the most common form of company in Monaco. Its minimum share capital is EUR15,000 and the company must have a bank account in Monaco. The company must have at least two shareholders (individuals or legal entities), and the manager (natural person) must reside in Monaco or in the surrounding cities in France or Italy. The company's registered address must be in Monaco, either at the manager's home address (for a limited period of two years, and subject to the landlord's approval – in this case the company cannot have employees) or on private premises, which need to be coherent with the company's activity or in a business centre that offers domiciliation services.

The Monegasque Joint Stock Corporation (*société anonyme monégasque*, or SAM) must have at least two shareholders (individuals or legal entities). The directors are not required to reside in or near Monaco. The minimum share capital is EUR150,000 and the company must have a bank account in Monaco. The company's registered address must be in Monaco, either on private premises or in a business centre, as described above.

Other types of entities are the *société en nom collectif* (SNC) and the *société en commandite simple* (SCS). These companies must have at least two partners and do not require a minimum share capital.

It is also possible to register a sole-trader activity (*entreprise en nom personnel*).

Finally, civil companies are also an option (*société civile particulière*, or SCP). These companies do not carry out any business but are merely limited to managing their own assets. They often function like holding companies, and no minimum share capital is required. The company must have at least two shareholders (individuals or entities), local or foreign, and the manager of the civil company is not required to reside in Monaco or surrounding cities. The company's registered address must be in Monaco, either at the manager's home address in Monaco (with no limitation period) or in a business centre.

3.2 Incorporation Process

All new business activities in Monaco must be specifically authorised by the government. The applicants must file an official authorisation request. Activities are sometimes denied because they are saturated or simply unwanted, and certain activities are subject to specific regulations in Monaco.

The authorisation request includes information on the company's purpose and its shareholders and directors, as well as a copy of the articles of association duly registered with the tax office.

The authorities are required to provide their response within three months of the filing of the authorisation request.

The following activities are subject to the prior obtaining of an agreement from the Commission for the Control of Financial Activities in application of Law No 1.338 of 7 September 2007 on financial activities and an authorisation of the company by the Monaco government:

- management of portfolios on behalf of third parties;
- management of undertakings for collective investment under Monegasque law;
- the receipt and transmission of orders on behalf of third parties;
- the provision of advice and assistance in the preceding matters;
- the execution of orders on behalf of third parties;
- the management of undertakings for collective investment under foreign law; and
- trading for own account (*compte propre*).

Once the authorisation is granted, it will be necessary to secure a registered address and open an account with a bank in Monaco in order to receive the share capital paid by the shareholders. Registration of the company with the Monaco Trade Registry will then be possible.

Commercial companies can become functional after approximately six months from the authorisation application, mostly due to administrative deadlines and the bank account opening process. The authorisation for a sole-trader activity

is also subject to a three-month administrative deadline. Civil companies can become active after approximately one month, as they are not subject to the authorisation process detailed above.

3.3 Ongoing Reporting and Disclosure Obligations

All companies must keep accounting records and, with the exception of civil companies, must file yearly accounts with the Monaco authorities.

All companies must record information on their ultimate beneficiaries upon registration with the Monaco Trade Registry, and disclose any subsequent changes. Amendments to the company's articles of association and management must also be disclosed.

3.4 Management Structures

SARL companies are managed by one or several managers (*gérants*), who may or may not be shareholders. The managers can act independently or jointly, depending on the wording of the articles of association, which may specify further powers.

SAM companies are managed by a board of directors. The directors (*administrateurs*) must hold at least one share in the company. The articles of association can provide for ownership of a minimum number of shares. Further powers can be granted to members of the board through a special mandate granted by the board of directors.

3.5 Directors', Officers' and Shareholders' Liability

The liability of directors and officers is as follows:

- the shareholders of a SARL are liable for losses incurred by the company up to their share in the capital;
- the liability of the partners of a SAM is limited to their share in the capital;
- the partners of an SNC are indefinitely, jointly and severally liable for the debts of the company on the basis of their entire assets;
- in an SCS, the general partners (*commandités*) are indefinitely, jointly and severally liable for the debts of the company, while the limited partners (*commandiataires*) are liable up to their contribution to the share capital; and
- the sole trader's liability extends to their entire assets – this also applies to the shareholders of a civil company.

4. Employment Law

4.1 Nature of Applicable Regulations

Labour law is governed by a small number of laws, the implementation of which is specified in sovereign ordinances and regulations. None of these laws or regulations are codified.

The employment contract is of particular importance in Monaco insofar as it constitutes the law between parties and allows for the inclusion of very specific clauses applicable during and after the period of employment (non-competition, intellectual property, etc). The employment contract can be written or oral.

Labour law is supplemented by case law of the Labour Court, the decisions of which fill certain legal gaps. As Monegasque labour law is comparable to French law, it is possible to refer to French case law on certain issues as well.

Some professions have been able to negotiate collective agreements that complement existing legislative and regulatory provisions (eg, the collective agreement for banks, which contains very specific rules).

In recent years, labour law has been modernised and new laws have regularly been added to the existing legislative and regulatory framework, particularly with regard to working hours. Legislative reforms are also expected.

There are also practices in Monaco that are not set out in any statute but should be known, such as the three-month notice period for an executive employee, which is not provided for in any legal statute but is nevertheless fully applied by judges.

4.2 Characteristics of Employment Contracts

The conditions for hiring and registering an employee in Monaco are regulated.

All job offers must be submitted to the employment service, which may present candidates to the employer in accordance with a certain order of priority established by law. In Monaco, there is a national preference whereby applications from employees of Monegasque nationality are given priority if they have the same level of competence. The employer may only conclude an employment contract with an employee who holds a work permit in Monaco.

Any new employment contract, any modification of an employment contract or any change of employer must be reported to the employment service. An employment contract may be concluded verbally, and may be concluded for a fixed or indefinite period. The law does not provide for a maximum duration for fixed-term contracts, which may be renewed as many times as necessary. However, the renewal of a fixed-term contract is not without risk, since it can lead to the fixed-term contract being converted into an open-ended contract if it turns out that the purpose of the contract is to fill a permanent job in the company.

The fixed-term contract is subject to certain specific rules relating, in particular, to the duration and organisation of work, but also to the termination of the employment contract. A fixed-term employment contract can only be terminated at the end of its term or for one of the reasons set out in Article 12 of Law 729 on employment contracts – eg, for a valid cause or in cases of serious misconduct, force majeure, or where provided for in the contract or determined by internal regulations. Article 6 of Law 729 (regarding termination of the contract by either party at any time subject to compliance with the notice period) cannot be used by the employer in the case of a fixed-term contract.

Collective agreements may contain additional provisions concerning fixed-term contracts.

4.3 Working Time

The working hours of employees are generally set at 39 hours per week. Derogation is possible under conditions set by law.

Hours worked in excess of 39 hours per week will generally give rise to a minimum increase in salary, as follows:

- a 25% increase for the first eight hours; and
- a 50% increase for the following hours.

4.4 Termination of Employment Contracts

Monaco is an "employment at will" jurisdiction. An open-ended employment contract can always be terminated by each party after a notice period, without obligation to justify this decision (Article 6 of Law 729).

Case law also provides a framework for the termination of employment contracts. Judges sanction dismissals when they are implemented in a brutal manner, without meeting the minimum formalities and without a minimum of respect for the employees. This general employment termination rule is not applicable in the banking sector, and is prohibited by certain establishment agreements in the hotel industry.

A fixed-term employment contract can be terminated before completion of its term by the will of one party but only in a limited number of cases, such as serious misconduct or force majeure.

A notice period of one month is applicable to employees with seniority who have been with the same employer for more than six months, and a notice period of two months is applicable to employees with seniority who have been with the same employer for more than two years. These rules may be waived in the presence of more favourable collective agreements or customary practices. The notice period is reduced by half if the employee takes the initiative to terminate the contract.

The contract may also be terminated without notice if such termination results from the agreement of the parties, or in the case of a serious fault or force majeure.

Any employee with a permanent employment contract who is dismissed after working with the same employer for more than two years is entitled (except in the case of serious misconduct) to a dismissal indemnity, comparable to one fixed in a neighbouring economic region. If the dismissal is not justified by a valid reason, the employer must pay the employee a severance compensation. Each month worked entitles the employee to an indemnity equal to one day's salary. The amount of this severance compensation may not exceed six months' salary, and it cannot be combined with the above-mentioned dismissal indemnity.

Any abusive breach of the employment contract may also give rise to damages, the amount of which is determined by a judge.

Collective Redundancies

In order to be recognised as a valid reason, a collective dismissal must be based on an economic justification, the criteria of which have been defined by case law. The employer is required to respect numerous obligations in order to carry out a collective redundancy, and must inform and consult employee representatives on collective redundancy projects.

Workforce reduction shall be achieved, as far as possible, through natural or voluntary departures, and various measures are provided to protect employees in the case of downgrading.

Employees included in a collective redundancy of an economic nature are given priority for re-employment for a period of one year from the date of their redundancy.

4.5 Employee Representations

All companies with more than 11 employees must hold internal elections to elect employee representatives for a period of one year. Employee representatives can hold several mandates

in succession. The number of representatives depends on the size of the company: in companies with more than 26 employees, there must be at least two representatives and two substitute representatives.

The employee representatives are the main contacts for the employer and the labour inspector. Their task is to report to the employer all individual and collective complaints relating to the application of wage rates and job classifications, laws and regulations, worker protection, health and safety and social security. They can also negotiate and conclude collective agreements with the employer on these same issues.

However, the law does not impose any obligation on the employers to conduct negotiations.

Employee representatives must be consulted on the following topics:

- collective redundancies (minimum of ten employees) of an economic nature;
- working hours (when the planned working hours exceed 48 hours);
- paid holidays; and
- internal regulations.

In order to carry out their assignments, the employee representatives benefit from private premises, a monthly time credit to carry out their duties and the right to move freely inside and outside the company. The employer must also meet with them once a month and answer their questions.

Finally, employee representatives have special protection throughout their term of office and for six months after they have finished their duties, which protects them from any risk of unfair dismissal.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Individual Taxation

Employees that are Monegasque nationals or residents in the Principality are not subject to any individual taxation, including income tax, capital gains, dividends, interests and other passive income. The absence of individual taxation in Monaco contributes to the Principality's attractiveness from an international standpoint (eg, employees of family offices established in Monaco are not subject to individual tax, provided they are Monaco residents).

The absence of income tax in the Principality only applies to Monaco-based activities and individuals who are genuinely residents in Monaco. This does not impact the tax rules that might be applied by other states, especially in cases where a Monaco resident employed by a Monaco-based business has kept close links with their state of origin (ie, sufficient ties to continue to qualify as a tax resident) and could therefore be subject to individual taxation on their global income.

Furthermore, the absence of individual taxation in Monaco does not apply to French nationals residing in Monaco, who are considered French tax residents under the 1963 Double Tax Treaty between France and Monaco. Individuals qualifying as French tax residents are fully liable to tax in France, even if they exclusively work in Monaco and their entire income is derived from a Monaco-based employment relationship.

Social Contributions

Both employees and employers are subject to social contributions in Monaco computed on their gross salary, as follows:

- employees are subject to a 6.85% contribution to the agency in charge of pensions in Monaco (*Caisse Autonome des Retraites*, or CAR) and a 2.4% contribution to the agency in charge of unemployment insurance in Monaco (*Unédic*); and
- in addition to the social contributions paid by their employees, Monegasque employers are liable for a 14.75% contribution to the Health Insurance Agency (*Caisse de Compensation des Services Sociaux*, or CCSS), a 9.24% contribution to the CAR (the total of a 7.15% flat rate (always applicable) and a 2.09% variable rate) and a 4.05% contribution to *Unédic*.

These are the maximum social contribution rates that can be applied to employers. Employers that are not affiliated with the *Caisse de Garantie des Créances des Salariés* are only liable for a 14.7% contribution to the CCSS.

5.2 Taxes Applicable to Businesses

VAT

Value added tax is levied in Monaco on the same basis as in France (ie, under the same substantive rules regulating transactions subject to VAT) and at the same rates, as follows:

- normal rate of 20%;
- intermediary rate of 10%;
- reduced rate of 5.5%; and
- super-reduced rate of 2.1%.

Some specific transactions are expressly exempted from VAT in Monaco, but will not be VAT-exempted in France. For example, services provided by attorneys, legal and tax advisers, bailiffs, chartered accountants and notaries are (for the time being) exempted from VAT in Monaco.

Tax on Profits (Impôt sur les Bénéfices)

Businesses carrying out industrial or commercial activity in Monaco and making more than 25% of their gross turnover outside Monaco are liable to tax on profits in Monaco. Conversely, Monaco-based businesses deriving their entire turnover from activities carried out within the Principality are not subject to tax on profits in Monaco.

As of 1 January 2022, the tax rate in Monaco is 25%, which is applicable on the net profits determined by the difference between the gross turnover and the tax-deductible expenses.

The main specific regime applicable to expenses relates to the managers' remuneration, which is deductible from the gross turnover by reference to a predetermined scale, according to which the deductible remuneration depends on the gross turnover of the business. This scale differs between service-providing businesses and businesses carrying out sales activities. For example, the maximum deductible expense for a manager's salary for a service-providing business will be EUR426,384 if the turnover is between EUR875,001 and EUR1 million, whereas the maximum deductible expense for a business carrying out sales activities will be EUR219,960 if the turnover is between EUR750,000 and EUR1 million.

Similarly, amortisation of non-commercial motor vehicles is only deductible up to a purchase value of EUR18,300, although this amount can be higher (EUR30,000) or lower (EUR9,900) for certain types of vehicles with predetermined carbon emissions.

Withholding Tax

On 7 December 2004, the Principality of Monaco and the EU signed an agreement providing for measures equivalent to those contained in the

European Council Directive of 3 June 2003 on the taxation of savings income in the form of interest payments.

The Principality may only apply a withholding tax on interest paid in Monaco to an individual who is resident in a member state of the EU, which would be split between the Principality and the individual's state of residence. However, the individual may opt to voluntarily provide information to the member state of residence, in which case they will not be subject to the withholding tax mechanism.

The agreement provides for the withholding tax rate to increase progressively over time. It is set at 15% for the first three years from the date of application of the provisions of the agreement, then increased to 20% for the following three years, and rises to 35% thereafter.

5.3 Available Tax Credits/Incentives

In the absence of individual taxation, the main tax credits and tax incentives offered in the Principality of Monaco relate to the tax on profits.

Research Tax Credit

Businesses incurring certain types of research and development expenditures might benefit from a research tax credit designed to promote and encourage innovation. Eligible businesses include those that are carrying out industrial, commercial or agricultural activities and are subject to the tax on profits in Monaco.

Three types of research and development expenditures give a right to the research tax credit:

- fundamental research with the aim of acquiring new knowledge;
- applied research carried out with the view of identifying the possible applications of new knowledge acquired from fundamental research; and
- experimental development that is designed to collect technical data that will aid decision-making.

The main expenditures that are likely to benefit from a research tax credit are staff costs – ie, wages paid to researchers and technicians that are directly and exclusively involved in eligible research and development activities within the business.

For this reason, it is crucial to:

- keep and update a list of employees working on the business' research and development projects;
- be able to provide justification of their qualifications (diplomas); and
- identify the research and development projects that they are working on, and keep records of the time spent by these employees on each project.

The amount of amortisation of immovable assets assigned to research and development activities can be taken into consideration for the computation of the research tax credit.

External expenses relating to services obtained from third parties (ie, service providers) can be allowed within the research tax credit regime under specific conditions detailed in Sovereign Order No 10.325 of 17 October 1991, as modified.

The research tax credit rate is as follows:

- 30% of the research and development expenditures below EUR100 million; and

- 5% of the research and development expenditures above EUR100 million.

The research tax credit is calculated on the annual tax return for each civil year and can be carried forward without limitation of time if not offset against the tax on profits owed for the current fiscal year.

New Companies Regime

This tax incentive is available for new companies incorporated after 1 October 1991 that are subject to the tax on profits and develop a genuinely new activity for the Principality. To be eligible, the companies must not carry out any activity within the banking, finance, insurance or real estate management sectors, and must not be held by another company (directly or indirectly) for more than 50% of their share capital.

Eligible companies enjoy a business tax exemption for their first two years of activity in the Principality and are subject to reduced rates for tax on profits for the following three years, as follows:

- from the first month of activity to the 24th month – tax on profits exemption;
- for the following 12 months (third year) – the tax on profits is computed on 25% of the taxable profits;
- for the following 12 months (fourth year) – the tax on profits is computed on 50% of the taxable profits; and
- for the following 12 months (fifth year) – the tax on profits is computed on 75% of the taxable profits.

State Aid

There are several state aid regimes offered by the Principality of Monaco or Monegasque public entities, such as the Monegasque Fund for Credit Insurance, the Monegasque Fund for Innovation, the Industrial Allowance, the Monegasque EUREKA Fund, etc.

To date, no BEPS recommendations regarding the OECD's recent two pillar solution to address the tax challenges arising from digitalisation of the economy have been implemented in Monaco. No draft tax legislation has been proposed in this respect.

5.4 Tax Consolidation

There is no tax consolidation regime available in Monaco.

5.5 Thin Capitalisation Rules and Other Limitations

There are no thin capitalisation rules applicable in Monaco.

5.6 Transfer Pricing

There are no transfer pricing rules in Monaco.

5.7 Anti-evasion Rules

There are no anti-evasion rules in Monaco.

However, even where the scope of the Monegasque tax on profits is very narrow, Monegasque public authorities are entitled to carry out tax audits against businesses that are regularly filing tax returns or against those that are not filing tax returns as they are considered to be outside the scope of the tax on profits (ie, less than 25% of their turnover is made outside the Principality).

6. Competition Law

6.1 Merger Control Notification

There are no specific rules in this field under the laws of Monaco. However, if a relevant transac-

tion involving one or more Monegasque entities has an impact in a country other than Monaco, the rules of that other country may apply. For instance, under the guidelines of the French Competition Authority, merger control shall apply to all companies regardless of their nationality or location, whether or not they have assets or a structure in France, and whether or not the transaction is carried out beyond French territory, provided that they have a turnover in France and exceed the relevant thresholds. In that case, the French control procedure shall apply.

6.2 Merger Control Procedure

There are no specific rules in this field under the laws of Monaco.

6.3 Cartels

There are no specific rules in this field under the laws of Monaco.

6.4 Abuse of Dominant Position

There are no specific rules in this field under the laws of Monaco.

7. Intellectual Property

7.1 Patents

According to Law No 606 of 20 June 1955 on patents, the following are considered new inventions or discoveries:

- the invention of new industrial products; and
- the invention of new means or the new application of known means for obtaining an industrial result or product.

Patents are protected for a maximum period of 20 years from the date of filing with the Intellectual Property Office. The applicant must provide a certain amount of information, including a description of the discovery, invention or application for which the patent is sought.

At the time of filing with the Intellectual Property Office, it is possible for the applicant to claim a right of priority by virtue of an earlier filing in a foreign country within six months of the filing of the application.

The greatest attention should be paid to the characteristics of the discovery, invention or application, as they will determine the scope of protection granted under the filed patent in the future. The applicant must also pay close attention to the content of their application, which must comply with the numerous requirements set forth in Article 6 of Law No 606.

Patents that have been properly applied for will be granted without prior examination, at the applicant's own risk and without any guarantee of the reality, novelty or merit of the invention, nor of the truth or accuracy of the description. It is therefore the responsibility of the applicant to ensure that their application is in order.

If the formalities required for the filing of the patent are not complied with, the registration will be rejected, and half of the fees paid at the time of the filing will be retained by the tax department. It is therefore highly recommendable to obtain the assistance of an intellectual property attorney in order to strictly comply with the application filing procedures provided for by Sovereign Order No 1476 relating to the application of the provisions of Law No 606 of 20 June 1955, as amended.

If the application complies with the required filing procedures, an order of the Minister of State noting the regularity of the application shall be issued to the applicant and shall constitute the

patent. If the registration is refused, the decision can be challenged by means of an informal appeal before the Minister of State or a contentious appeal before the Supreme Court.

A special register kept by the Intellectual Property Office shall record the descriptions, drawings, samples and models of patents granted. Extracts from this special register are available upon request to the Intellectual Property Department, and upon the payment of a special fee.

An action for invalidation and a revocation action are available to any person having an interest in the matter.

The Public Prosecutor's Office may also request the nullity or lapse of the patent in the event of non-compliance with the provisions of Law No 606 on patents for invention or for a reason of public policy. The action for invalidity or lapse of the patent is governed by a statute of limitations of five years.

In addition, the patentee may bring an action for infringement in the event of the manufacture of products or the use of means covered by the patent by a third party. If necessary, the patentee may request the appointment of a bailiff to establish the infringement and proceed to a seizure of the infringement before bringing an action on the merits before the Monegasque courts.

Finally, Monaco is a signatory of the European Convention of 5 October 1973 on the Grant of European Patents.

7.2 Trade Marks

Although Monaco is not a member of the EU, it is a signatory of certain European conventions on trade marks, including the Paris Convention on Intellectual Property and the Madrid System.

In Monaco, the definition of a trade mark is that established by the European Union Intellectual Property Office – ie, a distinctive sign enabling goods or services to be distinguished from those of competitors. The trade mark may be verbal, figurative or semi-figurative. In order to be registered, a trade mark must not be descriptive or deceptive, nor must it be contrary to public policy and the provisions of Article 6ter of the Paris Convention. The Intellectual Property Office has published a guide on the criteria for assessing the distinctiveness of a trade mark based on the common practice developed by the European Intellectual Property Network in relation to trade marks.

Trade marks are filed with the Monegasque Intellectual Property Office or with an intellectual property office located in one of the member countries of the Paris Convention. In the latter case, the applicant must request the extension of their trade mark registration to Monegasque territory within six months of the initial registration.

It is possible to file a collective trade mark if the regulations determining the conditions to which the use of the trade mark is subject are provided with the filing.

The filing of the trade mark is subject to certain administrative formalities, which are provided for in Ordinance No 7.801 of 21 September 1983 laying down the conditions for the application of Law No 1.058 of 10 June 1983 on trade marks and service marks.

The registered trade mark is protected for a period of ten years, which is renewable. Once registered, it is entered in a special register kept by the Intellectual Property Office and becomes enforceable against third parties.

If registration is refused, the decision can be challenged by means of an informal appeal before the Minister of State or a contentious appeal before the Supreme Court.

In order to protect their trade mark, the trade mark owner has a right of action against any person who fraudulently uses or imitates the protected trade mark. The offence of counterfeiting is punishable by a prison sentence and a fine, and the owner of the counterfeited trade mark can request the seizure and destruction of the counterfeited goods.

7.3 Industrial Design

The protection of designs provided for in Law No 607 is applicable to any new design, plastic form or industrial object that differs from similar ones, either by a distinct and recognisable configuration conferring a novelty on it, or by one or more external effects giving it a specific and new physiognomy. Registration is made at the Intellectual Property Office and may cover from one to 50 objects or designs, subject to the payment of a fixed registration fee.

The term of protection for designs is ten years from the date of filing or the date of disclosure declared at the time of filing the application for registration. This protection may be extended up to a maximum of 50 years subject to payment of the relevant filing fees, either on the date of the initial filing or upon each request for extension.

The registration of designs is published in the Monaco Official Journal and recorded in a special catalogue that is available to the public on request, subject to the payment of a fee.

The applicant may also file their designs in a sealed envelope in order to benefit from a priority right. In this case, the applicable term of protection is five years, which is renewable. A right of priority can also be claimed by a simple entry in a special register.

Under certain conditions, the owner of the designs has an action for infringement against third parties who fraudulently use or reproduce them, and may also seek the seizure of the infringing goods and the equipment used to carry out the infringement.

7.4 Copyright

The Principality of Monaco is a signatory to most of the European treaties and conventions in the copyright field, including the Berne Convention for the Protection of Literary and Artistic Works.

Copyright is protected throughout the author's lifetime and for 50 years after their death. This protection applies to published and unpublished works authored or co-authored by a Monegasque national, and also to works published for the first time in Monaco, regardless of the nationality of the author. "Published works" within the meaning of Monegasque legislation are published materials, regardless of their method of manufacture, which must be made available to the public in sufficient quantity.

The remuneration of authors' rights is freely fixed by the parties to the contract.

The author shall have the right to object to any distortion, mutilation or other modification of their work or any other infringement of the same work that is prejudicial to their honour or reputation.

Infringement of copyright is punishable by imprisonment and/or a fine, and the author may also bring an infringement action if a third party has fraudulently appropriated the authorship

of their work (either by putting the third party's name on the work or by presenting themselves as the author).

7.5 Others

Domain Names

The registration, management and maintenance of domain names is governed by a Naming Charter, which can be found in Appendix 1 of Ministerial Order No 2022-38 of 21 January 2022 implementing Article 20 of Law No 1.383 of 2 August 2011 for a digital Principality, as amended, relating to domain names.

According to the Charter, the following entities may apply to register or renew a domain name in the ".mc" zone:

- legal entities having their registered office, principal place of business or an administrative office established in the territory of the Principality of Monaco;
- associations and other Monegasque organisations or foundations;
- holders of Monegasque trade marks registered and/or protected in the Principality of Monaco;
- individuals carrying out a self-employed craft, commercial, industrial or professional activity duly authorised by a decision of the Minister of State; and
- embassies, consulates and other diplomatic representations of the Principality of Monaco abroad.

In general, the registration of domain names is accepted if the conditions relating to the applicant's status are met. For instance, for a company registered with the Trade and Industry Registry, the domain name must correspond exactly to the company name or to one of its signs clearly indicated on the company's certificate of incorporation. Other conditions are set out in the Naming Charter, depending on the status of the applicant.

There is no limit to the number of domain names that can be registered.

Applications for registration must be submitted to an accredited registrar, which will act as an intermediary between the applicant and the Network Internet Centre in Monaco (NIC Monaco). The registrar is a legal entity accredited by NIC Monaco that provides domain name registration services. NIC Monaco acts as the top-level registrar of the internet domain name address system corresponding to the Monegasque name space. Domain names are allocated by NIC Monaco through the registrars.

NIC Monaco is not a supervisory authority, although it may carry out certain checks on the lawfulness of domain names or when the provisions of the Charter appear to have been violated. During the so-called compliance checks, NIC Monaco may request additional information necessary for the registration of the desired domain name.

The registration and renewal of a domain name is carried out on the basis of declarations made by the applicant and under their responsibility. The holder is solely responsible for the use and exploitation of the domain name.

The domain name is valid for one year from the date of registration. This period is tacitly renewed from year to year, subject to the payment of the corresponding fee.

Any dispute relating to the registration or use of the domain name shall fall under the exclusive jurisdiction of the Monegasque courts.

8. Data Protection

8.1 Applicable Regulations

Monaco is not a member of the EU, so the General Data Protection Regulation (GDPR) does not apply directly in Monaco. However, a data controller or a data processor based in Monaco may be subject to the obligations provided by the GDPR based on Article 3 thereof (territorial scope).

In any case, the protection of personal data in the Principality is governed by Law No 1.165 of 23 December 1993, as modified, which provides the definitions of the most important terms, by:

- defining the role of the Monegasque supervisory authority (*Commission de Contrôle des Informations Nominatives*, or CCIN);
- listing the obligations of data controllers based in Monaco;
- detailing the data processing methods, data subjects' access to data, and security and confidentiality obligations;
- detailing the supervision role of the CCIN;
- regulating the transfer of personal data; and
- setting out penalties and defining the scope of the Law.

8.2 Geographical Scope

Articles 20 and 20-1 of Law No 1.165 concern the transfer of personal data. Monaco law distinguishes between two types of data transfer, which are subject to different rules.

Data transfers to countries that provide adequate protection as defined by Article 20 of the Law are not subject to the authorisation of the CCIN, but must be declared in a formal document. Transfers to a country or organisation that does not provide adequate protection need to be authorised by the CCIN. The authorisation request is filed by the data controller.

8.3 Role and Authority of the Data Protection Agency

The CCIN is the authority in charge of enforcing data protection rules in Monaco and has several roles, as follows:

- the receipt and analysis of processing declarations and requests;
- authorising the transfer of personal data to a country that does not have an adequate level of data protection;
- monitoring and examining complaints and petitions;
- informing data subjects of their rights and obligations by responding to their questions about data protection;
- issuing warnings and addressing formal notices;
- referring facts establishing an offence to the Court of First Instance and the Public Prosecutor; and
- co-operating with other data protection agencies.

9. Looking Forward

9.1 Upcoming Legal Reforms

Data Protection

Bill No 1054 dated 20 December 2021 is intended to replace Law No 1.165 of 23 December 1993, as amended, on the protection of personal data. The goal is to integrate the new international standards resulting from Convention 108+ of the Council of Europe and the GDPR into domestic law. The bill is also inspired by the principles resulting from Directive (EU) 2016/680. It is divided into ten chapters and contains 114 articles (instead of the 26 articles present in the

current law), in addition to the accompanying explanatory statement.

Its main contributions are the elimination of a certain number of prior formalities applicable to data controllers, the introduction of the office of Data Protection Officer, and the introduction of new obligations such as the realisation of impact analysis and the keeping of a directory of processing. Another novelty concerns the strengthening of the sanctioning powers of the future Personal Data Protection Authority (PDPA), which will replace the current CCIN.

At this stage, a rapporteur must be appointed within the National Council in order to analyse the bill, and to present their analysis and possible amendment proposals in a public session. There is no foreseeable date of entry into force of the new law in Monaco.

Intellectual Property

The protection of literary and artistic works is currently the subject of an in-depth legislative reform. A bill is currently being discussed in Parliament in order to harmonise the Monegasque copyright regime as much as possible with the one in force in neighbouring countries, and to establish a legal regime for intellectual property issues left unresolved by the current legislative and regulatory framework.

Recently, the regime and the amount of the resale right have been reformed in light of the provisions of Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

NETHERLANDS

Law and Practice

Contributed by:
Friederike Henke, Ingrid Cools, Philip ter Burg, IJsbrand Uljée, Suzan van de Kam and Epke Spijkerman
BUREN

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BUREN is an independent, internationally oriented firm of lawyers, notaries, and tax lawyers with offices in Amsterdam, Beijing, The Hague, Luxembourg, and Shanghai. It has more than 70 legal professionals providing a full range of legal services to domestic and international business clients who conduct business nationally and globally. The firm offers sound legal solutions combined with business acumen, which ensures a holistic perspective to every legal and tax challenge faced by clients. BUREN works closely with its clients to tailor solutions in alignment with the clients' business goals. It has carefully established a global network with premier and reputable law firms and other service providers. It also has dedicated regional practices (China, Japan, Germany, Hong Kong, and Spain/Latin America) staffed by native speakers and professionals that have a profound knowledge of local business and culture.

Authors

Friederike Henke read law in Maastricht (the Netherlands) and Saarbrücken (Germany) and has been a lawyer in the Netherlands since 2006. In 2010, she was admitted to the German Bar, following which she joined the Cologne Bar as a Rechtsanwältin (lawyer). At BUREN, she specialises in international corporate law, M&A, financing, reorganisation, and restructuring. Friederike advises both multinationals and mid-sized companies in international transactions and procedures, and in their daily legal work. She is treasurer of the Dutch chapter of the German lawyers association (DAV Niederlande) and a member of the German–Dutch Attorneys Association as well as the International Association of Young Lawyers (AIJA).

Ingrid Cools obtained her master's degree in law and her bachelor's degree in biomedical sciences from Vrije University Amsterdam in 2016 and joined BUREN in 2020. Ingrid specialises in assisting in mergers and acquisitions, joint ventures, and restructuring. She advises both national and international companies in cross-border transactions and assists both strategic and private-equity parties. Ingrid regularly works with international law firms in cross-border transactions.

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Philip ter Burg completed his studies in Dutch business law at Leiden University in 1988 and received an LLM in international business law from Queen Mary College, University of London, in 1989. He specialises in international trade, intellectual property, and litigation, and has a wealth of experience in international litigation, representing companies with regard to distribution and agency agreements. Philip is a partner at BUREN and a member of the IBA, the Dutch Distribution, Franchise and Agency Law Association, the Dutch Transport Law Association, and the Corporate Litigation Association, and a former board member of the international trade chapter of the Dutch Bar Association.

IJsbrand Uljée graduated in tax law from the University of Groningen in 2011, and has been working as a tax adviser in the international tax practice since 2012. Prior to BUREN, he was employed by one of the "big four" firms and at an international tax boutique firm. IJsbrand advises clients on the Dutch tax aspects of domestic and international transactions such as mergers, acquisitions, and restructuring of investments and debt. He is a member of the Dutch Association of Tax Advisers.

Suzan van de Kam obtained her degree in Dutch law from Radboud University Nijmegen and completed the Grotius specialisation course on employment law. She joined BUREN in 1999 and is now a partner at the firm. Suzan advises on the full spectrum of complex employment issues, including litigation and dispute resolution, European works councils and unions, and the employment aspects of all types of corporate transactions. She advises and represents national and international companies on dismissals, collective dismissals, reorganisations, outsourcing, downsizing, national and European co-determination, health and safety, and other topics. Suzan is a member of the Dutch Employment Law Association (VAAN) and The Hague chapter of the Employment Law Association (VHA).

Epke Spijkerman graduated in Dutch law from Leiden University in 2000 and completed the post-academic course in employment law (PALA) at Erasmus University Rotterdam in 2008. He joined BUREN in 2020 as a partner. Epke specialises in employment and the employee participation law aspects of international M&A, business transfers, reorganisations, and dismissal proceedings (collective and individual). He has extensive experience in advising and litigating for national and international companies, including listed multinationals. Epke is a member of the European Employment Lawyer Association, the Amsterdam Employment Lawyers Association, the Dutch Employment Lawyers Association, the Employment Law Association, and the Association for Sport and Law.

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BUREN

WTC
Tower Seven – level 14
Strawinskylaan 1441
PO Box 78058
1070 LP Amsterdam
The Netherlands

Tel: +31 020 333 83 90
Email: info@burenlegal.com
Web: www.burenlegal.com/en

1. Legal System

1.1 Legal System and Judicial Order

Like in many other (European) countries, the legal system of the Netherlands is a civil law system. While legislation is the primary source of law, precedents developed in case law play an important role, as do the principles of reasonableness and fairness.

In addition to its own domestic legal system, the legal framework of the European Union applies in the Netherlands.

Judicial System for Civil and Criminal Cases

Eleven district courts (*rechtbanken*) deal with civil and criminal cases, and there are four courts of appeal (*gerechtshoven*). For civil and criminal cases, the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) is the highest instance, but it can overturn judgments of the courts of appeal on limited and specific legal grounds only, without reviewing the facts of a case.

Ranking high in The World Bank's Rule of Law Index, the Dutch legal system is considered one of the most efficient civil law systems in the world. On average, legal proceedings in the Netherlands take 130 days. Urgent matters may be heard in summary proceedings, in which judgments are rendered in a time frame of a few weeks or even a few days.

For certain areas of law, the Netherlands has established courts with specific expertise. The following courts are most relevant in an international business law context:

- the Netherlands Commercial Court, which allows parties to litigate in the English language entirely (from writ of summons to court hearing to judgment) in any international commercial dispute;
- the Enterprise Court (*Ondernemingskamer*) of the Amsterdam court of appeal, which has exclusive jurisdiction over certain matters relating to corporate law;
- the Maritime Court of the Rotterdam district court, which allows parties to litigate partly in English; and
- a chamber of the district court of The Hague, specialised in intellectual property law, which allows parties to litigate partly in English.

Judicial System for Administrative Cases

As in civil and criminal cases, district courts have jurisdiction in administrative cases, in principle,

provided that the applicable complaints procedure with the respective administrative body has been completed first. There are a number of competent courts for appeals – which court has jurisdiction to handle the appeal depends on the type of case. Most appeals are heard by the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*), which in most cases is the highest court for matters of administrative law in the Netherlands. A final appeal to the Supreme Court is only possible in tax cases.

Unlike in other countries, judicial bodies in the Netherlands do not pass judgment on the constitutionality of legislation. Based on a recent decision in the Dutch parliament, the constitutionality of legislation will in the future be dealt with by a separate commission of the parliament.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Approval

The approval requirements in the Netherlands have always been rather limited. As a consequence of the EU FDI Screening Regulation (Regulation (EU) 2019/452), which entered into force in 2019, this changed. Certain sectors and industries are regulated regardless of the nationality or home state of the investor.

Electricity, Gas, Drinking Water and Telecommunications Act

The Electricity Act, the Gas Act and, since 1 October 2020, the Telecommunications Act require notification to the Dutch Ministry of Economic Affairs (and Climate Policy) of any change of control with respect to an electricity, gas or telecommunications company. This screening obligation applies to any change of control that leads to a change of "predominant control" in any of the above sector-specific (electricity, gas or telecommunications) companies, regardless of the identity of the investor. A transaction triggering a change of control may be prohibited or be subject to certain conditions for reasons of public safety or supply security. If parties fail to notify the Ministry, a transaction is voidable.

Drinking water companies are by law required to be directly or indirectly held by Dutch public persons.

Financial Supervisions Act

Certain changes of control in companies and institutions that are subject to the Financial Supervisions Act are to be reported to the Authority for Financial Markets (*Autoriteit Financiële Markten*) or the Dutch Central Bank (*De Nederlandsche Bank*).

Dutch Implementation of Screening Mechanisms: Security Test Act

On 1 June 2023, the Investments, Mergers and Acquisitions Security Test Act (*Wet Veiligheidstoets investeringen, fusies en overnames*) (Security Test Act, also referred to as Vifo-Act) entered into force. The Security Test Act requires a change of control in certain Dutch companies to be notified to and approved by the Bureau for Investment Screening (*Bureau Toetsing Investeringen* – BTI). Companies that are active in the Netherlands in supplying vital infrastructure or undertakings, or that are active in sensitive technology, as well as companies that manage a business campus, fall under the scope of the Security Test Act. The screening mechanism applies retroactively to investments made after 8 September 2020.

The term "control" refers to the ability to exercise decisive influence on a target company, either through shareholding or on a de facto basis once the investment has taken place. Thresholds apply depending on the type of target company involved. Upon receipt of the notification, the BTI will examine whether the transaction can lead to a risk to national security, particularly the continuity of vital processes, the prevention of undesirable strategic independencies and the integrity and exclusivity of knowledge and information.

In principle, the approval time is within eight weeks of receipt of the notification. If a formal assessment is required, the BTI has an additional eight weeks for further investigation. Each phase can be extended separately.

Pending BTI approval of the transaction, a standstill obligation applies to the parties involved.

Based on Article 6(1) of the EU FDI Screening Regulation, the European Commission will have to be informed about the transaction and both the European Commission and other EU member states may ask questions about a transaction.

2.2 Procedure and Sanctions in the Event of Non-compliance

On the basis of current legislation, a transaction is voidable if parties to a foreign investment in the electricity, gas or telecommunications sector fail to notify the Ministry.

Failure to comply with the notification obligations under the Security Test Act may lead to a direct suspension of all voting rights of the investor, pursuant to the transaction. The company will be obliged make all efforts to co-operate.

Furthermore, the BTI may require the parties to make a certain notification within three months of the transaction becoming known. In the meantime, the rights of the investor will be suspended. The BTI may also impose an administrative fine, with the maximum being 10% of the turnover.

If the transaction has taken place without the approval of the BTI, the Security Test Act stipulates that the acquisition shall be declared null and void.

2.3 Commitments Required From Foreign Investors

Foreign investors are required to fulfil the notification requirements described in **2.1 Approval of Foreign Investments**.

2.4 Right to Appeal

This section is not applicable in the Netherlands.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The legal entities most commonly used in the Netherlands are the private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid* – BV) or the public limited company (*naamloze vennootschap* – NV), both of which have legal personality, and the (limited or general) partnership (*personenvennootschap*), which is a contractual arrangement without legal personality.

BVs

The key characteristics of a BV are as follows:

- capital is divided into shares;
- privately owned (ie, with a closed circle of shareholders);
- no minimum capital is required; and

- different types of shares can be created, which makes it possible to vary with regard to (among others) voting rights and profit-sharing rights.

A BV is more flexible than an NV and is the most frequently used corporate entity form in the Netherlands. BVs are popular as holding companies in (international) group structures and as operational and financing companies, and are also considered suitable for structuring joint ventures.

NVs

The key characteristics of an NV are as follows:

- a minimum share capital of EUR45,000;
- all shareholders have voting rights and profit rights;
- different types of shares are possible; and
- there are specific rules with regard to the proper functioning of the general meeting.

In general, an NV is subject to stricter capital and creditor protection rules than a BV. The NV is designed primarily as a public company, the shares of which can be listed on a stock exchange. Until 2019, an NV's capital could exist of individual bearer shares. Since that time, such shares can only be issued by way of a global certificate. Any (individual) bearer shares that were not converted into registered shares by 1 January 2020 are considered to have been converted by operation of law. Until 2 January 2026 shareholders of bearer certificates are entitled to acquire a replacement share in the form of a registered share from the respective company.

Partnerships

The two most common forms of Dutch partnerships are the general partnership (*vennootschap onder firma* – VOF), which is a partnership between two or more general partners, and the limited partnership (*commanditaire vennootschap* – CV), which is a partnership between one or more managing partners and one or more limited partners.

A Dutch partnership does not have legal personality.

3.2 Incorporation Process

The incorporation of a BV requires few formalities and can be carried out very quickly and easily.

BVs and NVs are incorporated by the execution of a notarial deed of incorporation (*akte van oprichting*) by a Dutch civil law notary (*notaris*). This deed of incorporation contains the initial articles of association and must be in the Dutch language. An English translation is commonly provided.

The incorporation of an NV requires a bank statement providing evidence of the payment of the minimum paid-up capital (if in cash) or a description of the contribution drawn up and signed by the incorporators, and an auditor's certificate attesting to such payment (if in kind).

The founders of an NV or a BV may be one or more individuals or legal entities, of any nationality and domiciled anywhere.

The Dutch civil law notary (*notaris*) is required by law to register persons who will have an interest of at least 25% in the newly incorporated company (the Ultimate Beneficial Owner(S) – UBO) with the UBO register. A partnership under Dutch law is set up by the execution of a partnership agreement between one or more partners. The partnership agreement must provide for a durable co-operation between the partners and must

be governed by Dutch law. The partners may be either individuals or legal entities.

A VOF must have at least two general partners, whereas a CV must have at least one managing partner and one limited (or "silent") partner. Each partner must contribute to the partnership.

3.3 Ongoing Reporting and Disclosure Obligations

Private companies must be registered with the trade register of the Dutch Chamber of Commerce within eight days of incorporation. The trade register holds publicly available information on companies, such as the names of the managing directors, supervisory directors and proxy holders (including the scope of their powers), if any, and the articles of association.

Amendments to the articles of association and certain amendments to the limited partnership agreement must be filed and registered with the trade register, as must certain changes in the company/partnership.

If all issued and outstanding shares in the company are held by one individual or legal entity, certain basic data regarding this sole shareholder must also be registered.

All companies and legal entities must register the ultimate beneficial owner(s) with the UBO register.

Companies must maintain accounting records and prepare financial statements. Additional accounting, auditing and publication requirements apply to small, medium and large companies, based on certain thresholds.

Dutch law contains no special requirements for the contents of the annual accounts of partnerships, unless all managing partners are corporations incorporated under foreign law, in which case that partnership is subject to the Dutch financial reporting requirements.

3.4 Management Structures

Dutch corporate law provides that a Dutch company must have at least a management board consisting of managing directors, and a general meeting of shareholders. Dutch companies may also have a supervisory board, although this is not required for most Dutch companies. The management board is the executive body of the company, charged with the company's day-to-day management.

The management board may consist of just one managing director, who can be a natural person or a legal entity. There are no requirements regarding the nationality or the place of residence of managing directors (although this may be a highly relevant issue for tax purposes).

Dutch corporate law offers companies a choice between a one-tier board consisting of executive and non-executive directors, and a two-tier board consisting of a management (executive) board and a supervisory (non-executive) board. Large companies that meet certain statutory criteria must have a one-tier board (with non-executive directors) or a supervisory board with considerable powers (as prescribed by law).

As for partnerships, VOFs are, in principle, managed by and may be represented by all partners. CVs are managed by the managing partner(s), who is/are responsible for the day-to-day affairs of the CV.

3.5 Directors', Officers' and Shareholders' Liability

A distinction should be made between the internal and external liability of managing directors: internal liability exists towards the company, while external liability exists towards third parties, such as creditors of the company or the tax authorities.

As a general rule, managing directors are jointly and severally liable for mismanagement only in cases of serious culpability (*ernstig verwijt*).

Mismanagement can consist of acting (or failing to act) in violation of the law or the articles of association, or acting in a clearly unreasonable way.

Managing directors who enter into a contract on behalf of a company while knowing (or having reason to know) that the company will not be able to fulfil its contractual obligations or will not have sufficient assets against which to take recourse may be held liable (externally) for any resulting damages. The burden of proof rests with the prejudiced creditor.

As a general rule, shareholders are not personally liable for acts performed in the name of the company, and are under no obligation to contribute to the losses of the company in excess of the amount to be paid on their shares. However, Dutch case law has recognised that there may be exceptional circumstances that allow the "corporate veil" to be lifted and shareholders to be held jointly liable for the company's debts and obligations.

Partners in VOFs are jointly and severally liable for all obligations of the partnership. The liability of general partners in a CV is unlimited, while the liability of limited partners is limited to the amount of their capital contributions, provided they have not performed any acts of management or representation of the partnership.

4. Employment Law

4.1 Nature of Applicable Regulations

The legal framework governing employment contracts is set out in the Dutch Civil Code (DCC). Additional terms and conditions may be agreed in an individual employment contract, provided they do not contradict the mandatory statutory provisions of the DCC. Furthermore, the legal relationship between an employer and employee may be governed by collective labour agreements between the trade unions and employers (or organisations of employers). Multiple other laws and regulations are also of influence – eg, the Equal Treatment Act.

In addition, case law provides an important series of precedents and principles, which often help to clarify ambiguous statutory or contractual provisions. The laws of the European Community and other international treaties and regulations form another important source of law.

4.2 Characteristics of Employment Contracts

Dutch employment law does not require employment contracts to be made in writing. Certain provisions, however, need to be in writing in order to be valid, such as non-competition clauses or probation period clauses.

No legal provision dictates the language in which employment contracts should be concluded; they do not necessarily have to be in Dutch, with international companies commonly offering employees employment contracts in English.

Employment contracts can be concluded for a definite period of time (fixed-term contracts) or an indefinite period of time (indefinite contracts). Consecutive fixed-term employment contracts, if extended, are automatically converted into indefinite contracts, once certain criteria are met. This applies if the number of consecutive contracts exceeds three, or if the aggregate term of the consecutive contracts exceeds 36 months.

4.3 Working Time

Under the Dutch Working Hours Act, employees are generally allowed to work a maximum of 12 hours per day and a maximum of 60 hours per week. Over a period of 16 consecutive weeks, employees may not work more than 48 hours per week on average. Over a period of four consecutive weeks, the weekly average may not be more than 55 hours.

Collective labour agreements or employee handbooks may contain provisions on the standard working hours in a company. Unlike many other countries, the Netherlands does not provide a national standard for overtime, which is usually agreed by individual employment contracts and collective agreements.

4.4 Termination of Employment Contracts

The dismissal of employees is governed by mandatory statutory dismissal provisions. The system differs substantially from most other (European) countries.

Fixed-term contracts end by operation of law on the agreed end date.

Employers may terminate indefinite contracts by giving notice of termination. The most striking difference to other jurisdictions is that employers must, in principle, first apply for a dismissal permit from the governmental agency called UWV Werkbedrijf before they can give such notice, or they must request the court to terminate the contract. The manner of termination for employers is prescribed by law, depending on the reason for termination: termination for economic reasons or due to long-term incapacity for work must be effected through the UWV procedure, while dismissal on other grounds has to take place through termination by the court.

Unlike employers, employees do not require a permit from the UWV nor have to go to court to terminate their employment contract. The statutory notice period for employees is one month. The statutory notice period for employers is between one and four months, depending on the duration of the employment relationship.

Several dismissal prohibitions apply. For example, sick employees are protected against termination of employment during the first two years of their sickness and also pregnant employees benefit from dismissal protection. Both fixed-term contracts and indefinite contracts can be terminated by mutual consent between the employer and the employee. Employers usually offer financial compensation, based on (at least) the “transition payment” (see below), and it is common to confirm the termination in a settlement agreement, by which the parties grant each other full and final discharge.

Indefinite contracts and fixed-term contracts longer than six months may include a probationary period during which each party may terminate the employment contract with immediate effect, without the prior permission of the UWV or the court.

Employment contracts may be terminated with immediate effect and without prior permis-

sion from the UWV or the court if there is an "urgent cause" to do so. The DCC provides a non-exhaustive list of acts that may qualify as an "urgent cause", such as fraud and theft.

Employers are required to make a "transition payment" to employees if one of the following applies:

- the employment contract is terminated by the employer by giving prior notice of termination;
- the court terminates the employment contract at the employer's request; or
- the employer decides not to renew the employment contract after the expiration of the agreed fixed term.

Transition payments are equal to one third of a monthly gross salary for every full year of employment, regardless of the employee's age, and calculated pro rata, depending on the exact duration of employment. The payment never exceeds EUR89,000 (as of 2023), or one annual salary for employees earning more than EUR89,000. Only employees who are seriously culpable for termination, eg due to theft or fraud, are not entitled to a transition payment. If the court rules that an employer has demonstrated seriously culpable behaviour towards an employee, eg, discrimination or harassment, the court can grant the employee additional severance.

Employers who intend to dismiss at least 20 employees within a period of three months (in one region) are subject to the Collective Redundancy (Notification) Act. Under that legislation, employers must notify the UWV and the relevant trade unions of the intended dismissals, and must first discuss the proposed decision and its social consequences with these trade unions. Usually, a collective dismissal arrangement (social plan) will be negotiated.

4.5 Employee Representations

Under the Dutch Works Council Act (WCA), companies employing at least 50 persons must establish a works council for the purpose of consultation with and representation of the employees. The employees elect the members of the works council directly from amongst themselves. The number of members depends on the number of employees within the company, and varies from a minimum of three to a maximum of 25.

The WCA provides a number of rights for the works council, including the right to advise on certain matters and the right of approval. Companies must request the prior advice of the works council on certain decisions (and their implementation) about significant business matters, such as the transfer of control over the company or any part thereof, the establishment, takeover or disposal of control over another company, or the termination of operations or a substantial part thereof. In addition, companies must request the prior approval of the works council in respect of certain decisions concerning the introduction, modification or repeal of "social" regulations within the enterprise, such as regulations on:

- pension schemes;
- profit-sharing or saving plans;
- working hours or leave; and
- salary or job classification systems.

Furthermore, trade unions often represent their members in discussions about a collective labour agreement and in collective dismissals.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

Taxes Paid by Employees

Personal income tax

Personal income tax is levied on Dutch tax residents (on income from various worldwide sources) and non-Dutch tax residents (on income from Dutch sources).

Personal income tax is levied on three different categories of income, referred to as "boxes":

- box 1 concerns income from work and home, and includes income from past and current employment, sole proprietorship, and an owner-occupied home;
- box 2 concerns taxable income from, in short, share interests of 5% or more in companies; and
- box 3 concerns income from savings and investments.

Wage tax is withheld by employers, and functions as a pre-tax to personal income tax (and employee social security contributions). Income from past and current employment (realised by Dutch and non-Dutch tax residents) is determined by the Dutch Wage Tax Act 1964. Except in certain specific cases (for instance, if the individual functions as a board member or supervisory board member of a Dutch company), individuals who work (almost) entirely outside the Netherlands are generally not considered "employees" for Dutch wage tax purposes.

Personal income tax for box 1 is levied at progressive rates on income, minus personal deductions and allowances. In 2024, the applicable rates for non-retired persons are:

- 36.97% for income up to and including EUR38,098 (9.32% excluding social security contributions levied from employees);
- 36.97% for income ranging between EUR38,098 and EUR75,518; and
- 49.50% for income exceeding EUR75,518.

Starting in 2024 box 2 is levied at a progressive rate on income. In 2024, the applicable rates are:

- 24.50% for income up to and including EUR67,000; and
- 33% for income exceeding EUR67,000.

In 2024 box 3 income tax is levied at a rate of 36% on three categories based on a deemed return on assets minus liabilities. The deemed return for 2024 will be announced at the start of 2025, except for the "other assets" which is already known (deemed return: 6.04). The effective rates applied in the preliminary 2024 personal income tax assessments are:

- Bank balances (including savings) and cash: 0.3708% (flat rate of return of 1.03 × 36%).
- Other assets: 2.1744% (flat rate of return of 6.04 × 36%).
- Debt: –0.8892% (flat rate of return of –2.47 × 36%).

In 2024, the first EUR57,000 (EUR114,000 for taxpayers with a tax partner) of net box 3 assets are tax-exempt.

Subject to certain conditions, employees hired outside the Netherlands can apply for a ruling allowing employers to pay 30% of the wage tax-free for the first 20 months, including allowances. Per 1 January 2024, this scheme may be applied up to the maximum amount under the Standards for Remuneration Act (EUR233,000 in 2024). Furthermore, the 30% facility will be

scaled back to 20% after 20 months once the 30% facility is applied from 1 January 2024 onwards. If an employee starts utilising the facility on 1 January 2024, the facility will be scaled back to 20% from 1 September 2025 onwards. The facility will be further scaled back to 10% again after 20 months. The limitations do not apply to applicants who already applied the 30% ruling before 1 January 2024.

Employee social security contributions

Individuals are subject to social security contributions levied on income up to and including EUR38,098. The applicable rate is 27.65%.

Taxes Paid by Employers

Wage tax

Employers qualifying as "withholding agents" must withhold wage tax and social security contributions (levied at the level of employees) in respect of wages paid to employees for Dutch wage tax purposes.

Employer social security contributions

In summary, the rates of employer social security contributions in 2024 are as follows:

- general unemployment insurance (*Algemeen werkloosheidsfonds* – AWF): 2.64% for contracted workers with an indefinite term and 7.64% for flex workers and temporary workers;
- occupational disability insurance (*Wet op de arbeidsongeschiktheidsverzekering* – WAO or *Wet werk en inkomen naar arbeidsvermogen* – WIA): 7.54% for large employers and 6.18% for small employers;
- Health Insurance Act contribution (*Zorgverzekeringswet* – ZVW): 6.57%;
- childcare allowance contribution (*Werkgeversbijdrage Kinderopvang*): 0.5%;
- government unemployment insurance (*Uitvoeringsfonds voor de overheid* – UFO): 0.68%; and
- the Return to Work Fund (*Werkhervattingskas* – Whk): 1.22% (approximate amount).

Only income up to and including EUR71,628 is subject to the above contributions.

5.2 Taxes Applicable to Businesses

Corporate Income Tax

Dutch tax-resident companies (or companies deemed to be tax residents) are subject to Dutch corporate income tax based on their worldwide income.

Non-Dutch tax-resident companies are subject to corporate income tax from certain Dutch sources, including:

- Dutch permanent establishments or permanent representatives;
- shareholdings of at least 5% in Dutch companies that cannot pass certain anti-abuse tests; and
- other specific sources, including Dutch real estate, directorship services and the exploration of natural resources.

The Dutch corporate income tax rate in 2024 is 19% for taxable profits up to and including EUR200,000, and 25.8% for taxable profits exceeding this amount.

Under the Dutch participation exemption, income (eg, dividends and capital gains) derived by Dutch resident corporate taxpayers from qualifying subsidiaries is exempt from Dutch corporate income tax.

In 2024, the term of the loss carry forward facility is an unlimited period. The carry back period

is one year. Profits of up to EUR1 million can be fully deducted under the application of the loss carry forward and backward facility. For profits exceeding EUR1 million, only 50% of the profit can be reduced under these facilities.

Minimum Profit Tax

In line with EU regulations, the Netherlands has introduced a Minimum Profit Tax law: *Wet Minimumbelasting* 2024. The Minimum Profit Tax Act 2024 requires large multinational enterprises with an annual turnover exceeding EUR750 million to be subject to (at least) 15% minimum corporate income tax due to the so-called OECD Pillar Two project.

The Netherlands adopted the optional Qualified Domestic Minimum Top-Up Tax (QDMTT), which ensures that profits of low-taxed Dutch entities which are part of a Pillar Two group are first to be topped-up locally, thus preventing other group jurisdictions from taxing these undertaxed Dutch profits. It is expected that the QDMTT will be granted Safe Harbour status by the OECD.

Dividend Withholding Tax

Shareholders of Dutch tax-resident companies are generally subject to 15% Dutch dividend withholding tax in respect of dividends (and other payments treated as dividends) paid by Dutch tax-resident companies (or companies deemed to be tax residents). In principle, distributing companies should withhold and pay any Dutch dividend withholding tax due.

An exemption applies to dividends distributed to corporate shareholders owning a share interest of at least 5% in the relevant distributing company if, in short, the corporate shareholder is a tax resident of the EU or a Dutch tax treaty jurisdiction, and is the beneficial owner of the dividend, provided it is not a hybrid transaction and certain other anti-abuse tests are met.

Application of the extensive Dutch tax treaty network may result in a reduction or refund of Dutch dividend withholding tax.

Conditional Withholding Tax

The Netherlands does not currently levy withholding tax on interest and royalty payments, with the exception of a specific levy in intragroup abusive situations.

In 2024, a conditional withholding tax at a rate of 25.8% is due on intra-group dividend, interest and royalty payments by Dutch resident companies to related entities residing in jurisdictions that are either on the blacklist issued by the Dutch Ministry of Finance (including low tax jurisdictions (less than 9%) and jurisdictions that are on the EU blacklist of non-cooperative jurisdictions) or in abusive situations.

VAT

The Netherlands levies Value Added Tax (VAT) on the supply of goods and services as part of the domestic implementation of the EU VAT Directive (Directive 2006/112/EC). The current Dutch VAT system, therefore, is comparable to the VAT systems of other EU member states, although the Netherlands uses certain optional measures to facilitate trading.

Under Dutch VAT law, in principle any person or entity can qualify as an “entrepreneur” (taxable person) if they act independently and perform (preparatory acts to) economic activities on a continuing basis, whatever the purpose or result of those activities. Entrepreneurs acting as such are, in principle, required to file VAT returns and are entitled to a refund of (input) VAT charged, provided they are engaged in VAT taxable trans-

actions within the territory of a member state of the European Union.

In the Netherlands, the following VAT rates apply to supplies of goods and services in 2024:

- general rate: 21%;
- reduced rate: 9%; and
- zero rate (0%).

Furthermore, entrepreneurs must meet certain administrative obligations when rendering VAT taxable or exempt transactions (eg, invoicing, keeping proper accounts, filing VAT returns, and EU Sales Listing reporting).

5.3 Available Tax Credits/Incentives

Innovation Box Regime

Dutch taxpayers can apply an "innovation box regime" to qualifying profits from certain self-developed intangible fixed assets.

Under the innovation box regime, profits are included in the tax base of a taxpayer only for 9/25, resulting in an effective tax rate of 9%.

Qualifying profits are benefits from qualifying self-developed intangible fixed assets multiplied by a nexus ratio. The nexus ratio consists of 130% of the taxpayers' operating expenses and third-party outsourcing expenses incurred in relation to the creation of the relevant asset, divided by any expenses incurred in relation to the creation of the relevant assets, with a maximum of 100%.

For small taxpayers, qualifying assets are intangible fixed assets developed by research and development (R&D) activities for which a so-called R&D certificate was issued.

Taxpayers are considered small if their net group turnover is less than EUR250 million in the respective financial year and the four preceding years combined, and the benefits derived from the intangible assets are less than EUR37.5 million in the respective financial year and the four preceding financial years combined.

For large taxpayers, qualifying assets are intangible fixed assets developed by R&D activities falling within the scope of certain specific categories.

R&D Wage Tax Credit Regime

The R&D wage tax credit regime enables companies that engage in R&D activities to pay less wage tax and social security contributions than they withhold from their employees.

The amount of the reduction is limited to the total amount of wage costs and social security contributions. R&D costs may include both wages and other costs related to self-developed R&D.

In order to qualify for the R&D wage tax credit regime, companies have to apply for a permit from the Netherlands Enterprise Agency (RVO).

The granting of this permit is subject to the following conditions:

- the R&D activities (eg, development of a product, production process, software or technical research) will be performed in-house by the applicant;
- the innovation is new to the organisation of the applicant;
- the applicant seeks to solve technical difficulties of the development process;
- the R&D activities are performed within the EU; and
- the R&D permit is requested in advance.

In addition, the granting of the permit is subject to the available funding.

Business Incentives

The small-scale investment incentive provides for tax deductions for corporate income tax and personal income tax purposes in connection with the acquisition of one or more new qualifying business assets.

The investment incentive for environment-improving assets provides for tax deductions in connection with the acquisition of one or more new environment-improving assets. The deduction generally amounts to 40% of the amount of the investment, which should be included on a list published by the RVO, and requires the issuance of a notification from the RVO.

Under conditions similar to those of the investment incentive for environment-improving assets, it is possible to apply the random depreciation regime to environment-improving assets or energy-improving assets. Under this regime, taxpayers can randomly depreciate 75% of the investment made in the qualifying asset.

Some investments are excluded from the application of the above-mentioned incentives.

5.4 Tax Consolidation

Fiscal Unity for Dutch Corporate Income Tax Purposes

Companies that are part of a "fiscal unity" for Dutch corporate income tax purposes may file a consolidated tax return, and are taxed on a consolidated basis as if they were just one company. As a result, transactions between companies belonging to the fiscal unity are, in principle, ignored and not subject to taxation on profits or gains.

However, for purposes of certain anti-abuse rules (eg, for the anti-base erosion rules included in Article 10a of the Dutch Corporate Income Tax Act 1969), transactions between entities within a fiscal unity are considered.

The Dutch fiscal unity rules include other anti-abuse rules, which can be triggered by the formation or dissolution of a fiscal unity, for example.

Companies belonging to the fiscal unity are jointly and severally liable for payments of corporate income tax over the period of the fiscal unity.

Parent companies and their subsidiaries can, upon request, form fiscal unities if a number of requirements are met, including the following:

- ownership requirement – the parent company must hold the economic and legal ownership of at least 95% of the shares in the nominal paid-up capital of its subsidiary, which provides entitlement to at least 95% of the statutory voting rights in that subsidiary and to at least 95% of the profits, and represents at least 95% of the capital of the subsidiary; and
- residency requirement – the applying companies should be residents of the Netherlands for tax treaty purposes.

In addition to the above, a parent company can form a fiscal unity with an indirectly held subsidiary if both companies are tax residents of the Netherlands and the intermediate company (or companies) between the parent company and the indirectly held subsidiary resides in another EU or EEA member state. Furthermore, two Dutch tax-resident subsidiaries can form a fiscal unity if their joint parent resides in another EU

or EEA member state. A new tax consolidation system is currently under discussion.

Fiscal Unity for Dutch VAT Purposes

A VAT group can be created by two or more persons established within an EU member state, who, while legally independent, are closely bound to each other by financial ties (ie, more than 50% shareholding), organisational ties (ie, central management) and economic ties (ie, same or related activities or suppliers). A VAT group is treated as one VAT entrepreneur.

Transactions between the members of a VAT group are not subject to VAT. The right to deduct input VAT is based on the activities of the VAT group as a whole. The VAT group regime only applies if each member of the VAT group qualifies as a VAT entrepreneur.

5.5 Thin Capitalisation Rules and Other Limitations

The Dutch earning stripping rules limit the deduction of excessive interest expenses related to intra-group and third-party payables for Dutch corporate income tax purposes.

Under these rules, the starting point is to determine the Dutch taxpayers' so-called interest expense excess, which is the amount by which the Dutch taxpayers' tax-deductible interest expenses exceed their taxable interest income. The deductibility of the interest expense excess is limited to 20% of the taxpayers' EBITDA (carving out tax-exempt income) or a safe harbour threshold of EUR1 million, whichever is higher. For real estate entities, these rules may change starting from 1 January 2025. Also, four political parties reached a provisional agreement to form a government in the Netherlands. This provisional agreement contains the coalition plans for the coming years. One of these plans is that the percentage will be increased to 25%, which is in line with the EU average.

Interest disallowed under the earnings stripping rule can be carried forward to later years without any time limitations.

Dutch corporate income tax law includes several other rules based on which deduction of interest may be denied, including the anti-tax base erosion rules – see **5.7 Anti-evasion Rules**.

5.6 Transfer Pricing

For Dutch tax purposes, transactions between affiliated entities must be performed under the same terms and conditions as would be agreed between non-affiliated entities under similar circumstances (the so-called "arm's length principle"). If the terms and conditions of an affiliated party transaction are not at arm's length, the transaction is taxed as if they had been.

For Dutch transfer pricing purposes, companies are considered to be affiliated if one entity participates (directly or indirectly) in the management, control or capital of another entity, or if the same person participates (directly or indirectly) in the management, control or capital of two entities.

Dutch taxpayers must have documentation available showing that the conditions of affiliated party transactions are at arm's length. In addition, multinationals with a consolidated group turnover of at least EUR750 million in the preceding year are required to file country-by-country (CbC) reports containing detailed information on the transfer pricing policy and the allocation of assets and personnel within the group. CbC reports are exchanged automatically with the tax authorities of all countries in which the multinational group operates.

Furthermore, Dutch taxpayers that are part of a multinational group with a consolidated turnover of at least EUR50 million in the preceding year must prepare both so-called "master files" and "local files".

In addition, rules apply based on which hybrid mismatches that arise under the application of the arm's length principle are neutralised. Based on these rules, downwards fiscal profit adjustments, recognition of losses and value increases of assets acquired from affiliated parties (the value increases are also referred to as "informal capital contributions" or "deemed dividend distributions") under the application of the arm's length principle will be denied if, in short, the taxpayer cannot reasonably prove that a corresponding upwards adjustment will be included in the tax base in the jurisdiction of the affiliated party.

5.7 Anti-evasion Rules

Dutch corporate income tax law includes various rules targeting tax evasion, such as limitation of interest deduction rules preventing tax base erosion, controlled foreign companies (CFC) legislation, exit taxation and the non-resident corporate income tax rules (see **5.2 Taxes Applicable to Businesses**). Furthermore, there are various Dutch dividend withholding tax rules targeting tax evasion, such as anti-dividend stripping rules and certain other anti-abuse rules (see **5.2 Taxes Applicable to Businesses**). Finally, Dutch tax law includes an unwritten general anti-abuse rule (fraus legis). Some of these anti-evasion rules are listed below.

Limitation of Interest Deduction Rules – Anti-tax Base Erosion Rules

Under the Dutch anti-tax base erosion rules, the deduction of interest expenses (including currency results and other costs) is limited to related party loans that have been used to finance:

- profit distributions or repayments of capital to related parties;
- capital contributions to related parties; or
- the acquisition of certain share interests.

There are, however, exceptions under which the interest deduction limitation rule does not apply (eg, if the loan and the transaction are based primarily on business reasons).

CFC Legislation

Under the CFC rules, undistributed "tainted" (passive) income derived from subsidiaries or permanent establishments that are tax resident in certain blacklisted jurisdictions (ie, the jurisdictions referred to under **5.2 Taxes Applicable to Businesses**, under "Conditional Withholding Tax") is, in principle, annually included in the taxable basis of the Dutch taxpayer (subject to certain conditions). Only interests of 50% in direct or indirect subsidiaries or permanent establishments of Dutch taxpayers together with related companies are targeted.

Exit Taxation

If Dutch resident corporate taxpayers transfer their tax residencies to other jurisdictions or transfer assets to non-Dutch permanent establishments, the assets and liabilities must be stated at fair market value. Any gains (ie, hidden reserves, goodwill and/or currency exchange gains) will, in principle, be subject to corporate income tax. Under certain conditions, it is possible to apply an extended payment deadline.

General Anti-abuse Rule (Fraus Legis)

Under the application of fraus legis, transactions can be eliminated for Dutch tax purposes or replaced by other transactions. Fraus legis

can be applied if the Dutch tax authorities prove that the sole or predominant motive for a transaction is tax avoidance, and that the envisaged tax consequences of a transaction conflict with the purposes and rationale of the relevant law.

Anti-hybrid Rules

Dutch tax law includes anti-hybrid rules implementing the amended Anti-Tax Avoidance Directive (ATAD2). These rules include limitation of deduction rules under which hybrid mismatches between "associated enterprises", head offices and their permanent establishments or between two or more permanent establishments of an entity and mismatches under a so-called "structured arrangement" are neutralised. A hybrid mismatch is generally present if there is a double deduction of costs or a deduction of costs without inclusion of the corresponding benefit. These rules apply for the following hybrid mismatches.

- Hybrid entity mismatches – an entity is treated as non-transparent in one jurisdiction and transparent in another jurisdiction.
- Hybrid financial instruments – an instrument that includes debt and equity is treated as non-transparent in one jurisdiction and transparent in another jurisdiction.
- Hybrid financial transfers – an arrangement to transfer a financial instrument causes a hybrid mismatch.
- Imported hybrid mismatches – a hybrid mismatch situation between parties in non-EU jurisdictions is shifted to an EU member state through the use of a non-hybrid instrument.
- Hybrid PEs – a permanent establishment is treated differently between jurisdictions as regards the presence or attribution of profit to business activities in the jurisdictions.
- Dual resident mismatch – a payment made by a dual resident company may be deductible in multiple jurisdictions.

A separate anti-mismatch rule applies to "reversed hybrid situations", which concern entities that are treated as transparent in the jurisdiction of incorporation or registration, and that are treated as non-transparent in the jurisdictions of their participants. Reverse hybrid entities are subject to corporate income tax in the Netherlands. Furthermore, a reverse hybrid entity may also be subject to dividend withholding tax and conditional withholding tax.

Taxpayers are required to have information in their administration substantiating whether or not any hybrid mismatch rules are met. If such information is not present, the tax inspector could request the provision of such documentation and the taxpayer would have the burden of proof that no hybrid situation would be present.

EU Mandatory Disclosure Directive (DAC6)

Under DAC6, taxpayers and intermediaries such as tax advisers, accountants, trust offices and (in certain cases) lawyers that design, promote or implement tax planning schemes are required to report potentially aggressive tax arrangements to the tax authorities.

The Dutch law refers to Annex IV of DAC6 for the definition of the reportable cross-border arrangements.

Since 1 January 2021, reportable arrangements should be reported within 30 days, starting the day after:

- the reportable arrangement is made available for implementation;

- the reportable arrangement is ready for implementation; or
- when the first step of the implementation is made, whichever occurs first.

An exception applies to "marketable arrangements", which should be reported every three months.

6. Competition Law

6.1 Merger Control Notification

Mergers can be subject to either EU or Dutch merger control rules. The rules in the Dutch Competition Act are based on and essentially resemble the EU competition rules.

The EU Commission must be notified of any merger with an EU dimension prior to its implementation. If the Dutch notification thresholds are met, then companies must comply with the Dutch notification requirements.

In principle, the Commission only examines larger mergers with an EU dimension if the merging firms reach certain turnover thresholds. There are two alternative ways to reach turnover thresholds.

- The first alternative requires:
  (a) a combined worldwide turnover of all the merging firms of more than EUR5 billion; and
  (b) an EU-wide turnover for each of at least two of the firms of more EUR250 million.
- The second alternative requires:
  (a) a worldwide turnover of all the merging firms of more than EUR2.5 billion;
  (b) a combined turnover of all the merging firms of more than EUR100 million in each of at least three member states;
  (c) a turnover of more than EUR25 million for each of at least two of the firms in each of those three member states; and
  (d) an EU-wide turnover of each of at least two firms of more than EUR100 million.

In both alternatives, the EU dimension requirement is not met if each of the firms achieves more than two thirds of its EU-wide turnover within one and the same EU member state.

Mergers without an EU dimension are subject to Article 29 of the Dutch Competition Act, under which the Dutch Authority for Consumers and Markets (*Autoriteit Consument en Markt* – ACM) must be notified of a concentration if both the combined turnover of the firms involved is more than EUR150 million in the calendar year before the concentration and at least two of the companies involved earned at least EUR30 million in the Netherlands.

According to Article 27(1) of the Dutch Competition Act, the following types of transactions (concentrations) are subject to merger control:

- the merger of two or more previously independent companies; and
- the acquisition of direct or indirect control by:
  (a) one or more natural persons or legal entities that already control one company; or
  (b) one or more companies of the whole or parts of one or more other companies, through the acquisition of a participating interest in the capital or assets, under an agreement or by any other means.

Control is defined as the ability to exercise decisive influence on the activities of a company on the basis of factual or legal circumstances.

Long-term joint ventures performing all functions of an autonomous economic entity are seen as concentrations under section 27(b)(1) of the Dutch Competition Act.

Sector-specific thresholds apply to credit and financial institutions, and to concentrations in respect of healthcare companies.

The Dutch Competition Act is enforced by the ACM, which is an autonomous administrative authority that operates independently of the Ministry of Economic Affairs. The ACM is also the local competent authority for matters relating to Regulation (EC) 139/2004 on the control of concentrations between undertakings (the "Merger Regulation").

6.2 Merger Control Procedure

Transactions meeting the thresholds of the Dutch Competition Act must be notified to the ACM. The intended transaction must be notified before its completion, and the concentration may not be effected before four weeks have passed after the notification (Article 34(1) of the Dutch Competition Act).

The ACM assesses concentrations in two phases. During Phase I, which starts with the notification, the ACM must decide within four weeks whether the transaction requires a licence. If no licence is required, the parties can execute the transaction.

If the ACM decides that a licence is required, the parties can apply for the licence at their own discretion and timing. However, the transaction cannot be completed without a licence. Phase Two is initiated with the submission of a licence application, after which the ACM conducts a more in-depth analysis of the effects of the concentration. The ACM must decide on the application within 13 weeks, failing which the concentration is deemed approved. However, the Phase Two procedure often takes more time, mainly due to stop-the-clock requests for additional information. If the ACM decides not to grant a licence, the applicants are not allowed to execute the transaction.

If the proposed concentration involves a healthcare company employing 50 or more healthcare providers, the companies involved must first notify the Dutch Healthcare Authority (*Nederlandse Zorgautoriteit* – NZa) of the intended transaction so that it can assess the possible effects of the concentration.

Two or more concentrations taking place between the same persons or undertakings within a period of two years shall be regarded as one concentration effected on the day of the last transaction.

6.3 Cartels

The rules in the Dutch Competition Act governing anti-competitive agreements, decisions and concerted practices essentially resemble the EU rules. Agreements between companies, decisions by associations of companies and concerted practices that restrict competition or aim to do so are prohibited; this includes both horizontal and vertical restrictions of competition.

Under certain conditions, anti-competitive agreements are exempted from this prohibition. The respective national provisions again reproduce the conditions required under EU law. Exemptions include agreements that serve to improve the production of goods or promote technical progress while allowing consumers a fair share of the resulting benefit. The European Commission's block exemptions, such as the EU Vertical Agreements Block Exemption Regula-

tion, apply mutatis mutandis. Agreements or concerted practices in violation of rules governing anti-competitive agreements and practices are, in principle, null and void.

A new Vertical Block Exemption Regulation 2022/720 (VBER) entered into effect on 1 June 2022, replacing Regulation 330/2010 which applied until 31 May 2022. The new VBER has narrowed the scope of certain safe harbours, especially for online intermediation services (platforms), with a specific focus on dual distribution and parity obligations, but also introduced new flexibility for both exclusive and selective distribution systems and online sales restrictions.

Also, on 1 July 2023 the horizontal block exemption regulations (BERs) on research and development (R&D) and specialisation agreements, as well as draft revised guidelines on horizontal co-operation entered into effect.

The cartel prohibition is enforced by the ACM, which can impose fines of up to EUR900,000 or 10% of a company's worldwide group turnover in the past calendar year, whichever is higher. In addition, the amount of the fine can be multiplied by the number of years that the violation lasted, up to a maximum of four years. Therefore, for infringements that have lasted four years or more, the maximum fine can be as high as 40% of the undertaking's worldwide group turnover. In case of recidivism within five years, the maximum fine can be doubled and can therefore be as high as 80% of the undertaking's worldwide group turnover. The maximum fine that the ACM can impose on natural persons who have played a leading role in a cartel is EUR900,000, which can be doubled if that person committed a similar violation in the preceding five years.

Under EU Council Regulation No 1/2003, the ACM is required to apply EU rules (ie, Article 101 of the TFEU) if an agreement or concerted practice can affect trade between member states. Conduct allowed under EU rules cannot be prohibited under Dutch national law under such circumstances.

6.4 Abuse of Dominant Position

Under Article 24 of the Dutch Competition Act and Article 102 of the TFEU, companies that have a position of economic strength are prohibited from abusing that dominant position. Article 1(i) of the Dutch Competition Act defines a dominant position as a position in which one or more companies are able to prevent effective competition from being maintained on the Dutch market or part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end users. As a rule of thumb, a market share of less than 40% does not constitute a dominant position, but a rebuttable presumption of dominance exists above 50%.

Market shares are not decisive by themselves; other relevant factors may include the existence of intellectual property rights, the level of concentration of the market and barriers to entry. Abuse is not defined, and may consist of charging unreasonably high prices, refusing to supply, or charging extremely low prices ("predatory pricing") to force competitors out of the market.

7. Intellectual Property

7.1 Patents

Under Dutch patent law, technical inventions (defined as products or operating procedures in any technological field) are eligible for patent protection if they meet three material criteria:

- novelty – the product or process may not have been made public anywhere in the world before the date of submitting the patent application, not even through the activities of the inventor themselves;
- inventive step – the invention must not seem obvious to a professional; and
- industrial application – the invention must relate to a technically demonstrable functioning product or production process.

Patents can be applied for in the following ways:

- by filing a national application with the Netherlands Patent Office (*Octrooicentrum Nederland*);
- by filing a European application with the European Patent Office (EPO) designating the Netherlands as a country for which patent protection is desired (as one of more than 30 possible countries in the EU);
- by filing an application with the WIPO under the Patent Cooperation Treaty; or
- since 1 June 2023, by filing for a Unitary Patent.

On 1 June 2023 the EU regulations establishing the Unitary Patent system (No 1257/2012 and No 1260/2012) became applicable. On that date, 17 EU member states had ratified the UPC (Unified Patent Court Agreement) Agreement, ie Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovenia and Sweden. Additional EU member states are expected to ratify the UPC Agreement in the coming years, so that eventually Unitary Patents will make it possible to get patent protection in up to 25 EU member states by submitting a single request to the EPO.

Once the EPO grants a European patent application, the applicant can choose between: (i) a European patent with chosen countries; or (ii) a Unitary Patent for the European countries that have ratified the UPC Agreement.

Through the UPC Agreement, a ruling can be obtained from a single authority regarding the validity or infringement of a Unitary Patent for all EU Member States that ratified the UPC Agreement. The UPC (Unified Patent Court), has headquarters in Munich and Paris. In The Hague, there will be a local division at The Hague Hearing Centre. Companies can litigate European patent cases there in Dutch and English.

For a transitional period (initially of 7 years) for classic European patents the patentee can choose whether or not to use the UPC. If it is chosen not to use the UPC, then litigation will continue to go through the national courts. This is called “opting out” of the UPC.

Dutch patents and Unitary Patents are valid for a maximum of 20 years from the filing date, provided that the annual fees are paid. If certain requirements are met, the term of protection for medicinal and plant protection products can be extended by up to five years through a supplementary protection certificate.

Patent owners can prevent others from unlicensed use of the patented technology. In addition, patent owners can demand information, the disclosure of records, the destruction of infringing products and damages from infringers. Damages can be calculated on the basis of lost profits of the patent owner, a licence analogy or the profits of the infringer. Punitive damages cannot be claimed in the Netherlands.

The District Court of The Hague has a specialised patent division and has exclusive jurisdiction in patent litigation regarding Dutch patents. It is possible to appeal judgments of The Hague District Court to the Appeal Court in The Hague, which will review the dispute in full and has specialised IP justices. Appeal judgments can be reviewed by the Supreme Court of the Netherlands, albeit only on issues of law, not fact.

7.2 Trade Marks

The Netherlands has three different systems for trade mark protection:

- the Benelux Convention on Intellectual Property (trade marks and designs);
- Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark; and
- the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol).

Trade marks can consist of any signs, particularly words, including proprietary names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

- distinguishing the goods or services of one business from those of other businesses; and
- being represented in the register in a manner that enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

Benelux trade marks offer protection in Belgium, the Netherlands and Luxembourg, and may be applied for at the Benelux Office for Intellectual Property (BOIP). European trade marks that provide protection for all EU member states have to be applied for at the European Union Intellectual Property Office (EUIPO).

Dutch trade marks are initially protected for ten years. Protection may be prolonged for an indefinite number of times upon the timely payment of the extension fees.

The unlicensed use of registered trade marks is forbidden, and taking “unfair advantage” of the reputation of trade marks also constitutes an infringement. To enjoy the exclusivity rights of trade marks, trade mark owners must put the trade marks to genuine use for the goods or services for which they have been registered within five years of filing. In the event of trade mark infringements, trade mark owners may claim injunctive relief, rendering of account, damages, product recall and even destruction of the infringing goods.

Benelux trade marks are enforceable through the civil courts. Both Dutch district courts and courts of appeal have broad experience in IP issues.

The district court of The Hague (the EUTM court in the Netherlands) has a chamber of judges specialising in IP law, and has exclusive jurisdiction for litigation related to EU trade marks.

7.3 Industrial Design

As with trade mark protection, the Netherlands has three different systems for the protection of industrial design:

- the Benelux Convention on Intellectual Property (trade marks and designs);
- Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs; and
- The Hague System for the International Registration of Industrial Designs.

The terms "design" or "drawing" relate to the appearance of products or parts of products. To claim a design right, the design must be novel and have an individual character.

Benelux designs offer protection in Belgium, the Netherlands and Luxembourg, and may be applied for at the BOIP. European designs that provide protection for all EU member states have to be applied for at the EUIPO. The Hague System for the International Registration of Industrial Designs allows for the registration of designs in 70 contracting states by filing one single international application with the WIPO.

Design registrations are initially valid for five years from the date of filing and can be renewed in blocks of five years up to a maximum of 25 years.

Unregistered designs are protected against copying for a period of three years from the date on which the design was first made available to the public within the territory of the European Union. After the expiry of these three years, protection cannot be extended.

In the case of design right infringements, the owners can claim injunctive relief, rendering of account, damages, product recall and even destruction of the infringing goods.

Benelux design protection is enforceable through civil courts. The district court of The Hague has a chamber of judges specialising in IP law, and has exclusive jurisdiction for litigation related to EU designs.

7.4 Copyright

The Dutch Copyright Act (*Auteurswet*) implements the harmonised standards set forth by EU copyright law. Many of the EU directives reflect EU member states' obligations under the Berne Convention and the Rome Convention, as well as the obligations of the EU and its member states under the World Trade Organisation "TRIPS" Agreement and the two 1996 World Intellectual Property Organisation (WIPO) Internet Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty). The Copyright Act automatically protects the copyright of works of literature, science or art from the moment the work is created, on the condition that the work in question is an original work. The term "work" embraces many materials, such as books, brochures, films, photographs, musical works, works of visual art and geographical maps. Software is also protected under the Copyright Act. A work must be "the author's own intellectual creation" in order to qualify for copyright protection.

Upon the death of the author, the copyright automatically devolves to the heirs. Copyright ends 70 years after the death of the work's creator.

Copyright owners have the exclusive right to publish and copy the copyrighted works, including translations.

The Dutch Copyright Act stipulates that employers own the copyrights in works created by employees in the course of their employment.

Copyright owners have the right to take legal action against persons infringing their copyrights. Dutch civil law and Dutch copyright law provides, among other things, for the possibility of injunctions, full damages, the surrender of profits made on the infringement, to be accounted for by the infringing party, the transfer or destruction of infringing products, cost orders and withdrawal from the market, or the destruc-

tion of materials predominantly used for the manufacturing of the infringing products.

In addition to copyright, there are "neighbouring rights", which are also known as "related rights" and protect the work of performers, music and film producers, and broadcasting companies.

7.5 Others

Plant Breeders' Rights

Under EU Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights and the Dutch 2005 Seeds and Planting Materials Act, plant breeders can invoke plant breeders' rights to protect new plant varieties. The Board for Plant Varieties (*Raad voor Plantenrassen*) is responsible for granting plant breeders' rights in the Netherlands.

Database Rights

Databases consisting of collections of ordered data can be protected by database rights under the Dutch Database Act.

Semiconductor Topography Rights

Semiconductor topography rights protect the design of electronic circuits on computer chips (also known as the topography of semiconductor products). These rights protect circuits designed to perform specific functions.

Tradename Law

Tradename law protects the names under which enterprises operate. Tradenames come into being automatically, as soon as enterprises start operating; owners do not have to register tradenames in the Commercial Register. The protection of tradenames is regulated in the Tradenames Act. Tradename law has been of growing importance recently due to the use of tradenames in internet domain names.

Trade Secrets

The Dutch Trade Secrets Act (*Wet bescherming bedrijfsgeheimen*) implements the EU Trade Secrets Directive (Directive 2016/943/EU), which sets out rules for the protection of trade secrets.

Trade secrets refer to any information that:

- is not generally known or readily accessible to persons in the circles who normally deal with this type of information and is therefore of economic value;
- is subject to appropriate confidentiality measures by the lawful holder; and
- the holder has a legitimate interest in the confidentiality thereof.

An owner of trade secrets must enforce "appropriate measures" and establish the confidentiality of said trade secrets in order to ensure protection.

The Dutch Trade Secrets Act stipulates the actions allowed for discovering trade secrets: so-called reverse engineering is permissible, provided it does not violate contractual obligations or other mandatory statutory law.

In the case of infringements, trade secrets owners can demand the cessation or prohibition of the use or disclosure of the trade secret, and even product recalls regarding the infringing goods and/or their destruction, as well as damages.

8. Data Protection

8.1 Applicable Regulations

The main regulations applicable to personal data protection in the Netherlands are:

- Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR); and
- the Dutch GDPR Implementation Act (*Uitvoeringswet* AVG) of 16 May 2018.

The GDPR

The GDPR is a uniform and unitary data protection law applicable throughout the EU and EEA, and is directly applicable in the Netherlands. It allows EU member states to enact additional implementing provisions – eg, in relation to special categories of personal data as referred to in Article 9(1) of the GDPR, and providing for certain exemptions for scientific or historical research or statistical purposes, for authentication and security purposes, etc. The Netherlands has exercised this right by introducing the GDPR Implementation Act.

The GDPR defines "personal data" as any data that can be traced back to specific individuals (the data subjects), either directly or indirectly. Health data, genetic data, data about race or ethnicity, and other special categories of personal data, as well as personal data relating to criminal convictions and offences, enjoy additional protection.

The GDPR defines a controller as the party who determines the purpose and means of processing, and a processor as the party who processes personal data on behalf of a controller. Both controllers and processors are subject to the rules in the GDPR.

The GDPR stipulates that, in order to be able to demonstrate compliance, controllers must adopt internal policies and implement measures that satisfy the principles of data protection by design and data protection by default.

The processing of personal data (including disclosure to third parties) must be lawful, transparent and fair. It must be limited to specific purposes and to the data necessary for these purposes (data minimisation). Other principles are that the data must:

- be accurate;
- be kept secure; and
- not be stored for any longer than needed (storage limitation).

The GDPR also requires businesses to inform data subjects of how their data is used and to document their compliance with the GDPR. Data subjects have the right to access their personal data, to request corrections, and to have their data deleted (or restricted) under certain conditions.

Controllers and processors must designate data protection officers (DPO) in the following circumstances:

- if they are public authorities;
- if their core activities consist of the regular and systematic monitoring of data subjects on a large scale; or
- if their core activities consist of processing sensitive personal data on a large scale (including processing information about criminal offences).

The ePrivacy Directive and the Dutch Cookie Act

Additional provisions regarding data protection and privacy in the context of telecommunications are set out in Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the

electronic communications sector EU (ePrivacy Directive) and in the Dutch Cookie Act.

The ePrivacy Directive has been implemented in the Dutch Telecommunications Act, which prohibits unsolicited communication by email (as well as faxes and automated communication systems) for commercial, non-commercial or charitable purposes, unless senders can demonstrate the recipient's prior consent.

Under the Cookie Act, informed consent is required for the use of cookies, unless the cookies are:

- needed to facilitate communication;
- strictly necessary for the service requested by users; or
- aimed at obtaining information about the quality and/or effectiveness of the services provided and have little or no impact on the users' personal lives.

These rules apply to both first-party cookies and third-party cookies.

8.2 Geographical Scope

Pursuant to Article 3(1), the GDPR applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the EEA, regardless of whether or not the processing takes place in the EEA. The term "establishment" extends to any real and effective activity – even a minimal one – exercised through stable arrangements in the EEA.

Businesses not established in the EEA will also be subject to the GDPR if they offer goods and services to individuals in the EEA, or if they monitor the behaviour of data subjects who are in the EEA. Non-EEA businesses that do this on a regular basis or in combination with certain high-risk activities will have to designate a representative in the EEA. Under these rules, websites directed at an EEA audience or tracking visitors from the EEA must comply with the GDPR.

No special requirements apply to data transfers from the Netherlands to other EEA countries. Transfers of personal data to countries outside the EEA, however, require – with just a few exceptions – either a decision of the European Commission that the destination country ensures an adequate level of protection (this is the case for the UK, Switzerland, Canada, Israel and Japan, for example), or appropriate safeguards to protect the data subjects' rights (such as the Commission's standard contractual clauses (SCCs) or binding corporate rules approved by a supervisory authority).

On 16 July 2020, the Court of Justice of the European Union (CJEU) issued its decision in Data Protection Commissioner v Facebook Ireland, Maximillian Schrems, commonly referred to as "Schrems II". The decision invalidated the EU–US Privacy Shield Framework, which was designed to provide companies on both sides of the Atlantic with a mechanism to comply with data protection requirements when transferring personal data from the European Union to the United States in support of transatlantic commerce.

On 10 July 2023, the European Commission adopted its adequacy decision for the EU–US Data Privacy Framework. The decision concludes that the United States ensures an adequate level of protection – comparable to that of the European Union – for personal data transferred from the EU to US companies under the new Framework. On the basis of the new adequacy decision, personal data can flow safely from the EU to US companies participating in

the Framework, without having to put in place additional data protection safeguards.

The adequacy decision followed the adoption of the Executive Order on "Enhancing Safeguards for United States Signals Intelligence Activities" by US President Biden on 7 October 2022 and a Regulation issued by the US Attorney General. The EU–US Data Privacy Framework introduces new binding safeguards to address all the concerns raised by the European Court of Justice, including limiting access to EU data by US intelligence services to what is necessary and proportionate, and establishing a Data Protection Review Court (DPRC), to which EU individuals have access. The new framework introduces significant improvements compared to the mechanism that existed under the Privacy Shield. For example, if the DPRC finds that data was collected in violation of the new safeguards, it will be able to order the deletion of the data. The new safeguards in the area of government access to data will complement the obligations that US companies importing data from the EU will have to subscribe to.

US companies can join the EU–US Data Privacy Framework by committing to comply with a detailed set of privacy obligations, for instance the requirement to delete personal data when it is no longer necessary for the purpose for which it was collected, and to ensure continuity of protection when personal data is shared with third parties.

The functioning of the EU–US Data Privacy Framework is subject to periodic reviews, to be carried out by the European Commission, together with representatives of European data protection authorities and competent US authorities. The first review will take place within a year of the entry into force of the adequacy decision, in order to verify that all relevant elements have been fully implemented in the US legal framework and are functioning effectively in practice.

On 4 June 2021, the European Commission issued modernised the SCCs for data transfers from controllers or processors in the EU/EEA (or otherwise subject to the GDPR) to controllers or processors established outside the EU/EEA (and not subject to the GDPR). These modernised SCCs replace the three sets of SCCs that were adopted under the previous Data Protection Directive 95/46. Since 27 September 2021, it is no longer possible to conclude contracts incorporating these earlier sets of SCCs and on 27 December 2022 the grace period for using contracts incorporating these earlier sets of SCCs expired.

8.3 Role and Authority of the Data Protection Agency

The Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*) was established by the GDPR Implementation Act as an independent supervisory authority, as referred to in Article 51(1) of the GDPR. The Authority is charged with supervising the processing of personal data in accordance with the provisions of the GDPR and the law.

The functions of the Dutch Data Protection Authority include:

- providing guidance to individuals and organisations in the form of information and advice;
- supporting organisations by offering practical tools;
- reviewing requests for prior consultations and licence applications for processing data relating to criminal convictions and offences; and
- promoting the creation of codes of conduct.

It has the power to investigate violations, to issue orders to stop violations and to impose fines of up to EUR20 million or 4% of the world-wide annual turnover, whichever is higher.

9. Looking Forward

9.1 Upcoming Legal Reforms

Changes to Tax Classification Rules

The tax qualification rules of Dutch and foreign entities as tax transparent or opaque entities will change from 1 January 2025. As the default rule, a limited partnership under Dutch law (CV) would always be treated as transparent for Dutch tax purposes. The Dutch classification regarding a fund's common account (FGR) will also change from 2025 such that FGRs will in general be treated as transparent for Dutch tax purposes, except if they qualify as investment institutions within the meaning of the Act of Financial Supervision.

NIGERIA

Law and Practice

Contributed by:
Chinyerugo Ugoji, Tiwalola Osazuwa, Rebecca Ebokpo, Jibrin Dasun, Peretimi Akinmodun, Chijioke Ochogwu and Oluwatobi Omotayo
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ÆLEX is a full-service commercial and dispute resolution law firm. It is one of the largest law firms in West Africa, with offices in Lagos, Port Harcourt and Abuja in Nigeria and Accra in Ghana. ÆLEX merges local legal expertise and presence, as well as political and industry-wide connections, with an appreciation of global standards. Its lawyers are experts in their fields, and many have multidisciplinary backgrounds and experience. The firm's clients include banks, multinational corporations, government, parastatals, listed companies and entrepreneurs. Diverse practice groups work together on transactions where multiple areas of law are involved, ensuring that clients benefit from both individually tailored advice and the collective might of the entire firm's expertise.

Authors

Chinyerugo Ugoji is a partner in ÆLEX's corporate and commercial practice group, focusing on corporate law, mergers and acquisitions, tax and regulatory compliance. He advises on share and asset acquisitions and divestments, joint ventures, corporate restructuring transactions, competition/antitrust and tax-efficient structures. He advises international clients on exchange control issues which impact inward investment, and repatriation of profits and capital. He has advised extensively on a broad range of Nigerian tax issues (including corporate income tax, personal income tax, capital gains tax, customs duties, stamp duties and value-added tax) arising from mergers and acquisitions and other commercial transactions.

Tiwalola Osazuwa is a partner in ÆLEX's intellectual property, TMT, and mergers and acquisitions practice groups. She has advised several local and multinational companies on corporate structure, foreign direct investment, regulatory compliance, fintech transactions, and share and asset acquisitions. She has also provided competition advice to several clients and successfully assisted with filings with the Federal Competition and Consumer Protection Commission. She is Vice President of the Executive Committee of the Intellectual Property Law Association of Nigeria and a Group Leader in the Well-Known Marks Committee of the International Trademark Association.

Contributed by: Chinyerugo Ugoji, Tiwalola Osazuwa, Rebecca Ebokpo, Jibrin Dasun, Peretimi Akinmodun, Chijioke Ochogwu and Oluwatobi Omotayo, ***ÆLEX***

Rebecca Ebokpo is a senior associate in ÆLEX's international trade, regulatory compliance, dispute resolution and corporate/commercial practice groups. She has extensive experience in advising on foreign direct investment and foreign portfolio investment in Nigeria. Rebecca also advises clients on immigration formalities, due diligence and corporate restructuring. She is an expert in providing legal opinions on complex corporate governance and restructuring issues. Rebecca represents litigants in various courts throughout Nigeria. She is a TRACE and NCMI certified compliance officer with expertise in anti-money laundering, anti-bribery and corruption matters. She is also a member of the Nigerian Bar Association, the International Bar Association and the Chartered Institute of Arbitrators, UK.

Jibrin Dasun is a senior associate and team lead in ÆLEX's tax and corporate/commercial practice groups. He regularly advises on corporate/commercial transactions focusing on the tax, regulatory and exchange control issues affecting inbound and outbound investments. He is a Chartered Tax Practitioner in Nigeria and an International Tax Affiliate of the Chartered Institute of Taxation (CIOT) of the United Kingdom. He holds an Advanced Diploma in International Taxation from CIOT UK. He is a member of the International Fiscal Association and a member of the Taxes Committee of the International Bar Association.

Peretimi Akinmodun is a senior associate in ÆLEX's technology, media and telecommunications (TMT) practice group. She obtained her LLM in Intellectual Property and Information Technology from Fordham University. She advises a diverse clientele, including multinational technology firms, telecommunications companies, FMCGs and startups in various sectors, including e-commerce, e-hailing, edtech, agritech, logitech and fintech. She provides expert guidance to her clients on matters of data protection and privacy, business partnerships, contract negotiation and drafting, cybersecurity, licensing, regulatory compliance, advertising, etc. Her impressive track record includes high-profile work for a global telecommunications company and one of the foremost global search engine companies.

Chijioke Ochogwu is an associate in company secretarial, corporate/commercial, and labour and employment practice groups at ÆLEX. She regularly advises companies on business start-up and corporate due diligence issues in Nigeria. She also advises clients on regulatory compliance, corporate financing and private equity. She advises companies on various issues relating to employment disputes, review of contract of employments, review of human resources policies to ensure compliance with the local labour laws and general advisory on management of employees and their affairs, employee confidentiality, redundancy and termination of employment. She also manages the secretarial affairs of companies and regularly advises companies on relevant corporate governance structures.

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Oluwatobi Omotayo is an associate in ÆLEX's corporate/commercial and company secretarial practice groups. She advises diverse clients on corporate and commercial transactions. She regularly provides advice to companies on corporate governance, restructuring and contractual issues. She is proficient in providing company secretarial services.

ÆLEX

4th Floor
Marble House
1 Kingsway Road
Falomo, Ikoyi
Lagos
Nigeria

Tel: +234 (0)201 279336-9, 4617321-3
Email: lagos@aelex.com
Web: www.aelex.com

1. Legal System

1.1 Legal System and Judicial Order

Nigeria operates a mixed legal system which is sourced from received English law, common law, customary law and sharia law.

The judicial system is hierarchical in nature and divided between federal and state jurisdictions. The judicial order is also divided between original and appellate jurisdictions, with the Supreme Court being the highest court.

Additionally, there are some specialised courts and tribunals that are established by statute for dealing with special matters. For example, the National Industrial Court deals with employment disputes, the Investment and Securities Tribunal deals with capital markets-related issues, while the Tax Appeal Tribunal deals with tax issues. These specialised courts/tribunals have original jurisdiction over the matters assigned to them by law, while appeals from the courts/tribunals will follow the hierarchical order provided in the law that set them up.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Nigeria operates an open economy and encourages the inflow of foreign investment by way of foreign direct investment (FDI) and foreign portfolio investment (FPI). Foreigners interested in FDI or FPI are required to take up shares in an existing company or register a business at the Corporate Affairs Commission (CAC) with a minimum share capital of NGN100 million. A company with foreign participation is also required to obtain a business registration certificate and business permit from the Nigerian Investment Promotion Commission (NIPC) and the Federal Ministry of Interior, respectively.

Therefore, every foreign-owned company must be incorporated locally before commencing business in Nigeria except companies which have been granted exemption under the Companies and Allied Matters Act 2020 or its preceding legislation, or companies exempted under any treaty to which Nigeria is a party.

Additionally, the Business Facilitation Act 2023 provides for the expansion of the class of foreign companies exempted from the incorporation requirement to include foreign companies granted an exemption under extant National Assembly Acts.

The Companies and Allied Matters Act 2020 further provides for circumstances where a foreign company can apply to the Minister for Trade for exemption from registration where such foreign company falls under certain categories. These categories are as follows:

- foreign companies invited to Nigeria by or with the approval of the Federal Government to execute any specified individual project;
- foreign companies which are in Nigeria for the execution of specific individual loan projects on behalf of a donor country or international organisation;
- foreign government-owned companies engaged solely in export promotion activities; and
- engineering consultants and technical experts engaged on any individual specialist project under contract with any of the governments in the Federation or any of their agencies or with any other body or person, where such contract has been approved by the Federal Government.

Where the foreign investment involves a merger (whether a small or large merger), the approval of the Federal Competition and Consumer Protection Commission (FCCPC) will be required.

Negative List

Although the Nigerian economy is open to foreign investment, foreigners are restricted from investing in the items on the negative list. These are:

- the production of arms, ammunition, etc;
- the production of, and dealing in, narcotic drugs and psychotropic substances;
- the production of military and paramilitary clothing and accoutrements, including those of the police and the customs, immigration and prison services; and
- such other items as the Federal Executive Council may from time to time determine.

Sector-Specific Restrictions

Additionally, there are some Nigerian laws that restrict and limit the capacity of foreigners to invest in some sectors in Nigeria. These apply to the following sectors.

- *Oil and gas:* To be competitive in the award of contracts, at least 51% of the shares of a company must be owned by Nigerians.
- *Coastal trading:* The Coastal and Inland Shipping (Cabotage) Act restricts the use of foreign-owned or manned vessels for coastal trade in Nigeria.
- *Broadcasting:* A company applying for a broadcasting licence must demonstrate that it is not representing any foreign interests and that it is substantially owned and operated by Nigerians.
- *Advertising:* Only a national agency (ie, an agency in which Nigerians own not less than 74.9% of the equity) can advertise to the Nigerian market.
- *Private security:* A foreign investor cannot acquire an equity interest in, or sit on the board of, a Nigerian private security company.
- *Engineering services:* A company engaged in engineering services must be registered with the Council for the Regulation of Engineering in Nigeria (COREN); one requirement for registration is that the company must have Nigerian directors registered with the COREN holding at least 55% of the company's shares.
- *Aviation:* To qualify for the grant of an aviation licence or permit, the Nigerian Civil Aviation Authority must be satisfied that an applicant is a Nigerian company or citizen.

2.2 Procedure and Sanctions in the Event of Non-compliance

Generally, obtaining approvals from the necessary regulatory governmental bodies is done after incorporating a company at the CAC. The two major post-incorporation permits required are a business registration certificate from the NIPC and a business permit from the Federal Ministry of Interior.

An enterprise with foreign participation must apply to the NIPC for registration before commencing business. However, where an enterprise has commenced business but subsequently secures foreign participation, such enterprise is required to register with the NIPC within three months of such acquisition. Such entity must also ensure that a business permit is obtained from the Ministry of Interior. The process for the registrations with the NIPC and Ministry of Interior involves completing application forms and payment of application fees. Copies of incorporation documents, a tax clearance certificate and other documents will be required for the pro-

cess. The business registration with the NIPC is usually completed within 48 hours, while the business permit from the Ministry of Interior may take between five and eight weeks (or longer) to process.

It is an offence for a foreign entity to carry on business in Nigeria without incorporating a local company or obtaining exemption. Section 78(2) of the Companies and Allied Matters Act 2020 voids any act of non-compliance with the requirement of registration of a company by a foreign investor. Section 79 of the Companies and Allied Matters Act 2020 also criminalises non-compliance by foreign entities, such that where an unregistered foreign company carries on business without applying for an exemption from registration requirements, that company and its officers and agents are liable to prosecution and, upon conviction, liable to the payment of a penalty as may be prescribed by the CAC in a Regulation. Where the offence is a continuing one, the company and every officer or agent of the company are liable to a further penalty, as the CAC shall specify by Regulation, for every day during which the default continues.

2.3 Commitments Required From Foreign Investors

It is expected that a foreign investor will import the capital for their investment into Nigeria as a form of commitment. Thus, one of the documents required for approval of a business permit application is a copy of the company's Certificate of Capital Importation (CCI). The CCI is usually issued by a commercial bank upon receipt of the capital of a foreign investor. A foreign investor also shows commitment by adhering to the regulations guiding foreign investment in Nigeria, some of which are obtaining prerequisite approvals and continuous compliance with regulatory bodies in their specific sectors.

2.4 Right to Appeal

Except for items on the negative list (see **2.1 Approval of Foreign Investments**), and subject to meeting the requirements for pre- and post-incorporation approvals, foreign investments are usually granted permits and approvals by the relevant authorities. There are no known cases of non-authorisation of a legitimate investor.

While the non-authorisation of legitimate investors is uncommon, the Companies and Allied Matters Act 2020 introduces the establishment of the Administrative Proceedings Committee to address grievances arising from the operations of the Act. The inclusion of a provision enabling appeals to the Federal High Court creates an additional layer of recourse. This ensures that in circumstances where legitimate investors that have an interest in any entity registered under the Act are displeased, they possess a means to seek just and fair resolution.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

In Nigeria, the most common types of corporate vehicles are limited liability companies. A limited liability company is one in which the members' liabilities are limited to the amount of unpaid shares they hold, particularly in the event of the company's winding up. Such companies can take the form of either private company limited by shares or a public limited company.

A private company is governed by at least one director and is required by law to have a minimum issued share capital of NGN100,000 where it has no foreign participation or sector-specific capital or board composition requirements. It can be formed by a single shareholder; however, the membership of a private company must not

exceed 50 persons, except for former or current employees of the company. On the other hand, a public company must have a minimum membership of two persons and has no maximum limit. The minimum issued share capital of a public company is NGN2 million.

Private companies are well suited for establishing joint ventures, special purpose vehicles and subsidiaries of foreign entities. Public companies, on the other hand, are ideal for raising capital from the public through the sale of shares on the stock market.

Limited liability partnerships (LLPs) and limited partnerships (LPs) are other types of corporate vehicles available in Nigeria. LLPs are managed by the partners, and their liability is limited. Every LLP must have at least two individuals as authorised partners. LPs, on the other hand, are managed by at least one general partner. The general partner's liability is unlimited, while the liability of the limited partners is limited unless they actively participate in the partnership's management. An LP cannot have more than 20 partners. LLPs are suitable for professional services and businesses looking for the flexibility of a partnership with the benefits of limited liability, whereas LPs are suitable for businesses where some partners want to invest capital without participating in the day-to-day management.

3.2 Incorporation Process

The first step in incorporating a company is to check for the availability of the proposed name and reserve the name. This is typically completed within 24 hours, except where the proposed name is not available. Thereafter, the pre-incorporation form is completed on the company registration portal of the CAC, and relevant documents including resolutions of the proposed shareholders are uploaded. Subsequently, the filing fee and stamp duty are paid; this can be completed in a few hours, after which the documents will be approved and the company incorporated. Following this, the certificate of incorporation and certified true copies of the memorandum and articles of association, along with a status report, can be downloaded from the portal. The incorporation process can be completed within a day or more depending on the ability of the company to provide the necessary information and documents as well as the seamless operation of the CAC's company registration portal.

3.3 Ongoing Reporting and Disclosure Obligations

The law requires that the decisions of a private company – in respect of (i) a change of name or address, (ii) an alteration of the memorandum or articles of association, (iii) a removal or appointment of directors, (iv) an allotment or transfer of shares, (v) an increase or decrease in share capital, (vi) charges and (vii) the appointment of a secretary – be filed with the CAC. Additionally, (i) all private companies are required to file their annual returns at the CAC, and (ii) every person who gains significant control over a company is required to inform the company, which shall then notify the CAC for entry into the register of persons with significant control maintained by the CAC. These requirements also apply to public companies except as they relate to the transfer of shares, since the stocks of a public company are freely traded on the stock exchange or over-the-counter markets.

3.4 Management Structures

The management structure for public and private limited liability companies is single-tier in nature. This implies that the board of directors performs both management and supervisory functions.

3.5 Directors', Officers' and Shareholders' Liability

The law puts directors in the position of trustees for their companies; therefore, the primary duty of a director is the fiduciary duty and the exercise of due care, skill and diligence in the discharge of these duties. Thus, an obligation is placed on directors to act in utmost good faith in their dealings with the company. This includes the duty not to place themselves in a position where there is conflict of interest between their duties and their personal interests. Directors are also obliged to attend meetings and not to fetter their discretion to vote in a particular way. This means that directors must disclose their personal interests to the company at every point in time. Failure to abide by these obligations would be a reasonable ground for an action in negligence and breach of fiduciary duty to lie against directors. Additionally, directors are required to declare any personal interest they have in a transaction, whether directly or indirectly.

Furthermore, the law also allows the piercing of the corporate veil in order to identify the members and directors of a company in the event that a crime is committed by that company.

4. Employment Law

4.1 Nature of Applicable Regulations

The primary law which governs employment relationships in Nigeria is the Labour Act (Chapter L1, Laws of the Federation of Nigeria 2004). The Act is, however, limited in scope as it applies only to workers (ie, persons who perform manual and clerical roles).

Conversely, the Labour Act does not apply to non-workers (ie, persons who perform executive, administrative, technical and professional roles). Rather, their relationship with their employers is governed by the terms of an employment contract, the law of contract and any applicable collective bargaining agreement.

4.2 Characteristics of Employment Contracts

Although the Labour Act acknowledges that employment contracts may be oral or written, express or implied, it mandates employers to issue employment contracts to their workers no later than three months after the beginning of the employment relationship.

The employment contract is required to state the following:

- the name of the employer;
- the name and address of the worker and the place and date of their engagement;
- the nature of the employment;
- if the contract is for a fixed term, the date when the contract expires;
- the appropriate period of notice to be given by any party wishing to terminate the contract;
- terms and conditions relating to:
  - (a) hours of work;
  - (b) holidays and holiday pay; and
  - (c) incapacity for work due to sickness or injury, including any provisions for sick pay; and
- any special conditions of the contract.

There is no statutory requirement in relation to the issuance, form and content of the employment contracts of non-workers. However, in practice, the employment contracts are usually written.

4.3 Working Time

For workers, the Labour Act provides that the hours of work shall be fixed by mutual agreement of the parties, collective bargaining within the organisation or industry concerned, or an industrial wages board. Where workers are required to work for six hours or more in a day, they are to be granted rest intervals of not less than one hour in total.

In every period of seven days, a worker is to be given one day of rest that must not be less than 24 consecutive hours, and if the rest period is reduced for any reason, the worker is to be granted corresponding time off from work not later than 14 days thereafter, or be paid wages in lieu at overtime rates.

In addition, although the Labour Act stipulates that any hour which a worker is required to work in excess of the agreed normal hours will constitute overtime, it does not make provision for the rate at which wages for overtime hours are to be paid. This will, therefore, be subject to agreement by an employer and employee.

With respect to non-workers, the working time and overtime hours will be as agreed by the parties and stipulated in an employment contract or collective bargaining agreement.

4.4 Termination of Employment Contracts

An employment contract may be terminated by either an employer or employee upon giving the required length of notice or making payment in lieu of such notice and complying with all other applicable requirements provided for in an employment contract. However, in certain sectors, the consent of a regulator should be obtained before an employer can terminate any employment contract.

In respect of workers, where there is no specific notice period stated in the employment contract or collective bargaining agreement, the following minimum notice periods as set out in the Labour Act will apply:

- one day, where the contract has continued for a period of three months or less;
- one week, where the contract has continued for more than three months but less than two years;
- two weeks, where the contract has continued for a period of two years but less than five years; and
- one month, where the contract has continued for five years or more.

For non-workers in the same position, the courts have held that reasonable notice (which in many cases is a notice of at least one month) should be given.

Failure by an employer to comply with the notice and termination obligations provided by contract or the law could potentially lead to a suit against it for wrongful termination or penalties being imposed by regulators. If the courts decide in favour of the employees, a probable outcome could be that the employer would be required to pay damages to the employees.

Redundancies

Redundancy is defined under the Labour Act as an involuntary and permanent loss of employment caused by an excess of manpower.

In carrying out a redundancy exercise in respect of workers, an employer is required to:

- inform the trade union or workers' representative concerned of the reasons for and the extent of the anticipated redundancy;

- adopt the principle of "last in, first out" in the discharge of the particular category of workers affected, subject to all factors of relative merit, including skill, ability and reliability; and
- use its best endeavours to negotiate redundancy payments to any discharged worker.

Although the above requirements only apply to workers, they can be used by employers as a guide when carrying out redundancy exercises in respect of non-workers, subject to the provisions of an employment contract or any applicable collective bargaining agreement.

Failure by an employer to comply with the requirements for carrying out a redundancy exercise could lead to a suit against it for wrongful termination or penalties being imposed by regulators. If the courts decide in favour of the employees, the probable outcome would be that the employer would be required to pay damages to the employees.

4.5 Employee Representations

Unless stipulated under an employment contract or collective bargaining agreement, there is no requirement for employees to be represented, informed or consulted by management.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Personal Income Tax

Generally, an employee is considered tax resident in Nigeria where the employer is in Nigeria or has a fixed base in Nigeria, or where the duties of that employment are wholly or partly performed in Nigeria, unless:

- the duties of the employment are performed for, and the remuneration is paid by, a non-resident employer;
- the employee is not in Nigeria for an aggregate of 183 days in any 12-month period; or
- the remuneration is taxed in the country of the non-resident employer, with which Nigeria must have a double tax treaty.

Individual employees are allowed a consolidated relief allowance of 20% of gross income plus either NGN200,000 or 1% of gross income, whichever is higher. The balance of the income after all deductions will be taxed in accordance with the graduated tax scale rates set out below:

- up to NGN300,000 – 7%;
- NGN300,001–600,000 – 11%;
- NGN600,001–1,100,000 – 15%;
- NGN1,100,001–1,600,000 – 19%;
- NGN1,600,001–3,200,000 – 21%; and
- NGN3,200,001 and over – 24%.

Every employer is obliged to withhold and remit its employees' personal income tax to the tax authority of the state(s) in which such employees are resident under the pay-as-you-earn (PAYE) scheme.

Social Security Contributions

The following are social security contributions required of employers and their employees:

- *Pension:* An employer with 15 or more employees is required to contribute a minimum of 10% of the monthly emolument of each employee to the retirement savings account of each employee. Employees are required to contribute a minimum 8% of their monthly emoluments, to be deducted by their employers.

- *Nigeria Social Insurance Trust Fund ("NSITF"):* Employers are required to contribute 1% of the total monthly payroll to the NSITF for purposes of the Employee Compensation Scheme, which compensates employees (or their dependants) in the event of injury, disability or death.
- *Industrial Training Fund ("ITF"):* Employers in industry or commerce, having 25 or more employees and not operating within a free trade zone, are required to contribute 1% of their annual payroll to the ITF for the purpose of providing industrial training to employees.
- *Health insurance:* It is mandatory for all employees to have a functional health insurance package. Employers with a minimum of ten employees are required to register for contribution to the National Health Insurance Scheme (NHIS). These contributions are to be paid into the account of a designated health maintenance organisation (HMO), which is accredited by the NHIS. The HMOs are required to contract with healthcare providers for providing healthcare for the employees insured with the HMO under the NHIS.
- *Group life insurance policy:* An employer is required to maintain a group life insurance policy in favour of its employees for a minimum of three times the annual total emolument of its employees.

5.2 Taxes Applicable to Businesses

Companies Income Tax (CIT)

CIT is imposed on the profits of any company accruing in, derived from, brought into, or received in Nigeria in respect of a trade or business.

Companies incorporated in Nigeria are liable to CIT on their worldwide income.

A non-Nigerian company would be liable for CIT if it:

- has a fixed base in Nigeria;
- habitually operates a business in Nigeria through a dependent agent;
- executes a turnkey contract in Nigeria;
- provides technical, managerial, consultancy or professional services to a person resident in Nigeria, to the extent that the foreign company has "significant economic presence" in Nigeria;
- trades, or engages in business or activity, with another person controlled by it or which has a controlling interest in it and conditions are made or imposed between the company and that other person in their commercial or financial relations, which the tax authority deems artificial or fictitious; or
- transmits, emits or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any activity – including electronic commerce, application store, high frequency trading, electronic data storage, online adverts, participative network platforms or online payments – to the extent that the company has "significant economic presence" in Nigeria.

The Minister of Finance issued an order specifying when foreign companies would be deemed to have "significant economic presence" in Nigeria. Under the order, a foreign company that has a Nigerian domain name, registers a website in Nigeria, or has a turnover of NGN25 million from the provision of all forms of digital services to Nigerian residents would be deemed to have significant economic presence in Nigeria.

The CIT rate is 30%. However, small businesses with a turnover of less than NGN25 million are exempt from paying CIT, while medium-sized companies with a turnover of between NGN25 million and NGN100 million pay CIT at a reduced rate of 20%.

There is also a tertiary education tax of 3% on the same tax base as CIT.

Nigeria has refused to agree to the "two-pillar solution" introduced by the Organisation for Economic Co-operation and Development (OECD). However, Nigeria has signed the following instruments:

- the Multilateral Convention to Implement Tax TreatyRelated Measures to Prevent Base Erosion and Profit Shifting;
- the Multilateral Competent Authority Agreement for the Common Reporting Standard; and
- the Multilateral Competent Authority Agreement for the Automatic Exchange of Country-by-Country Reports.

Hydrocarbon Tax/Petroleum Profits Tax (PPT)

In addition to the CIT, a hydrocarbon tax of 15% is payable for operations in onshore and shallow waters pursuant to a Petroleum Prospecting Licence (PPL) and 30% in respect of operations in onshore and shallow waters pursuant to a Petroleum Mining Lease (PML).

Companies that opt not to convert their Oil Prospecting Licence (OPL) or Oil Mining Lease (OML) to a PPL or PML, respectfully, will continue to be taxed under the Petroleum Profits Tax Act until their OPL or OML expires. The petroleum profits tax (PPT) rates vary between 50% and 85%, depending on the nature of the company's operations. Also, a special PPT rate of 65.75% applies when a company has not yet started the sale or bulk disposal of chargeable oil under a programme of continuous production and all pre-production capitalised costs have not been fully amortised.

Notable Taxes and Levies

The following are notable taxes and levies imposed on companies:

- Information technology tax of 1% of profits before tax is payable by telecommunications companies, internet service providers, pension managers and custodians, and financial institutions with a turnover of NGN100 million and above. The tax, when paid, is deductible for the company's income tax purposes.
- A levy of 0.005% of the net profit of a company is payable annually to the Nigeria Police Trust Fund.
- An oil and gas company is required to pay 3% of its annual budget to the Niger Delta Development Commission for tackling ecological problems in the Niger Delta, where most of Nigeria's oil is produced.
- A National Agency for Science and Engineering Infrastructure (NASENI) levy of 0.25% of profit before tax is payable by companies engaged in banking, mobile telecommunications, ICT, aviation, maritime, and oil and gas with a turnover of NGN100 million and above. The levy, when paid, is deductible for the company's income tax purposes.
- Entities listed on any recognised exchange in Nigeria, regulated entities, public companies, private companies that are holding companies of public or regulated entities, companies with government concession/licences, private companies in which government retains an interest, companies engaged and paid by any tier of government for public works with an annual contract sum of over NGN1 billion,

and any company with an annual turnover of NGN30 billion are required to pay into a fund to be maintained by the Federal Reporting Council of Nigeria, an annual levy at the following rates:

(a) 0.02% where the annual turnover is not more than NGN25 million;
(b) 0.025% where the annual turnover is greater than NGN25 million but not more than NGN50 million;
(c) 0.03% where the annual turnover is greater than NGN50 million but not more than NGN500 million;
(d) 0.04% where the annual turnover is greater than NGN500 million but not more than NGN1 billion; and
(e) 0.05% where the annual turnover is greater than NGN10 billion.

Withholding Tax (WHT)

WHT of 10% applies to payment of passive income (interest, dividends, royalties and rents) to a Nigerian company.

WHT of 10% is also payable in respect of passive income payments to a non-Nigerian company including those resident in a country with a double tax treaty (DTT) in Nigeria (unless where the 10% exceeds the maximum rate in the DTT, in which case the DTT rate will apply).

Payment of technical, managerial, consultancy or professional services attracts WHT of 5% for Nigerian companies and 10% for non-resident companies. The WHT is the final tax when paid to a non-resident company.

A 15% WHT applies to earnings of non-resident "entertainers and sportspersons", and this is the final tax payable in Nigeria.

Also, a WHT of 20% is payable on directors' fees paid to non-residents, which is the final tax payable in Nigeria.

Value Added Tax (VAT)

VAT is levied on the supply of all goods and services to a person resident in Nigeria at the rate of 7.5% and payable to the Federal Inland Revenue Service (FIRS). VAT is collected by the supplier of goods and services excluding oil and gas companies (including oil service companies), ministries, departments and agencies of governments, and select telecommunications companies. These companies are required to pay the VAT on the invoices from their suppliers directly to the FIRS.

Non-resident suppliers of goods, services and intangibles are required to register, collect and remit VAT to the FIRS. Where a non-resident supplier fails to collect the tax, the Nigerian-resident beneficiary is required to self-account for the VAT and remit same to the FIRS.

Capital Gains Tax (CGT)

CGT of 10% is payable on chargeable gains arising from the disposal of all assets, inclusive of digital assets, except the following:

- securities issued by the Nigerian government;
- decorations awarded for valour or gallant conduct;
- life assurance policies;
- chattels sold for NGN1,000 or less;
- assets acquired by way of a gift which are subsequently disposed of by way of gift;
- investment in superannuation funds, statutory provident funds and retirement benefit schemes;
- assets devolving upon death;
- compensation for loss of office up to NGN10 million;

- securities in a unit trust scheme, provided the proceeds are reinvested;
- gains arising from the acquisition of the shares of a company as the result of a merger, takeover or acquisition, provided that no cash payment is made in respect of the shares acquired;
- gains accruing to local government councils and statutory corporations; and
- gains accruing from the disposal of chargeable assets by ecclesiastical, charitable or educational institutions of a public character, statutory or registered friendly societies and registered co-operative societies and trade unions, provided that such gains do not arise from the disposal of assets acquired in connection with any trade or business, nor from the disposal of an interest possessed by the corporation in a trade or business carried on by some other person, and are applied purely for the purposes of the organisation, institution or society.

Gains arising from the disposal of shares in a Nigerian company for an aggregate sum of NGN100 million or more in any 12 consecutive months are subject to CGT at 10%. However, if the proceeds are utilised to acquire the shares of any Nigerian company in the year of disposal of the shares, CGT is not payable.

Stamp Duty

Stamp duty is paid on instruments (including electronic instruments) executed in Nigeria or relating to any property situated, or to any matter or thing done or to be done, in Nigeria. The stamp duty rates differ for various instruments and can either be a nominal rate of NGN500 or ad valorem rates which can be as high as 6%.

Property Taxes

Owners of real properties are subject to such rates and levies as may be imposed by the states in which the properties are situated. For instance, in Lagos State, landowners are required to pay a land use charge which is calculated as a percentage of the assessed value of a land.

In many states, the holder of an interest in land is required to register that interest, and registration fees may be as high as 6%.

5.3 Available Tax Credits/Incentives

There is a 20% tax credit for expenditure on research and development, in addition to capital allowance (up to 95% in the first year), in lieu of depreciation. However, a startup licensed by the National Information Technology Development Agency (“labelled startups”) can deduct 100% expenditure on research and development.

Other incentives peculiar to labelled startups are:

- labelled startups are exempted from contributions to the Industrial Training Fund in respect of in-house training provided to its employees for the duration of the startup label;
- investors are entitled to an investment tax credit equivalent to 30% of their investment in labelled startups;
- gains arising from the disposal of the shares of a labelled startup are exempt from CGT provided that the shares have been held for a minimum of 24 months; and
- non-resident companies that provide technical, consulting, professional or management services to a labelled startup shall be subjected to a reduced WHT rate of 5% on income derived from such services.

Foreign-earned passive income brought into Nigeria through any of the commercial banks is exempt from CIT.

Interest on long-term foreign loans with repayment periods above seven years (with a two-year grace period), those with repayment periods between five and seven years (with not less than 18 months' grace period), and those with repayment periods between two and four years (with not less than 12 months' grace period), respectively, enjoy CIT exemption of 70%, 40% and 10%.

Venture capital companies that invest in venture capital projects and provide at least 25% of the total project cost enjoy a 50% WHT reduction on dividends received from project companies and capital allowance on their equity investments in venture project companies, as well as tax exemption on gains arising from the disposal of such equity.

Companies engaged in crude oil production enjoy an investment tax credit (ITC) or an investment tax allowance (ITA) of between 5% and 50% of their qualifying expenditure. The ITC operates as a full tax credit and does not result in a deduction from qualifying capital expenditure for the purposes of calculating capital allowances. The ITA is deductible from profits in arriving at taxable profits. Companies that convert to the fiscal regime of the Petroleum Industry Act will not enjoy the ITA and ITC incentives.

A company engaged in a "pioneer industry" or in the production of a "pioneer product" (as designated by the government of the day) may apply for "pioneer status", which, when granted, entitles it to:

- a three-year tax holiday, which may be extended for two further terms of one year each or for one further term of two years;
- relief from WHT on dividends paid to its shareholders during the tax holiday; and
- postponement of capital allowance until the end of the tax holiday.

Approved enterprises operating within a free trade zone are exempt from all federal, state and local government taxes, levies and rates.

5.4 Tax Consolidation

Nigerian law does not permit consolidated tax grouping; each company within a group is therefore taxable in Nigeria on an individual basis. Consequently, losses suffered by one member of a group of companies cannot be used to reduce the tax liability of another company within the group, but can be carried forward and set off against the future profits of the company that incurred them.

5.5 Thin Capitalisation Rules and Other Limitations

Existing anti-avoidance provisions allow the Nigerian tax authority to disallow/reduce interest charged between related parties, where that interest is not reflective of the arm's length principle.

Furthermore, the tax deductibility of interest expenses on a foreign-party loan is limited to 30% of EBITDA in any given tax year, and deductible interest expenses not fully utilised can be carried forward for a maximum of five years.

5.6 Transfer Pricing

The arm's length standards in the transfer pricing standards and guidelines issued by the OECD

and the UN apply in Nigeria unless they conflict with the domestic transfer pricing legislation.

5.7 Anti-evasion Rules

There are anti-avoidance provisions in the various tax laws that empower the tax authorities to make necessary adjustments to counteract any reduction to tax that would result from transactions that are considered artificial.

There is legislation that empowers the tax authorities to tax the undistributed profits of a Nigerian company where that company is controlled by five persons or fewer.

6. Competition Law

6.1 Merger Control Notification

The following Nigerian legislation regulates competition and merger notification in Nigeria:

- the Federal Competition and Consumer Protection Act 2018 (FCCPA);
- the Merger Review Regulations 2020;
- the Merger Review (Amended) Regulations 2021;
- the Merger Review Guidelines 2020;
- the Notice of Threshold for Merger Notification 2019;
- the Notice in respect of Indicative Timeframes for Merger Notification and Review Process 2020;
- the Guidelines on Simplified Process for Foreign-to-Foreign Mergers with Nigerian Component, 2019; and
- the Federal Competition and Consumer Protection Commission (Administrative Penalties) Regulations, 2020.

Pursuant to the FCCPA, any merger or acquisition that results in a change of control of a business in Nigeria and meets the notification threshold will come under the regulatory purview of the Federal Competition and Consumer Protection Commission (FCCPC).

The provisions of the FCCPA apply to all undertakings and all commercial activities within, or having effect within, Nigeria. They also apply to conduct outside Nigeria by any person in relation to the acquisition of shares or other assets outside Nigeria resulting in the change of control of a business, part of a business or any asset of a business, in Nigeria. In essence, any foreign-to-foreign merger that results in a change of control of a Nigerian business will come under the FCCPC's regulatory purview.

A merger occurs where there is direct or indirect control over the whole or part of the business of another undertaking. It may be achieved through:

- the purchase or lease of shares, an interest or assets;
- an amalgamation or other combination; or
- a joint venture.

Under the FCCPA, an undertaking is deemed to have control over the business of another if:

- it beneficially owns more than half of the issued share capital or assets of the undertaking;
- it is entitled to cast a majority vote or can control the voting of a majority at a general meeting;
- it can appoint or veto the appointment of a majority of the directors;
- it is a holding company and the undertaking is its subsidiary; and
- it has the ability to materially influence the policy of an undertaking.

Mergers are categorised into small and large mergers.

The FCCPC must be notified of a merger before implementation if, in the financial year preceding the merger:

- the combined annual turnover of the acquiring undertaking and the target undertaking in, into or from Nigeria equals or exceeds NGN1 billion (circa USD2.24 million); or
- the annual turnover of the target undertaking in, into or from Nigeria equals or exceeds NGN500 million (circa USD1 million).

A merger with an annual turnover below the stipulated threshold constitutes a small merger and those above the threshold constitute large mergers.

A transaction classified as a small merger may be implemented without notifying the FCCPC. However, where the FCCPC is of the opinion that a small merger may substantially prevent or lessen competition, it may, within six months after the implementation of that merger, require that the parties notify it of the merger. Parties to a small merger may also voluntarily notify the FCCPC of the merger at any time.

Failure to obtain the approval of the FCCPC prior to the implementation of a notifiable merger could result in the parties being liable upon conviction to pay a fine not exceeding 10% of their turnover in the business year preceding the date of the offence. The FCCPC also has the power to invalidate or void the merger.

6.2 Merger Control Procedure

Where the FCCPC determines that a small merger is to be notified to it, the notification is to be published within five business days after receipt by the FCCPC. The parties are to take no further steps to implement the merger until it has been approved by the FCCPC. The FCCPC is to make its decision within 20 business days of the parties fulfilling the notification requirements or extend the time that it will consider the merger by a single period, not exceeding 40 business days, and issue an extension notice to the notifying party.

With regard to a large merger, the FCCPC is required to respond within 60 days after the parties to the large merger have fulfilled the notification requirements. The parties shall not implement the merger until it has been approved by the FCCPC. The FCCPC may extend the period in which it has to consider the proposed merger to 120 business days and issue an extension notice to all parties to the merger.

Where the FCCPC fails to issue a report regarding its consideration of the merger within the prescribed periods (including any extension period where an extension notice is issued), the merger shall be deemed approved. However, the FCCPC is empowered to revoke this approval.

For eligible transactions, the FCCPC may permit parties to apply under an expedited procedure which will reduce the applicable timelines by up to 40%.

The Merger Review Regulations 2020 provide for a two-stage review of a merger. In the first phase, the FCCPC's assessment will focus on whether the transaction is likely to substantially prevent or lessen competition. If it is likely to, the parties will be allowed to offer remedies for competition concerns that are of a remediable nature. Upon completion of its review, the FCCPC will either approve the transaction unconditionally or subject to accepted remedies or, if the transaction

still raises competition concerns, the FCCPC will proceed to undertake a second detailed review of the merger.

In the second detailed review, the FCCPC will consider whether there are any factors that are sufficient to offset its competition concerns, eg, technological efficiencies or other pro-competitive gains, or public interest grounds. If the FCCPC makes a positive determination on either ground, it will approve the transaction subject to conditions which it deems appropriate; otherwise, the transaction will be refused.

6.3 Cartels

The applicable legislation is the FCCPA. The FCCPA prohibits restrictive agreements, which are defined as any agreement among undertakings or a decision of an association of undertakings that has the purpose (or actual or likely effect) of preventing, restricting or distorting competition in any market, unless such agreement has been authorised by the FCCPC.

In addition, an undertaking is prohibited from requesting another undertaking to refuse to sell or purchase any goods or services with the intention of harming certain undertakings. The FCCPA also prohibits the unlawful withholding of products from a dealer. An undertaking will be treated as withholding goods or services from a dealer if:

- the undertaking refuses to supply those goods or services to the order of the dealer;
- the undertaking refuses to supply the goods or services to the dealer except at prices (or on terms or conditions as to credit, discount or other matters) that are significantly less favourable than those at or on which the undertaking normally supplies those goods or services to other dealers carrying on business in similar circumstances; or
- the undertaking treats the dealer in a manner less favourable than that in which it normally treats other dealers in respect of time or methods of delivery or other matters arising in the execution of the agreement.

The FCCPA prohibits any term or condition of an agreement for the sale of any goods or services to the extent that it purports to establish minimum prices to be charged on the resale of the goods or services in Nigeria.

6.4 Abuse of Dominant Position

The FCCPA prohibits the abuse of a dominant position by one or more undertakings in a market. This occurs where the undertakings charge an excessive price to the detriment of consumers, refuse to give a competitor access to an essential facility where it is economically feasible, engage in an exclusionary act such as refusing to supply scarce goods to a competitor, or sell goods or services below their marginal or average cost unless the technological efficiency and other pro-competitive gains outweigh the anti-competitive effects of its act. Exclusive dealing arrangements or market restrictions between affiliated undertakings will not be considered as an abuse of a dominant position.

The dominant position of an undertaking is determined by its ability to act without considering the reaction of its customers, consumers or competitors. In a dominant position, the undertaking enjoys a position of economic strength which prevents effective competition in the relevant market.

However, where an undertaking seeks to contribute to improving production or distribution of goods or services or promoting technologi-

cal or economic progress that will benefit the consumers, it will not be treated as an abuse of a dominant position. The FCCPA directs that where the FCCPC finds that an undertaking has abused a dominant position, the FCCPC is authorised to prepare a report indicating the abusive practices, notify the undertakings of its findings and direct the undertakings to cease the abusive practices. The undertaking is also liable upon conviction to a fine of not less than 10% of its turnover in the preceding business year or a higher percentage, as the court may determine.

7. Intellectual Property

7.1 Patents

Inventions are patentable in Nigeria if they are new, result from inventive activity and are capable of industrial application, or if they constitute a new improvement on an already patented invention.

An invention is considered new if it does not form part of the state of the art (ie, the field of knowledge relating to the invention which has been made available to the public before the date of filing a patent application). An invention is deemed to result from inventive activity if it does not obviously follow from the state of the art, and it is deemed capable of industrial application if it can be manufactured or used in any kind of industry, including agriculture.

A patent cannot be obtained in respect of plant or animal varieties, essentially biological processes for the production of plants or animals, or any invention whose publication or exploitation would be contrary to public order or morality.

The right to patent an invention is vested in the first person to file a patent application in Nigeria or validly claim priority to a foreign application, whether or not they are the true inventor. The true inventor must, however, be named in the patent, even if they are not the person applying for the patent.

An application for a patent is to be made to the Registrar of Patents and accompanied by a description of the relevant invention with any appropriate plans and drawings. The application process typically takes about 12 months.

There is no substantive examination of patents by the Registrar before a grant is made in respect of an invention. As such, patents are granted at the risk of the patentees and without a guarantee of their validity. A patent, when granted, is valid for a period of 20 years from the date of filing, subject to the payment of the prescribed annual fees.

A patent gives the patentee the exclusive right to exploit their invention. The patentee's rights under a patent, however, extend only to acts done for industrial or commercial purposes. A patentee whose rights have been infringed may institute a civil action against the infringer and claim reliefs such as damages, an injunction and an account of profits.

7.2 Trade Marks

A trade mark is a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof. Marks that are deceptive, scandalous, generic, descriptive, geographical names in their ordinary signification, or the commonly used and accepted names of chemical substances cannot be registered as trade marks in Nigeria.

For a mark to enjoy statutory protection, it must be registered in Nigeria. An application to regis-

ter a trade mark is to be made to the Registrar of Trade Marks and must contain the specification of goods or services in relation to which the trade mark is to be used.

The Registrar, on receipt of an application, will issue a letter of acknowledgement containing all relevant filing details of the trade mark application (eg, temporary number, date of application, the trade mark). The Registrar, thereafter, examines the trade mark for distinctiveness, similarity with existing registered trade marks and general compliance with the requirements of the law.

Where the Registrar is satisfied, it will issue a Notification of Acceptance for the mark to be advertised in the Trademarks Journal for opposition purposes. Otherwise, the mark is refused and a Letter of Refusal is issued stating the reason(s) for the refusal. An applicant, through its local agent, may appeal a refusal within two months; otherwise, the application will be deemed abandoned.

When a trade mark is advertised in a Trademarks Journal, any person may, within two months from the date of the publication, give notice to the Registrar of their opposition to the registration of the mark. Where no opposition is received at the expiration of the opposition period, or where the opposition is determined and resolved in favour of the applicant, the Registrar will issue a certificate of registration upon payment of the prescribed fee.

Currently, the registration process may take up to two years. A trade mark is registered for an initial period of seven years but can be renewed for further periods of 14 years.

The registration of a person as the proprietor of a trade mark in respect of any goods or services gives that person the exclusive right to the use of that trade mark in relation to those goods or services. A proprietor whose trade mark rights have been infringed may institute a civil action against the infringer and claim reliefs such as damages, an injunction and an account of profits.

7.3 Industrial Design

An industrial design refers to any combination of lines or colours or both – and any three-dimensional form, whether or not associated with colour – if it is intended by the creator to be used as a model or pattern to be multiplied by an industrial process and is not intended solely to obtain a technical result.

An industrial design can be registered in Nigeria if it is new and is not contrary to public order or morality. An industrial design will not be considered new if, before the date of application for registration, it has been made available to the public unless the creator of the design can prove that they had no knowledge that it had been made so available.

The right to registration of an industrial design is vested in the person who, whether or not they are the true creator, is the first to file, or validly to claim a foreign priority for, or an application for registration of, the design. The true creator is, however, entitled to be named in the application.

An application to register an industrial design is to be made to the Registrar of Patents and Designs and accompanied by a specimen of the design or a photographic or graphic representation of the design and an indication of the kind of product for which the design will be used.

The registration of an industrial design is effective in the first instance for five years from the date of the application for registration and can

be renewed for two further consecutive five-year periods, each upon payment of the prescribed fees.

The registration of an industrial design gives the creator the exclusive right to exploit their design. The creator's rights, however, extend only to acts done for industrial or commercial purposes. A creator whose rights have been infringed may institute a civil action against the infringer and claim reliefs such as damages, an injunction and an account of profits.

7.4 Copyright

Under Nigerian law, musical, literary and artistic works, audiovisual works, sound recordings and broadcasts enjoy copyright protection. A work is, however, not eligible for copyright unless sufficient effort has been expended to give it an original character and it is fixed in a definite medium of expression.

The law does not provide for the registration of copyright as it arises automatically upon the creation of a work. However, in fulfilment of its statutory responsibilities, the Nigerian Copyright Commission (NCC) has established a process by which authors can notify the NCC of their works.

Copyright in literary, artistic and musical works lasts for 70 years after the end of the year of the author's death. Copyright in audiovisual works and photographs subsists for 50 years after the end of the year of the first publication of the work or after the work was created, copyright in sound recordings subsists for 50 years after the end of the year the recording was made available or after the work was created, and copyright in broadcasts subsists for 50 years after the end of the year in which the broadcast first took place.

Copyright gives the owner of the eligible work the right to the exclusive use of the work. Where the right of a copyright owner is infringed, they may institute a civil action against the infringer and claim reliefs such as damages, an injunction and an account of profits. In addition, it is an offence under the law for persons to deal with infringing works and such persons may, if found guilty, be liable to a fine or imprisonment.

7.5 Others

Software (referred to as computer programs under Nigerian law) and neighbouring rights (covering performers' rights and expressions of folklore) are protected as copyright in Nigeria.

Trade secrets are, however, not statutorily protected in Nigeria.

8. Data Protection

8.1 Applicable Regulations

The primary law regulating data protection is the Nigeria Data Protection Act, 2023 (DPA). The Data Protection Bill was signed into law in June 2023, thereby making the DPA the first comprehensive law on data protection in Nigeria. It provides a legal framework for the protection of personal information and established the Nigeria Data Protection Commission (NDPC) for the regulation of the processing of personal information.

The DPA contains transitional provisions which preserve regulations, orders, rules and other documents issued by the National Information Technology Development Agency and the defunct Nigeria Data Protection Bureau until repealed, amended, replaced or altered.

As such, other applicable laws and regulations on data protection in Nigeria include:

- the Nigeria Data Protection Regulations 2019 (the erstwhile primary regulation on data protection);
- the Nigeria Data Protection Regulations Implementation Framework 2020;
- the Cybercrimes (Prohibition, Prevention) Act, 2015 and the Cybercrimes (Prohibition, Prevention) Amendment Act, 2024;
- the Guideline for Management of Personal Data by Public Institutions in Nigeria 2020; and
- such other guidelines and documents made in furtherance of the above-listed.

It is important to note that in instances of conflict between the DPA and any of the pre-existing regulations, the provisions of the DPA will override those of such regulations.

8.2 Geographical Scope

The DPA is applicable to the processing of data, whether by automated means or not, where:

- the data controller or processor is domiciled in, resident in, or operating in Nigeria;
- processing of personal data occurs within Nigeria; or
- the data controller or processor is not domiciled in, resident in, or operating in Nigeria but is processing the personal data of a data subject in Nigeria.

8.3 Role and Authority of the Data Protection Agency

The NDPC is responsible for the enforcement of data protection rules in Nigeria.

The NDPC was established by the DPA and is charged with the responsibility of overseeing the implementation of the provisions of the DPA. The NDPC's role also includes:

- the regulation of the deployment of technical and organisational measures to enhance personal data protection;
- fostering the development of personal data protection technologies, in accordance with recognised international best practices and applicable internal law;
- where necessary, accreditation, licensing and registration of suitable persons to provide data protection compliance services;
- promotion of public awareness on the obligations of data controllers and processors under the DPA; and
- receiving complaints relating to violations of the DPA or subsidiary legislation made under the DPA.

The NDPC is also empowered by the DPA to:

- prescribe fees payable by data controllers and processors in accordance with data processing activities;
- issue regulations, rules, directives and guidance under the DPA;
- prescribe the manner and frequency of filing and content of compliance returns by data controllers and data processors of major importance to the NDPC;
- call for information from a person, or inspect any documents with respect to anything done under the DPA;
- conduct investigations into any violation of a requirement under the DPA or subsidiary legislation made under the DPA by a data controller or a data processor; and
- impose penalties in respect of any violation of the provisions of the DPA or any subsidiary legislation made under the DPA.

9. Looking Forward

9.1 Upcoming Legal Reforms

With the start of a new administration, there has been the implementation of the new laws introduced by the previous government, such as the Business Facilitation Act and the DPA. Nigeria has also been actively making efforts to improve its tax system, aiming to increase revenue generation and promote compliance. As we peer into the horizon of legal transformation, our focus is fixed on the possible reforms within the Nigerian economy while hoping for further innovations that will improve the business climate in Nigeria and promote investments.

NORWAY

Law and Practice

Contributed by:
Thomas Abrahamsen, Tron Dalheim, Marius Holm Rynning, Siri Teigum, Magnus Hauge Greaker and Christopher Sparre-Enger Clausen
Advokatfirmaet Thommessen AS

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Advokatfirmaet Thommessen AS is considered to be one of Norway's leading commercial law firms, with offices in Oslo, Bergen, Stavanger and London. It provides advice to Norwegian and international companies and organisations in both the public and private sectors. With approximately 300 lawyers, it covers all business-related fields of law, including M&A and corporate law (private and public transactions), banking and finance, IP, compliance and investigation, insolvency and restructuring, insurance, litigation and other dispute resolution, tax, competition, employment, real estate, technology data protection and cybersecurity, sustainability and climate risk, and energy (ie, oil and gas, oil service and renewable energy and infrastructure).

Authors

Thomas Abrahamsen is an M&A and ECM partner at Advokatfirmaet Thommessen AS and is a corporate generalist attorney with substantial transaction experience, particularly in the energy (oil and gas and renewables), industrial, infrastructure and tech/software sectors. His broad M&A and corporate law practice includes corporate deals, asset transactions, fundraising processes, IPOs, private placements and restructurings. His practice also includes capital markets/ECM, venture capital and cross-border M&A projects. He often advises companies during their growth phase and in regard to their international expansion from Norway, as well as investors coming into the Norwegian market.

Tron Dalheim is a partner at Advokatfirmaet Thommessen AS and is a recognised employment law adviser to Norwegian and international companies. He has litigated a number of cases concerning labour law and pensions and is admitted to the Bar of the Supreme Court. He is also the author of the "Norwegian Law Commentary on the Working Environment Act" and has written a book on Seamen's Law. He has experience from several industries, including oil and offshore, shipping and aviation. He has recently worked with restructuring processes, litigation and conflict management within the field of labour law.

Marius Holm Rynning is a partner at Advokatfirmaet Thommessen AS's Oslo office and heads its tax practice, representing clients in a wide range of tax and structuring matters. He has particular experience in fund formation, private M&A, restructurings and debt and equity offerings, with a primary focus on private equity.

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Siri Teigum is a partner at Advokatfirmaet Thommessen AS. She assists clients in negotiations and dispute resolution and is top-ranked within these areas. She has been responsible for the clearance of a number of complex mergers and acquisitions and has handled different types of EEA and competition cases before the EFTA, CJEU and Norwegian courts. She is ad hoc judge of the EFTA Court, leader of the board on the Norwegian Bar Association, leader of the board of the Government Pension Fund Norway, a member of the board of Gyldendal ASA and a member of the board of the Faculty of Law, University of Oslo.

Magnus Hauge Greaker is a partner at Advokatfirmaet Thommessen AS. He mainly works on patent, trade mark and trade secrets litigation for clients in life sciences, oil and oil service, aquaculture and other technology. His' experience also covers marketing law and pharmaceutical regulatory law.

Christopher Sparre-Enger Clausen is a partner at Advokatfirmaet Thommessen AS and heads its technology and data protection practice group, specialising in technology and data protection law. He assists clients with legal and strategic advice within a broad range of areas relating to digitalisation and technology, such as data protection, cybersecurity, outsourcing, licensing, cloud computing and software development, as well as IP and regulatory matters pertaining to IT and telecommunications.

Advokatfirmaet Thommessen AS

Ruseløkkveien 38
0251 Oslo
Postboks 1484 Vika
NO-0116 Oslo
Norway

Tel: +47 23 11 11 11
Email: pak@thommessen.no
Web: www.thommessen.no

THOMMESSEN

Contributed by: Thomas Abrahamsen, Tron Dalheim, Marius Holm Rynning, Siri Teigum, Magnus Hauge Greaker and Christopher Sparre-Enger Clausen, **Advokatfirmaet Thommessen AS**

1. Legal System

1.1 Legal System and Judicial Order

Norway has a legal system based on division of power between the different branches of government (ie, the legislative, executive and judicial branches). The legal system is generally based on written statutes adopted by the National Assembly (*Stortinget*). In certain areas, case law is the predominant source of law. Norway is a member of the European Economic Area and is required to adopt EU legislation in most areas.

The court system is based on general courts covering all or most legal disputes, both legal and criminal. There are special courts in certain areas. The regular court system consists of city/district courts, appeal courts and the Supreme Court.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

As a general rule, foreign investments do not require approval by the Norwegian authorities. However, the Norwegian Security Act (LOV-2018-06-21-24) contains certain provisions that may impose restrictions on foreign investments.

The Security Act does not discriminate between foreign or national investments but applies equally to all undertakings that have been brought within the scope of the Act. Under Section 1-3, Norwegian ministries are empowered to bring undertakings operating within the respective ministry's field of responsibility under the scope of the Security Act.

A company may be brought under the scope of the Security Act if it handles:

- classified information;
- information or infrastructure of major importance for fundamental national functions; or
- activities of major importance for fundamental national functions.

This means that the law typically applies to companies in the telecommunications, defence, transport and energy sectors and companies involved in food and water supply too.

Where an undertaking or company has been brought within the scope of the Security Act, an acquirer must notify the relevant ministry if it is acquiring a "qualified ownership interest". Under Section 10-1, a "qualified ownership interest" is achieved if the acquirer directly or indirectly obtains:

- a third of the company's share capital, interests or votes;
- a right to become owner of a third of the share capital or interests; or
- significant influence over the company through other means.

When assessing whether the acquirer has acquired a "qualified ownership interest" under Section 10-1, shares which are owned or taken over by the acquirer's associates have the same status as the acquirer's own shares. Under Section 2-5 of the Securities Trading Act, this includes shares or other equity interests that are owned or procured by:

- the spouse or a person with whom the acquirer cohabits in a relationship akin to marriage;
- the acquirer's underage children, and underage children of a person the acquirer cohabits with;
- an undertaking within the same group as the acquirer;

- an undertaking in which the acquirer themselves or a person as mentioned above or below exercises influence as stated in Section 1-3(2) of the Private Limited Companies Act, Section 1-3(2) of the Public Limited Companies Act or Section 1-2(2) of the General and Limited Partnerships Act; or
- a party with whom the acquirer must be assumed to be acting in concert in the exercise of rights accruing to the owner of a financial instrument, as well as in cases where a bid is frustrated or prevented.

There is no publicly available list of companies falling within the scope of the Security Act. However, the National Security Authority may provide guidance on whether a company has been brought within the scope of the Security Act on a case-by-case basis.

In addition, the King-in-Council (ie, the government) has an ex officio provision in Section 2-5 of the Security Act, allowing the government to intervene in activities that "may entail a risk that is not insignificant that interests of national security will be threatened". This provision applies irrespective of the distinct provisions of ownership control. There is no time limit on the application of this provision. It therefore applies to both planned and ongoing activities.

2.2 Procedure and Sanctions in the Event of Non-compliance

If an undertaking or company is brought within the scope of the Security Act, notification of the acquisition of a "qualified ownership interest" to the relevant ministry is mandatory. Under the Regulation of the Security of Undertakings issued on the basis of the Security Act (FOR-2018-12-20-2053), the notification must include the following:

- the acquirer's name, address, company register number, birth date or similar personal identification number;
- the company register number of the company that the acquisition relates to;
- the acquirer's ownership share after the concerned acquisition is completed;
- the ownership structure of the acquirer;
- the names of the person that are members of the acquirer's board of directors;
- the names of the persons that are members of the acquirer's management;
- possible relations between the acquirer and other existing owners of the company that the acquisition relates to;
- the acquirer's ownership interests in other companies that are covered by the Security Act;
- the acquirer's ownership interests in other companies within the concerned sector;
- the acquirer's annual turnover and annual accounts for the last five years, to the extent this information is available; and
- other circumstances that the acquirer assumes may be of relevance for the assessment of whether the acquisition will be approved.

Upon receiving the notification, the relevant authority must issue its decision within 60 working days. If the relevant authority requests further information from the undertakings concerned within 50 working days, the deadline is suspended until this information is provided.

If the relevant authority does not consider the acquisition to be a potential threat to national security, it will clear the acquisition and notify the acquirer of the clearance. If the relevant authority identifies a potential threat, it will submit the acquisition to the Norwegian government for a final decision. The Security Act does not impose

a deadline on the government to reach a final decision.

Notification to the relevant ministry does not have a suspensory effect on the transaction, and approval may be obtained both before and after closing. However, if approval is refused, the transaction will have to be reversed.

2.3 Commitments Required From Foreign Investors

The relevant authorities may allow an acquisition on the condition that the acquirer implements measures or imposes arrangements to mitigate any concerns the relevant authority may have. These conditions may, inter alia, relate to protection of sensitive information and restrictions on the resale of shares, etc.

2.4 Right to Appeal

There is no procedure for administrative review or appeal of the government's refusal to approve an acquisition under the Security Act. The refusal may, however, be brought before the ordinary courts under the general rules regarding judicial review of administrative decisions under Norwegian law.

Judicial review of administrative decisions is limited to reviewing:

- whether the government had a legal basis for their decision;
- whether the government complied with the procedural rules; and
- whether the refusal to approve the acquisition was based on the correct factual basis.

The court may also decide whether the decision was in accordance with certain fundamental principles of objectivity and equality in administrative law.

If the court concludes that the refusal to approve the acquisition was unlawful, the refusal will be invalidated. In so far as the grounds for invalidation are repairable, the authorities may issue a new refusal after a new processing of the case. Both the seller and the buyer may bring a refusal before the courts.

Amendments to the Security Act

In June 2023, the Norwegian Parliament adopted a set of amendments to the Security Act. These amendments included an expansion of the scope of businesses that may be the subject of a decision to be brought within the scope of the Security Act, to include businesses that are of vital importance to national security interests and businesses of significant importance to fundamental national functions or national security. The amendment came into force on 1 July 2023.

In addition, the Norwegian Parliament also adopted the following amendments that have yet to come into force.

- A mandatory notification obligation will also apply for acquisitions of a qualified ownership interest in a business holding supplier clearance for having access to information classified as confidential or higher.
- Lowering the thresholds of qualified ownership interest from one third to at least 10% of the share capital, interests or votes in the target company, with recurring filing obligations at 20%, one third, 50%, two thirds or 90%, or where significant influence over the company is acquired by other means. In addition to the prospective buyer's filing obligation, certain transactions may also trigger a notification obligation for the seller and/or target company.
- Introducing a standstill obligation during the case handling and a prohibition against shar-

ing information (eg, in the DD) that may be used for security-threatening activities, unless prior consent from the relevant ministry has been obtained.
- Provisions on administrative sanctions (for failure to notify) and criminal liability (violations of intervention decisions pursuant to Section 2-5 or Section 10-3 of the Security Act).

These amendments are expected to come into force in the second half of 2024. With these amendments, the Norwegian government aims to enhance the effectiveness and comprehensiveness of the Security Act, ensuring that national security interests are adequately protected.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The most common corporate vehicle in Norway is the limited liability company.

The liability of each shareholder in a limited company is restricted to its respective part of the share capital and shareholders are not personally liable for the obligations of the company. There are two forms of limited liability companies: private limited companies (*Aksjeselskap*, AS) and public limited companies (*Allmennaksjeselskap*, ASA). Only public limited companies (or a foreign equivalent) may be listed on the Oslo Stock Exchange or Euronext Expand, and there is little reason to establish a public limited company unless it is envisaged to list the company's shares on one of these two marketplaces.

In terms of listing on Euronext Growth Oslo (a junior exchange which is a multilateral trading facility), the listed entity can also be a private limited company. Joint ventures are normally structured as private limited companies in the Norwegian market.

Private limited companies must have a share capital of at least NOK30,000, whereas a public limited company must have a minimum share capital of NOK1 million.

There are no restrictions on the number of shareholders. Therefore, a Norwegian limited liability company can have just one shareholder. All shares carry equal rights and one vote each, unless otherwise provided for in the articles of association. The articles of association may prescribe different classes of shares – A, B and C shares – eg, with different rights to participate in the profits of the company and/or different voting rights.

Parent companies and shareholders are in general not liable for their subsidiaries' or the company's debts or liabilities. However, Supreme Court practice confirms that the corporate veil can be pierced in extraordinary circumstances.

Shareholders exercise their rights through general meetings. The annual general meeting is required to be held each year on or prior to June 30th, to deal with and decide upon the annual accounts and the annual report. Apart from the annual general meeting, extraordinary general meetings may be held if the board of directors considers it necessary, or if the auditor or shareholders representing at least 5% with respect to public limited companies, or 10% with respect to private limited companies of the share capital, demand this in writing.

3.2 Incorporation Process

A limited liability company is formed by one or more founders – which can be foreign compa-

nies or individuals – signing a deed of formation. Within three months of the formation, the required share capital must be deposited by the shareholder(s) and submitted for registration with the Register of Business Enterprises. The payment of share capital must be documented in the submitted registration and be confirmed by a bank, an auditor or a law firm.

The company is formally considered a legal entity upon registration.

Establishing a Norwegian company for investors not having local board directors in Norway can take between two and six weeks. If there are local board directors with existing local social security numbers, incorporation can be done in approximately one to two weeks, through a digital solution being offered by the Register of Business Enterprises.

Despite a fairly easy incorporation process, foreign companies often set up business in Norway by acquiring an already established shelf company from a law firm. The investor will in this case immediately receive the registration number and control of the shelf company. Registration of a new name, new board, etc, in a shelf company normally takes between four and six weeks if the board directors do not have a social security number in Norway and must apply for the number, and one to two weeks if the directors are based in Norway and already have a social security number.

3.3 Ongoing Reporting and Disclosure Obligations

All limited companies, regardless of size, have to maintain financial accounts. They also have a statutory book-keeping obligation. However, so-called "small enterprises" are subject to simplified requirements. Companies must prepare and file annual accounts with the Norwegian Accounting Register by July 31st each year. Penalties apply for late filing. The information must be reported in a way that complies with statutory accounting rules, and that reflects a true and fair view of the company's assets, liabilities, results and financial position in accordance with generally accepted accounting practices in Norway (NGAAP).

Private limited companies are not required to have an auditor if they:

- have operating revenues of less than NOK7 million;
- have a balance sheet amount of less than NOK27 million; and
- have an average number of employees not exceeding ten labour years.

3.4 Management Structures

Norwegian law and market practice prescribes a one-tier management structure. Advisory boards are not very common but are sometimes used where the majority owner is based outside Norway.

A public limited company must have a board of directors comprising a minimum of three directors, including the chairperson of the board, while the board of directors in a private limited company may comprise only one director (who may also be the sole shareholder of the company).

Both public and private limited companies are subject to rules regarding employee representation in the board of directors. If the number of employees in the company exceeds 30, the employees will have the right to appoint one director while if the number exceeds 50, the employees will have the right to appoint one

third of the directors (but in any event at least two directors). Public limited companies are required to have a general manager/CEO who is responsible for day-to-day management, but this is optional for private limited companies. However, most private limited companies do have a general manager who is registered with the Register of Business Enterprises.

At least half the board of directors plus the managing director must reside in Norway or be EEA citizens residing in an EEA country or citizens of the UK residing in the country. For both public and private limited companies, there are also certain requirements that both sexes are represented on the board of directors. Listed companies must also comply with the Norwegian Corporate Governance Code (NUES) on a comply-or-explain basis, which sets forth certain requirements for the composition of the board of directors and a number of other corporate governance principles.

3.5 Directors', Officers' and Shareholders' Liability

The board of directors is responsible for the management of the company and should ensure a proper organisation of the business. Under Norwegian law, the board of directors of a private limited company will maintain a share register of all the company's shares and shareholders while the shares in a public limited company must be registered in the Norwegian Central Securities Depository (VPS). Both share registers are publicly available.

Directors of the board have a fiduciary duty to the company and its shareholders. This duty requires that the board of directors acts in the best interests of the company when exercising their functions and exercise a general duty of loyalty and care towards the company. Members of the board of directors may each be held personally liable for any damage they negligently or wilfully cause the company.

4. Employment Law

4.1 Nature of Applicable Regulations

Norwegian employment relationships are regulated by legislation, including the Working Environment Act.

Working conditions are regulated by collective bargaining agreements to a great extent. In principle, collective bargaining agreements are not compulsory but are common in many industries in practice.

4.2 Characteristics of Employment Contracts

Written Employment Contracts

All employment relationships will be subject to a written employment contract according to law. This applies to both permanent and temporary types of employment. There are statutory minimum requirements for the content of the employment agreement. The contract should state factors of major significance for the employment relationship.

The Norwegian government has implemented the EU Directive on Transparent and Predictable Working Conditions (2019/1152). The changes come into force on 1 July 2024 and include additional requirements to the content of employment contracts, including, among other things:

- information about any right to absence paid by the employer;
- the procedure for termination of an employment relationship;

- the various components that make up the salary; and
- any right to competence development that the employer may offer.

Permanent Appointments Versus Temporary Appointments

As a main rule, all appointments of employees will be permanent. Temporary employment is only permitted in special instances provided under Section 14-9(2) of the Working Environment Act. The most common instances of temporary employment are:

- when the work is of a temporary nature and differs from the work that is ordinarily performed in the undertaking (typically in connection with special projects, seasonal employment, etc); and
- for work as a temporary replacement for another employee.

The regulation on temporary employment is strict in Norway. If the employment contract fails to inform about the temporary nature of the employment relationship or if the requirements for temporary employment are not met in respect of a temporarily appointed employee, the employee will be considered permanently appointed, meaning that the ordinary rules for termination, etc, will apply. The employee may also claim compensation and damages for not being employed permanently.

Zero-hour contracts (ie, contracts where the employee is not guaranteed a certain level of work) are not permitted unless the legal requirements for temporary employment are fulfilled.

4.3 Working Time

Under the Working Environment Act, the normal working hours are nine hours per day and 40 hours per week. Employees are entitled to a 30-minute lunch break which is not included in the working hours. Employees in leading and/or particularly independent positions may be exempted from the working time regulations in the Working Environment Act subject to an individual assessment in each case.

Different regulations may follow from collective bargaining agreements, whereby normal working hours are usually 7.5 hours per day and 37.5 hours per week. This is also market practice in many industries. The working time is lower for shift workers, among others.

The total amount of working hours (including overtime hours) may not exceed 13 hours during 24 consecutive hours and 48 hours during seven consecutive days. The 48-hour limit may be averagely calculated over a period of eight weeks.

Additionally, employees are entitled to daily and weekly off-duty time. Under Section 10-8 of the Working Environment Act, the main rule is that an employee is entitled to have at least 11 hours continuous off-duty time per 24 hours and a 35 hour off duty period per seven days. The off-duty period will be placed between two main work periods.

4.4 Termination of Employment Contracts

There is no employment at will in Norway. Any termination initiated by the employer must be objectively justified on the basis of circumstances relating to the undertaking, the employer or the employee.

Termination due to circumstances related to the employee include for breach of contract. There

is generally a high threshold for termination due to circumstances related to the employee.

A workforce reduction due to insufficient workload, scaling down of operations or restructuring will normally be accepted as sufficient and valid grounds for termination. A loss in revenue is not required. The courts will typically evaluate whether the employer has had a true and complete picture of all relevant facts when making the redundancy decision, and whether proper and mandatory procedural requirements are met. The courts will usually abstain from reviewing the employer's commercial preference on how to run its business.

Norway has implemented the Collective Redundancies Directive (98/59/EC). If more than ten employees are to be terminated in the same process, mandatory consultations must be conducted with employee representatives and a notification must be sent to the public welfare administration. Nevertheless, discussions with the employee representatives are in any case recommended to ensure good process. Meetings with employee representatives should be documented in minutes.

If not all employees are to be made redundant, the selection of redundant employees must be based on fair and reasonable criteria determined in advance, preferably in discussions with the employee representatives. Typical selection criteria are seniority, competence and social considerations (eg, age, heavy family responsibilities and/or illness or injury).

Termination due to redundancies is only valid if the employer does not have other suitable work within the employing entity to offer the employee. The obligation to offer other suitable work only applies if there are vacancies or any manpower requirements within the undertaking that the relevant employee is qualified for. The employer's assessment of the existence of vacant positions and the specific employee's suitability should be documented in writing. The duty to offer vacant positions in the case of redundancies applies on a group level within Norway.

Before any final decision on the selection of redundant employees and termination of employment is made, the employer must summon each affected employee to an individual discussion meeting. The purpose of the meeting is to discuss the reasons for the possible termination of employment and allow the employee to comment on the employer's assessment, correct or supplement the facts and present possible reasons for why the employee should not be terminated. Minutes must be taken in the discussion meeting.

A notice of termination may be given after the discussion meeting is held and after the employer's final assessment and decision is made. The notice letter must be in writing and delivered to the employee personally or by registered mail. The notice letter must comply with mandatory formal requirements and contain information about the employee's rights to request negotiation, instigate legal proceedings and remain in the position while contesting the validity of the termination. The agreed or mandatory notice period will start to run on the first day of the month following the month in which notice was received by the employee. There are statutory rules for notice periods depending on the employee's age and/or seniority.

There are no statutory rules in Norway stating that employers have to pay redundant and terminated employees a severance pay. However, employers often enter into termination agree-

ments with employees on a voluntary basis as an alternative to the employer's formal termination. Severance pay may be included in these agreements. Many employers see this as an efficient way to reduce their workforce and eliminate any risks of disputes following the terminations.

If a termination of employment is ruled invalid by the court, the employment continues "as is" unless the court finds its continuation to be clearly unreasonable. The employee will nevertheless be entitled to compensation for invalid termination. The size of the compensation varies depending on the employee's financial loss as well as other factors.

4.5 Employee Representations

Employers have an extensive duty according to law and collective agreements to inform and consult with employee representatives on issues of importance for the employees' working conditions. Although it is not mandatory, the Working Environment Act presupposes that the employees in an undertaking have an employee representative. This representative does not have to be formally elected.

Trade union representation at a company level is not mandatory by law but may be required if the employer is bound by a collective bargaining agreement.

Employees are entitled to claim board representation if the company has more than 30 employees.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

Norwegian tax resident individuals are subject to income tax on their employment income, wherever earned, when received.

Individuals that are not tax resident in Norway will, as a general rule, only be liable for tax on the income from work performed in Norway. If an employee stays in Norway for more than 183 days during a 12-month period, or more than 270 days during a 36-month period, the employee will become tax resident in Norway and have to report and pay tax on global wealth and income. Any tax charge on non-resident individuals may be limited where a tax treaty applies.

Income tax is charged at progressive rates up to 47.4%, including social security contributions. The income tax rate is flat at 22%. In addition, a progressive bracket tax is levied for income exceeding NOK208,050 per year, starting at 1.7% bracket tax for the lowest step and 17.6% bracket tax for income over NOK1.35 million. Employers have to deduct income tax from payments of employment income and report it to the Norwegian tax authorities.

Employer social security contributions are charged at 7.89% through the same mechanism. In addition, employers are charged with national insurance contributions on the income. The standard rate is 14.1%, although the rate is reduced for certain geographical parts of Norway. An extra 5% employer social security contribution tax may be levied on income above NOK850,000. Non-Norwegian workers in Norway may also be part of the voluntary Pay As You Earn (PAYE) tax scheme. Under this scheme, the employee will be taxed at a fixed percentage.

This amount is deducted by the employer from employment income.

5.2 Taxes Applicable to Businesses

Companies Subject to Taxation

Companies resident in Norway for tax purposes are subject to a flat nominal tax rate, which is currently 22% on their worldwide income. Losses are tax deductible.

If a non-Norwegian company carries out business or participates in business which is managed from Norway, the company will become taxable to Norway on all income and net wealth from the activities. However, tax treaty protection may be available. Tax losses may be set off against taxable income for later years and may be carried forward indefinitely.

VAT

The standard rate of VAT in Norway is 25%. However, a lower rate of 15% is levied on food and an even lower rate of 12% is levied on public transportation and hotel accommodation, etc. The rules on VAT apply to businesses selling goods or services that exceed NOK50,000 within a 12-month period. If so, the business in question must register for VAT in Norway and add VAT on the invoices to clients and customers.

Dividends and Capital Gains

Receipt of dividends and capitals gains on shares is in principle exempt from Norwegian taxation for Norwegian limited liability companies under the participation exemption, provided that:

- the distributing company is genuinely established in an EU/EEA state;
- if outside the EU/EEA, a minimum 10% of the shares must be owned by the Norwegian company for at least two years so long as the distributing company is not resident in a low tax jurisdiction; and
- the distributing company is not receiving a tax deduction for the distribution.

If the receiving company is tax resident in Norway and holds less than 90% of the shares in the distributing company, 3% of the dividends will be regarded as taxable income. As this income is taxed at the general rate of 22%, the effective tax rate of the dividends is 0.66%. This tax does not apply to capital gains.

Dividends distributed from Norwegian tax resident limited liability companies to shareholders resident outside Norway are, in general, subject to withholding tax at a flat rate of 25%. The withholding tax rate is normally reduced through tax treaties between Norway and the country in which the shareholder is resident. Dividends distributed to non-resident limited liability companies resident within the EU/EEA for tax purposes are exempt from Norwegian withholding tax under the participation exemption, provided that the company is the beneficial owner of the shares and can be proved to be genuinely established in an EU/EEA state.

There is no income tax or withholding tax on capital gains on shares in limited liability companies that are resident in Norway realised by a Norwegian corporate shareholder or a non-Norwegian shareholder, provided that the non-Norwegian shareholder does not hold the shares in connection with a trade or business carried out in Norway. Norway does not impose stamp duty on the transfer of shares.

5.3 Available Tax Credits/Incentives

Research and Development Regime

Norway has a tax initiative called SkatteFUNN research and development (R&D). This is a tax scheme designed to stimulate R&D in Norwegian trade and industry. All businesses and enterprises subject to taxation in Norway are eligible to apply for tax relief through the R&D scheme. The Norwegian companies and branches of foreign companies with R&D projects can apply for a deduction of 19% of incurred costs, up to NOK25 million. Even though there are no requirements as to type of business, the projects must:

- be aimed at developing new or better goods, services or production processes;
- be aimed at acquiring new knowledge or new skills;
- benefit the company; and
- be goal-oriented and limited to achieving these goals.

5.4 Tax Consolidation

Group companies remain separately taxable entities for Norwegian corporation tax purposes. However, Norwegian companies that are part of the same tax group may consolidate their taxable profits and losses through group contributions. The contributing company can claim a deduction for the contribution in its taxable income, provided certain requirements are met while the recipient can increase its taxable income by the same amount.

The ownership requirement for a Norwegian tax group is more than 90%. The parent company must directly or indirectly hold more than 90% of the shares and the voting rights of the subsidiary at the end of the year in order to be in a position to contribute or receive group contributions.

Group contributions are also available for Norwegian branches of foreign companies that are resident within the EU/EEA.

5.5 Thin Capitalisation Rules and Other Limitations

Interest on loans is generally deductible for Norwegian tax purposes. However, interest may be denied if Norwegian interest limitation rules apply or if the loan arrangement is not in accordance with the arm's length principle.

There are no general thin capitalisation rules in Norwegian tax law. However, there are regulations that allow for reclassification of income and deductions between affiliated companies. If a Norwegian entity is regarded as being thinly capitalised, a part of the entity's interest and debts may be reclassified as dividend and equity.

Norway has also implemented interest limitation rules. The applicable rules are dependent on whether the company is part of a consolidated group for accounting purposes. For these group companies, the interest limitation rules apply for interests above NOK25 million for the Norwegian part of the group. For non-group companies, the threshold limit is NOK5 million. Where the threshold amount is exceeded, deductions are limited to 25% of the company's taxable EBITDA, subject to certain exceptions based on equity comparisons between the Norwegian part of the group and the worldwide group.

5.6 Transfer Pricing

The arm's length principle for related-party transactions is part of the Norwegian Tax Act, implying that the Norwegian tax authorities may increase a taxpayer's taxable income if the pricing is not in accordance with the arm's length principle. Both Norwegian and foreign tax authorities monitor multinational companies' internal pric-

ing, and they demand an increasingly analytical and transparent approach in accordance with the arm's length principle.

More specifically, foreign companies and other businesses are required to provide information and disclosures for transactions and intercompany balances between affiliated companies. This mainly applies to foreign companies and other businesses that have:

- controlled transactions with a total fair value of NOK10 million or more in the income year; or
- receivables and liabilities with a total value of NOK25 million or more at the end of the income year.

The documentation rules only apply to companies that provide Norwegian tax returns. An exception has also been made from the obligation to prepare special documentation for companies that have less than 250 employees and either have:

- a total sales revenue of not more than NOK400 million; or
- a total balance sheet that is not more than NOK350 million.

However, this exception does not apply to companies, etc, which have transactions with companies resident in a state where Norway is not entitled to receive tax information.

5.7 Anti-evasion Rules

There is a general Norwegian anti-avoidance standard that has been developed by the courts and was incorporated into the Norwegian Tax Act in 2020. Under this standard, transactions that have been made with a main purpose of avoiding taxation may be disregarded by the tax authorities.

There are also specific anti-avoidance provisions regarding discontinuation of tax positions (carried-forward tax loss, etc) in connection with transactions or reorganisations if it is likely that the primary motive was to make use of the tax position.

6. Competition Law

6.1 Merger Control Notification

The Norwegian rules on merger control are set out in Chapter 4 of the Norwegian Competition Act (LOV-2004-03-05-12) and regulations adopted pursuant to it, in particular the Regulation on Notification of Concentrations (FOR-2013-12-11-1466).

Section 18 of the Competition Act stipulates an obligation to notify certain concentrations to the Norwegian Competition Authority (NCA), notably any merger or acquisition of control where:

- more than two of the undertakings concerned have turnover in Norway of more than NOK100 million; and
- the aggregated turnover of the undertakings concerned exceeds NOK1 billion.

The Norwegian merger regulation is modelled after, and to a large extent mirrors, the EU Merger Regulation (EUMR) and will normally follow the guidance and case law of the European Commission and ECJ. Consequently, concepts such as a "concentration", "undertakings concerned" and "control" echo those of the EUMR.

Joint ventures are subject to merger control if the joint venture is jointly controlled and is "full-func-

tion". "Full-function" entails that the joint venture has the necessary functions to operate as an autonomous economic entity on a lasting basis.

In addition, the NCA may impose a filing obligation on acquisitions of non-controlling minority shareholdings and concentrations falling below the jurisdictional thresholds (within three months of a change of control or conclusion of the agreement). There are examples of interventions by the NCA on these types of transactions in recent years.

Finally, pursuant to the one-stop-shop principle, a concentration that is notifiable to the European Commission is not notifiable to the NCA. This does not apply to products not covered by the EEA Agreement.

6.2 Merger Control Procedure

There is no deadline for filing a notification of a planned concentration, but the concentration cannot be implemented prior to the NCA clearing the transaction (standstill obligation under Section 19 of the Competition Act).

The Norwegian merger control procedure consists of a Phase I and a Phase II. In addition, the parties may engage in a voluntary pre-notification dialogue with the NCA. The pre-notification process is informal and has no set timeframe. Pre-notification dialogue is recommended in complex cases.

In Phase I, the NCA has 25 working days to assess whether it may want to intervene against the proposed concentration, or alternatively to approve the concentration. Where the NCA notifies the parties that intervention might take place, the NCA must demonstrate that there are reasonable grounds to assume that the concentration will create or strengthen a significant restriction of competition, contrary to the purpose of the Act. If remedies are proposed within 20 working days, Phase I may be extended by ten working days.

The majority of notified concentrations are approved in Phase I.

During Phase II, the NCA must – within 70 working days counted from the day the notification was filed – adopt a commitment decision or issue a statement of objections. If remedies are proposed by the parties after 55 working days, the deadline may be extended by a maximum of 15 working days.

Following a statement of objections, the parties are given 15 working days to comment on the statement. The NCA is then given 15 working days to conclude its final decision. However, if the parties suggest remedies after having received the statement of objections, the NCA deadline may be extended by 15 working days. Finally, the parties may request an additional extension of 15 working days if necessary. With all possible extensions, the entire period of review may amount to 145 working days.

A decision by the NCA to intervene may be appealed to the Competition Appeals Board.

Many mergers are filed with the NCA through a simplified merger procedure (approximately 70% in 2022), which allows for a lower degree of detail and often a swift process. Simplified merger notifications are normally cleared well within the limit of 25 working days. In order to file a simplified notification, certain alternative criteria must be met, as set out in Section 3 of the Regulation on Notification of Concentrations – for example, concentrations where the parties have no overlapping activities, and a combined

market share below 20% in markets with horizontal overlap and below 30% in markets where the parties have a vertical overlap. In addition, certain joint ventures with sufficient limited activities in Norway may also qualify for a simplified merger procedure.

Under Section 29 of the Competition Act, breaches of the obligation to notify a concentration or the standstill obligation may trigger an administrative fine amounting to up to 1% and 10%, respectively, of the total turnover of the undertaking.

6.3 Cartels

Section 10 of the Competition Act prohibits anti-competitive agreements and practices. The provision mirrors Article 53 of the Agreement on the European Economic Area (EEA) and Article 101 of the Treaty on the Functioning of the European Union (TFEU).

In addition to Norwegian case law and preparatory works, the provisions of the Competition Act are interpreted in light of case law from the European Court of Justice, the General Court, the European Commission, the EFTA Court and the EFTA Surveillance Authority (ESA).

Section 10 prohibits any agreements between undertakings, decisions by associations of undertakings, informal collaborations and practices which have as their object or effect the prevention, restriction or distortion of competition.

Exceptions from the cartel prohibition are enshrined in Section 10(3) of the Competition Act (which mirrors Article 53(3) of the EEA and Article 101(3) of the TFEU), targeting, in particular, co-operations where any restrictions of competition are outweighed by efficiency benefits.

Under Section 29 of the Competition Act, infringements of Section 10 may be sanctioned with administrative fines and imprisonment. However, no individual has been punished for offences to date. These fines may amount to up to 10% of the total turnover of the undertakings involved.

6.4 Abuse of Dominant Position

Abuse of dominance is prohibited under Section 11 of the Competition Act and corresponds to Article 54 of the EEA and Article 102 of the TFEU.

To establish dominance, the undertaking must have an economic strength which allows it to prevent effective competition in the relevant market by enabling it to act, to a significant extent, independently of its competitors, customers and, ultimately, consumers. The assessment of dominance largely resembles that of EU law and will take into account various measures of economic strength, such as market share, the underlying market structure and the number and positions of other competitors.

Behaviour by an undertaking with a dominant position that restricts actual or potential competition, including competitor's opportunities for growth and market entry, may amount to abusive behaviour. Examples of such behaviour that may be covered by the prohibition in Section 11 include:

- loyalty-inducing discounts;
- exclusive agreements with customers; and
- margin squeezing or other foreclosing behaviour such as predatory pricing and refusal to supply.

A dominant undertaking is nevertheless entitled to provide a justification for behaviour that otherwise could be deemed abusive – ie, if its

behaviour is objectively necessary and proportional or if the behaviour is efficiency-enhancing and generally benefits consumers. The benefits afforded to consumers must be sufficiently probable and impossible to achieve in a less restrictive manner. Further, the behaviour cannot eliminate competition from the market.

Under Section 29 of the Competition Act, infringements of Section 11 may be sanctioned with administrative fines. These fines may amount to up to 10% of the total turnover of the dominant undertaking.

New Market Investigation Tool

The ministry of trade and fisheries has announced that it intends to send a proposition for a new market investigation tool to the Norwegian Parliament before the summer of 2024. The initial proposition from the ministry was subject to public hearing in 2023. The proposed market investigation tool will provide the NCA with the competence to initiate investigations into conduct, which is not prohibited by the competition rules, but which the NCA still considers problematic for competition. Subsequent to these investigations, the ministry proposes to provide the NCA with broad powers to intervene by imposing requirements upon the relevant undertakings, hereunder structural divestment requirements if needed. The ultimate content and details of the market investigation tool are still unknown, subject to the final proposition from the ministry and the subsequent legislative process.

7. Intellectual Property

7.1 Patents

A patent provides the inventor, or the inventor's successor in title, with an exclusive right to exploit an invention conceived within any field of technology provided that the invention is susceptible of industrial application, commercially or operationally.

The Patents Act governs patents in Norway, and the Norwegian Industrial Property Office (*Patentstyret*) processes patent applications and grants patents. With respect to substantive patent law (the requirements of novelty, inventive step, susceptible of industrial application, etc), the Patents Act implements the EU Biotech Directive (Directive 98/44/EC) and is consistent with the European Patent Convention. When processing the application, it normally takes approximately six to seven months before the applicant receives the first statement from the Norwegian Industrial Property Office on the patentability. The application will be published in the Industrial Property Office's register and online 18 months after the application is filed. Following receipt of the statement of patentability, it usually takes one to two years until the outcome of the application is finally decided.

If the patent is granted, it may be maintained for up to 20 years, counted from the filing date of the patent application. Applying for supplementary protection certificates may extend the protection period by up to five years for plant protection products and up to five and a half years for certain medicinal products; see Regulation (EC) No 1610/96 and the amendments made in (EU) 2019/933 and (EC) No 469/2009.

Patent enforcement may be brought before the courts, offering several remedies against an infringer. A practical remedy is to request a preliminary injunction either in separate proceedings or as a part of ordinary proceedings on the merits. The available remedies against infringements in ordinary proceedings are:

- injunctions to stop an ongoing infringement;
- corrective measures (such as recall, destruction, etc, of goods); and
- reasonable compensation and/or damages for financial loss caused by the infringement.

Where the patent holder enforces its patent against an infringer, the infringer will often defend by arguing that the patent is invalid. The infringer must then launch a counter-claim for invalidation, which will be handled by the same court and in the same case as the enforcement action. An alleged infringer can also defend by arguing non-infringement.

It should be noted that Norway is not part of the cooperation within the EU with respect to unitary patent protection and the United Patent Court (UPC). Unitary patents will therefore not have effect in Norway and the UPC will not have jurisdiction over European patents that are validated in Norway.

7.2 Trade Marks

Trade marks are governed by the Norwegian Trade Marks Act, which implements the EU Trade Marks Directive (Directive (EU) 2015/2436). A trade mark is a distinctive sign for goods or services in an industrial or commercial undertaking and may consist of any sign capable of distinguishing the goods or services of one undertaking from those of another, such as words and combinations of words, including slogans, names, letters, numerals, figures, pictures, the shape of the goods or their packaging. A trade mark may be acquired by applying for registration or without registration when the trade mark is established by use. A trade mark right provides the proprietor with an exclusive right to use the trade mark in marketing, etc, of certain goods and/or services.

The Norwegian Industrial Property Office (*Patentstyret*) processes trade mark applications, and the registration process normally takes between three weeks and eight months, depending on the complexity of the case and whether the application raises any particular issues. The length of protection of registered trade marks is ten years, counted from the day of application. However, the protection may be prolonged for an unlimited number of additional ten-year periods. A renewal fee must be paid for each ten-year period.

Enforcement of infringement of trade marks may be brought before the courts in preliminary injunction proceedings or ordinary proceedings on the merits. The available remedies are, inter alia:

- injunctions to stop an ongoing infringement;
- corrective measures (such as recall, destruction, etc); and
- reasonable compensation and/or damages for financial loss caused by the infringement.

The alleged infringer can defend by arguing non-infringement and invalidity. Where the infringer wishes to defend by arguing invalidity, it must launch a counter-claim for invalidation, which will be dealt with in the same matter as the enforcement action.

7.3 Industrial Design

Designs are governed by the Norwegian Designs Act, which implements the EU's Designs Directive (Directive 98/71/EC). A design refers to the appearance of a product – for example, the shape, use of colours, patterns and composition.

Protection of design may be obtained by applying to register the design with the Norwegian Industrial Property Office (*Patentstyret*) provided

that the product has a new appearance that is not already known before the application is filed. Usually, the Norwegian Industrial Property Office takes a total of two months to complete the processing of the application.

The registration provides the proprietor with an exclusive right to use the appearance and form of a designed product for a period of five years counted from the date of application. The protection period can be prolonged for new five-year periods by paying a renewal fee. However, the total protection period cannot exceed 25 years, counted from the date of application.

Enforcement of infringement of designs may be brought before the courts in preliminary injunction proceedings or ordinary proceedings on the merits. The available remedies are, inter alia:

- injunctions to stop an ongoing infringement;
- corrective measures (such as recall, destruction, etc); and
- reasonable compensation and/or damages for financial loss caused by the infringement.

The alleged infringer can defend by arguing non-infringement and invalidity. Where the infringer wishes to defend by arguing invalidity, it must launch a counter-claim for invalidation, which will be dealt with in the same matter as the enforcement action.

7.4 Copyright

Copyrights are governed by the Norwegian Copyright Act, which implements several EU Directives in the copyright area. Copyright is automatically obtained where the following three conditions are met:

- the work must have been created;
- the work must be within the literary or artistic area; and
- the work must be an expression of an original and individual creative effort by the author.

Typical examples of literary or artistic work are written texts, works of photography, music and visual arts. Software is also considered work within the literary or artistic area and, therefore, can be protected by copyright. Databases are also protected under the Norwegian Copyright Act through a sui generis protection regime.

There is no registration of copyrights in Norway. The copyright comes into existence automatically once a work is created. The author will enjoy copyright protection for their lifetime and for 70 years after the year of their death.

Enforcement of infringement of copyrights may be brought before the courts in preliminary injunction proceedings or ordinary proceedings on the merits. The available remedies are:

- injunctions to stop an ongoing infringement;
- corrective measures (such as recall, destruction, etc); and
- reasonable compensation and/or damages for financial loss caused by the infringement.

7.5 Others

Trade Secrets

Trade secrets are governed by the Norwegian Trade Secrets Act, which implements the EU Trade Secrets Directive (Directive 2016/943/EU) and protects undisclosed know-how and business information (trade secrets). To be protected under the Act, the information must have commercial value as it is secret, and the holder must have taken reasonable steps to retain secrecy.

The Trade Secrets Act identifies the following acts as infringing acts:

- unlawful acquisition;
- unlawful use of trade secrets;
- marketing, etc, of goods which significantly benefit from trade secrets that are unlawfully used, if the infringer knew, or ought to have known, that the trade secrets were used unlawfully; and
- unlawful disclosure of trade secrets.

The holder of trade secrets may bring enforcement action before the courts in preliminary injunction proceedings or ordinary proceedings on the merits. The available remedies are:

- injunctions to stop an ongoing infringement;
- corrective measures (such as recall, destruction, etc); and
- reasonable compensation and/or damages for financial loss caused by the infringement.

Unfair Marketing

Unfair marketing is governed by the Norwegian Marketing Control Act. The Act contains several provisions protecting the interests of both traders and consumers. For example, the Marketing Control Act prohibits, in the course of trade, copying of the products of another person under such circumstances that the use must be considered unfair exploitation of the efforts or result of another person, provided that this presents a risk of confusion between the products. The Marketing Control Act also prohibits acts in the course of trade that conflict with good practice among traders.

Acts prohibited under the Marketing Control Act may be brought before the courts, and the injured party may claim injunctions, reasonable compensation and/or damages.

8. Data Protection

8.1 Applicable Regulations

The main data protection regulations in Norway are the Norwegian Personal Data Act and the General Data Protection Regulation (GDPR).

The GDPR is an EU Regulation intended to harmonise data protection regulations across the EU member states. Although not a member state of the EU, Norway has incorporated the GDPR (as with most EU legislation) through its membership of the European Economic Area (EEA).

The GDPR is incorporated in Norwegian law through the Norwegian Personal Data Act, which also supplements the GDPR with certain additional Norway-specific rules. The Personal Data Act and the GDPR apply generally to all processing of personal data in Norway. In addition, there is some sector-specific legislation (eg, with respect to the health sector) which provides additional rules.

8.2 Geographical Scope

The Data Protection Act and the GDPR apply to domestic companies' processing of personal data, as well as to the processing of personal data concerning persons ("data subjects") situated in Norway carried out by foreign companies.

The incorporation of the GDPR in Norwegian law harmonises the data protection regulations in Norway with that of the other EU and EEA member states. Therefore, except for certain national adjustments and country-specific legislation, a foreign company targeting customers in Norway would be faced with much the same regulations as in other EU or EEA countries.

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While foreign companies' processing of personal data concerning Norwegian data subjects is within the scope of the Norwegian data protection regulations, the processing will only be subject to these regulations in so far as the processing in question relates to:

- the offering of goods or services to Norwegian data subjects (whether for free or subject to payment); or
- the monitoring of the behaviour of data subjects taking place in Norway.

The regulations will apply to companies irrespective of whether the company in question is the controller (ie, determines the purposes and means of the personal data processing) or a data processor (ie, processes personal data on behalf of a controller – eg, as a contractor) in relation to the processing which falls within the geographical scope.

Foreign companies intending to conduct processing of personal data which falls within the scope of the Norwegian data protection regulations should pay due consideration to what implications this may have when planning to enter the market. In particular, these companies should take the requirements for a sufficient legal basis for the processing into account, to ensure that the processing will itself be lawful.

In total, there are six such legal bases on which a company may base its processing of personal data under the GDPR, with the most common for private entities being consent, contract (ie, that the processing is necessary for the fulfilment of a contract with the data subject), legal obligations (such as book-keeping and tax reporting requirements) and "legitimate interest", which requires a balancing of the interests of the data subject with those of the company to ensure that the processing does not infringe the fundamental rights and freedoms of the data subject.

In particular, any contemplated sharing of personal data with other companies should be assessed to ensure that it fulfils these requirements. Provided that a satisfactory legal basis exists, the company must ensure that it provides the data subjects with sufficient information on how their personal data is processed, and that the company's organisation and information systems relevant to the processing are equipped to enable the data subjects to exercise their rights. These rights include:

- the right of access to their personal data;
- the right to demand that their personal data is deleted; and
- the right to object to the processing in certain circumstances.

Consideration should also be made with respect to the age of the company's targeted data subjects, as the age requirement for providing consent to the processing of personal data may differ from other European jurisdictions and may depend on the nature of the services for which consent is relied upon as the legal basis. For example, if the consent relates to processing of personal data in the context of an information society service (ie, online retailers, on-demand streaming service providers or social media platform operators) the age of consent in Norway is 13, whereas the age requirement in the context of other data processing situations may be higher.

Where a foreign company intending to process personal data concerning Norwegian data subjects is established outside the EU or EEA, additional requirements are likely to apply. Except for a shortlist of pre-qualified third countries (eg, the

UK), most countries outside the EU and EEA are not deemed to have an adequate level of personal data protection compared to the requirements set out in the GDPR and in Article 8 of the EU Human Rights Charter. For US entities, only entities certified under the EU-US Data Privacy Framework are part of the shortlist of prequalified approved international data transfers.

The restrictions on international data transfers means that if such a third-country-based foreign entity intends to transfer or process personal data regarding Norwegian data subjects in its country of origin, it will be required to perform quite extensive comparisons of the data protection laws and regulations between its jurisdiction and Norway, and implement supplementary measures to protect the personal data it intends to transfer. The aim of this exercise is to ensure that the personal data transferred enjoys an "essentially equivalent" level of data protection to that offered under the GDPR in connection with the transfer.

While special requirements in connection with transfers of personal data out of Norway and the EU/EEA are not new, the extent and scope of the transferring company's obligations and responsibilities in this respect have become greatly expanded since the 2020 Court of Justice of the European Union case commonly referred to as "Schrems II", as well as since subsequent updated guidance from the European Data Protection Board (EDPB).

8.3 Role and Authority of the Data Protection Agency

Norway's Data Protection Authority (*Datatilsynet*) oversees and enforces Norway's data protection rules.

The Data Protection Authority acts as Norway's supervisory authority for all personal data processing which falls within the geographical scope of the data protection regulations applicable in Norway and is authorised to take enforcement actions against companies responsible for any non-compliance. The primary enforcement actions available to the Data Protection Authority include corrective orders, coercive fines and administrative fines up to the maximum amount provided for under the GDPR.

The Data Protection Authority may take enforcement actions against both foreign and domestic companies, although administrative fines are the primary consequence that foreign companies are likely to face for non-compliance with the Norwegian data protection rules. Notable cases involving foreign companies include the Data Protection Authority issuing an administrative fine to Grindr LLC (a dating app provider) in the amount of NOK65 million based on unlawful (in the opinion of the Data Protection Authority) sharing of collected personal data regarding Norwegian data subjects with third parties, and an administrative fine in the amount of NOK2.5 million issued to Argon Medical Devices, Inc for failure to notify the Data Protection Authority of a personal data breach within the mandatory 72-hour deadline.

9. Looking Forward

9.1 Upcoming Legal Reforms

2022 and 2023 were quite active in terms of legislative initiatives and new rules being prepared and implemented. The following includes certain key legislative changes that are effective as well as certain possible upcoming legal reforms to be aware of related to the Norwegian market.

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The Transparency Act came into effect on 1 July 2022. It requires companies to make sure human rights and decent working conditions are respected in their operations and supply chains. All companies affected had to publish their first public report by 30 June 2023, evidencing how they comply with the Transparency Act. This public report will, going forward, have to be updated on a yearly basis.

Significantly, the Norwegian Parliament officially adopted a sector-specific aquaculture tax of 25% on 31 May 2023, after the sitting labour/centre government had proposed both 40% and 35% in the initial proposals and white papers. This new tax has created a lot of debate, with affected companies having delayed investments amidst expectations that they will adapt their business structures and operations to comply with the new tax regime.

In terms of the labour market regulations, new Norway-specific rules on hiring from staffing agencies came into force on 1 April 2023, stripping employers of the option to hire from these agencies based on the job being of a temporary character.

In 2022, the government proposed a so-called economic rent tax on onshore wind energy from 2023, at an effective rate of 40%. After industry concerns that this could derail renewable energy expansion and the need for further investment in the sector, the government decided to postpone plans by a year to 2024. The new rules were adopted by the parliament on 12 December 2023 and set a tax rate of 25% effective from 1 January 2024.

On 15 March 2024, the Norwegian government proposed new regulations to ensure the implementation of the EU Corporate Sustainability Reporting Directive (CSRD). CSRD contains requirements regarding annual reporting for both unlisted and listed large undertakings, as well as listed SMBs, to ensure the transparency and sustainability of companies. The Norwegian implementation of CSRD will follow a timeline over multiple years where more and more companies will be made subject to the reporting requirements.

Trends and Developments

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Thomas Abrahamsen, Tron Dalheim, Marius Holm Rynning, Siri Teigum, Magnus Hauge Greaker and Christopher Sparre-Enger Clausen
Advokatfirmaet Thommessen AS

Advokatfirmaet Thommessen AS is considered to be one of Norway's leading commercial law firms, with offices in Oslo, Bergen, Stavanger and London. It provides advice to Norwegian and international companies and organisations in both the public and private sectors. With approximately 300 lawyers, it covers all business-related fields of law, including M&A and corporate law (private and public transactions), banking and finance, IP, compliance and investigation, insolvency and restructuring, insurance, litigation and other dispute resolution, tax, competition, employment, real estate, technology data protection and cybersecurity, sustainability and climate risk, and energy (ie, oil and gas, oil service and renewable energy and infrastructure).

Authors

Thomas Abrahamsen is an M&A and ECM partner at Advokatfirmaet Thommessen AS and is a corporate generalist attorney with substantial transaction experience, particularly in the energy (oil and gas and renewables), industrial, infrastructure and tech/software sectors. His broad M&A and corporate law practice includes corporate deals, asset transactions, fundraising processes, IPOs, private placements and restructurings. His practice also includes capital markets/ECM, venture capital and cross- border M&A projects. He often advises companies during their growth phase and in regard to their international expansion from Norway, as well as investors coming into the Norwegian market.

Tron Dalheim is a partner at Advokatfirmaet Thommessen AS and is a recognised employment law adviser to Norwegian and international companies. He has litigated a number of cases concerning labour law and pensions and is admitted to the Bar of the Supreme Court. He is also the author of the "Norwegian Law Commentary on the Working Environment Act" and has written a book on Seamen's Law. He has experience from several industries, including oil and offshore, shipping and aviation. He has recently worked with restructuring processes, litigation and conflict management within the field of labour law.

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Marius Holm Rynning is a partner at Advokatfirmaet Thommessen AS's Oslo office and heads its tax practice, representing clients in a wide range of tax and structuring matters. He has particular experience in fund formation, private M&A, restructurings and debt and equity offerings, with a primary focus on private equity.

Siri Teigum is a partner at Advokatfirmaet Thommessen AS. She assists clients in negotiations and dispute resolution and is top-ranked within these areas. She has been responsible for the clearance of a number of complex mergers and acquisitions and has handled different types of EEA and competition cases before the EFTA, CJEU and Norwegian courts. She is ad hoc judge of the EFTA Court, leader of the board on the Norwegian Bar Association, leader of the board of the Government Pension Fund Norway, a member of the board of Gyldendal ASA and a member of the board of the Faculty of Law, University of Oslo.

Magnus Hauge Greaker is a partner at Advokatfirmaet Thommessen AS. He mainly works on patent, trade mark and trade secrets litigation for clients in life sciences, oil and oil service, aquaculture and other technology. His' experience also covers marketing law and pharmaceutical regulatory law.

Christopher Sparre-Enger Clausen is a partner at Advokatfirmaet Thommessen AS and heads its technology and data protection practice group, specialising in technology and data protection law. He assists clients with legal and strategic advice within a broad range of areas relating to digitalisation and technology, such as data protection, cybersecurity, outsourcing, licensing, cloud computing and software development, as well as IP and regulatory matters pertaining to IT and telecommunications.

Advokatfirmaet Thommessen AS

Ruseløkkveien 38
0251 Oslo
Postboks 1484 Vika
NO-0116 Oslo
Norway

Tel: +47 23 11 11 11
Email: pak@thommessen.no
Web: www.thommessen.no

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Corporate and M&A

Activity and trends in Norway's M&A market in Q1 2024

Public M&A has been very slow in Q1 2024, with only three listings. Private M&A is more resistant to the volatile market. However, higher interest rates and energy prices, new taxes being introduced in Norway in 2023 and 2024 and a more cautious market generally have decreased the overall deal volume in Q1 2024 with a slow down of 10% compared to Q1 2023.

However, there has been a 22% increase in deal volume from Q4 2023 to Q1 2024. This suggests that M&A is on the road to recovery. The key trends in Norwegian M&A as of Q1 2024 are:

- few PE structured exits;
- fewer large deals but more activity in small and mid cap segments;
- PE funds are investing together with industrials, in particular within renewables, more often;
- the tech, media, energy and maritime/shipping sectors have performed relatively strongly while retail, real estate, construction and capital goods companies have been heavily affected by high interest rates;
- there is a continued high demand for infrastructure targets, with significant amounts of capital available;
- transactions take quite some time to get over the finishing line and are more complex than in a bull market;
- local transactions, often multilateral and driven by industrial synergies, dominate, while there has been less cross-border activity; and
- seller credits and earn-outs continue to be significant parts of the deal negotiations.

In summary, there have been willing buyers and deals have been made in H1 2024, but buyers are carefully managing transaction risks and are still finding it difficult to finance their transactions. A local feature is the continued weakening of the Norwegian krone, making Norwegian targets more attractive for foreign buyers in US dollars, euros or British pound sterling, among other foreign currencies.

Outlook for H2 2024

The pipeline for IPOs in the second half of 2024 is promising. However, it remains to be seen, if, and to what extent, the public market window will be open in the latter part of 2024. It is expected that macro conditions will largely decide how quickly the public markets are open for business. If inflation is kept under control and interest rates start to fall, public markets are expected to improve and there will potentially be a long list of candidates for IPOs. In terms of private M&A, the second half of 2024 is predicted to be quite healthy.

Market intelligence suggests that sellers and buyers have adjusted to a regime with higher interest rates. The PE funds have a long list of planned exits to carry out and the inventory of these exits continue to grow and will at some point lead to increased activity. Consolidation within the E&P and oil service is expected to continue, mostly with industrial players being active buyers.

The key question is how quickly the markets will fully recover and therefore how long the current buyer's market will continue. Whether we will see a significant uptick in deal volumes in H2 2024 or in 2025 remains to be seen.

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Legal developments relevant for M&A – new rules on gender representation in the board of directors

In January 2024, the proposed changes on gender representation in the board of directors of large and mid-sized private limited liability companies came into force. These changes brought the regime in private limited liability companies into line with the equivalent regulations for public limited liability companies.

From late 2024, the bill will include limited liability companies with a total operating and financial income of more than NOK100 million. When it is fully implemented in 2028, the new bill will affect private limited liability companies with at least 30 employees or with a total operating and financial income of more than NOK50 million.

These changes will represent a significant change in terms of how boards are composed in the Norwegian market. However, the gender requirements only apply to boards of directors with three or more board members and the requirements vary depending on the size of the board of directors in question.

Legal developments relevant for M&A – proposed changes to the Norwegian FDI regime

In late 2023, a government-appointed commission proposed changes to Norway's FDI regime, to bring it more into line with the EU FDI Regulation. The commission made several recommendations, including:

- implementing a predictable and targeted notification system;
- distinguishing between foreign investors from EEA countries and third countries;
- introducing a new screening authority overseeing the FDI regime where all instances of investment screening would be processed; and
- passing a separate act to implement the new regime.

If these recommendations are adopted, the scope of possible transactions subject to FDI screening will be expanded further. It is estimated that approximately 400 transactions annually would be affected by these changes, if implemented.

Employment

Increased requirements for employment contracts

The EU Directive on Transparent and Predictable Working Conditions (2019/1152) has been implemented in Norwegian law but unlike many EU member states, Norway has implemented the directive by way of introducing information requirements in employment contracts.

The changes include additional requirements to the content of employment contracts, including, among other details:

- information about any right to absence paid by the employer;
- the procedure for termination of the employment relationship;
- the various components that make up the salary; and
- any right to competence development that the employer may offer.

The changes apply to new employment contracts entered into after 1 July 2024. Existing employees may require a new and updated contract.

Employers should review contract templates and must also implement a system to incor-

porate changes in the information provided in employment contracts.

Restrictions on temporary employment and use of temporary agency workers

With effect from 1 April 2023, the following restrictions on the use of temporary agency workers entered into force.

- A company may no longer use temporary agency workers for work of a "temporary nature". This change implies that use of temporary agency workers for performance of time-limited work (for instance, a time-limited increase in workload) will no longer be permitted.
- Companies may only use temporary agency workers if:
  - (a) the worker is to perform work as a temporary substitute for another person;
  - (b) the worker qualifies as a "specialist" in accordance with the new regulations that entered into force on 1 July 2023; or
  - (c) the company has entered into an agreement with its unions subject to certain requirements.
- A temporary agency worker who has been "hired in" for a consecutive period of three years will be entitled to permanent employment with the undertaking.

The statutory ban on the use of temporary agency workers does not apply to delivery of services under the service provider's supervision and direction. It is important to establish whether a contract is to be regarded as a contract for delivery of services or a temporary agency work contract.

The Norwegian Labour Inspection Authority has been given financial support to follow up on implementation. It is anticipated that the Authority will increasingly focus on implementation throughout 2024.

Extended employee rights within a group

On 1 January 2024, new rules entered into force strengthening employees' rights in the case of redundancies in a company group. The new rules will entail a right for potentially redundant employees to be considered for positions at group level within Norway (ie, in the case of redundancies, employers will have to offer other suitable jobs at the same group level).

Employees' preferential rights to new positions following redundancies will also correspondingly apply at group level in Norway. The parent company in a group of a certain size will have a general obligation to facilitate co-operation, information and discussions between the different group companies and employees.

Taxation

Special tax

On 5 June 2023, the Norwegian Parliament decided to introduce a special tax on economic rent within the fish farming industry, with effect from 2023. The effective tax rate is set at 25% and will be imposed in addition to an ordinary corporate tax rate of 22%.

On 4 January 2024, the Norwegian Parliament decided to introduce a special tax at an effective rate of 25% on onshore wind production plants (plants consisting of more than five turbines or installed effect exceeding a total of 1MW), with effect from 2024.

Wealth and exit tax

There has been an ongoing political debate about the taxation of wealth and of persons moving abroad (the so-called exit tax). Since November 2022, the Norwegian Parliament has

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implemented legal measures that increase the wealth tax for certain individuals upon exit from Norway.

Global minimum tax

On 4 January 2024, the Norwegian Parliament adopted a new taxation act (*Suppleringsskatteloven*) that introduces rules on global minimum taxation for certain corporate groups in Norway, including entirely Norwegian groups. The act is complemented by administrative regulations.

Both the act and the regulations came into force earlier in 2024. The legislation seeks to implement the OECD's Global Anti-Base Erosion Rules.

The rules apply to groups that have a total income of at least EUR750 million in two of the last four years before the year being tested. The threshold assessment is calculated based on the total accounting income as recorded in the consolidated group accounts. Special rules apply for currency conversions.

The rules state that a group that has companies in a jurisdiction with an effective tax rate lower than 15% will be considered as having under-taxed income. This under-taxed income will be subject to taxation in the form of a top-up tax in another country where the group is established and which has introduced rules on global minimum tax, eg, Norway.

The supplementary tax is equal to the difference between the lower effective tax rate and 15%. The result is that the group's total profit in any jurisdiction will be taxed at a minimum of 15%.

Competition Law/Antitrust

Merger control

The Norwegian Competition Authority (NCA) continues to actively monitor transactions. It reviewed 160 notifications in 2022, of which 112 were notified under the simplified procedure and imposed filing obligations on a number of non-notifiable transactions. The NCA's willingness to accept remedies was demonstrated in three cases that were resolved through remedies.

In the last year, two prohibition decisions adopted by the NCA were overturned. The Competition Appeals Tribunal (CAT) reviewed and repealed the NCA's prohibition decision in the DNB/Sbanken case, concluding that the acquisition would not significantly reduce effective competition in a market for distribution of mutual funds to consumers.

In a landmark ruling on 17 February 2023, the Norwegian Supreme Court invalidated the NCA's prohibition of the 2019 acquisition of tech start-up Nettbil by media conglomerate Schibsted. This marked the first merger case to be heard by the Norwegian courts and signifies a crucial development in terms of Norwegian merger control. In particular, the ruling confirms that the courts may review the NCA's economic assessments and that while the parties' internal documents may form an important part of an investigation, they must nevertheless be interpreted in light of the context they were drawn up in.

Policy

The NCA's new market investigation powers

In Q1 2023, the Norwegian government launched a public consultation on its legislative proposal to introduce a market investigation tool, following, for example, the UK's Competition and Markets Authority (CMA).

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The proposal suggests granting the NCA extensive powers to determine where market investigations will be initiated and their outcome (eg, behavioural or structural remedies or conditions to target competition issues relating to tacit collusion, digital markets and the groceries market, unilateral conduct by non-dominant undertakings and killer acquisitions).

The NCA's power to bring decisions from the CAT to the courts

On 23 May 2023, the Norwegian Parliament adopted a legislative proposal giving the NCA legal authority to bring cartel cases from the CAT to the courts. The amendments to the Norwegian Competition Act entered into force on 1 July 2023.

Cartels and investigations

In terms of information exchange cases, the NCA issued a combined fine of NOK545 million (approximately EUR52 million) in November 2022 to four publishing houses and Bokbasen, for having exchanged competitively sensitive information through an online book database. All of the parties have appealed the NCA's decision to the CAT.

The NCA has issued a statement of objections (SO) to the three largest grocery retailers concerning their use of "price hunters" to collect information on shelf prices from each other's stores. In the SO, the NCA warns of fines totalling a record high of NOK21 billion (approximately EUR2 billion) for anti-competitive information exchange practices.

An overview of the NCA's dawn raids indicates that it currently has five pending investigations, including the price hunter case.

Private enforcement

Four truck manufacturers were acquitted by the Oslo District Court in Posten Norge's legal claim for damages, following the EC decision regarding the trucks cartel on the basis that an economic loss was not sufficiently proved by Posten. The decision has been appealed.

Intellectual Property

Increase in patenting and patent disputes within aquaculture and green technology

In recent years, authors have witnessed an increase in patenting activities and patent disputes relating to aquaculture and green technology. As Norway's aquaculture industry continues to grow and flourish, innovators and companies are increasingly focusing on developing novel technologies to enhance fish farming practices and improve sustainability. These types of patents cover a wide range of innovations, including advancements in fish feed, fish health management and efficient aquaculture systems.

The increased emphasis on green technology has also resulted in a surge of patents in areas such as renewable energy and environmental conservation. One significant area of patent growth is offshore wind technology. Norway's long coastline and strong winds offer ideal conditions for offshore wind farms and among other key aspects, patents have been filed for advancements in turbine design, foundation structures and floating wind platforms. This shift aligns with global efforts to address climate change and the urgent need for sustainable technologies.

Amendments to the Norwegian Trade Marks Act

The amendments to the Norwegian Trade Marks Act came into force on 1 March 2023. The primary objective of the amendments is to imple-

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ment the Trade Marks Directive (EU) 2015/2436 into Norwegian law. The key amendments introduced are as follows.

- No requirement for a trade mark to be represented graphically. Previously, trade marks had to be represented graphically to be registered in the Norwegian Trademark Register. However, the amendment eliminated this requirement and now the only criteria is that the trade mark is represented in a clear and precise manner, enabling a clear determination of the scope of protection.
- Additional grounds for refusal. The amendment introduced additional absolute grounds for refusal of a trade mark registration, where applications filed in bad faith or by an agent without the consent of the trade mark owner can now be refused or declared invalid.
- Trade marks as security. Previously, only patents and plant variety rights were eligible to be used as security under Norwegian legislation. However, the amendment now permits the use of trade marks as security.

New decision from the Supreme Court of Norway regarding trade mark law

In the Kystgjerdet Case (HR-2022-2222), outdoor fence providers Vindex and Norgesgjerde filed a lawsuit against Kystgjerdet for trade mark infringement due to its use of their company names in advertising, both in the content of a specific advertisement and as a paid keyword visible in the Google search field. The lower courts ruled in favour of Vindex and Norgesgjerde, confirming the infringement.

However, the Supreme Court's focus was primarily on determining the appropriate damages and compensation for the infringement. Vindex and Norgesgjerde initially sought a total of NOK10 million in compensation and damages, taking potential losses resulting from Kystgjerdet's online advertisements into account. However, the Supreme Court ultimately awarded each company NOK800,000 after the Supreme Court found that Vindex and Norgesgjerde failed to establish a causal relationship between their decrease in revenue and Kystgjerdet's advertisements, as well as the financial benefit gained by Kystgjerdet.

The Supreme Court based the compensation on a "reasonable licence fee" according to Section 58 of the Trade Marks Act. Since there was insufficient data available to determine the exact number of customers influenced by the disputed advertisements, the Supreme Court exercised discretion in determining the reasonable licence fee.

Data Protection

Regulatory enforcement

The Norwegian Data Protection Authority continues to be on the top ten list of supervisory authorities who have issued the highest amounts of fines since the GDPR entered into force, with a total of 51 fines totalling approximately EUR12.1 million. In 2023, the most noteworthy regulatory sanctions in Norway were the notification of intention to fine the Norwegian Labour and Welfare Authority (NAV) NOK20 million (approximately EUR1.8 million), which is the highest fine given by the Authority to a public body since the GDPR entered into force.

In 2023, the Norwegian Privacy Appeals Board also upheld the Authority's record fine for Grindr of NOK65 million (approximately EUR5.8 million) from December 2021. This decision has now been appealed to the Oslo District Court.

However, the most attention in terms of regulatory enforcement in Norway in 2023 has been

around the Authority's July 2023 decision of provisional measures to prohibit behaviour-based marketing on Meta platforms because of the high risk to the privacy rights and freedoms of Norwegian users of the platforms. Meta challenged the decision in court but the Oslo District Court ruled in favour of the Data Protection Authority in September 2023. Meta launched a new court filing in October but this was later withdrawn as Meta changed to a pay-or-OK approach for behavioural advertising, where the users of the Meta platforms can pay a monthly fee to avoid the advertising.

The Authority's position was largely supported by the European Data Protection Board (EDPB) in April 2024. The Data Protection Authority has also continued to sanction organisations of various sizes for commonplace and relatively minor compliance breaches.

The Authority's practice in recent years, including in 2022 and 2023, as pertains to administrative fines, seemingly highlights a trend where the monetary amount of a fine relative to the size of the organisation, assessed on a case-by-case basis, is focused on more than establishing a predictable practice of standardised turnover percentages for various types of infringements.

Cybersecurity and data breaches

Norwegian companies and public authorities continue to see a noticeable increase in the number of direct and indirect attacks aimed at Norwegian companies. As with other European countries, the apparent motivations behind these attacks have been both geopolitical and commercial.

New regulations from the EU, such as the NIS2-directive and the Digital Operational Resilience Act, which are not yet in force in Norway, have also increased the pressure on companies to increase their information security resilience. As a result, assessing and managing cyber-related risk exposure is increasingly prioritised by Norwegian and global companies more generally.

Data transfers

In July 2023, the new EU-US Data Privacy Framework for transfers of personal data between the USA and EU was approved by the EU and the USA. This decision facilitated legal transfers of personal data between the USA and EU. The framework has already been subject to criticism and will most likely also be challenged in court by privacy activists.

The role of the DPO

The EDPB issued a report on 17 January 2024, focusing on the role of the data protection officer (DPO) after the implementation of the GDPR. The report, which resulted from a collaborative investigation across the EU, revealed that most DPOs feel confident in their skills and competence to carry out their tasks under the GDPR.

They also stated that they do not receive instructions on how to perform their duties. However, the report highlighted some challenges faced by DPOs, including:

- organisations failing to appoint a DPO when required;
- inadequate resources for DPOs;
- insufficient reporting to top management; and
- DPOs not being fully entrusted with their required tasks under data protection law.

The Norwegian Data Protection Authority has stated that they will carefully review the report and consider implementing any necessary measures. In recent times, there has been a shift in the role of DPOs, aligning more closely with

Contributed by: Thomas Abrahamsen, Tron Dalheim, Marius Holm Rynning, Siri Teigum, Magnus Hauge Greaker and Christopher Sparre-Enger Clausen, **Advokatfirmaet Thommessen AS**

the original intention of the GDPR. Instead of being solely responsible for executing data protection efforts, DPOs are now primarily focused on supporting, advising and monitoring compliance with the GDPR. This trend is expected to continue in 2024 as companies refine and update their GDPR compliance efforts.

OMAN

Law and Practice

Contributed by:
Said Al-Shahry, Thamer Al-Shahry, Jeremy Pooley, Maria Mariam Rabeaa Petrou, Alaa Al Hinai and Salim Al Harthi
Said Al Shahry & Partners

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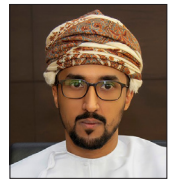
Said Al Shahry & Partners (SASLO) is a leading Omani full-service law firm which has provided expert legal services to its domestic and international clients for over 28 years. Today it operates seamlessly across three fully operational offices in each of the Sultanate's major civil and industrial hubs (Muscat, Sohar and Salalah), enabling the 36 experienced and qualified lawyers to service clients with specialist, local knowledge and around-the-clock support. SASLO has advised on some of the most complex financing and infrastructure deals in the Sultanate and has been involved in significant litigation and arbitration in Oman, setting precedents with the Supreme Court. It has a reputation for providing practical and commercial advice in the context of Omani regulatory and legal requirements. SASLO has a good working relationship with all government ministries and decision makers within Oman whose remit affects the business of both local and international clients. The firm has also regularly acted as an adviser to the government on the regulatory development of the business environment.

Authors

Said Al-Shahry is a managing partner at SASLO and one of Oman's most prominent legal professionals. He has more than 30 years of experience as both a legal adviser and an advocate at all courts throughout Oman at the primary and appellate levels, including before the Supreme Court. He has significant experience in dealing with high-profile cases, representing various clients, including government-owned entities as well as local and international corporates. He is an expert in handling complex disputes across a range of sectors and is well-known in arbitration and alternative dispute resolution, with particular expertise in construction arbitration. Said is a member of the International Arbitration Centre – GCC and the International Bar Association.



Thamer Al-Shahry is a partner and head of SASLO's dispute resolution practice. He is an experienced Omani lawyer specialising in banking, finance, capital markets, commercial agreements and corporate structures, with a particular focus on M&A, projects and energy (IPP/IWP and Sector Law), including PPP projects. He has extensive practical experience in a wide range of projects and landmark deals requiring a thorough knowledge of regulatory matters in Oman, as well as dealing with ministries and other authorities. Thamer is an increasingly prominent practitioner in dispute resolution and is experienced in high-profile international arbitrations and a wide range of general commercial, labour and banking disputes.

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Jeremy Pooley is a special counsel and head of SASLO's corporate and commercial practice and an international corporate lawyer of over 20 years' standing. He specialises in mergers, acquisitions and divestments, joint ventures, PE/VC/buyouts, banking and finance, fund formation and asset management, capital markets, power and water projects, oil and gas projects (upstream and downstream), other greenfield and brownfield projects, and corporate and commercial law. His practice has focused on the Middle East for almost ten years, and he has closed transactions across the GCC and wider MENA region.

Maria Mariam Rabeaa Petrou is a special counsel in SASLO's corporate and commercial team. She is a Cypriot-qualified lawyer and holds an LLB from the University of Central Lancashire and an LLM in International Business and Commercial Law from the University of Manchester. She is also a fellow of the Chartered Institute of Arbitrators (FCIArb) and holds a diploma in international arbitration. Maria has practised law in Cyprus, the UAE and Oman, and has been based in the Middle East for the last nine years. She advises clients on a variety of corporate and commercial matters, including advising consortia and lenders on independent water projects in Oman.

Alaa Al Hinai is a senior associate in SASLO's corporate and commercial team. She graduated from the University of Reading in 2016 with a bachelor's degree in Law, and from Queen Mary University of London in 2017 with a master's degree in Commercial and Corporate Law. Alaa is a qualified Omani lawyer who advises clients on a variety of matters, including corporate restructuring, corporate governance, regulatory compliance, acquisitions and employment. She also has practical experience in litigation matters and has represented clients before Primary Courts in disputes relating to civil, commercial and labour matters, amongst other things, and has gained extensive experience in drafting court pleadings.

Salim Al Harthi is an associate in SASLO's corporate and commercial team. He frequently assists in advising clients on a variety of issues, including company law/corporate governance issues, new laws, regulatory compliance, and privacy and data protection. He joined SASLO from a reputable Omani company, where he assisted with a wide range of corporate and commercial legal work. Salim graduated from Brunel University in the United Kingdom with a bachelor's degree in law in 2018.

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Said Al Shahry and Partners (SASLO)

SASLO Building No 597/1
Way No 262
Airport Heights, Ghala
PO Box 1288, PC 112 Ruwi
Muscat
Sultanate of Oman

Tel: +968 2463 6999
Fax: +968 2463 6900
Email: mail@saslo.com
Web: www.saslo.com

1. Legal System

1.1 Legal System and Judicial Order

Oman is a civil law jurisdiction. Legislation is the primary source of its laws, not judicial precedent.

Royal Decrees form the bedrock of Oman's legislative framework and are often supplemented by secondary/delegated legislation in the form of Ministerial Decisions. Royal Decrees are identified in this chapter of the guide with the initialisation "RD".

Oman's Civil Transactions Law RD 29/2013 (the "Civil Code") regulates all matters not addressed by other specific laws. Under the Civil Code, commercial arrangements between parties are governed by the contract between them unless the law imposes a contrary requirement. The principles of Islamic jurisprudence, the principles of sharia and customary practices may also be relevant when interpreting a contract (in that order of descending authority).

The courts take a purposive approach to the construction of contracts and will seek to identify the parties' intention to a contract. Broadly speaking, a party exercising rights under a contract will be expected to act reasonably and in good faith.

The Basic Law of the State RD 6/21 (the "Basic Law") essentially serves as Oman's constitution. Under the Basic Law, judicial power is independent and vested in the courts, which operate in accordance with the rule of law.

The judiciary consists of the Primary Courts (the Courts of First Instance), the Appeal Courts and the Supreme Court (Oman's highest court).

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

General Principles

Non-Omanis may only conduct business in Oman through a locally registered entity. In practice, this means that non-Omanis must either establish a presence in Oman or conduct their

business through a local commercial agent in order to invest in Oman.

Establishing a presence in Oman

Oman's Foreign Capital Investment Law RD 50/2019 (FCIL) came into force and effect in January 2020, and its impact has been to relax Oman's foreign ownership restrictions significantly.

Oman's Ministry of Commerce, Industry and Investment Promotion (MOCIIP) has issued, pursuant to Ministerial Decision 209/2020, as amended, a list of activities subject to foreign ownership restrictions (the restricted activities list). The restricted activities list includes activities such as automotive repair, translation/interpretation services and labour recruitment offices; it may be updated from time to time by a decision of the Minister of the MOCIIP.

Certain industry sectors do not appear on the restricted activities list, despite historically requiring a higher level of local ownership. Oman's engineering law, for instance, requires engineering consultancy offices to have a minimum of 35% local ownership. The MOCIIP is expected to continue to apply any such industry sector restrictions.

Even prior to the introduction of the FCIL, foreigners establishing a presence in Oman's "free zones" or "special economic zones" or under the US–Oman free trade agreement or certain reciprocal arrangements implemented within the GCC (Gulf Cooperation Council), were able to take advantage of less onerous foreign ownership restrictions. However, the restricted activities list also applies to non-Omanis establishing a presence under these routes.

Conducting business through a local commercial agent

Any arrangement under which a foreigner conducts business through a local commercial agent must be registered with the MOCIIP. Commercial agents must be duly licensed by the MOCIIP.

2.2 Procedure and Sanctions in the Event of Non-compliance

Companies, partnerships, branches and representative offices must be registered with the MOCIIP. Where the entity being established is owned in whole or part by non-Omanis, the application for registration will need to be processed through the investment services centre of the MOCIIP. MOCIIP registration is required before any of these types of entities can commence operations.

Contractual joint ventures (see **3.1 Most Common Forms of Legal Entity**) are the exception to this general rule: although they are treated as legal entities formed under the Commercial Companies Law RD 18/2019 (CCL 2019), they do not require registration with the MOCIIP. However, at least one of the parties to the contractual joint venture will need to have an appropriately licensed presence in Oman.

A foreigner undertaking investment activity in Oman other than in compliance with the FCIL may be fined between OMR20,000 and OMR150,000, as may an Omani who participates with a foreigner in an investment project other than in accordance with the FCIL.

2.3 Commitments Required From Foreign Investors

The FCIL's executive regulations were issued in June 2020 and amended further in March 2022. The FCIL's executive regulations set out the types of investment projects that may apply for

preferential treatment (eg, projects established in Oman's less developed regions) and the financial and non-financial conditions that must be satisfied for an investment project to qualify.

2.4 Right to Appeal

There is no formal procedure to challenge a decision by the MOCIIP to reject a foreign investment (eg, where the MOCIIP declines to issue the necessary licence or approval of the necessary registration). If an investor believes an application has been unreasonably rejected, the first response should be to open a dialogue through the appropriate channels at the MOCIIP. It is prudent to appoint local counsel with an understanding of the MOCIIP's structures, practices and ethos to assist with these discussions. If that approach is unsuccessful, an investor may challenge any such decision in court. Oman's legal system operates in accordance with the rule of law.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The types of legal entities available in Oman are companies established under the CCL 2019, branches and representative offices. For new entrants to Oman, a presence is typically established by incorporating a limited liability company/single-person company or by establishing a branch.

Entities may be established either "onshore" in Oman or in one of Oman's industrial free zones (free zones) or special economic zones (SEZs). A company established in a free zone or an SEZ may not undertake commercial activities onshore in Oman.

Companies Established Under the CCL 2019

These may be formed as:

- joint stock companies (JSCs), which may be established as:
  - (a) public joint stock companies (SAOGs); or
  - (b) closed joint stock companies (SAOCs);
- holding companies (Holdcos);
- limited liability companies (LLCs);
- single person companies (SPCs);
- contractual joint ventures (CJVs);
- general partnerships (GPs); or
- limited partnerships (LPs).

JSCs

A JSC must have at least three shareholders. The minimum share capital of an SAOG is OMR2 million, and the minimum share capital of an SAOC is OMR500,000. Higher share capital requirements may be required, depending on the activities undertaken by the JSC. A JSC must allocate 10% of its net profits to a legal reserve until the legal reserve reaches one third of the JSC's share capital.

The liability of a JSC is limited to the amount of its share capital, and a shareholder's liability is limited to its shareholding in the JSC's share capital.

SAOGs and SAOCs are subject to considerably more onerous regulatory requirements under the CCL 2019 than LLCs. SAOGs must also be listed. As a listed company, an SAOG is regulated by the Capital Market Authority (CMA) and subject to its rules and regulations.

A JSC is managed by its board of directors. Subject to the CCL 2019 and the JSC's Articles of Association, a JSC's board of directors has all authority necessary to manage its affairs; its board also has a duty to implement any resolu-

tions passed by the JSC's shareholders in general meetings. An SAOG must have between five and 11 directors, and an SAOC must have between three and 11 directors. In each case, the number of directors (which must be uneven) will be specified in the JSC's Articles of Association. A JSC's directors are listed in its commercial registration (a document maintained by the MOCIIP and available for public inspection), which will also set out the authorised signatories of the JSC and any limits on their powers.

The key advantage of JSCs over LLCs is that shares in JSCs may be mortgaged as security (this may be necessary in order for a company to procure debt financing). Unlike SAOCs and LLCs, SAOGs may also raise equity finance in the capital markets, as they are able to offer their shares to the public. LLCs may now procure funding through crowdfunding platforms, subject to the rules and regulations issued by the CMA. Some regulated activities in Oman may only be undertaken by SAOGs.

Holdcos

A Holdco is a JSC that exercises financial and administrative control over one or more JSCs and/or LLCs by holding at least 51% of the shares of each such company. Holdcos are generally subject to the same regulation as JSCs.

LLCs

An LLC must have at least two shareholders. An LLC must allocate 10% of its net profits to a legal reserve until the legal reserve reaches one third of the LLC's share capital.

The liability of an LLC is limited to the amount of its share capital, and a shareholder's liability is limited to its shareholding in the LLC's share capital.

LLCs are managed by one or more managers. Subject to the CCL 2019 and the LLC's constitutive documents, an LLC's managers have all the authority necessary to manage its affairs. An LLC's managers are listed in its commercial registration (also available for public inspection), which will also set out the authorised signatories of the LLC and any limits on their powers.

LLCs are subject to a considerably less onerous regulatory regime than JSCs and are considerably more prevalent.

SPCs

An SPC must have only one shareholder. SPCs are subject to the same regulation as LLCs under the CCL 2019, to the extent such regulations are not inconsistent with the nature of an SPC. SPCs were introduced for the first time under the CCL 2019, and are likely to be a popular alternative to LLCs going forward.

CJVs

A CJV is formed (typically pursuant to a written joint venture contract) by two or more partners. It is described in the CCL 2019 as a "concealed company", and is the only legal entity in Oman that is not subject to registration with the MOCIIP.

CJVs are not subject to any minimum share capital requirement. A CJV does not have a separate legal personality. Each of its partners therefore contracts only in its own name and has unlimited liability for the obligations and liabilities it assumes under that contract.

If a CJV partner discloses the existence of the CJV to a third party who deals with that partner in the context of the CJV's activities, then the CJV will become a general partnership. This will result in all of the CJV's partners assuming

unlimited liability for the liabilities and obligations of the CJV.

Investors tend to favour LLCs over CJVs because of the limited liability that LLCs confer. CJVs can, however, offer a quick route into the market and are subject to considerably less onerous regulation under the CCL 2019 than LLCs. Historically, foreign investors have sometimes adopted the CJV structure where they have a single contract to perform (eg, as a contractor on a project) and do not intend to remain in Oman following its completion. As a consequence of the liberalisation of Oman's foreign ownership restrictions, however, some contractors that would previously have adopted the CJV structure may view an LLC as a more attractive option in the future.

GPs and LPs

A GP is formed of two or more general partners, each of whom must be a natural person. The partners of a GP are jointly and severally liable for the GP's liabilities and obligations.

An LP is formed of at least one general partner and at least one limited partner. The general partners of an LP are jointly and severally liable for the LP's liabilities and obligations, whereas the liability of a limited partner in an LP is limited to the amount of its contribution.

GPs and LPs have constitutive contracts that regulate their management and operation. Subject to its constitutive documents, all partners of a GP and all general partners of an LP are considered managers of the GP/LP. The limited partners of an LP may not be involved in its management.

Neither GPs nor LPs are subject to a minimum capitalisation requirement, and neither structure has a legal reserve requirement. However, the unlimited liability of general partners means that GPs and LPs rarely attract investors when structuring their investments.

Branches

Previously, branch structures could only be established where a foreign company entered into a "qualifying contract" with the Omani government or a company in which the Omani government has a material interest. The CCL's executive regulations issued by the MOCIIP on 14 October 2021 override this requirement, and a "qualifying contract" with a government entity is no longer one of the prerequisites to establishing a branch in Oman.

Representative Offices

The permitted activities of a representative office are limited to the following:

- contacting customers to promote the products or services of the foreign company or institution it represents;
- contacting exporters and sellers of raw, manufactured and semi-manufactured materials required by the foreign company or institution it represents and removing any obstacles hindering quick access to them; and
- notifying the foreign company or institution it represents of any complaints it receives in relation to the products or services and overcoming difficulties related to the distribution of such products or the provision of services.

A representative office is prohibited from engaging in any of the following activities:

- import, export or sale, except for the importation of commercial samples of goods produced by the foreign company or institution it represents for the purpose of promotion;

- promotion of products or services other than those produced or offered by the foreign company or institution it represents; or
- contacting consumers directly.

Features Common to Branches and Representative Offices

There are no foreign ownership restrictions on branches/representative offices and, accordingly, the parent company of a branch/representative office can be a foreign company.

Branches/representative offices do not have a share capital or legal reserve requirement, but their parent companies are required to guarantee their obligations. This guarantee is the letter of undertaking referred to under **3.2 Incorporation Process**.

Both branches and representative offices are regulated by the constitutional documents of their parent companies. They are managed by a general manager, who will have the powers and authorities granted under a power of attorney issued by the parent company.

3.2 Incorporation Process

This section focuses on the formation process for LLCs and branches, as these are the usual alternatives for a foreign investor entering Oman for the first time. The process for establishing an SPC is the same as for an LLC.

LLCs

In some cases, pre-approval must first be sought for the LLC's proposed name. In most circumstances, however, the process to incorporate/register an LLC is initiated by submitting an application to the MOCIIP.

The application will need to be made by the LLC's founding shareholders and must be accompanied by all necessary supporting documents, including:

- the LLC's new constitutive contract;
- certain resolutions of the LLC's founding shareholders;
- a foreign investment form (where applicable); and
- copies of the passports of the LLC's first authorised signatories/managers.

Preparation of these supporting documents can involve considerable lead time because some will need to be notarised (or, in the case of foreign shareholders, apostilled) before submission to the MOCIIP. The constitutive contract must either be in Arabic or be provided with an Arabic translation (dual-language constitutive contracts are permissible). The licensing process will involve seeking approval for the specific activities to be undertaken by the LLC.

The steps following incorporation include registration with the Chamber of Commerce and Industry and application for a municipality licence. To apply for a municipality licence, the LLC will need to submit a copy of its tenancy agreement.

Branches

An application can be made to the MOCIIP for registration of a branch. The supporting documents that will need to be provided include the following:

- the commercial registration certificate of the foreign company in its principal place of business, which includes the foreign company's commercial activities;
- the incorporation documents of the foreign company (ie, the Articles of Association,

Memorandum of Association or the Constitutive Contract, as the case may be);
- the authorisation document issued from the foreign company to the manager(s) of the branch to carry out the management of the branch;
- a letter of undertaking from the foreign company to bear liability in relation to the acts of the branch; and
- copies of the passports/Omani identity cards of the authorised managers.

Preparing these documents can take time for the same reasons given in relation to LLCs above. All documents (except for copies of passports/Omani identity cards) must be translated into Arabic and duly notarised, legalised, or apostilled, as the case may be. As with an LLC, the branch's activities will need to be specifically licensed.

The MOCIIP usually registers a branch within one week of the application.

As with LLCs, the steps following incorporation include registration with the Chamber of Commerce and Industry and application for a municipality licence. The LLC must submit a copy of its tenancy agreement to apply for a municipality licence.

3.3 Ongoing Reporting and Disclosure Obligations

Any change to the constitutional documents or commercial registration certificate of an entity registered with the MOCIIP needs to be approved by the MOCIIP before it takes effect.

As noted in **3.1 Most Common Forms of Legal Entity**, all companies established under the CCL 2019 (other than CJVs), all branches and all representative offices must be registered with the MOCIIP. Accordingly, MOCIIP approval and registration are needed for any change to any such entity's constitutional documents (eg, its constitutive contract or Articles of Association) or commercial registration certificate, including in relation to its managers/authorised signatories or its share capital/shareholders.

Most entities registered with the MOCIIP are required to file approved financial statements with the MOCIIP (although exceptions apply).

JSCs are subject to considerably more stringent reporting requirements than LLCs. Analysis of these requirements falls outside the scope of this chapter of the guide.

3.4 Management Structures

LLCs are managed by one or more managers. Subject to the CCL 2019 and the LLC's constitutive documents, an LLC's managers have all the authority necessary to manage its affairs. The CCL 2019 and the LLC's constitutive documents specify the matters that are reserved to be decided by its shareholders.

Branches are regulated by the constitutional documents of their parent companies. They are managed by a general manager, who will have the powers and authorities granted under a power of attorney issued by the parent company.

3.5 Directors', Officers' and Shareholders' Liability

The rules governing the liability of management and shareholders will depend on the type of Omani legal entity in question. The comments below are confined to an overview of the main rules applicable to LLCs and branches.

LLCs

General principles

The managers of an LLC are jointly or severally liable to the LLC and third parties for, inter alia, their violation of the CCL 2019 and/or the LLC's constitutive documents and their negligence in the management of the LLC.

The CCL 2019 also provides that the managers of an LLC are subject to the same liability as the directors of a JSC, regardless of any provision to the contrary in the LLC's constitutive documents.

Conflicts of interest

The CCL 2019 contains several provisions that subject a manager to liability where the CCL 2019's provisions requiring a manager to avoid conflicts of interest have been contravened.

Piercing the corporate veil

The general rule is that the liability of an LLC is limited to the amount of its share capital, and a shareholder's liability is limited to its shareholding in the LLC's share capital.

There is, however, the potential in certain limited circumstances for the corporate veil to be pierced in the event of an LLC's bankruptcy, and managers can also become liable where they act outside their authority. In certain limited circumstances, managers may also become criminally liable under the Penal Code RD 7/2018, as amended (the "Penal Code") in the event of an LLC's bankruptcy.

Branches

The liability of a branch's directors/managers and officers will, generally speaking, be determined based on the laws applicable in the jurisdiction of incorporation of its parent company and the constitutional documents of its parent company.

The general manager of a branch will also be personally liable if the authority granted in their power of attorney is exceeded (as will any other authorised signatory of the branch who exceeds their authority).

The parent company of a branch is required to guarantee the obligations and liabilities of the branch pursuant to the letter of undertaking referred to under **3.2 Incorporation Process**. Therefore, the liability of a branch is not ring-fenced.

4. Employment Law

4.1 Nature of Applicable Regulations

The employer/employee relationship in Oman is regulated by the Labour Law RD 53/2023 (the "Labour Law"). Regulations are issued from time to time by the Ministry of Labour to regulate particular aspects of the employment relationship further.

The Labour Law prescribes an employee's minimum benefits and entitlements, such as maximum working hours, annual leave and sick leave entitlements. The employment contract may include benefits and entitlements that exceed these minimum requirements.

Employee unions are recognised in Oman. Collective negotiations may take place between the employer and the employees' trade union to improve the terms and conditions of work, enhance productivity and settle disputes. Employees have a right to strike peacefully, provided certain procedures are followed.

4.2 Characteristics of Employment Contracts

The Labour Law requires a contract of employment to be in writing; it must be in Arabic and must be translated into a language that both employer and employee can understand, where applicable. A contract of employment must include certain specified information and may be for a fixed or unlimited term.

4.3 Working Time

Employees may not be required to work more than eight hours a day or 40 hours a week, provided that the working hours are interspersed with but do not include an hour's lunch break per day. The continuous period of work must not exceed six hours. An employee is entitled to at least 48 consecutive hours of rest per week after five continuous working days.

If an employee is required to work overtime, then the employer must pay the employee overtime equivalent to the employee's basic salary for the extra work hours, plus at least 25% of such salary (for day-time work) and 50% of such salary (for night-time work); if the employee agrees in writing, the employer may grant the employee leave from work in lieu of the overtime.

Employees who work on an official holiday are entitled to salary for such day plus additional overtime pay equal to 100% of the daily basic wage or to an additional rest day for each day.

4.4 Termination of Employment Contracts

An employment contract will terminate under the following circumstances:

- upon the expiry of the term of the contract or completion of the work agreed upon;
- termination of the contract by the employer or employee in accordance with the Labour Law;
- upon the employee's death or permanent disability; and
- illness of the employee that necessitates absence from work for a consecutive or intermittent period of no less three months within one year, provided that the sick leave period set out in the Labour Law and the employee's balance of annual leave is exhausted.

Although an employer may terminate an employment contract by notice, the Supreme Court has held that termination should be based on a legal justification. If the termination of an employee's employment contract is arbitrary or without legal justification in accordance with the Labour Law, then an employee may file a claim for unfair dismissal. In such circumstances, the court may order the employee's reinstatement or the payment of not less than three months' salary as compensation. There are no definitive guidelines for the courts to consider in determining unfair dismissal claims or how compensation for unfair dismissal is calculated.

The employer may, in the event that an economic cause exists and after obtaining the approval of the committee as stipulated in Article 45 of the Labour Law, reduce the number of workers in the company to the extent required to maintain the continuity of the business and to avoid the risks of bankruptcy. The employer must comply with the following requirements if the approval of the committee is obtained:

- follow a fair standard in the selection of employees whose contracts will be terminated, such as employees with the lowest performance scores or any other standard;

- grant the employees whose contracts will be terminated a notice period of no less than three months; and
- give the employees whose contracts will be terminated priority to be reappointed if there is a job opportunity that matches their qualifications.

4.5 Employee Representations

The Labour Law does not expressly include provisions relating to employee representations.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Personal Income Tax

Although Omani citizens and residents are not currently subject to personal income tax unless they solely own an establishment (as defined in **5.2 Taxes Applicable to Businesses**), an income tax on high earners/high-net-worth individuals may be introduced in the future.

Social Insurance

The following taxes apply.

- *Insurance for old age, disability and death:* Omani employees must contribute 7.5% of their gross salary to the Social Protection Insurance (the SPI). The employer is also required to contribute to an amount equal to 11% of the gross salary of an Omani employee. The gross salary is restricted to OMR3,000 per month for calculating these contributions.
- *Insurance for work injuries and occupational diseases:* The employer is required to contribute to an amount equal to 1% of the gross salary of an Omani employee. The gross salary is restricted to OMR3,000 per month for calculating these contributions.
- *Insurance for employment security*: Omani employees must contribute 0.5% of their gross salary to the SPI. The employer is also required to contribute to an amount equal to 0.5% of the gross salary of an Omani employee. There is no cap for calculating these contributions.

Contributions for the three types of insurance referred to above are deducted from the employee's salary on a monthly basis and remitted by the employer to the PSI.

5.2 Taxes Applicable to Businesses

Income Tax

The following categories of persons (Omani taxpayers) are liable to income tax in Oman:

- enterprises;
- establishments; and
- permanent establishments.

The tax rate is generally 15% of taxable income, although a lower rate of 3% applies to certain small taxpayers where prescribed conditions are met.

For these purposes:

- "Person" means a natural or juristic person and includes joint ventures and non-Omani partnership agreements that do not assume the form of a company.
- "Enterprise" includes:
  (a) Individual enterprise owned by a natural Omani person which exercises in Oman any of the specific activities specified in Article 159 (bis) of the Income Tax Law. The owner of the enterprise shall be determined from the commercial or

industrial registers or other fiscal records or documents.

(b) Omani company that takes the form of partnership, limited partnership or limited liability company and exercises the activities specified in Article 159 (bis) of the Income Tax Law.

- "Establishment" means an establishment solely owned by a natural person who independently carries on a commercial, industrial or professional activity in Oman.
- "Permanent establishment" means a foreign individual or entity that carries out an economic activity either directly or indirectly through an agent, where such foreign individual/entity resides in Oman for a period exceeding 90 days within any 12-month period.

A lower income tax rate of 12% is temporarily in place for small and medium companies (SMEs), as noted under Economic Stimulus Plan below.

Special provisions apply to the taxation of income derived from the sale of petroleum. In addition, excise duties were introduced in Oman in 2019 on certain specific goods.

Economic Stimulus Plan

The Ministry of Finance has published an Economic Stimulus Plan (ESP) as part of its efforts to mitigate the effects of COVID-19 on the economy. The plan addresses the following key areas:

- taxes and fee incentives;
- stimulating business and investment through, for example, the simplification of procedures and the relaxation of regulations for foreign companies;
- SMEs, including a temporary reduction of income tax rates and the postponement of loan repayments;
- the labour market/employment, including a reduction in fees for hiring ex-pats; and
- banking – the postponement of loan instalments.

The tax measures adopted by the ESP include the following:

- income tax on dividends and interests has been suspended for an additional period of five years, from 2020 until 2024;
- the rate of income tax for SMEs has been reduced to 12% for the tax years 2020 and 2021;
- certain provisions have been introduced relating to the carrying forward of losses; and
- hotels were exempt from income tax for 2020 and 2021, and tourist facilities were exempt from paying the municipality and tourism taxes they collect until the end of 2021.

The ESP also exempts all companies whose main activity is operating in the economic diversification sectors from income tax for five years. Only activities which commenced between 1 January 2021 and 31 December 2022 are eligible for this exemption (subject to the rules and conditions set out by the Omani tax authority).

Amendment to Income Tax Law

The Income Tax Law was amended in 2020 by RD 118/2020. Key amendments include the following:

- enabling provisions to facilitate the exchange of information between the tax jurisdictions of different countries, which will help create a more tax-transparent environment to prevent tax avoidance;
- residency provisions to enable the authorities to determine the residential status of both individuals and corporates; and

- only one tax return must be submitted within four months of the tax year/period.

Value Added Tax (VAT)

VAT was introduced in Oman pursuant to RD 121/2020, promulgating the Value Added Tax Law. The standard VAT rate is 5%, and it is generally applicable to most goods and services. Other supplies – such as food, medicine and medical equipment – are charged at a 0% rate. In addition, certain other services, such as education and healthcare, are generally exempt from tax.

Withholding Tax

Omani taxpayers are required to withhold tax on any of the following types of payment to foreign entities that do not have a permanent establishment in Oman but which derive income from Oman:

- royalties;
- consideration for carrying out research and development;
- consideration for the use or right of use of computer programs;
- management fees;
- the provision of services, whether the services are rendered in Oman or outside (subject to certain exceptions); and
- dividends or interest (subject as set out below).

Withholding tax applies to foreign entities conducting business in Oman through a permanent establishment and does not consider the amount paid or credited to them as part of their income on which tax is levied in Oman.

Withholding tax is applied at 10% of the gross income from the above sources, as modified by any Double Tax Treaties entered into by Oman.

The withholding on payments of dividends and interest applies only to JSCs and investment funds.

Withholding tax related to dividends and interest has been suspended until 2024 (see under Economic Stimulus Plan above). Pursuant to a Royal Directive announced in January 2023, it is understood that dividends and interest will no longer be subject to withholding tax.

Article 4 (bis) (1) of the Executive Regulations of the Income Tax Law sets out the services which do not fall under the purview of withholding tax.

Pillar Two of the Organisation for Economic Co-operation and Development (OECD)

Pillar Two of the OECD has not been implemented.

5.3 Available Tax Credits/Incentives

Tax Credits

The worldwide income of an entity formed in Oman is taxed in Oman. Tax credits are available to Omani taxpayers (as defined in **5.2 Taxes Applicable to Businesses**) who are subject to foreign taxes on income that is also taxed in Oman. The credit is limited to the amount of tax incurred in Oman.

Tax Incentives

The FCIL's executive regulations set out the types of investment projects that may be exempt from tax, customs and other charges.

The income of companies established in the Salalah free zone, the Al Mazunah free zone and the Duqm SEZ is exempt from tax for a period of 30 years and 25 years for companies established in the Sohar free zone.

Tax Exemptions

Exemptions from tax are given in two ways: exempt activities and exempt income.

Exempt activities

Tax exemptions are available for industrial (manufacturing) activities; the exemption is for five years and cannot be renewed. Tax exemptions are also available to establishments/Omani companies engaging in shipping. The ESP has exempted certain commercial activities from income tax – see **5.2 Taxes Applicable to Businesses** (Economic Stimulus Plan).

Exempt income

Examples of income exempt from tax include the following:

- dividends received from Omani companies and permanent establishments;
- profits or gains on the disposal of securities listed on the Muscat Securities Market;
- the income of Omani marine companies and foreign marine companies conducting activities in Oman through an authorised agent, but only where the country of the foreign company affords reciprocal treatment;
- the income of foreign airlines carrying on business through permanent establishments in Oman to the extent of the income from operating aeroplanes for international transport, but only where reciprocal treatment is afforded in the airline's home country;
- without prejudice to the Income Tax Law, the income of collective investment funds offered for public subscription and financial trusts; and
- the income of a special purpose company established in Oman under the Securities Law.

While taxable under law, foreign companies engaged in oil and gas exploration activities normally have their liability to tax discharged by the government under the terms of their oil and gas concession agreements.

Foreign companies working for the government on projects deemed to be of national importance may be able to negotiate a tax protection clause whereby the government reimburses any tax paid by them.

5.4 Tax Consolidation

Oman does not have a regime of tax consolidation. Each taxable entity is required to file its own Annual Return of Income.

5.5 Thin Capitalisation Rules and Other Limitations

If the debt-to-equity ratio exceeds 2:1 in the case of related party debt, interest on the excess debt is not deductible for tax purposes. This rule applies to all Omani taxpayers other than banks and insurance companies, permanent establishments of foreign companies or proprietary (Omani-owned) establishments. Interest paid to related parties is allowed only to the extent the loan terms are at arm's length.

5.6 Transfer Pricing

Transactions between related parties must be valued at arm's length. There is no specific guidance on acceptable methods for determining an arm's-length price. In practice, the Oman tax authorities apply transfer pricing rules in accordance with OECD guidelines.

5.7 Anti-evasion Rules

Oman has stringent anti-evasion rules. Where a taxpayer fails to declare the correct income in their income return, the Chairman of the tax authority may impose a fine of between 1% and

25% of the difference between the tax value of the taxpayer's actual taxable income and the tax value as per the return submitted.

Subject to any harsher punishment specified in the Penal Code or any other law, the following offences are punishable by imprisonment for a period of between six months and three years and/or by a fine of between OMR5,000 and OMR50,000:

- intentional refusal by the tax manager to submit the actual taxable income;
- intentional abetment or assistance of the person subject to tax to submit incorrect tax declarations, accounts, records, lists of assets or debits or other documents relating to the tax return of the person subject to tax;
- intentional destruction, concealment or disposal of any documents, records, accounts or lists required by the Secretary-General to be submitted if such destruction, concealment or disposal takes place within two years of the date of receipt of the Secretary-General's notice; or
- intentional violation of the obligations to, among other things, provide data, information or documents regarding taxation-related international treaties or failure to do so as a result of gross negligence.

6. Competition Law

6.1 Merger Control Notification

Anti-competitive practices in Oman are regulated by the Competition Law RD 67/2014 (as amended – the "Competition Law") and its executive regulations. Any person intending to take any action resulting in an "economic concentration" must submit a written application to the MOCIIP.

An "economic concentration" is defined in the Competition Law as "any act that results in the transfer of the ownership of all or part of the assets, shares, stocks, use, rights or obligations of one person to another person or establishing consortiums or amalgamations or combining two or more managements under one joint management, which is likely to cause a person or a group of persons directly or indirectly to be in a dominant position." Joint ventures are, therefore, potentially caught by this definition.

Any action that would lead to an economic concentration resulting in the acquisition of more than 50% of the market concerned may not be approved by the MOCIIP, which has the discretion to approve or reject applications falling below this 50% threshold.

The scope of the Competition Law is broad. It applies to all activities of production, commerce, services and any other economic or commercial activities practised in Oman and to any economic or commercial activities performed outside Oman that would have consequential effects inside Oman.

The Competition Law also regulates the abuse of IP rights, where this would have an adverse effect on competition. It does contain limited exemptions, however, including for public utility companies and certain R&D activities.

6.2 Merger Control Procedure

The MOCIIP will examine any application for clearance of an economic concentration (see **6.1 Merger Control Notification**) and issue a decision within 90 days (and will be deemed to have approved the application if it does not respond within such timeframe).

6.3 Cartels

The Competition Law provides that any agreement, arrangement or practice (whether concluded inside or outside Oman) that has the object of preventing, limiting or weakening competition is prohibited.

Express examples of prohibited practices include collusion in bids or tenders among persons, or drawing up provisions in the conditions of tenders such as the inclusion of the trade mark of the commodity or specification of its type (ie, cartels).

The Competition Law contains a non-exhaustive list of practices that would be treated as having the object of preventing, limiting or weakening competition.

6.4 Abuse of Dominant Position

The abuse of a dominant position is prohibited under the Competition Law. Any person who enjoys a dominant position is prohibited from carrying out any practice likely to prejudice, restrict or prevent competition. The Competition Law also contains a non-exhaustive list of practices that would be caught by this prohibition on abusing a dominant position.

The Competition Law defines a dominant position as the ability of a person or a group of persons who directly or indirectly work jointly to control or influence the market concerned, including the acquisition of more than a 35% share of that market. The "market concerned" is also defined in the Competition Law, and has two key elements: relevant product and the geographical scope. Identifying and applying the scope of the "market concerned" to the activity/practice in question is key to determining whether a dominant position has arisen.

Agreements and arrangements (whether concluded inside or outside Oman) that aim to secure the monopoly of the import, production, distribution, sale or purchase of any goods or circulation thereof are also prohibited, as is performing any monopolistic act that would affect the market. For these purposes, a "monopoly" is defined in the Competition Law as the control by a person or a group of persons directly or indirectly of the quantity and prices of a kind of goods or service in a manner that would result in a restriction or cause an adverse effect on the freedom of competition.

The Executive Regulations

In January 2021, the executive regulations of the Competition Law were issued pursuant to MOCIIP Ministerial Decision No 18/2021 (the "Regulations"). The Regulations aim to remove uncertainty and provide clear guidance in determining whether or not an arrangement would fall within the scope of the Competition Law.

In doing so, the Regulations provide further guidance on the meaning of dominance, relevant products and geographical scope. They should therefore be consulted when assessing whether or not an arrangement would fall within the scope of the Competition Law (ie, whether or not an arrangement would be considered a prohibited practice or whether a transaction would require MOCIIP pre-approval).

The Regulations also set out clear guidance as to when market dominance could be triggered, as follows:

- where a person or persons acquire shares exceeding 35% of the relevant market; and
- where a person is able to influence product prices, or the volume of the supply of prod-

ucts, even if that person's share is less than 35% of the relevant market.

The Regulations set out the process to apply for MOCIIP approval for an economic concentration and provide that the application must be accompanied by several documents, including information determining the nature and structure of the economic concentration. Justification for the economic concentration, copies of reports, studies and questionnaires prepared for the purpose of assessing the economic concentration must also be provided. It is important to note that the Regulations provide that all documents submitted as part of the economic concentration application must be in Arabic; if they are in a foreign language, an attested and certified Arabic translation must be attached.

The MOCIIP has 90 days from the date of receiving all the required information and documents to consider the application and make its decision. The MOCIIP may approve (subject to conditions) or reject the application. A rejected or conditioned application can be appealed to the Minister of the MOCIIP.

7. Intellectual Property

7.1 Patents

Under the Industrial Property Rights Law RD 67/2008 (as amended – the "IPR Law"), an invention is patentable if it is new, involves an innovative step, and is capable of industrial application.

Broadly speaking, the procedure to register a patent is as follows.

- The procedure is commenced by submitting an application to the Directorate of Intellectual Property at the MOCIIP (the Registrar) in the prescribed form, accompanied by a petition (containing all the data concerning the applicant, the inventor and the title of the invention, and a statement proving the applicant's right to the patent if they are not the inventor) and a description of the invention.
- Eighteen months after the filing date, the Registrar will open the patent application for public examination. Upon payment of the prescribed fee at any time between the filing date and the expiry of such 18-month period, the applicant may request the Registrar to open the application for public examination.
- If the Registrar considers that the requirements set out in the IPR Law are not satisfied, they will notify the applicant to submit their observations and amend or divide the application within three months of the date of the notice.
- If the Registrar grants the patent, the applicant will be required to pay the prescribed fee within 90 days.
- The patent will be considered to be granted on the date of publication of such grant by the Registrar, and a certificate of grant signed by the Registrar will be issued.

A patent generally expires 20 years after the filing date.

7.2 Trade Marks

The IPR Law also regulates trade marks. A trade mark is any sign capable of being represented graphically in a manner that distinguishes the goods or services of one supplier from those of another supplier.

Broadly speaking, the procedure to register a trade mark is as follows.

- The procedure is commenced by submitting a trade mark application in the prescribed form

along with the relevant documents (such as details of the applicant and a power of attorney) to the Registrar.
- The Registrar will then examine the application to ensure that it complies with the prescribed requirements and is capable of being registered.
- Once the Registrar establishes that the application for registration meets all the legal requirements, the application will be published, and any interested party may submit a written objection to the registration to the Registrar after payment of the prescribed fees within 90 days of the publication date.
- If no objection is raised, the Registrar shall register the trade mark, publish it and issue a registration certificate to the applicant.
- Alternatively, the application for registration of the trade mark may be refused by the Registrar if it does not meet the requirements; the applicant would be notified of the decision and its reasons.
- The applicant may oppose the decision refusing the application for registration of the trade mark within 60 days of the date of notification. The applicant can also appeal to the competent court against the decision to refuse the application.

The protection period for a trade mark registered in Oman is ten years from the filing date (which may be renewed).

7.3 Industrial Design

Industrial design is defined under the IPR Law as "any combination of lines, colours or any three-dimensional form whether connected with lines or colours or not, provided that such combination or form gives a distinctive appearance to an industrial or a handicraft product forming a sign of an industrial or a handicraft product which is visually perceptible with an unaided eye." For the industrial design to be eligible for registration, it must be:

- new;
- not disclosed to the public; and
- be industrially applicable.

The term of protection for an industrial design registered in Oman is five years, which may be renewed for two consecutive periods of the same duration upon the owner's request and after payment of the prescribed fees.

Broadly speaking, the procedure to register an industrial design is as follows.

- The procedure is commenced by submitting an application for registration to the Registrar in the prescribed form, signed by the applicant or the applicant's lawyer.
- The application must be accompanied by drawings, photographs and a petition that sufficiently describes the goods incorporating the industrial design and indicates the type of products for which the industrial design is used.
- The Registrar will then evaluate the application and notify the applicant of the decision to accept or reject the application. The applicant must pay the prescribed fees within 90 days of the date of such notification.
- The Registrar will publish the industrial design in the Official Gazette.
- Upon successful completion of the no objection period, the Registrar will issue the registration certificate for the industrial design.

An industrial design expires five years from the filing date and is renewable for two consecutive periods of the same duration upon the owner's request.

7.4 Copyright

The Law for the Protection of Copyright and Neighbouring Rights RD 65/2008 (as amended – the "Copyright Law") regulates copyright law in Oman. Oman ratified the Berne Convention for Protection of Literary and Artistic Works in July 1999.

Protection under the Copyright Law is provided to original literary, technical and scientific works, regardless of their value, nature, method of expression, or the purpose of their authorship. Computer programs and databases read from a computer or elsewhere are protected by copyright. Mere ideas, procedures, methods of work, mathematical concepts, principles, inventions and data are not protected by copyright.

Before the author's work is published, an author or their representative may deposit an application for protection of their work to the MOCIIP in the prescribed form, together with three copies of the work. The Copyright Law considers such a deposit tantamount to ownership. The applicant will be provided with a deposit number, and the deposit will then be published in the Official Gazette. Thereafter, an application is submitted to the Ministry for the data deposit certificate for the work.

The financial rights of an author of a literary work, including computer programs, are protected during their life and for 70 years starting from the commencement of the calendar year following the year of their death.

Registration of title to the authorship of a work acts as proof of ownership to the work (Registered Owner), and the onus to prove that the work does not belong to the Registered Owner is on the infringer. In addition to the civil and penal remedies available, a titleholder is entitled to remedies at borders and interim/ex parte remedies. Civil remedies include orders to prevent the export/import of the goods involved in the infringement, orders to cease the infringement, and claims for compensation based on losses incurred and profits made by the infringer. If copyright infringement is established, the court must pass a judgment to confiscate any assets resulting from the infringement. Except in exceptional cases, the court must also order the confiscation of all the commodities involved in the infringement and the material and equipment used to commit the act of infringement and order their destruction at the expense of the judgment debtor or their disposal outside the trade channels if the destruction is liable to undermine public health or the environment.

7.5 Others

Under the Penal Code, a person who becomes acquainted with a secret by virtue of their profession, occupation or work and (without the consent of the concerned person) discloses it other than in the circumstances permitted by law, or uses it for their personal benefit or the benefit of another person, may be imprisoned for between one month and one year.

8. Data Protection

8.1 Applicable Regulations

Oman has issued its first comprehensive personal data protection law, enacted by RD 6/2022 (DPL). The DPL came into force on 13 February 2023 and was further supplemented by the Executive Regulations issued by the Ministry of Transport, Communications and Information Technology (the MOTCIT) pursuant to Ministerial Decision 34/2024 (the "Regulations").

The DPL introduces matters such as the rights of the data subject and the obligations of controllers and processors of personal data.

The DPL applies to any processing of personal data, which is defined in the DPL as data that makes a natural person identifiable, directly or indirectly, by reference to one or more identifiers. Identifiers include but are not limited to an individual's name, civil identification number or other data related to an individual's genetic, physical or mental identity.

Article 3 of the DPL sets out certain circumstances in which the provisions of the DPL will not apply to the processing of personal data. These circumstances include but are not limited to the following:

- the protection of national security or public interest;
- the execution by the units of the Administrative Apparatus of the State and other public legal persons of their functions prescribed to them under law;
- compliance with a legal obligation imposed on a controller under any law, judgment or court decision; and
- the protection of the economic and financial interests of the State.

Rights of the Data Subject

Consent

Under the DPL, personal data may only be processed with the data subject's express consent. This is to ensure that any processing of personal data is done within the framework of transparency, honesty and respect for human dignity. Any request to process personal data must be in writing, in a clear and understandable manner.

Sensitive personal data

The DPL provides for a general restriction on the processing of certain data, including:

- genetic and biometric data;
- health data;
- data relating to an individual's ethnic origin, sexual life, political or religious opinions or beliefs, criminal convictions; and
- data relating to security measures.

The processing of such data will require authorisation from the MOTCIT.

Other rights

Data subjects enjoy several other rights under the DPL, including the right to:

- obtain a copy of their processed personal data;
- transfer personal data to another controller;
- revoke their consent in respect of the processing of their personal data;
- amend, update and withhold personal data; and
- be notified of any breach or violation of their personal data and measures taken in this regard.

8.2 Geographical Scope

The DPL applies to any processing of data in Oman. Similarly, the transfer of data outside Oman may only be done in accordance with the controls specified in the Regulations.

8.3 Role and Authority of the Data Protection Agency

The MOTCIT is the authority responsible for implementing the DPL and has the right to do the following:

- prepare the controls related to the protection of personal data, including specifying the necessary safeguards and measures required to protect personal data;
- issue procedures for processing personal data and ensure the compliance of controllers and processors with such procedures;
- receive complaints filed by the data subject and decide on them within the period specified in the Regulations;
- co-operate with competent entities in other countries with respect to the protection of personal data;
- provide advice and support to units of the administrative apparatus of the State and other public legal persons in matters related to personal data protection;
- draft guidelines for implementing the DPL whenever necessary; and
- maintain a register of controllers and processors meeting the conditions in accordance with the regulation.

To protect the rights of data subject, the MOTCIT may:

- issue warnings to controllers and processors who violate the provisions of the DPL;
- order the correction or removal of personal data;
- suspend the processing of personal data, either temporarily or permanently;
- suspend the transfer of data to another country or an international organisation; and
- take any other measures it deems necessary for the protection of personal data.

Sectoral Laws

To the extent they do not contradict the DPL and the Regulations, certain sectoral laws containing limited data and privacy protection provisions will continue to apply. These include the Telecommunications Regulatory Law and the Banking Law, for example.

9. Looking Forward

9.1 Upcoming Legal Reforms

Securities Law Executive Regulations

The Securities Law came into force on 20 June 2022, repealing Royal Decree No 80/1998 promulgating the Capital Market Law, except for Articles 46–58, which shall remain in force. A draft of the executive regulations of the Securities Law has been published by the Financial Services Authority. The executive regulations are expected to be issued before the end of 2024.

The executive regulations are expected to regulate matters such as the conditions and procedure for establishing and licensing entities that are subject to the Securities Law, activities which require a licence to be undertaken and those which do not, and the prohibited activities.

Regulation of Virtual Assets

It is understood that the FSA and other regulators in Oman intend to promote and develop fintech products. The FSA is currently preparing the regulatory framework for the regulation of virtual assets, including the licensing, regulation and supervision of Virtual Asset Service Providers.

PAKISTAN

Law and Practice

Contributed by:
Bilal Shaukat, Hasnain Naqvee, Mayhar Kazi and Shafaq Rehman
RIAA Barker Gillette

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RIAA Barker Gillette offers the full range of corporate, commercial and dispute resolution legal services from offices in Pakistan's major cities: Karachi, Lahore, Islamabad and Peshawar. With ten partners and over 45 associates, the firm is amongst the country's largest practices. Its clients include multinational corporations, financial institutions, non-profit organisations, Pakistani conglomerates, private clients and government agencies. RIAA Barker Gillette is also the primary Pakistan contact for many major international law firms. It has extensive experience of complex, cross-border work, and in advising across a number of industry and regulatory sectors. The firm is routinely called on to act on projects, M&A, private equity, corporate restructuring and tax advisory mandates, and on commercial disputes. In addition to having offices in London and Dubai (DIFC), RIAA Barker Gillette is the exclusive member firm in Pakistan for Lex Mundi, the world's leading network of independent law firms, with members in more than 125 countries.

Authors

Bilal Shaukat is the managing partner of RIAA Barker Gillette Pakistan and is based in Karachi. His chief areas of focus include project finance, M&A and competition law. He has extensive experience in developing power, energy and infrastructure projects, and advises blue-chip clients on complex conventional and Islamic financing transactions. Bilal has also successfully advised clients on major corporate restructurings across a range of sectors. He is often called upon by PSX 100 firms, multinationals, financial institutions and insurance companies to advise on company laws, banking laws and income tax. He has contributed to a range of publications on investment and competition laws in Pakistan.

Hasnain Naqvee is a senior partner at RIAA Barker Gillette Pakistan, and one of Pakistan's leading corporate and project lawyers. He specialises in infrastructure projects, finance, FDI, corporate and commercial law, private equity, tax planning, restructuring, M&A and ADR. Clients praise his consistent achievement of win-win outcomes for all parties in negotiations. Hasnain regularly advises on new power projects being set up in Pakistan and Azad Jammu and Kashmir, mostly as counsel to the project company and occasionally as lenders counsel, and is well recognised and established in this practice area.

Mayhar Kazi is a partner at RIAA Barker Gillette. He is based in Karachi and advises on regulatory and tax advisory matters, as well as corporate, competition, employment and investment law. He also represents clients in complex commercial disputes involving arbitration, contract, company, energy, environmental, insurance, shipping and tax law. His clients include major names in the banking, chemicals, commodities, consumer electronics, FMCG, insurance, management consultancy, petroleum, power and pharmaceutical industries, and he has extensively worked alongside major international law firms. Mayhar has written for Bloomberg's Tax Planning International Review and authored chapters on dispute resolution, investment and tax law in Pakistan for major international publications.

Shafaq Rehman is a partner at RIAA Barker Gillette and has over ten years' experience in assisting clients on corporate advisory and transactional matters. Her clients are primarily multinational companies, either operating in Pakistan or seeking to commence operations in Pakistan. She is a key contact for major global and regional foreign law firms from North America, Europe and the Asia-Pacific region seeking advice on Pakistan law matters for their clients. Shafaq has assisted with establishing and regularising multiple start-ups, and has also acted for investors funding existing start-ups in Pakistan. She routinely advises on foreign exchange, labour, M&A and corporate compliance matters.

RIAA Barker Gillette

D-67/1
Block 4
Clifton
Karachi
Pakistan

Tel: +92 21 111 529 937
Email: pk@riaabg.com
Web: www.riaabarkergillette.com

RIAA Barker Gillette

1. Legal System

1.1 Legal System and Judicial Order

Pakistan is a common law jurisdiction, although its laws are largely codified. The laws relating to companies, contract and property are largely based on principles of English common law. Certain provisions of criminal law are based on principles of Islamic law. Subjects such as marriage and the inheritance of property are matters of personal law, so the applicable law will depend on the religion of the individual concerned.

Pakistan has an independent judiciary with a hierarchy of courts. Courts follow an adversarial system and precedent is binding. Judgments of lower courts are appealable to higher courts. There is no jury system, so all issues of fact and law are decided by judges.

In general, courts of civil judges serve as the courts of first instance for civil matters, and courts of magistrates serve as the courts of first instance in criminal matters. Courts of district judges generally exercise appellate jurisdiction. However, they also serve as courts of first instance for certain types of cases, such as defamation and, in Islamabad, in respect of civil claims valued at PKR50 million and above. One important exception is in the district of Karachi, where the High Court of Sindh has the original jurisdiction to hear civil claims valued at more than PKR65 million. This exception was recently challenged before the High Court of Sindh, wherein the provincial government has been directed to reconsider this exception to expedite the settlement of an overwhelming backlog of cases currently pending before courts in Pakistan.

In addition to the ordinary civil courts, Pakistan has set up various specialised courts and tribunals that exercise jurisdiction over certain types of civil disputes, such as banking courts, rent courts, consumer courts and intellectual property tribunals. There may also be an administrative division of cases among the various benches of a court.

Each of the four provinces (ie, Sindh, Punjab, Balochistan and Khyber Pakhtunkhwa) as well as the Islamabad Capital Territory have a High Court. While the High Courts generally exercise appellate jurisdiction, they are conferred with original civil jurisdiction in certain matters, including company and banking cases, by way of statute. All the courts mentioned above, including all ordinary and specialised courts and tribunals, fall within the supervisory jurisdiction of one of the five High Courts in Pakistan. The High Courts also exercise constitutional jurisdiction, under which they can adjudicate challenges to the legality of actions of government authorities. Any party aggrieved by the actions of such authorities may petition the High Court for relief in the nature of the issuance of a writ. Businesses often invoke the constitutional jurisdiction of the High Court to challenge the legality of actions of regulatory authorities, government departments, state-owned enterprises and tax authorities.

The Supreme Court of Pakistan is the highest court of appeal, and its judgments are binding on all other courts. The Supreme Court also has original jurisdiction in matters of public importance involving the enforcement of fundamental rights guaranteed under the Constitution.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Pakistan has a liberal foreign investment regime, with all other sectors of the economy being open to foreign investment except arms and ammunitions, consumable alcohol, currency and mint, high explosives, radioactive substances and security printing. Notably, foreigners cannot acquire land without the permission of the federal or provincial government. There are upper limits on investment by foreigners in newspapers (up to 25% subject to approval), broadcast media (49%) and airlines (49%) in Pakistan. There is no minimum requirement for the amount of foreign equity investment in any sector. Generally, foreign investments do not require any approval from the authorities, and the Foreign Private Investment (Promotion and Protection) Act, 1976 requires equal treatment to be given to foreign and domestic private investment.

In a renewed push to attract foreign investment, in early July 2023 the federal government approved the Pakistan Investment Policy 2023 (PIP 2023). Such policies do not have the force of law but are a statement of the government's objectives in attracting foreign investment, its sectoral focus areas and its commitment to facilitating investment. PIP 2023 reaffirms the government's commitment to an open-admission policy for foreign investment regime and the repatriability of profits. The announcement of PIP 2023 coincides with the creation of the Special Investment Facilitation Council (SIFC), whose apex body committee comprises the country's civil and military leadership, with the aim of streamlining approval processes and facilitating policy reforms to create an investor-friendly business environment. The SIFC has identified key sectors for prioritisation, including IT, agriculture, mines and minerals, energy and defence production, and aims to achieve USD100 billion in foreign investment in the next three years.

The recently enacted Foreign Investment (Promotion and Protection) Act, 2022, as amended by the Foreign Investment (Promotion and Protection) (Amendment) Act, 2022 (the "FIPP Act"), allows the federal government to designate certain investments, sectors, industries or projects as "qualified investments". It provides that no investment will be notified as a qualified investment if the amount to be invested in Pakistan is less than USD500 million, unless there are specific reasons, to be recorded by the federal government. The FIPP Act enables the promotion and protection of qualified investments by providing investment incentives for such investments, such as regulatory exemptions, tax exemptions and various other concessions. The FIPP Act applies to all of Pakistan except for the Province of Balochistan, where it applies only to qualified investments in the Reko Diq mining project.

Another recently enacted statute is the Inter-Governmental Commercial Transactions Act, 2022 (the "IGCT Act"), which provides an expedited means for the federal government to approve, implement and give broad exemptions from regulatory compliance to commercial transactions in pursuance of an agreement or MOU between the federal government and a foreign state. The IGCT Act contemplates commercial transactions between the federal government or state-owned entities and a foreign state or its nominated entity. For implementation, the IGCT Act allows the federal government to relax or exempt such commercial transactions from any "regulatory requirement or operation necessitated by any law" and to issue directions to any

provincial government, government agency or authority for, inter alia, land acquisition, resettlement, construction of access roads and utility services.

A number of industries are governed by specific statutes that require licences to be obtained prior to engaging in any regulated activity, including aviation, banking, electric power, finance, insurance, oil and gas and pharmaceutical drugs. Both Pakistanis and foreigners must obtain such licences.

Furthermore, depending on the nature and terms of the investment, investors may be required to obtain the approval of the Competition Commission of Pakistan under the provision of the Competition Act, 2010 (please refer to **6. Competition Law** for further detail). Again, the requirement for such approval is not specific to foreign investment.

Foreign companies require approval from the Board of Investment to establish branch or liaison offices in Pakistan. In the case of foreign banks, approval for establishing a branch in Pakistan will be required from the central bank: the State Bank of Pakistan. Furthermore, foreign shareholders and directors of Pakistani companies are required to obtain security clearance from the Ministry of Interior (MOI). Foreign promoters (other than Indian nationals or those of Indian origin) may proceed with the incorporation of companies, and foreign directors (other than Indian nationals or those of Indian origin) may assume office while the application for MOI clearance is in process. In the case of a refusal of security clearance, the foreign shareholder and director must take immediate steps to transfer shares or resign from office, as the case may be. Companies that have foreign subscribers/officers who are Indian nationals or of Indian origin will be incorporated after the receipt of security clearance.

2.2 Procedure and Sanctions in the Event of Non-compliance

As stated in **2.1 Approval of Foreign Investments**, there is no general requirement for the approval of foreign investments. Licences or approvals are required by persons seeking to engage in any activity that is regulated by a sector-specific law. The requirement for licences or approvals applies across the board, regardless of whether the investment is local or foreign.

Please see **6.1 Merger Control Notification** and **6.2 Merger Control Procedure** regarding the procedure for obtaining approval from the Competition Commission of Pakistan. If approval is not obtained in respect of any transaction for which it is required, the Competition Commission of Pakistan can impose fines and, in appropriate cases, undo the transaction. In most cases, the approval of the Competition Commission of Pakistan can be obtained within two months.

2.3 Commitments Required From Foreign Investors

As stated in **2.1 Approval of Foreign Investments**, foreign investments in open sectors of the economy are not subject to approval. The federal government is obliged to notify investments that are eligible for incentives and promotions under the FIPP Act as "qualified investments" in accordance with the terms of the FIPP Act. Under the IGCT Act, for implementing inter-governmental commercial transactions, the federal government may approve exemptions or relaxations from regulatory compliance, and issue directions to other government authorities.

2.4 Right to Appeal

As stated in **2.1 Approval of Foreign Investments**, foreign investments in open sectors of the economy are not subject to approval.

Appeals against orders of the Competition Commission of Pakistan may be filed with the Appellate Bench of the Commission within 30 days of the order. Appeals against orders of the Commission made by a bench of two or more members and of orders of the Appellate Bench of the Commission may be made to the Competition Appellate Tribunal within 60 days of the order. Orders of the Competition Appellate Tribunal may be appealed within 60 days before the Supreme Court of Pakistan.

Decisions of the Board of Investment on applications for the establishment of liaison or branch offices by foreign companies are not appealable, nor are decisions of the MOI on applications for security clearance of foreign shareholders or directors. However, such decisions may be challenged in any of the High Courts of Pakistan by way of judicial review of executive actions.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

Various kinds of corporate vehicles may be created under Pakistan law, including companies and limited liability partnerships, all of which are regulated by the Securities and Exchange Commission of Pakistan (SECP).

The Companies Act, 2017 allows for the creation of single member companies, private limited companies and public companies. The liability of members in each of these types of companies may be unlimited or limited by shares or guarantee. Furthermore, a single member company may be converted into a private company and vice versa, and a private company may be converted into a public company and vice versa. All companies have separate legal personality and the right to sue and be sued, own property, and generally create legal relations with third parties.

All companies are required to have directors, although the minimum number varies between single member, private and public companies. Only natural persons can be directors. Every company is required to have a chief executive officer.

Single Member Companies

Single member companies can have only one shareholder, which may be a natural or juristic person. They are required to have at least one director. Compliance with the requirements of the Companies Act on matters requiring the approval of a general meeting of the members or meetings of the board of directors, as the case may be, may be made by recording the decision in the relevant minutes signed by the sole member or director(s). A single member company is best suited for situations where 100% of the shareholding is required to be maintained by a single person.

Private Companies

Private companies are companies which by their articles:

- restrict the right of members to transfer their shares in the company, except as otherwise provided in the Companies Act;
- limit the number of members to 50 (excluding persons who are in the employment of the company); and
- prohibit any invitation to the public to subscribe for the shares, if any, or debentures or redeemable capital of the company.

Private companies must have at least two members and at least two directors. They are required to hold annual general meetings, at which the board of directors lays the financial statements before the members for adoption. Private companies are the most common form of corporate vehicle in Pakistan.

The sale of shares in private companies is subject to a statutory right of first refusal of the other members, which they may exercise in respect of shares proposed to be sold in proportion to their shareholding. Coupled with any other share transfer restrictions specified in the articles, this gives current shareholders the opportunity to retain ownership and control before any new shareholder can be inducted. Private companies are suited to businesses that do not require investment from the public, and to persons who wish to maintain control of their businesses. Many joint ventures are incorporated as private companies.

Public Companies

Public companies are defined as companies that are not private companies. There is no maximum number of shareholders in public companies, which are also entitled to invite the general public to subscribe to their shares. Their shares are not subject to any statutory restrictions on transfer, except in regulated sectors such as banking. Public companies may be listed (where their shares are traded on a stock exchange) or unlisted. The minimum number of directors of a listed public company is seven, or three if unlisted. The requirements for the holding of annual general meetings and the auditing of financial statements are the same as those applicable to private companies; listed companies are also required to audit quarterly accounts.

Public companies are suitable for large infrastructure and other greenfield projects, and for all businesses that require equity investment from the public or a large number of shareholders. Certain sector-specific laws, such as those governing insurance, stipulate that licences may be granted only to public companies.

In terms of statutory compliance, single member and public listed companies fall at opposite ends of the spectrum, with the former having the least onerous requirements and the latter the most.

Limited Liability Partnerships

Limited liability partnerships are regulated by the Limited Liability Partnership Act, 2017. They are rarely used as they are viewed as tax-inefficient corporate vehicles.

3.2 Incorporation Process

The process for incorporating a company is prescribed under the Companies Act and the Companies Regulations, 2024, and is comprised mainly of the steps set out below.

Setting Up Online Accounts

Online accounts are required to be set up for each of the initial subscribers and directors of the proposed company.

Accounts are generated automatically upon the submission of the requisite information to the SECP.

Name Availability

An application for confirmation of availability of the proposed name of the proposed company must be made to the SECP through the online SECP account of any initial subscriber or proposed director. If the proposed name is available, an email confirmation is issued by

the SECP within two working days. The name remains reserved for 60 days.

Incorporation

The subscribers apply to the SECP to incorporate the proposed company. Particulars of the proposed subscribers and directors are required to be submitted to the SECP online, together with constitutional documents. Companies are usually incorporated within one week of the submission of documents to the SECP. A "fast-track" option is available whereby a company may be incorporated within two days upon the payment of enhanced fees.

Security Clearance

If a company is incorporated with foreign shareholders, directors and/or chief executive, security clearance will have to be sought from the MOI. The application for such clearance must be made upon incorporation. The SECP proceeds with the incorporation of companies with foreign shareholders, directors and/or chief executive, and issues the certificate of incorporation and acknowledgements of filing, except in cases of persons of Indian nationality or origin. There is no prescribed timeframe for the processing of applications for security clearance; in practice, they can take anywhere from six months to two years.

3.3 Ongoing Reporting and Disclosure Obligations

Companies are subject to various reporting and disclosure obligations. Statutory filings under the Companies Act are required to be made with the Registrar of Companies (RoC) and are publicly accessible; they include:

- the annual return;
- the appointment of or a change in officers;
- the issuance of new shares;
- significant transfers of shares;
- amendments to constitutional documents; and
- all special resolutions passed by shareholders.

All companies are required to maintain a register of ultimate beneficial ownership and to submit declarations of compliance to the RoC on an ongoing basis.

In terms of financial reporting, all companies are required to file copies of annual audited financial statements with the RoC, except private companies whose paid up capital is not greater than PKR10 million. Listed companies are required to file quarterly audited accounts, to post them on their websites and to send them to the stock exchange. Listed companies are also subject to additional disclosure requirements under the Securities Act, 2015 and the rule book of the Pakistan Stock Exchange in respect of price-sensitive information.

3.4 Management Structures

Companies have a two-tier management structure in Pakistan, with the two principal decision-making organs being:

- the shareholders or members in the general meeting; and
- the board of directors.

The shareholders are the ultimate authority. Under the Companies Act, 2017, certain decisions are required to be made by the shareholders, including:

- the election of directors;
- the adoption of financial statements;
- declarations of dividends;
- the appointment of auditors; and

- the disposal of the undertaking of the company or a sizeable part thereof or of its subsidiary.

The articles of association of a company can broaden the scope of matters that require shareholder approval.

The board of directors is responsible for day-to-day management, including decisions regarding:

- the issuance of shares;
- borrowing;
- the investment of funds;
- the approval of financial statements;
- capital expenditure; and
- major acquisitions.

The board also appoints the chief executive officer of the company.

3.5 Directors', Officers' and Shareholders' Liability

Directors' and Officers' Liability

The Companies Act codifies directors' duties, which include the duty to act in accordance with the company's articles and to act in good faith to promote the objects of the company for the members as a whole, and in the best interests of the company and various stakeholders. Directors are required to avoid conflicts of interest, and to account for any undue gains to the company. Contraventions of such duties, without prejudice to other consequences, constitute an offence liable to a monetary penalty. Furthermore, if a company carries on any business or transaction that is ultra vires, every person acting as an officer who is responsible for such action(s) is guilty of an offence carrying a substantial penalty, and is also personally liable for the consequences of such action. The Companies Act also sets out grounds on which a person may be disqualified from acting as a director, including persistent non-compliance with the filing requirements under the Companies Act and conducting business with a company of which they are a director in a manner that deprives the shareholders of a reasonable return.

The vast majority of the provisions of the Companies Act imposing liability for acts or omissions of a company on its officers do so only towards those officers who are responsible for, authorise or permit them.

The Companies Act protects independent and non-executive directors of listed companies and public sector companies by providing that they shall be liable only in respect of acts or omissions that occurred with their knowledge and consent, or where they had not acted diligently.

Shareholders' Liability

As a general rule, the liability of members or shareholders (other than of an unlimited liability company) is limited to the extent of the amount of their shares or guarantee. In certain limited circumstances, courts disregard a company's separate legal personality and may "pierce the corporate veil" in order to impose liability on shareholders. This is typically done where the shareholders have used the corporate structure to avoid liability for wrongdoing or to defraud creditors. Courts have always been cautious and circumspect in this regard.

4. Employment Law

4.1 Nature of Applicable Regulations

Prior to the 18th Amendment to the Constitution in 2010, both Parliament (the federal legislature) and the Provincial Assemblies could enact legislation on labour. Following the amendment,

labour became an exclusively provincial subject, meaning that only the various Provincial Assemblies can enact legislation on the subject for their respective provinces, while Parliament can enact laws only for the federal capital territory. In practice, prior to the 18th Amendment, laws concerning labour and employment were mostly enacted by Parliament for application across Pakistan, and thus these laws were uniform across the country. Since the 18th Amendment, the various provinces have enacted their own statutes, which are by and large the same statutes previously enacted by Parliament, with some modifications.

Legislation on labour and employment in Pakistan distinguishes between workers (also referred to as "workmen" under some laws) and other employees. An employee performing primarily skilled or unskilled, manual or clerical work is treated as a worker. Other employees regulated by labour law are those engaged in the business of an establishment, but excluding those whose roles are supervisory or managerial. The laws relating to labour and employment afford greater protection to workers, and many such laws are applicable only to workers. Federal legislation applies only in the Islamabad Capital Territory and, on subjects such as industrial relations, to trans-provincial establishments, which are employers employing workers in more than one province.

Managers and Supervisors

There are no laws specifically regulating the employment of persons engaged as managers, supervisors or similar roles; their employment relationship is governed largely by their contracts of employment. Some statutes are generally applicable to employment, including the various provincial Shops and Establishments statutes, which require weekly holidays, working hours, overtime, wage periods, day care, leave and termination of employment. Please refer to **4.3 Working Time** for further detail.

Workers

There are a number of statutes governing the employment relationship of workers. The contracts of employment of workers cannot be inconsistent with the provisions of such statutes. The main statutes are:

- Shops and Establishment Acts and Ordinances – as above;
- Standing Orders and Terms of Employment Ordinances and Acts, which govern the classification of workers and require the terms and conditions of employment to be given in writing, specifying group incentive schemes, compulsory group insurance, the payment of bonuses, an employer's liability for wages in the event of the stoppage of work, the closure of establishments, the termination of employment, misconduct and retrenchment;
- Factories Acts, which apply to factories and make provisions for health and safety, daily and weekly working hours, weekly holidays, overtime, paid leave and the employment of adolescents; and
- Industrial Relations Acts, which provide for the formation of trade unions, the determination of collective bargaining agents, the representation of workers and their participation in management, strikes and lock-outs, collective bargaining agreements and the settlement of industrial disputes, as well as entitling workers to apply for redressal of individual grievances.

Certain terms of the employment relationship of workers may also be contained in collective bargaining agreements, which are negotiated by unions with employers and usually provide for

employment benefits that are generally applicable to workers employed in the establishment, including bonuses, allowances, enhanced health coverage and holidays.

4.2 Characteristics of Employment Contracts

Workers

Contracts for the employment of workers must be in writing and must contain job descriptions and terms and conditions. Such contracts cannot impose obligations that are inconsistent with mandatorily applicable statutes. The primary statutes are mentioned in **4.1 Nature of Applicable Regulations**.

Managers and Supervisors

There are no requirements specifically applicable to the employment contracts of employees who are not classified as workers. Such contracts are not required to be in writing. For those employees in supervisory or managerial positions, contracts may also contain non-disclosure, non-compete and non-solicitation provisions, where required.

Generally

In practice, most contracts of employment are written. They cover the roles and responsibilities of the employee, the duration of employment, remuneration and benefits, the obligation to abide by the HR policies framed by the employer and termination provisions.

4.3 Working Time

There are no minimum working hours for salaried employees. The limits on daily and weekly regular and overtime working hours and for adults and adolescents vary between different parts of Pakistan, and are set out in the applicable Shops and Establishments/Terms of Employment legislation, which applies to non-managerial employees of commercial and industrial establishments, and in the Factories Acts, which apply to workers employed by factories.

Shops and Establishments/Terms of Employment Legislation

Working hours

Adults can work nine hours per day (except in Khyber Pakhtunkhwa, where the limit is eight hours per day) and 48 hours per week. Adolescents and young persons can work seven hours per day and 42 hours per week.

In Sindh and Khyber Pakhtunkhwa, adolescents are defined as persons between the ages of 14 and 18, while in Punjab they are defined as persons between the ages of 15 and 18. In Balochistan and Islamabad Capital Territory, young persons are defined as persons between the ages of 14 and 17.

Overtime

In Khyber Pakhtunkhwa, there is a limit of 24 hours per week for adults; adolescents cannot work overtime.

In Sindh, there is an annual limit of 150 hours of overtime work for adults and 100 hours for adolescents.

In Punjab, there is a limit of 624 hours per year for adults; adolescents cannot work overtime.

In Balochistan and Islamabad Capital Territory, the annual limit is 624 hours of overtime work for adults and 468 hours for young persons.

Time of day restrictions

Under the Shops and Establishments/Terms of Employment legislation applicable across various parts of Pakistan, establishments (which do not include factories) must be closed at 9pm

in Khyber Pakhtunkhwa and 8pm in the rest of Pakistan.

Records

Employers are required to maintain registers of employment and remuneration, for recording, inter alia, the number of hours of regular and overtime work. The legislation has not kept pace with the practice of remote work, which became common in the corporate sector during Pakistan's COVID-19 lockdowns.

Factories Acts

Working hours

Regular hours for adult workers throughout Pakistan are as follows:

- nine hours per day (including breaks) in non-seasonal factories and ten hours in seasonal factories;
- 48 hours per week in non-seasonal factories and 50 hours per week in seasonal factories; and
- 56 hours per week where a worker is engaged in work that must, for technical reasons, be continuous throughout the day.

Overtime

There are no limits on overtime work in factories.

Records

Employers are required to maintain registers of employment and remuneration, for recording, inter alia, the number of hours of regular and overtime work.

4.4 Termination of Employment Contracts

Workers

Termination

Under the Standing Orders/Terms of Employment legislation, which applies to workers employed by commercial and industrial establishments other than factories, the employment of workers may be terminated only through giving notice in writing, stating the reason for such termination. Workers are entitled to challenge their termination (for any reason) as an individual grievance, depending on the part of Pakistan in which they are employed, before either the National Industrial Relations Commission or the Labour Court.

Where any worker is to be retrenched due to redundancy, the employer is required to first retrench the worker who is the last person employed in that category of workers. With respect to collective redundancy, employers are required to seek the permission of the government (in Sindh and Khyber Pakhtunkhwa) or the Labour Court (in the rest of Pakistan) before closing down an establishment or terminating the employment of more than 50% of the workers, except in the event of fire, catastrophe, stoppage of power supply, epidemics or civil commotion.

Benefits

If the employment of a permanent worker (defined as a worker who has been employed for at least nine months) is terminated by the employer for any reason other than misconduct, the employer is required under the Standing Orders legislation to give one month's notice or payment in lieu and payment in lieu of accumulated unused leave, and to contribute to either a gratuity or a provident fund, as explained below.

Gratuity

The employer is required to pay a gratuity, equivalent to one month's salary for every year of service or part thereof exceeding six months. The gratuity is calculated on the basis of the salary paid to the worker in the last month of service.

Provident fund

If the employer has established a provident fund to which the employer and worker make matching contributions, the employer is not required to pay a gratuity to that worker for the period during which the provident fund has been in existence. In Sindh and Khyber Pakhtunkhwa, the amount distributed from the provident fund must not be less than the amount of gratuity that would have been paid to the worker had there been no provident fund.

Misconduct

Any worker terminated for misconduct that is proven in accordance with the law, after a proper inquiry at which the worker is given a right of hearing, is not entitled to any gratuity except the amount standing to their credit in the provident fund, including the contributions of the employer to such fund.

Practical aspects

It is common practice for employers to obtain a waiver and release from liability from workers whose employment is terminated at the time of the payment of benefits.

Additional benefits introduced in Punjab and Balochistan

The laws regulating Shops and Establishments, Terms of Employment and factories, as applicable in the province of Punjab, have been substantially amended to extend several additional protections to adolescents, such as restrictions on working overtime, the fixing of work hours and the maintenance of a specific register relating to adolescents at the workplace. Furthermore, the Shops and Establishments law of Punjab has imposed obligations on employers to ensure that employees are:

- properly vaccinated;
- not required to lift excessive weight;
- provided with a canteen facility; and
- provided with separate toilets for male and female employees.

Similarly, the province of Balochistan has recently introduced revised versions of the Factories Act and Shops and Establishments law, as applicable to said province, incorporating extensive protections and benefits specifically for adolescents.

Managers and Supervisors

The termination of employment of other employees who fall within the ambit of labour laws requires either the employer or the employee to give one month's notice in writing, or the employer to give payment in lieu thereof.

In practice, employers obtain a waiver and release of liability and standard indemnities from employees who are not classified as workers whose employment is terminated. In appropriate cases, employers also obtain non-compete, non-disclosure and non-solicitation undertakings from employees on termination, where the contract of employment does not otherwise so provide.

4.5 Employee Representations

The law requires workers to be represented, and to be consulted by management. There is no corresponding requirement in relation to employees who are not workers.

The applicable legislation is the Industrial Relations Act, which has separately been enacted by every province and by the federal Parliament. It applies to workers who are employed in the Islamabad Capital Territory and by any employer that carries on business in more than one province or territory of Pakistan.

Unions and Collective Bargaining Agents (CBAs)

All Industrial Relations Acts entitle workers employed in an establishment or an industry to form and join a trade union. The purpose of trade unions is to regulate relations between workers and between workers and employers, and, in the case of unions in respect of industries, to impose restrictive conditions on the conduct of any trade or business. A trade union whose members comprise at least a specified proportion of the total workers employed by the establishment (varying between 20% and 33%, depending on which Industrial Relations Act is applicable) is entitled to be registered as a CBA. The CBA's role is to:

- negotiate with the employer on the terms and conditions of employment;
- represent workers in any dispute with the employer;
- declare strikes; and
- suggest names of workers for representation on the boards of trustees of provident funds and workers' profit participation funds (required by legislation to be established by industrial undertakings that meet certain specified thresholds).

Works Councils

Works councils are made up of representatives of the management and the workers, and are required to be established in every establishment employing at least 50 workers. The council is a forum for discussions between management and workers on matters affecting the welfare of workers, such as working conditions, health and safety.

Workers' Participation in Management of Factories

Workers in factories employing 50 or more persons are entitled to nominate (where there is a CBA) or elect representatives to the management committee. Such representatives have the right to participate in meetings of the management committee, except those that discuss commercial or financial transactions. Management is required to seek the advice, in writing, of workers' representatives before taking any decision regarding HR policies, changing physical working conditions, training, recreation and welfare, regulation of working hours and breaks, and other matters relating to the conduct of workers at the factory.

Joint Management Board

The Industrial Relations Acts applicable to Khyber Pakhtunkhwa, Balochistan and the Islamabad Capital Territory and employers carrying on business in more than one province or territory of Pakistan require the management in every factory owned by a company and every other factory in which 50 persons are employed to set up a joint management board with at least 30% worker representation. The board is required to attend to matters relating to improving productivity and efficiency, remuneration methods and providing minimum facilities to workers employed through third-party contractors. The joint management board may call for information about the working of the company from management.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

Income Tax

Salary is defined under the Income Tax Ordinance, 2001 (ITO) as any amount received by

an employee from employment, whether of a revenue or capital nature. Salary is chargeable to income tax on progressive rates. For tax year 2024 (1 July 2023 to 30 June 2024), the highest tax bracket applies to annual salaries of above PKR6 million. Under the ITO, employers are obliged to withhold tax from salaries paid to employees.

Professional Tax

Persons engaged in any profession, trade, calling or employment are required to pay professional tax to the provincial government. Companies are charged professional tax on the basis of their paid-up capital, while factories and certain commercial establishments are charged on the basis of the number of their employees. The rates of tax for service providers are fixed. This tax is required to be paid annually.

Social Security Contributions

Employers of workers (as defined in **4.1 Nature of Applicable Regulations**) are required to contribute to the Employees' Social Security Fund. The prescribed contribution on the part of the employer is 6% of the wage limits determined by the government, with reference to the applicable minimum wage.

Employees' Old Age Benefits Contributions

Employers of workers (as defined in **4.1 Nature of Applicable Regulations**) who employ at least five persons are required to contribute to the Employees' Old Age Benefits Fund in respect of every worker in their employment. In provinces other than Sindh, the threshold for the application of the Employees Old Age Benefit Act, 1976 to an employer set up after 1 July 2006 is the employment of 20 persons. The current prescribed rate of contribution for employers is 5% of the minimum wage and 1% for workers.

5.2 Taxes Applicable to Businesses

Companies are subject to a number of taxes, depending on the nature of their business. The major taxes levied are described below.

Income Tax

A company resident in Pakistan is liable to pay the prescribed rate of income tax on its global income. The rate of tax applicable to the taxable income of a company in Pakistan (other than a banking company) is currently 29%, while the tax rate applicable to small companies is currently 20%.

High-earning persons including companies are also required to pay super tax on their total income, regardless of whether it is exempt from income tax, subject to final tax at a lower rate or earned from a business subject to a special regime of income tax (such as insurance, the exploration and production of petroleum, banking or the trading of listed securities). The rate of such super tax for tax year 2024 ranges from 1% to 10% of such total income on a sliding scale of PKR150 million to over PKR500 million.

Furthermore, the Finance Act 2023 levies an additional tax on any company that has made windfall income, profits or gains due to any economic factor(s) during the three years preceding tax year 2023 and onwards. The federal government has been authorised to determine the business sectors to which such tax will apply and the rate of such tax, not exceeding 50% of such income, profits or gains.

Certain kinds of income of a company are subject to income tax separately at lower rates of 15% to 25%, such as dividend and interest income.

In addition, companies are subject to withholding obligations on a number of payments, including payments for goods and services, interest, dividends, royalties to resident persons and payments to non-residents. Companies are also required to pay advance income tax when making a number of different kinds of payment, including for imports and electricity bills. Such taxes are usually adjustable against the tax liability of the person from whose income they are withheld or collected.

General Sales Tax

Sales tax (a value-added tax on the sale of goods) is levied under the Sales Tax Act, 1990 at the rate of 18% (unless a different rate of tax is applicable thereto under the 1990 Act) on local supplies and the import of goods.

Sales Tax on Services

Sales tax on services is levied under provincial legislation on the provision and receipt of specified services within such province. The standard rates of sales tax on services range from 13% to 16% of the value of service. For instance, in the province of Sindh, the sales tax on service (other than the telecommunication sector) is chargeable at 13%. See **9.1 Upcoming Legal Reforms** regarding the development of a unified tax return for sales tax on both goods and services.

Customs Duty

Customs duty is leviable under the Customs Act 1969 on goods that are imported into Pakistan. A regulatory duty under the Customs Act 1969 is also chargeable on certain goods imported into or exported from Pakistan. The rates of custom duty and regulatory duty on various goods are set out in the First Schedule of the Customs Act 1969.

Excise Duty

Federal excise duty is levied under the Federal Excise Act 2005 on specified goods produced or manufactured in Pakistan, imported into Pakistan, manufactured in non-tariff areas and brought to tariff areas for consumption and on certain services. The general rate is 15%, except where otherwise provided in the Act.

Infrastructure Cess

Each of the four provinces of Pakistan levy infrastructure cess under legislation enacted for that purpose on goods entering or leaving a province. In Punjab, such cess is also levied on goods manufactured, produced or consumed in the province.

Organisation for Economic Co-operation and Development – Pillar Two Solution

Pillar Two of the Organisation for Economic Co-operation and Development's Two Pillar solution has not been implemented in Pakistan.

5.3 Available Tax Credits/Incentives

Income Tax Credits and Incentives

The ITO allows a tax credit for foreign income tax not exceeding the lesser of the foreign income tax paid and the amount of local tax payable on such income. Other tax credits are available under the ITO for the following, subject to applicable requirements:

- investment by greenfield industrial undertakings engaged in manufacturing or ship-building in new machinery, buildings, equipment, hardware and software, except self-created software and used capital goods;
- persons engaged in coal mining projects in Sindh supplying coal exclusively to power generation projects; and
- start-ups as defined in the ITO for the tax year in which the start-up is certified by the

Pakistan Software Export Board and the next two tax years.

Taxpayers are also allowed tax credits in respect of such withholding or advance taxes as may have been paid by them during the tax year and which are allowed to be adjusted under the terms of the ITO.

Other incentives are available under the ITO, including most notably:

- an initial depreciation allowance of 25% in respect of new plant and machinery, which may be taken advantage of in the first year in which a person first uses this for purposes of business or the year in which commercial production is commenced, whichever is later; and
- a first-year depreciation allowance of 90% in respect of plant, machinery and equipment installed for the generation of alternate energy by an industrial undertaking set up anywhere in Pakistan.

In addition, the Second Schedule to the ITO contains numerous specific tax exemptions or incentives that have been introduced over time to meet specific policy objectives of the federal government. For instance, the income of companies establishing power generation projects in accordance with the policies of the federal government is exempt from taxation if certain conditions in the exemptions are complied with.

Special Economic Zones

Enterprises set up in special economic zones set up under the Special Economic Zones Act, 2021 are entitled to the following benefits:

- a one-time exemption from customs duties and taxes on the import of plant and equipment (except motor vehicle and their parts) into the zone for installation in the zone, subject to verification by the Board of Investment; and
- an exemption on taxes on income for zone enterprises for a period of ten years commencing from the date of commencement of commercial production.

Special Technology Zones

Profits and gains of zone enterprises are exempt from income tax for a period of ten years from the date a licence is issued by the Special Technology Zones Authority.

Export Processing Zones

The incentives available to businesses established in export processing zones include the duty free import of machinery, equipment and material, and an exemption from sales tax on input goods, including electricity. Under certain conditions, zone enterprises are allowed to sell up to 20% of products manufactured by them to customers within Pakistan.

5.4 Tax Consolidation

Under Section 59AA of the ITO, a holding company and any wholly owned subsidiaries thereof may opt to be subjected to income tax as one fiscal unit. The facility of group taxation may only be exercised by companies that are incorporated in Pakistan.

5.5 Thin Capitalisation Rules and Other Limitations

The rules of thin capitalisation are provided under Section 106 of the ITO, which stipulates that, when the foreign debt to foreign equity ratio of a foreign-controlled resident company (at least 50% of the ownership of which is held by any non-resident person(s)) exceeds 3:1 at any time during a tax year, a deduction that would

otherwise apply to the profit on debt (ie, interest) paid by the company in that year would not be allowed on that part of the debt which exceeds the foregoing ratio, and any amount in excess thereof would be included in the taxable income of such company.

The above rule on thin capitalisation applies to all foreign controlled companies incorporated in Pakistan, excluding financial institutions, banking companies and branches of foreign companies in Pakistan.

5.6 Transfer Pricing

Section 108 of the ITO read with Chapter 6 of the Income Tax Rules 2002 (the "2002 Rules") sets out the rules in relation to transfer pricing that are applicable to transactions undertaken between associates or related parties in Pakistan. These rules give the Commissioner of the Federal Board of Revenue the power to distribute, apportion or allocate income, deductions or tax credits between the associated or related persons as is necessary to reflect the income that the persons would have realised in an arm's length transaction.

Under the 2002 Rules, the following methods may be followed by the Commissioner for the purposes of determining an arm's length result:

- the comparable uncontrolled price method;
- the resale price method;
- the cost-plus method; or
- the profit split method.

5.7 Anti-evasion Rules

Anti-avoidance or anti-evasion rules are prescribed under the ITO, Section 109 of which defines a "tax avoidance scheme" as "any transaction where one of the main purposes of a person in entering into the transaction is the avoidance or reduction of any person's liability to tax under this Ordinance".

For these purposes, "reduction in a person's liability to tax" means a "reduction, avoidance or deferral of tax or increase in a refund of tax and includes a reduction, avoidance or deferral of tax that would have been payable under this Ordinance, but are not payable due to a tax treaty for the avoidance of double taxation".

Powers of the Commissioner

As part of the anti-avoidance rules, the Commissioner may determine a person's liability to tax by:

- recharacterising a transaction or a part thereof that may have been entered into under a tax avoidance scheme;
- disregarding a transaction for not having a substantial economic effect;
- recharacterising a transaction where the form of the transaction does not reflect the substance;
- disregarding an entity in Pakistan (for tax year 2018 onwards) that, inter alia, has been set up as a part of tax avoidance scheme; or
- from tax year 2018 onwards, treating a place of business in Pakistan as a permanent establishment, if said place fulfils the conditions specified in the definition of permanent establishment.

6. Competition Law

6.1 Merger Control Notification

Requirement to Obtain Clearance

Section 11(2) of the Competition Act, 2010 requires clearance to be sought from the Competition Commission of Pakistan (CCP) where an undertaking intends to acquire the shares or

assets of another undertaking, or where two or more undertakings intend to merge the whole or part of their business, and meet the pre-merger thresholds prescribed under the Competition (Merger Control) Regulations, 2016 (the "Merger Regulations").

The Competition Act applies to undertakings across the world and to all actions and matters that take place in Pakistan and distort competition in Pakistan. Therefore, clearance is not required to be sought in respect of an acquisition or merger that meets the pre-merger thresholds but to which the Competition Act does not apply.

Where a pre-merger clearance requirement applies, the merger parties may not proceed with the merger or acquisition unless clearance is obtained from the CCP.

Relevant Definitions

The term "merger" is defined to mean "the merger, acquisition, amalgamation, combination or joining of two or more undertakings or part thereof into an existing undertaking or to form a new undertaking; and the expression 'merge' means to merge, acquire, amalgamate, combine or join, as the context may require". Furthermore, the term "acquisition" has been defined as "any change of control of any undertaking by way of acquisition of shares, assets or any other means".

Pre-merger Thresholds

Merger parties (excluding asset management companies, for which different thresholds apply) are not required to make an application for clearance from the CCP unless:

- the value of gross assets of the undertaking, excluding goodwill, is not less than PKR300 million, or the combined value of the undertaking and the undertaking(s) whose shares are proposed to be acquired or the undertakings being merged is not less than PKR1 billion;
- the annual turnover of the undertaking in the preceding year is not less than PKR500 million, or the combined turnover of the undertaking and the undertaking(s) whose shares are proposed to be acquired or the undertakings being merged is not less than PKR1 billion;
- the transaction relates to the acquisition of shares or assets of the value of PKR100 million or more; or
- in the acquisition of shares by an undertaking, if an acquirer acquires voting shares, which – taken together with voting shares, if any, held by the acquirer – shall entitle the acquirer to more than 10% of voting shares.

If either of the first and second and either of the third and fourth thresholds listed above are applicable to the respective merger or acquisition and the Competition Act applies, it is necessary to seek the approval of the CCP, unless the transaction is exempted under Regulation 5 of the Merger Regulations.

6.2 Merger Control Procedure

Timing

Pre-merger applications are required to be filed by the undertakings concerned as soon as they agree in principle or sign a non-binding letter of intent to proceed with the merger.

Forms and Filing Fee

The application is required to be made in the form prescribed by the CCP, along with all supporting documents and payment of the requisite fee. The fee is set on a sliding scale in proportion to the turnover of the merger parties. The highest fee slab is PKR4.5 million and applies where the

turnover of the merger parties exceeds PKR10 billion.

First Phase Review and Timing

The CCP conducts a first phase review to make a preliminary assessment of whether the transaction should be allowed. Under the Competition Act, the CCP is required to decide the application within 30 days of receipt by issuing an order allowing the merger or initiating a second phase review, failing which the CCP is deemed not to have any objection to the merger. The CCP treats the 30-day period as commencing only upon receipt of a complete application and, as a matter of practice, considers the 30-day period to consist of 30 working days. As the CCP may request further documentation, thereby rendering the previously submitted application incomplete, parties ordinarily wait for the decision of the CCP.

Second Phase Review and Timing

If the CCP decides to initiate a second review, it may require the merger parties to provide further information. The CCP is required to decide the second review within 90 days of receipt of the requested information, failing which it is deemed that the CCP has no objection to the merger.

6.3 Cartels

Section 4 of the Competition Act applies to anti-competitive agreements and practices, which are defined as agreements or decisions in respect of the production, supply, distribution, acquisition or control of goods or the provision of services that have the object or effect of preventing, restricting or reducing competition within the relevant market. Under Section 4(1), such agreements and practices are prohibited unless exempted by the CCP.

Section 4(2) of the Competition Act provides an illustrative, non-exhaustive list of anti-competitive agreements and practices, which include actions typical of cartels in relation to the production, distribution or sale of goods or services, such as:

- fixing prices and quantities;
- imposing other restrictive conditions;
- dividing markets;
- limiting technical development or investment; and
- collusive tendering or bidding.

Other anti-competitive agreements and practices listed in Section 4(2) include making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Under Section 9 of the Competition Act, the CCP may exempt anti-competitive agreements and practices that contribute substantially to production or distribution, promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, or whose benefits clearly outweigh the adverse effect on competition.

6.4 Abuse of Dominant Position

The Competition Act prohibits any undertaking from abusing a dominant position. The “dominant position” of one undertaking or several undertakings in a relevant market is deemed to exist if such undertaking(s) has or have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers, and the position of an undertaking will be presumed to be dominant if its share of the relevant market exceeds 40%. An abuse

of dominant position is deemed to have been brought about, maintained or continued if it consists of practices that prevent, restrict, reduce or distort competition in the relevant market.

Section 3(3) of the Competition Act provides the following non-exhaustive list of practices that constitute abuse of a dominant position:

- limiting production or sales, and implementing unreasonable increases in prices or other unfair trading conduct;
- price discrimination by charging different prices for the same goods or services for different customers in the absence of an objective justification that may justify different prices;
- tie-ins, where the sale of goods or services is made conditional on the purchase of other goods or services;
- making conclusions of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of the contracts;
- applying dissimilar conditions to equivalent transactions for other parties, placing them at a competitive disadvantage;
- predatory pricing, driving competitors out of a market, preventing new entry and monopolising the market;
- boycotting or excluding any other undertaking from the production, distribution or sale of any goods or the provisions of any service; and
- refusal to deal.

7. Intellectual Property

7.1 Patents

Patents are regulated under the Patents Ordinance 2000, Section 7 of which stipulates that "an invention is patentable if it is new, involves an inventive step and is capable of industrial application".

Length of Protection

The prescribed term in respect of a registered patent is 20 years from the date of filing of the application for registration.

Registration of Patents in Pakistan

An application for registration of an invention for a patent may be filed at the Patent Office by submitting:

- the prescribed forms for regular applications and applications under the Paris Convention for the Protection of Industrial Property (the "Convention"); and
- the specifications of the invention.

After the application is accepted, it is advertised in the official gazette.

A notice of opposition may be filed by a third party opposing the patent application on the grounds set out under Section 23 of the Patent Ordinance. If no opposition is received, the applicant is required to file a prescribed form, after which the patent is "sealed" and granted to the applicant.

Enforcement and Remedies

A patent holder may initiate proceedings of infringement at the Intellectual Property Tribunal against any person who unlawfully makes, sells or uses their duly registered patented invention or counterfeits it. In certain instances, patents may also be enforced by the Controller of Patents. In suits involving the infringement of patents in Pakistan, the tribunal may grant, inter alia, damages, injunctions or accounts.

7.2 Trade Marks

Trade marks are governed in Pakistan under the Trade Marks Ordinance 2001 read with the Trade Mark Rules 2004. The term "trade mark" is defined under Section 2 (xlvii) of the Ordinance as "any mark capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings".

Length of Protection

A trade mark is registered for a period of ten years from the date of application, and is renewable for further periods of ten years.

Process for Registration of a Trade Mark in Pakistan

An application to register a trade mark of goods or services of a particular class may be filed with the Trade Marks Registry in the prescribed form, along with:

- a cover letter requesting the registration of the proposed mark;
- representation of the proposed mark;
- an affidavit containing the prescribed undertakings in relation to the proposed mark; and
- a power of attorney by way of Form TM-48 if the applicant wishes to appoint an authorised agent for the registration of the proposed mark.

The registrar then examines the documents. After acceptance of the application, the proposed mark is advertised in the Trade Marks Journal and is subject to any opposition from any person, to which the applicant may respond within a period of up to one month. If any objection is filed, the Registrar – at their discretion and after giving both the opponent and the applicant an opportunity to be heard – may either approve or reject the registration. Upon approval of the registration, the applicant is provided with a certificate of registration.

Enforcement

A proprietor of a registered trade mark may institute proceedings against the infringement of their registered trade mark at the Intellectual Property Tribunal. Furthermore, the proprietor of a "well-known" trade mark in terms of the Convention is also entitled to restrain by injunction the use in Pakistan of a mark that is identical or deceptively similar to the well-known trade mark in the following circumstances:

- in relation to identical or similar goods or services, where the use is likely to cause confusion; or
- where such use causes dilution of the distinctive quality of the well-known trade mark.

Remedies

In suits involving the infringement of trade marks in Pakistan, the tribunal may grant reliefs of, inter alia, damages, injunctions, accounts or otherwise as are available in respect of the infringement of any other proprietary right. For well-known trade marks, the holder is entitled to injunction only.

Recent Developments

The Trade Marks Ordinance, 2001 has recently been amended by the Trade Marks (Amendment) Act, 2023 to, inter alia, incorporate the provisions of the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (the "Madrid Protocol"), which has been ratified by Pakistan.

The Trade Marks (Amendment) Act, 2023 incorporates necessary provisions to the Trade Marks Ordinance, 2001 to enable local proprietors in Pakistan to seek registration of their respective

trade marks in the relevant contracting states that are signatories to the Madrid Protocol, by filing a unified application of registration, subject to the provisions of the Ordinance. Foreign entities also have the ability to designate Pakistan in their applications for the recognition of their respective trade marks in the country through the International Bureau of the World Intellectual Property Organization.

7.3 Industrial Design

The term "design" has been defined in Section 2I of the Registered Designs Ordinance 2000 as "features of shape, configuration, pattern ornament applied to an article by any industrial process or means, being features which in the finished article appeal to and are judged solely by the eye, but does not include a method or principle of construction or features of shape or configuration which are dictated solely by technical and functional considerations".

For the purposes of the 2000 Ordinance, the term "article" means "any article of manufacture and includes a part of an article if made and sold separately".

Length of Protection

The prescribed term in respect of a registered design is ten years from the date of registration. The initial period of protection may be extended for a further two periods of ten years each.

Procedure for Registration

A regular or Convention application may be made in a prescribed form (the Convention application must be filed within six months of the first application filed in the Convention country) at the Patent Office. Such application must be accompanied by the drawings, photographs or a specimen, an affidavit and a separate form if the design is in respect of any set of articles that will be made on the requisite form. A copy of the representation or specimen of the design filed in the Convention country must be filed with the application or within three months of the application. Upon acceptance of the application, the registrar supplies the applicant with a certificate of registration.

Enforcement and Remedies

Any person aggrieved by infringement of their registered design may initiate proceedings against the infringer at the Intellectual Property Tribunal. Relief available to the proprietor of registered designs includes injunctions and damages.

7.4 Copyright

Copyrights are governed by the Copyright Ordinance 1962 read with the Copyright Rules of 1967, in terms of which the term "copyright" entails exclusive rights in, inter alia, literary, dramatic or musical, artistic or cinematographic works.

Length of Protection

Copyright in respect of any literary, dramatic, musical or artistic work (other than a photograph) published in the name of and within the lifetime of the author subsists for 50 years, starting from the beginning of the calendar year immediately following the year in which the author dies. In all other cases, the copyright in the works subsists for a period of 50 years from the beginning of the calendar year in which that work is published.

Steps for Registration of a Copyright in Pakistan

An application for registration of a copyright may be filed with the Registrar by way of a prescribed form. Upon submission, the application is examined by the Registrar. If such application pertains to artistic work, it is published by the applicant

in a newspaper where the applicant resides or carries on business, whereafter the application remains open to any objection by any person on specified grounds for a period of 30 days from the submission of the application. Upon being satisfied with the particulars of the application, the Registrar registers the work of the applicant in the Register of Copyrights and issues a certificate of registration.

Enforcement and Remedies

Copyrights may be enforced in Pakistan by way of filing a suit with the Intellectual Property Tribunal. A proprietor may also approach the police to seize the infringing material. In suits involving the infringement of copyrights in Pakistan, the tribunal may grant reliefs of, inter alia, damages, injunctions or accounts, or reliefs as are otherwise available in respect of the infringement of any other right.

7.5 Others

In addition to the IP rights discussed throughout the rest of **7. Intellectual Property**, Pakistan also recognises other intellectual property, such as layout designs of integrated circuits (protected under the Registered Layout-Designs of Integrated Circuits Ordinance, 2000) and plant breeders' rights (protected under the Plant Breeders' Rights Act, 2016).

However, rights to any information of a confidential nature (such as trade secrets) do not have statutory protection in Pakistan, but may be protected by contractually binding the persons to whom such information is disclosed.

PIP 2023 sets out that the Intellectual Property Organisation will establish a window for the facilitation of foreign investors, to assist companies in obtaining patents, trade marks and copyrights, and to respond expeditiously to requests for enforcement of infringements.

8. Data Protection

8.1 Applicable Regulations

Data Protection

There is currently no generally applicable data protection legislation in Pakistan.

The Prevention of Electronic Crimes Act 2016 (the "2016 Act") regulates various kinds of electronic crimes and mechanisms for investigation, prosecution and adjudication in relation to offences committed electronically.

While the 2016 Act criminalises the unauthorised access, sale, use and transmission of data, it does not specifically regulate the rights and obligations of controllers and processors of data in Pakistan.

Disclosure of Information

The disclosure of personal information that has been obtained by any person as part of a lawful contract or otherwise in accordance with the law is also prohibited under the 2016 Act to the extent that such disclosure is made without the consent of the person concerned, or if such data is disclosed with the intent to cause – or knowing that it is likely to cause – harm, wrongful loss or gain to any person or compromise the confidentiality of such data.

8.2 Geographical Scope

The 2016 Act extends to every citizen of Pakistan and to any act committed outside Pakistan by any person, provided that such act constitutes an offence in terms of the 2016 Act and affects any person or property located in Pakistan.

8.3 Role and Authority of the Data Protection Agency

Pakistan does not currently have any enforcement agency or authority with the specific purpose of regulating and protecting data. The Federal Investigative Agency has been designated by the federal government to investigate offences prescribed under the 2016 Act. The Pakistan Telecommunication Authority has also been conferred limited powers under the 2016 Act.

9. Looking Forward

9.1 Upcoming Legal Reforms

Development of Unified Tax Return for Sales Tax on Goods and Services

Pakistan's tax power is distributed between federal and provincial governments. Federal taxes include customs duty, sales tax on goods, excise duty and most income and capital gains taxes. Sales tax on services is provincial. Both are value-added taxes with inter-adjustable input liability but different compliance requirements.

In April 2021, the Federal Board of Revenue and provincial revenue authorities agreed to enable taxpayers to file a single National Sales Tax Return (NSTR) for all sales tax. Further legislation is required by Parliament and provincial assemblies to harmonise sales tax legislation, and technical issues need to be resolved in order for the NSTR to become operational. The NTSR will substantially reduce the compliance burden.

Provincial sales tax laws sought to tax services originating and received in the province, leading to double taxation issues. The federal and provincial governments issued nearly identical Place of Provision of Services Rules to determine the place of provision for specific services like advertising, insurance, franchising and the transportation of goods. This is a positive development and will help to settle conflicts on the taxation of services provided from one province to another.

Data Protection Bill

The Prevention of Electronic Crimes Act 2016 criminalises the misuse of personal data (including personal data processed by a third party in its capacity as a service provider) without consent (see **8. Data Protection**), but there is currently no generally applicable data protection legislation in Pakistan.

The Ministry of Information and Technology has finalised the Personal Data Protection Bill 2023 (the "PDP Bill"), but it is yet to be passed by the Parliament.

If and when enacted, the PDP Bill shall provide for and regulate the processing of personal data, confer rights on data subjects and restrict data controllers from processing personal data without the consent of the data subject. The PDP Bill proposes the establishment of a National Commission for Personal Data Protection with the power to, inter alia, seek information from data controllers in respect of data processing, impose penalties for non-compliance and non-observance of data security practices and order a data controller to take such reasonable measures as it may deem necessary to remedy any failure to implement the provisions of the PDP Bill once promulgated.

Companies Regulations 2024

The SECP has recently promulgated the Companies Regulations, 2024, which aim to facilitate both local and foreign companies operating in Pakistan by providing a consolidated and updated framework for company incorporation, compliance, reporting, licensing, group registration,

buyback of shares and registration of intermediaries. The streamlined process is expected to make it easier for companies to navigate regulatory requirements.

With the promulgation of the regulations, the SECP has also launched the ezfile online portal (replacing the e-services system) in an attempt to provide a comprehensive regulatory platform designed to facilitate easy compliance with the regulations and provide a centralised system for companies to fulfil their regulatory obligations, reducing the administrative burden and improving efficiency.

Cannabis Control and Regulatory Authority Ordinance, 2024

The Cannabis Control and Regulatory Authority Ordinance, 2024 represents a landmark legislative development in Pakistan, aimed at regulating the cultivation, extraction, refining, manufacturing and sale of cannabis derivatives for medical and industrial purposes. This ordinance establishes the Cannabis Control and Regulatory Authority (CCRA), a dedicated body tasked with overseeing the legal cannabis industry in Pakistan. Ordinances are temporary legislation that lapse within 120 days unless enacted by Parliament. Before making any decisions, businesses will look to see whether the Ordinance is enacted as an Act of Parliament.

Arbitration Bill

In 2023, the Chief Justice of Pakistan's Supreme Court directed the formation of the Arbitration Law Review Committee to prepare a new Arbitration Bill to modernise Pakistan's arbitration regime. In May 2024, the Committee finalised a draft Arbitration Bill, which seeks to align Pakistan's arbitration framework with international standards, particularly the UNCITRAL Model Law.

The Bill is inspired by the arbitration laws of India and other common law jurisdictions, and covers both international and domestic arbitration across Pakistan. It distinguishes between international commercial arbitration and domestic arbitration, allowing greater party autonomy and less court intervention for international arbitrations. The Bill promotes arbitration by limiting challenges to the arbitral process, clarifying arbitrability, streamlining arbitrator appointments and providing for interim measures by courts and tribunals. Importantly, it limits the scope for setting aside awards, making awards automatically enforceable unless set aside or suspended. The Bill is currently with the Federal Law Minister to be placed before Parliament for enactment; if passed, it will significantly modernise Pakistan's arbitration regime.

PARAGUAY

Law and Practice

Contributed by:
Néstor Loizaga, Veronica Franco, Eduardo Ammatuna and Erika Bañuelos
FERRERE

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Authors

Néstor Loizaga is a partner at FERRERE at its Paraguay offices. He specialises in foreign direct investment, complex commercial agreements, joint ventures, distribution contracts, complex mergers and acquisitions, banking and finance law, and corporate and commercial law. He advises diverse multinational companies and multilateral credit organisations. Néstor is "top ranked" by Chambers and Partners.

Veronica Franco is a partner at the Paraguay office in Asunción and specialises in complex corporate and financial transactions. She also leads the competition practice of FERRERE, having been involved in more than half of the merger control proceedings submitted before the competition authority in Paraguay in the last year. In the corporate and financial areas, she has been principally involved in matters related to M&A, foreign investment and the launching of new products, project finance, joint ventures, commercial and distribution agreements, bilateral and syndicated loans, and securities issuance in the local and international capital markets. Veronica is ranked in Chambers' Global Guide.

Eduardo Ammatuna is a partner at FERRERE, and leads the fluvial practice at the firm's Paraguay office, advising multinationals of the stature of Cargill, Seacor (Interbarge) and Trafigura (Impala) on their fluvial operations using the Paraguay–Paraná Riverway. This includes assistance on highly complex matters, such as regulatory processes related to authorisation of companies as ship-owners, obtaining and renewing all permits and licences required to operate Paraguayan-flag river vessels, ship-owner corporate restructurings, and flag registry cessations. Eduardo has developed a practice in security businesses, assisting a major player in this area on the process of organising in Paraguay and obtaining authorisation as a private security company.

Erika Bañuelos has been a member of FERRERE's Paraguay office since 2015 and leads the firm's tax and customs practice in Asunción. She advises on corporate restructuring, investment regimes, and day-to-day queries raised by clients seeking to optimise the tax impact of their operations in the country. In addition, she assists clients with administrative and contentious administrative matters related to tax and customs. Her previous professional experience includes participating as a litigator against the tax administration in emblematic tax refund cases. She has been ranked as "associate to watch" by the prestigious firm Chambers and Partners since its 2019 edition.

FERRERE

Asunción
Torres del Paseo
Torre 1 Nivel 25
Avda. Santa Teresa N° 2106
Paraguay

Tel: +595 21 318 3000
Email: nloizaga@ferrere.com
Web: www.ferrere.com

1. Legal System

1.1 Legal System and Judicial Order

Paraguay has a civil law legal system. The basic organisation of the judicial order in Paraguay is the Supreme Court of Justice, Appeal Courts and Lower Courts.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Paraguay has a strong legal framework supporting and promoting foreign investments. Law No 117/91 "On Investments" guarantees a free exchange regime without restrictions for the entry and exit of capital, as well as for the remittance abroad of dividends, interest, commissions, and royalties for the transfer of technology or other items, which are subject to the taxes applicable by law in Paraguay. The country allows the free contracting of investment insurance within its jurisdiction and abroad, and the establishment of joint ventures.

Furthermore, there are no requirements to record with Central Bank investments or remittance of capital required for investments, settle imports and exports with the Central Bank, or liquidate currency. All investments can flow through the private banking system.

2.2 Procedure and Sanctions in the Event of Non-compliance

There is no applicable information in this jurisdiction.

2.3 Commitments Required From Foreign Investors

There is no relevant information in Paraguay.

2.4 Right to Appeal

The right to appeal is not applicable in Paraguay.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

Most legal entities operating in Paraguay are organised as:

- branches of foreign companies;
- joint stock corporations;
- limited liability companies; or
- simplified joint stock companies (EAS).

Joint stock and limited liability companies must have at least two shareholders, who may be either individuals or legal entities. They do not have a minimum share capital and the liability of the shareholders/quotaholders is limited to the capital owned.

Joint stock corporations require:

- a board of directors and a comptroller;
- annual shareholders' meetings to approve the financial statements; and
- the maintenance of corporate books.

Joint stock corporations offer greater conveniences for the transfer of shares and the appointment of new members to the board of directors, in comparison with limited liability companies.

The administration of a limited liability company does not require corporate books. The representation of the limited liability company is carried out by a management team appointed by the quotaholders in the by-laws. However, limited liability companies lack the conveniences of joint stock corporations; the transfer of shares and

the appointment/cessation of managers require an amendment of the by-laws.

Except for financial, banking, insurance, stock exchange, and currency exchange activities (which can only be carried out by a joint stock corporation), from a commercial perspective, there are no differences regarding the activities in which joint stock corporations or limited liability companies can engage. However, the EAS are limited to commercial activities, except those subject to special regulations such as liberal activities of individuals, educational services, mining activities, oil, or other extractive activities.

A branch allows the foreign parent company to conduct business in Paraguay without creating a new legal entity. The parent company must appoint a legal representative and allocate operating capital to the branch. This corporate form does not require keeping corporate books. On the other hand, the liability for the acts of the branch extends to the parent company.

Simplified joint stock companies can be incorporated with a single shareholder (whether an individual or legal entity, national or foreign) and share characteristics with joint stock corporations – corporate books and approval of fiscal year, but they do not require a comptroller. However, various procedures that are already available and implemented for the other forms of legal entities are not yet available for EAS.

3.2 Incorporation Process

The incorporation of any of the legal entities must be instrumented in a public deed certified by a Public Notary (except the EAS incorporated with a single form) and registered at the Paraguayan public registries, prior to the issuance of a report from the corporate surveillance entity. The legal entities acquire legal personality upon registration at the Public Registry of Legal Entities and Commerce and can engage in commercial activities from the registration before the tax authority to obtain the tax ID. This process takes between two to four months.

3.3 Ongoing Reporting and Disclosure Obligations

In Paraguay, private companies are subject to reporting and disclosure obligations. The specific filing obligations and requirements vary depending on the corporate form. Some key filing obligations are:

- Changes of management – any change of management in a limited liability company or a branch office, such as the appointment or cessation of managers/legal representatives, requires its registration in the Paraguayan public registry. On the other hand, the shareholders' meeting that appoints or dismisses the board of directors in a joint stock corporation or an EAS must be submitted to the corporate surveillance entity. In all cases, an update before the General Directorate of Legal Entities and Structures and the tax authority is required.
- Changes of shareholders/quotaholders – any change of quotaholders in a limited liability company requires its registration in the Paraguayan public registry. On the other hand, the transfer of shares in a joint stock corporation or an EAS must be submitted to the corporate surveillance entity. In all cases, an update before the General Directorate of Legal Entities and Structures and the tax authority is required.
- Amendment to articles of incorporation – any amendments made to the articles of incorporation of a legal entity must be filed with the public registry. This includes changes

to the corporate name, registered address, share capital, purpose, or any other significant provisions outlined in the articles, such as a change of management or quotaholders in the limited liability company. Furthermore, the public deed must be registered before the corporate surveillance entity and the information of the legal entity must be updated before the General Directorate of Legal Entities and Structures.
- Approval of financial statements – legal entities are required to prepare and submit annual financial statements, including balance sheets, income statements, and cash flow statements, to the annual shareholders meeting in the first quarter of the year. This meeting must be filed before the corporate surveillance entity.
- Allocation of profits – all forms of legal entities must inform the tax authority of the allocation of profits, if any, approved in the annual meeting or by any other competent body.
- Update before the General Directorate of Legal Entities and Structures – legal entities are required to disclose information about the legal entity, its shareholders/quotaholders, authorities, and their ultimate beneficial owners. This information must be reported annually before 30 June or within 15 days of any change, and failure to comply with the disclosure requirements can result in penalties or other legal consequences.

3.4 Management Structures

Legal entities in Paraguay typically follow a one-tier management structure. The law only requires one management body. Nevertheless, it is possible that legal entities create additional bodies such as supervisory or counselling/advisory boards in their by-laws.

The number and duration of the administrative bodies is determined in the by-laws. The directors/managers/legal representatives may or may not be shareholders. They are eligible for re-election and their appointment is revocable. They can be Paraguayan or foreigners with legal residence in the country.

3.5 Directors', Officers' and Shareholders' Liability

In Paraguay, the liability of legal representatives (directors for a joint stock corporation and managers for a limited liability company) is primarily governed by the Paraguayan Civil Code. The legal representatives are responsible for the administration of the legal entity. They are agents and are jointly and severally liable with the legal entity for the incomplete or deficient performance of their mandate. According to the regulations, legal representatives are accountable to third parties, creditors, and suppliers, as well as shareholders/quotaholders and the legal entity.

Legal representatives must act in accordance with their mandate. Compliance means adhering to the provisions of the by-laws, laws, instructions from shareholders/quotaholders, and generally following the duties of conduct inherent to their position while safeguarding the legal entity's interests. Failure to comply or fulfil their duties, depending on whether it is done with intent, negligence, or fault, may result in their liability to compensate for damages and losses caused.

The liability of legal representatives may be contractual or non-contractual, depending on the case.

All acts carried out by the legal representatives are considered as performed by the company, as

long as they are within their powers or in fulfilment of the corporate purpose. In case of doubt, it will be presumed that the director acted on their own behalf.

In Paraguay, the concept of piercing the corporate veil exists, and under certain circumstances, courts can disregard the corporate entity to hold legal representatives and officers personally liable. However, the conditions and criteria for piercing the corporate veil may vary, and it is subject to judicial interpretation based on the specific facts and circumstances of each case.

4. Employment Law

4.1 Nature of Applicable Regulations

Labour relations in Paraguay are regulated by the Labour Code, Law No 213/1993, and governs the relations between employees and employers and in situations in which there is a clear element of subordination. Employment relationships are regulated, in addition, by collective bargaining agreements, internal working regulations and employment agreements.

4.2 Characteristics of Employment Contracts

The employment contract may be verbal or written; contracts that stipulate a remuneration higher than the legal minimum wage must be in writing.

Regarding its duration, the employment contract may be:

- for a fixed term;
- for an undefined term; or
- for a specific work or service.

The contract entered for a fixed term may not exceed:

- one year in the case of blue-collar employees; or
- five years in the case of white-collar employees.

The contract for a specific work or service will last until the total execution.

4.3 Working Time

There is a maximum working time applicable to salaried employees.

The ordinary working day is:

- 8 hours per day or 48 hours per week for day work (from 06:00 to 20:00);
- 7 hours per day or 42 hours per week for night work (from 20:00 to 6:00); and
- 7.5 hours per day or 45 hours per week for mixed work (which covers periods of time between day and night work).

Daytime overtime hours worked outside the agreed working hours are paid with a 50% surcharge when they correspond to working days, and 100% when they correspond to holidays and rest days. Night-time overtime hours are paid with a 100% surcharge on the value of the night hour.

Overtime may not exceed 3 hours per day; and the total hours worked in a week may not exceed 57 hours per week, including ordinary and overtime hours.

4.4 Termination of Employment Contracts

The termination of individual employment contracts may occur due to the initiative of the

employee or the employer indistinctly, with or without just cause in accordance with the provisions of the Labour Code. The Labour Code establishes a trial period of 60 days during which it is possible to terminate the employment relationship without liability for any of the parties (only the salary corresponding to the days worked, and the proportional Christmas bonus, is paid).

Upon termination of the employment relationship in an undefined-term contract, the employer must pay the employee the outstanding salary corresponding to the days worked, the proportional Christmas bonus, and the amount corresponding to the accrued vacations that are pending to be taken.

In case of unjustified dismissal, the employer must also pay an indemnity equivalent to 15 daily wages for each year of service or fraction of six months, plus an amount, that varies according to the seniority of the employee, of between 30 and 90 daily wages as notice, in case of failure to give prior notice of dismissal. The employee is also entitled to be paid a proportional amount corresponding to vacations not yet accrued in relation to the time worked, according to the employee's seniority in the company.

Upon termination of contracts for a defined term or for work, the salary for the month and the proportional Christmas bonus must be paid. In the event of termination of the contract before the established term, the Paraguayan law establishes that a judge may determine the indemnity, the maximum amount of which may be equal to the remainder of the contract. In practice, in these cases the employee is paid as if it were a contract for an undefined term, paying the notice and the corresponding indemnity according to the time worked.

Collective redundancies are permissible under the same rules as for termination of individual employment contracts – no consultation is required.

4.5 Employee Representations

There is no applicable information regarding employee representations in this jurisdiction.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

In Paraguay, both employees and employers are required to pay taxes in the context of an employment relationship. The specific taxes that must be paid vary depending on the employee's income and the employer's industry – eg, corporate/personal income tax and social security contributions.

5.2 Taxes Applicable to Businesses

Corporate Income Tax (IRE)

The IRE rate is 10% and levies Paraguayan source revenues from activities developed, goods located, or economic rights used in Paraguay, regardless of the nationality, domicile, or residence of the parties involved in the operations or the place where they are held. IRE also considers Paraguayan-sourced income from activities carried out abroad. Nevertheless, to avoid double taxation, taxes paid abroad can be offset against the tax owed in Paraguay.

Value Added Tax (IVA)

The VAT is levied upon the sale of goods and the rendering of services, excluding those of personal character that lend in dependency relations, and the introduction of goods into the country. The standard rate is 10%, with a lower 5% rate applying to supplies of basic foodstuffs,

pharmaceutical products, agricultural products in their natural state, hunting and fishing animals, alive or not, in their natural state, and the transfer of the right to use goods or immovable property. Exports are zero-rated. Exemptions include raw farm products, some fuels, foreign currency, books, and newspapers.

Tax on Dividends and Profits (IDU)

The IDU is levied on the distribution of dividends or profits to the shareholders of a company incorporated in Paraguay. The rates of this tax depend on the place of residence of the partner or shareholder: (i) 8% if resident in Paraguay; or (ii) 15% if not resident in Paraguay. In the case of corporations, the obligation is triggered when the ordinary assembly decides upon the distribution of dividends, regardless of the time of payment. In the case of limited liability companies or entities that do not have the obligation to hold a meeting, the profits will be considered distributed within the term stipulated in their by-laws; if they are not specified in their by-laws, they will be considered distributed in the fourth month after the closing of the fiscal year.

Non-resident Tax (INR)

The INR is levied on income from Paraguayan sources obtained from activities carried out, assets located, or rights economically used in the country by individuals or legal entities not resident in Paraguay. This tax is paid through the withholding that must be applied by the taxpayer paying the income to the non-resident. The general INR rate is 15% and is applied on the net presumed income, calculated on a percentage of the total amount paid to the non-resident. The percentages are stipulated by the Tax Law and range from 30% to 100% of the gross amount paid to entities or individuals domiciled abroad. The effective rates vary from 4.5% to 15% of the amount paid.

The OECD Two-Pillar Solution

Paraguay has approved the OECD's Two-Pillar Solution that addresses the tax challenges resulting from the digitalisation of the global economy, along with 141 other jurisdictions. Implementation has not yet been announced, as of 16 July 2024, and a domestic top-up tax is yet to be confirmed.

5.3 Available Tax Credits/Incentives

Tax Incentive Regime for Domestic and Foreign Capital Investment

This regime promotes investments and reinvestments of capital through the granting of tax special benefits. To obtain these benefits, the foreign investor must submit an investment project to the Ministry of Industry and Commerce, and the analysis of the project is carried out by a commission composed of representatives of the regulatory agencies of the investment industry.

Free Trade Zone Regime

The Free Trade Zone Regime constitutes a duly delimited area within the customs territory, where free trade activities are allowed free of customs duties and fiscal taxes established for the rest of the country. The main objective is to develop business centres, prevent smuggling and piracy, and increase the competitiveness of exports.

To obtain the free-zone concession, the petitioners must submit their application to a council integrated by members of the Ministries of Finance, Industry and Commerce, and Public Works. Once the petition is approved, a contract is signed with the executive branch, which establishes the terms and conditions of the concession.

Maquila Regime

The Maquila Regime establishes that companies incorporated abroad hire the services of a com-

pany domiciled in Paraguay to carry out, totally or partially, industrial or service processes, to transform, manufacture, repair, or assemble foreign products.

The objective of is to export to the international market. However, the companies can allocate a small proportion of their production to the local market, without losing the tax exemptions they enjoy.

The Maquiladora companies can operate under any of the figures established in the national legislation, which may be natural or legal persons, national or foreign, domiciled in the country. There is no limitation regarding the participation of capital. It can be a 100% national, foreign, or joint venture.

Maquila operations are exempt from all taxes or duties affecting the process, from the import of raw materials and inputs, and the manufacture of the products, to the export of the products, including VAT. In return, a single tax must be paid, with a rate of 1% on the value added in Paraguay or on the invoice value, whichever is higher.

National Product and Employment Regime

This regime establishes a mechanism to support domestic industrial production by granting a certification for the use of national labour and products, which grants a 20% preference margin on public bids.

National Automotive Policy

The National Automotive Policy seeks to promote domestic and foreign capital investment by granting tax benefits for the manufacture and/or assembly of motorised and non-motorised vehicles, and automotive parts.

The benefits are 0% tariff on the importation of capital goods, raw materials, components, kits, parts, pieces and spare parts, and manufacturing supplies that are required for the manufacture of motorised and non-motorised vehicles, and automotive parts.

It also grants an advantage in the liquidation of VAT. Reducing the taxable base to 20% of the amount of the customs value. That is, the CIF value of the goods.

Investment Guarantees, Promotion of Employment Generation, and Economic and Social Development

This regime promotes and protects capital investment in the creation of industries and other productive activities in Paraguay.

To apply the incentives of this law, the beneficiaries must submit the investment project to the study of an investment council. Once this council approves the granting of benefits to the project, a contract is signed with the state.

Among the benefits of this regime, it is possible to agree on the invariability of the IRE tax rate for a period of ten years as from the start-up of the corresponding company, which corresponds to the start of operations corresponding to the investment project. The term of invariability of tax rates may be extended to fifteen years if the investment project exceeds its maximum value.

Special Regime for the Importation of Raw Materials

The main objective of this regime is to promote investment and stimulate existing industrial companies, by means of tariff liberations, improving the competitiveness of industries as a source of employment and adding value.

The tax benefit is that of importing raw materials at a 0% tariff for each import.

To be a beneficiary of this regime, companies must apply, indicating in an Annual Production Program the raw materials to be imported during the year and describing which will be the final products resulting from these imports. Additionally, there is a duty to report, bi-monthly, the quantities produced during the two-month period. To date, all these procedures are carried out electronically.

5.4 Tax Consolidation

Paraguayan tax law does not allow tax consolidation.

5.5 Thin Capitalisation Rules and Other Limitations

As per thin capitalisation rules, the deduction of royalties, technical assistance, and interest paid to related entities are topped at 30% of the net income before deducting these amounts.

5.6 Transfer Pricing

IRE taxpayers are obligated to apply special rules that regulate transactions between related or linked companies since 2021.

The breach of such rules allows the tax authorities to revise and determine the revenues and deductions considering the values that would have been used by independent parties in comparable operations.

The Tax Law basically provides that the arm's length principle must be observed in order to determine whether a transaction is being conducted between related entities at market value or not. To assess this, the following methods are introduced:

- comparable uncontrolled price (CUP);
- resale price method (RPM);
- cost plus method (CPM);
- profit split method (PSM);
- residual profit split method (RPSM);
- transactional net margin method (TNMM); and
- market value method (MVM).

5.7 Anti-evasion Rules

The INR rules were created to prevent the avoidance of IDU. This is the only specific rule for this purpose.

6. Competition Law

6.1 Merger Control Notification

Paraguayan Competition Law No 4,956 (the "Competition Law") was enacted in 2013 and its regulatory Decree No 1,490 in 2014. The Competition Law introduces, for the very first time, a concentration control mechanism in Paraguay. The governmental agency responsible for enforcing the competition framework in Paraguay is the National Antitrust Commission (*Comisión Nacional de la Competencia* or "CONACOM" for its Spanish acronym). The members of the commission were formally appointed in 2015 and the commission has only been operative since then.

An economic concentration (either merger or acquisition) is considered to take place by the exercise of control over a legal entity previously independent, as a result of the acquisition of part or all of its assets, and is subject to merger control clearance to the extent that one of the following thresholds is reached if:

- after giving effect to the transaction, the parties involved, considered together, have a

market share equal or over 45% of a relevant market; or
- the parties' combined turnover in Paraguay in the last fiscal year is equal to or exceeds SMM100,000 (approximately PYG228.932 billion; USD33.22 million; and EUR28.16 million).

6.2 Merger Control Procedure

Below are the details of the merger control process in Paraguay.

Preliminary Review

From the date of filing, the competition authority has a period of five business days to verify that the notification has all the documentation and basic information required by the regulation.

In case the competition authority considers that information is missing, the notifier is requested to submit the missing information within five working days.

After this submission, the competition authority has again a period of five working days to verify that the information submitted complies with the requirements. After this, the formal review of the file begins.

Estimated time: five to 15 working days.

Formal Review

The formal review comprises two stages: (i) first stage of review lasting 30 working days; and (ii) second stage of review lasting 60 working days.

In either of the two stages the competition authority may request information from the notifier, the effect of which is to suspend the review period until the required information is submitted (the competition authority may ask follow-up questions on the information submitted in each case).

Estimated time: three to six months.

6.3 Cartels

The Paraguayan Competition Law generally provides that all individual or concerted practices, activities, or recommendations that aim to restrict, limit, hinder, distort or impede existing or future competition in a relevant market are prohibited. Further, the Paraguayan Competition Law prohibits collusive practices, understood as concerted or consciously parallel agreements, decisions, or practices, regardless of whether they are written or verbal, formal or informal, that have as their purpose to produce or possibly produce the effect of preventing, restricting, or distorting competition in all or part of the market.

The Paraguayan Competition Law provides a non-exhaustive list of agreements that are deemed to be anti-competitive by default, regardless of the market power of the parties involved:

- price fixing, including collective price fixing agreements in the context of associations;
- limitation, restriction, or control of the market, including production, distribution, technical development, or investments, to the detriment of competitors or consumers;
- market partition, including customers or supply sources;
- discriminatory commercial conditions;
- subordination of products or services to the acceptance of supplementary benefits that, by their nature or in accordance with commercial usage, have no relation whatsoever with the purpose of such contracts;
- collusive bidding;

- restrictions on production or sales, in particular through market shares;
- the concerted refusal to acquire; and
- unjustified collective denial of participation in an agreement, or admission to an association, which is decisive for competition.

When analysing practices, activities, or recommendations that aim to restrict, limit, hinder, distort, or impede existing or future competition in a relevant market, the Paraguayan Competition Law provides that the Competition Authority must take into consideration:

- the result in economic efficiency gains for the economic agents involved within the scope of the Paraguayan Competition Law;
- the possibility of obtaining such efficiencies from alternative practices; and
- the benefit passed on to consumers.

The Paraguayan Competition Law neither provides for a standard of analysis of what can be interpreted as an economic efficiency gain, nor has limits for such interpretation.

6.4 Abuse of Dominant Position

The Competition Law prohibits the abuse of a dominant position by one or more undertakings unless the CONACOM considers that there are efficiency gains resulting from the agreement, and that these gains offset the market restrictions.

According to the Competition Law, an undertaking has a dominant position whenever it is not exposed to substantial and effective competition. This is analysed taking into account:

- the substitutability of the product in the relevant market;
- regulatory restrictions limiting market access of other products;
- number of offerors or suppliers to the market; and
- the market power of the undertaking to unilaterally influence price formation or restrict supply or offer in the market.

The Paraguayan Competition Law does not contemplate a percentage of market share to define a dominant position. Note, however, that, based on recent precedents issued by the Competition Authority, a market share of 45% is to be considered a preliminary indication of market dominance, notwithstanding that further analysis is to be made based on the criteria indicated above.

7. Intellectual Property

7.1 Patents

The Patent Regime in Paraguay is regulated by Law 1.630/00 “On Invention Patents” (“Patent Law”) which specifically protects the rights of owners of inventions and utility models.

Patent Law provides that new inventions of products or processes that involve an inventive activity and are susceptible to industrial application shall be patentable.

The following items are not patentable:

- simple discoveries, scientific theories, and mathematical methods;
- purely aesthetic creations;
- economics, business or advertising schemes, plans, principles, or methods, and those related to purely mental or intellectual activities or game matters;
- computer programs considered in isolation;

- the diagnostic, therapeutic, and surgical methods for treatment of people or animals; and
- the different ways of reproducing information.

In addition, inventions whose commercial exploitation must be impeded to protect public order or morality, to protect health, life of people or animals, and to preserve plants, to prevent serious environmental damage, and plants and animals, except micro-organisms, and essential biological processes to produce plants and animals, which are not non-biological or microbiological processes, are excluded from patent protection. The products or procedures included in the state of the art developments cannot be patented either.

The patent gives the owner the exclusive right to use it for a maximum period of 20 non-extendable years, counted from the date of filing the application for registration with the Paraguayan Intellectual Property Office (PYIPO). As of the third year of the application for registration, annual fees must be paid to keep the same in force.

Any person or company, national or foreign, can obtain a patent upon request and undergo the process before the PYIPO. The application form includes the information of the applicant and the inventor (name and address), the denomination and description of the invention, claims, and drawings (if applicable), and a summary of the invention.

The application will remain in the secrecy period for 18 months if priority has been invoked. Once this period has expired, the PYIPO will carry out a formal examination. The applications without a priority invoked will also undergo the formal examination approximately 18 months after the filing date. Once the formal examination is approved, the PYIPO will issue a publication order. The application must be published for five days in a newspaper of mass circulation.

Once the publications are filed, the application will be ready to undergo the substantive examination. If no official objections are issued or third-parties' observations are filed, the application will be deemed as ready to be granted. A new publication order shall be issued at this point. The requirements of the first publication must be met. Once all the requirements established by law have been fulfilled, the PYIPO authority will grant the patent registration certificate.

Once a patent is granted in Paraguay, the patent holder can enforce their rights against any unauthorised use or infringement. The enforcement and remedies related to patent infringement include:

- Civil action to claim the right to the patent – when a patent for an invention or utility model has been applied for or obtained by someone who had no right to obtain it, or to the detriment of another person who also had such right, the affected person may claim their right before the competent judicial authority requesting that the pending application or the patent be transferred, or that the affected person be recognised as applicant or co-owner of the right. In the same action, the affected person may claim compensation for damages.
- Civil action for infringement of patent rights – the owner of a patent may initiate, before the competent judicial authority, the corresponding actions against whoever carries out acts in violation of the rights arising from the patent.

As precautionary measures, the judicial authority may order:

- the immediate cessation of the acts constituting the infringement;
- the seizure of the products resulting from the infringement and of the materials, instruments, and means that served to commit the infringement; and
- the suspension of the importation or exportation of the products, materials, or means that served to commit the infringement.

7.2 Trade Marks

The Trade Mark Regime in Paraguay is regulated by Law 1.294/98 "Trademark Law", which specifically protects the rights of owners of trade marks.

The Trademark Law defines the trade marks as any signs used to distinguish products and services. They may consist of one or more words, mottos, emblems, monograms, seals, vignettes, reliefs, names, fanciful word forms, letters and numbers in distinctive shapes or combinations, and arrangements of colours, labels, containers, and wrapping. They may also consist of the shape, presentation, or packaging of products or their containers, wrapping, the mode, or place in which the corresponding products or services are provided.

Trade mark registrations are valid for ten years and may be extended indefinitely for further ten-year periods, provided that their renewal is requested within the year preceding their expiry and subject to completion of the same formalities as those required for registration. The new term shall be computed from the date of expiry of the preceding registration.

The registration process starts with the filing of the application. Once the application is filed, the PYIPO carries out a formal examination to confirm whether the application complies with all the formal requirements established in the Trademark Law, including the registration of the POA before the PYIPO.

Once the formal examination is approved, the publication order is issued. The application must be published for three days, after which the opposition term starts running (60 working days). If no opposition is filed, the application undergoes the substantive examination. Providing that no precedents are found and no registrability objections are raised, the application is declared as ready to be granted. On the assumption that no opposition is filed, and no objections are raised, the registration process should take about 12 to 18 months.

Trade mark licences: the pertinent agreements must be recorded before the PYIPO in order to have legal effects vis-à-vis third parties.

Once a trade mark is registered in Paraguay, the owner can enforce their rights and take action against trade mark infringement. The enforcement and remedies related to trade mark infringement include civil and criminal actions.

The resolution issued by a judicial authority may order:

- the immediate cessation of the infringing acts;
- the payment of the costs and expenses of the lawsuit and compensation for damages;
- the seizure of the products resulting from the infringement including the containers, packaging, labels, printed or advertising material and other materials, and means that were mainly used to commit the infringement;

- the suspension of the importation or exportation of the products, materials, or means that served to commit the infringement; and
- the prohibition of the importation or exportation of the infringing products, materials, or means.

Paraguayan trade mark law also provides for administrative proceedings, opposition, cancellation for non-use, and nullity actions to address disputes and maintain the integrity of the trade mark registration. Additionally, the owners of registered trade marks can also file criminal complaints with a public prosecutor who must investigate the alleged criminal action.

7.3 Industrial Design

The Industrial Designs Regime in Paraguay is regulated by Law 868/81 "On Industrial Designs" ("Industrial Designs Law"), which specifically protects the rights of owners of industrial designs.

The Industrial Designs Law defines "industrial designs" as any combination of lines and colours, and "industrial model" as any plastic form of lines and colours, intended to give a special appearance to an industrial or handcrafted product and that serves as a prototype for its manufacture.

Industrial designs may be registered if they are new and do not serve only to obtain a technical effect, nor are contrary to public order, morality, and good customs.

The grace period for filing applications from disclosure is six months.

The protection granted by registration shall last for five years from the filing date of the application and may be renewed for two consecutive periods of the same duration.

The application form may be filed before the PYIPO along with the description of the design, its graphic representation, and the class of product for which the design will be used.

The registration process starts with the filing of the application. Once the application is filed, the PYIPO carries out a formal examination to confirm whether the application complies with all the formal requirements established in the Industrial Designs Law, including the registration of the POA before the PYIPO.

Once the formal examination is approved, the files undergo the substantive examination. Once the substantive examination is approved, the publication order is issued. The application must be published for one day, after which the opposition term starts running (60 working days). Providing that no opposition is filed, no precedents are found, and no registrability objections are raised, the application is declared as ready to be granted, and the registration process should take about 12 to 18 months.

The owner of an industrial design registration may file a judicial action before the Civil Court to request the cease-and-desist of the acts constituting the infringement and the compensation for damages. Criminal complaints can also be filed by the owners of registered industrial designs.

7.4 Copyright

Copyright refers to the legal protection granted to the creators of original literary, artistic, and intellectual works. It gives the creators exclusive rights over their works, allowing them to control the reproduction, distribution, display, and adaptation of their creations.

Copyright protection is generally based on the life of the author plus 70 years after their death and shall be transmitted according to the provisions of the Civil Code. For collective works, the protection lasts for 70 years from the date of death of the last co-author.

Copyright registration is not mandatory for acquiring protection. Copyright protection is automatically granted to original works as soon as they are created, and the registration is merely declaratory and not constitutive of rights. However, registering a copyright can be beneficial as it provides evidence of ownership and facilitates enforcement actions. The registration process may involve applying, along with providing the necessary documentation (a copy of the work) before the Copyright Office from the PYIPO.

Paraguayan copyright law provides various enforcement mechanisms and remedies to protect copyright holders. If a copyright infringement occurs, the copyright owner can initiate legal proceedings before the competent court. Remedies for copyright infringement may include:

- Injunctions – the court may issue an injunction to prevent further infringement or to order the cessation of ongoing infringement.
- Damages – copyright owners may be entitled to claim monetary damages, which can include actual damages suffered due to the infringement and any profits gained by the infringer.
- Seizure and destruction – the court may order the seizure and destruction of infringing copies or materials.
- Criminal penalties – in cases of intentional and commercial copyright infringement, criminal penalties such as fines and imprisonment may be imposed.

7.5 Others

The software and databases are protected by the provisions of the Copyright Law.

The protection of undisclosed information related to industrial and trade secrets is governed by Law 3283/07 “Of protection of undisclosed information and test data for pharmaceutical records” (“Law 3283/07”).

The mentioned law provides that legitimate holders of undisclosed information, whether natural or legal persons, may prevent unauthorised access, disclosure, use, or acquisition of such information by unauthorised third parties in a manner contrary to honest commercial practices.

Undisclosed information refers to:

- all kinds of technical, commercial, or business information that is secret in the sense that it is not generally known or easily accessible to persons who normally deal with the type of information in question;
- knowledge that has commercial value because it is secret; and
- content that has been subject to reasonable measures by the natural or legal person who produced it or legitimately controls it to keep it secret.

The protection conferred by Law 3283/07 does not create exclusive rights in favour of whoever possesses or has developed the information. Unauthorised access by third parties to the information, contrary to honest commercial practices, shall entitle the possessor to exercise the relevant civil actions.

8. Data Protection

8.1 Applicable Regulations

The processing of personal data is regulated by the Protection of Personal Credit Data Law No 6534/20 ("Data Protection Law").

Currently there is a draft bill under consideration in Paraguay's legislature that aims to establish a more comprehensive regulatory framework for data protection.

The Paraguayan Constitution (1992) provides that all individuals have the right to:

- access:
  (a) public databases containing general information; and
  (b) information and data about them or their assets, regardless of whether it is stored in public or private data registries;
- know how and for what purposes their personal information is being used; and
- request a court order to update, rectify, or delete inaccurate or unlawfully impacting personal data that infringes upon their rights (Article 135, Constitution).

8.2 Geographical Scope

The Data Protection Law governs the handling of personal data collected or stored within Paraguay. This encompasses various information systems, files, and records, as well as physical, electronic, and digital databases utilising manual, automated, or partially automated methods for collecting data.

Processing and transferring personal data without the explicit, informed, and voluntary consent of the data subject is deemed illegal.

Regarding the transfer of personal data to third-party countries or international organisations, such transfers are only permissible if they meet the requirements, guarantees, or exceptions stipulated in the Data Protection Law.

The Data Protection Law is currently undergoing further regulation to provide more precise guidelines. The regulatory agencies have not yet established the mechanisms necessary to determine whether third-party countries and international organisations meet the minimum required standards. Under current regulations, data transfer agreements for cross-border transfers do not need to be approved by the relevant Paraguayan authorities.

8.3 Role and Authority of the Data Protection Agency

Two regulatory agencies, namely the Central Bank of Paraguay (BCP) and the National Secretariat for Consumer and User Defense (SEDECO), have been designated under the Data Protection Law to act as supervisory authorities. These agencies possess the power to impose sanctions in cases of violations, but they do not have the direct authority to enforce monetary penalties (fines) against non-compliant entities or individuals who refuse to pay voluntarily.

In situations where fines imposed under the Data Protection Law are not voluntarily paid, the enforcing authority would need to initiate legal proceedings to seize and sell assets belonging to the liable entity or individual in order to effectively collect the fines. Additionally, the affected party has the option to file a civil lawsuit through the regular courts to claim damages.

Within their respective areas of expertise, the BCP and SEDECO can impose various sanctions on those found responsible for breaches

of the Data Protection Law through prior administrative proceedings. These sanctions include the following.

- Issuing a warning.
- Imposing fines of up to 15,000 minimum wages (approximately USD200,000), which may be doubled for repeat offences. In cases where the liable party is an individual or a company with an annual turnover exceeding PYG6 billion (approximately USD822,000), the fines can reach up to 50,000 minimum wages (approximately USD675,000).
- Suspending activities related to data processing for a maximum of six months, along with prescribing necessary corrective measures.
- Disqualifying individuals from holding positions or roles within the financial and credit system, as well as credit information bureaus, for a duration ranging from six months to five years.
- Temporarily closing operations related to data processing if the corrective measures ordered by the regulatory authority are not implemented after the suspension period.
- Immediately and definitively shutting down operations that involve the processing of sensitive data.

These administrative sanctions can be graduated by the competent enforcement authority based on their severity. It is important to note that these sanctions are independent of any corrective or precautionary measures issued by the authorities to protect the public interest as outlined in the Data Protection Law. It is possible to appeal these sanctions before the administrative court.

9. Looking Forward

9.1 Upcoming Legal Reforms

From an employment law perspective, no major reforms are expected in Paraguay.

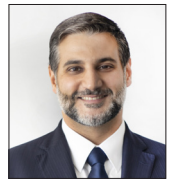
Trends and Developments

Contributed by:
Néstor Loizaga, Guillermo Jover and Claudia Arietti
Ferrere Abogados

Ferrere Abogados is the only multi-jurisdictional purely South American law firm. It has 200 attorneys in Bolivia, Paraguay, and Uruguay. In Paraguay, FERRERE is the largest legal services firm and specialises in all branches of law, with experience in diverse industries and services. Clients and international publications acknowledge its experience and leadership, and each year it receives recognition and awards from the chief international professional services raters. It is a fully merit-based organisation that does not allow relatives of partners to join the firm. It has an early mandatory retirement policy and places great emphasis on promoting diversity, with women making up 30% of the partnership. Premier regional and international companies, as well as global law firms, take advantage of the firm's regional footprint to complete their coverage of the region. FERRERE is ranked by Chambers and Partners as a leading firm in Chambers' Global and Latin America Guides.

Authors

Néstor Loizaga is a partner at FERRERE at its Paraguay offices. He specialises in foreign direct investment, complex commercial agreements, joint ventures, distribution contracts, complex mergers and acquisitions, banking and finance law, and corporate and commercial law. He advises diverse multinational companies and multilateral credit organisations. Néstor is "top ranked" by Chambers and Partners.



Guillermo Jover is a specialist in corporate and financial matters and has experience at both regional and international levels. He is currently based at FERRERE's Asunción office. Guillermo holds a juris doctor degree from the University of Virginia (USA). Prior to his law studies, he obtained his BA in Government and Latin American Studies from The University of Texas in Austin (USA). He also completed studies at Université Paris-Sorbonne (Paris IV) and is an SJD candidate at Universidad Católica Nuestra Señora de la Asunción (Paraguay).

Contributed by: Néstor Loizaga, Guillermo Jover and Claudia Arietti, **Ferrere Abogados**

Claudia Arietti is a senior associate in FERRERE's Asunción office. Her practice focuses on corporate and financial transactions for local and international clients. She has experience advising multilateral organisations, local and foreign companies, and financial institutions in matters involving foreign investment, commercial and distribution agreements, bilateral and syndicated, secured and unsecured loans, banking, and stock exchange regulations. Claudia was a Fulbright Scholarship grantee during her LLM studies at New York University, and in 2016 she was awarded an NYU International Finance and Development Fellowship at the International Institute for Sustainable Development (IISD) in Geneva.

FERRERE

Asunción
Torres del Paseo
Torre 1 Nivel 25
Avda. Santa Teresa N° 2106
Paraguay

Tel: +595 21 318 3000
Email: ferrereparaguay@ferrere.com
Web: www.ferrere.com

Contributed by: Néstor Loizaga, Guillermo Jover and Claudia Arietti, **Ferrere Abogados**

Paraguay's Green Revolution: The Boom of Sustainable Forestry and the Voluntary Carbon Market

Paraguay's rich biodiversity and vast expanses of native forests have positioned it as a significant potential player in the global voluntary carbon markets in the past few years. Now, large investments in the country's forestry sector stand to make Paraguay the next frontier in commercial forestry as well.

A study conducted by Paraguay's National Forestry Institute (INFONA) in the Eastern Region of Paraguay revealed that the forestry sector now has a current installed processing capacity of over one million cubic metres of timber per year, with more than half of that still being unutilised; this supply shortfall in forestry products has incentivised investment in new plantations. Additionally, a USD4 billion investment for the construction of a world-class pulp mill near the city of Concepción was announced in 2020 and is currently under development. This project alone contemplates the acquisition of more than 200,000 hectares of land for new tree plantations, which will include large-scale efforts to restore native forest ecosystems. The project will also increase the country's processing capacity, as well as the local demand for raw materials. In fact, the demand for new plantations created by this single project (Paraguay's largest private investment to date) already exceeds the current supply.

The forestry sector's positive prospects have not gone unnoticed by the investment community. A local fund was opened in the Asunción stock exchange last year, the first of its kind to be exclusively focused on new commercial forest plantations, while investors from more than 25 countries across five continents have recently invested in a USD325 million impact forestry fund which will target a portfolio of 80,000 hectares and the planting of more than 60 million trees in Eastern Paraguay. Even more recently, the World Bank announced a USD100 million facility for Paraguay's public second-tier financial agency, AFD, to be destined to finance investments in the country's forestry sector, through sector-specific lines of credit and seed capital for the creation of a forestry fund that looks to mobilise an additional USD300 to 400 million in private investment for the sector.

In a launching event for this facility, authorities from both the World Bank and the Paraguayan government stressed the importance of tying new investments in forestry to sustainable practices. Among the most discussed mechanisms to guarantee that sustainability remains at the core of any future forestry projects in Paraguay are certified carbon credit projects, which can be incorporated into forestry projects by including native forest restoration or conservation components, reconverting degraded pasture lands, or incorporating agroforestry schemes to existing farming operations.

As companies throughout the world are pledging to achieve net-zero greenhouse gas (GHG) emissions, voluntary carbon markets present an increasingly attractive opportunity. The global south, in general, has tremendous potential to supply the world with carbon credits for these markets, and as the forestry sector grows and local demand for tree plantations increases in Paraguay, so will the opportunity to develop ARR (Afforestation, Reforestation & Revegetation) carbon credit projects.

Paraguay's potential as an exporter of carbon credits in the voluntary market is huge. The country has 16 million hectares of land covered by native forests, an area about twice the size

of Austria. In Paraguay's Chaco region, which represents about two-thirds of the total size of the country, legal clearing of forests is taking place at a steady pace, mostly to make room for soy plantations and cattle ranches, currently the options that seem to make most economic sense. Many REDD+ (Reducing Emissions from Deforestation and Forest Degradation) conservation projects are already being developed in the Paraguayan Chaco and are at different stages of the design, verification and registration process and many more will enter the pipeline as local participants gain a better understanding of how the market works, and foreign stakeholders become comfortable with developing projects in the country.

In addition to its large native forest area and growing forestry sector, Paraguay's potential in the voluntary carbon markets is further increased by other factors, including:

- the country's free market economy;
- its openness to foreign investors and equal treatment for foreign investments;
- a simple incorporation process for new companies;
- an attractive tax regime;
- a supportive regulatory ecosystem for carbon credit projects; and
- an easy-to-navigate legal framework.

The Carbon Credit Law, enacted in 2023, represents a significant step towards environmental sustainability and climate change mitigation in the country. This law establishes a legal framework for the creation, certification, and trading of carbon credits, aiming to incentivise reductions in greenhouse gas emissions across various sectors.

Projects can come from forestry and land use, agriculture and livestock, waste, energy and transportation, industrial processes and product use, as long as they demonstrate additionality, meaning that they effectively reduce or capture carbon emissions beyond the baseline of business as usual. In keeping with Paraguay's long-standing tradition of respect for private property, the law makes it clear that rights to carbon credits are, originally, held by the owner of the land or the asset used to generate such carbon credits, and that such rights may be transferred freely by the owner to third parties. The law also exempts the sale of carbon credits from local value-added tax (VAT).

Furthermore, law creates the National Carbon Registry, which is expected to add order and transparency to the local market. The law's enforcement authority is the Ministry of Environment and Sustainable Development (MADES), which has also been tasked with the drafting of the law's implementing decree, which will implement many of the law's requirements and provide further clarification as to the requirements and process of registering, transferring, and accounting carbon credits generated from local projects.

As mentioned, Paraguay has a long history of respect for private property, and there are clear rules governing the transfer of ownership or possession of any real estate property involved in a carbon credit project, whether by purchase, lease, or other mechanism. Local law also allows for the granting by the landowner of an in rem right over the forest surface in favour of a third party – eg, a project developer or investor – effectively separating the ownership of the forests from the ownership of the underlying land. This in rem forest surface right is a useful tool in carbon credit projects, providing project devel-

opers with secure rights over the forest mass, full control over its management and conservation, and protection from any third-party action that may damage, destroy, or in any way affect, the forest mass.

Paraguay has yet to see the limit of its potential in the forestry sector and the voluntary carbon markets. Its unsatisfied demand for sustainable forestry products and welcoming business environment for new investors in the forestry sector, its huge swaths of native forests, and its potential to convert degraded pastures into new forests, naturally make it a potential new frontier in sustainable forestry and in the development of REDD+ and ARR carbon credit projects. This potential is bolstered significantly not only by its free market economy and welcoming attitude towards foreign investors and foreign investments, but also by a positive regulatory landscape, including an attractive tax regime, local institutions supportive of the development of the forestry sector and the voluntary carbon market, and a navigable legal framework, which now included carbon-specific legislation.

Paraguay: Legislative Advances in Renewable Energy

The latest national energy balance report published by the Vice Ministry of Mines and Energy (VMME) in 2022 reveals that 74% of Paraguay's gross energy supply comes from renewable sources. However, there is a high dependence on petroleum derivatives in final energy consumption, posing sustainability challenges.

According to the energy sector report in Paraguay published by the Inter-American Development Bank (IDB) in 2022, one of the sector's challenges is to explore new alternatives for producing energy using unconventional renewable energy (URE) sources. Additionally, the report highlights that unsustainable energy consumption patterns with a high dependence on petroleum derivatives reveal the need for measures in energy efficiency.

Paraguay has abundant natural resources, which will play a crucial role in diversifying the energy matrix, mitigating climate change, and fostering the country's economic growth in line with the Sustainable Development Goals (SDGs).

Recently, legislative advances have been made to promote the development of renewable energy in Paraguay. In January 2023, Law No 6977, "Regulating the Promotion, Generation, Production, Development, and Use of Electrical Energy from Non-Hydraulic Unconventional Renewable Energy Sources" (the "URE Law"), was enacted, and in February 2024, Presidential Decree 1168/2024 further regulating the URE Law was issued. Additionally, in March 2023, a bill aiming to establish a legal framework for the use, storage, commercialisation, distribution, transportation and export of hydrogen (the "Hydrogen Bill") was presented to Congress.

Below, the authors summarise the most relevant aspects of the URE Law and the Hydrogen Bill.

The URE Law

This law aims to promote and regulate the generation and use of electrical energy from non-hydraulic URE sources. URE is crucial for diversifying the energy matrix and reducing greenhouse gas emissions.

Subjects

The production of electrical energy from URE sources can only be carried out by individuals or legal entities domiciled in Paraguay. URE producers can be classified as:

- self-generators;
- cogenerators;
- exporters; and
- generators.

Licence

The law stipulates that URE production with a nominal capacity greater than one megawatt (MW) requires a licence issued by the Ministry of Public Works and Communications (MOPC), through the VMME, and registration in the URE registry. The licence duration is up to 15 years and can be renewed at the request of the licensee.

Self-generators and cogenerators of URE

URE self-generators are licensed to produce electrical energy for their own consumption and can inject surplus energy into the National Interconnected System (SIN).

URE cogenerators are licensed to produce steam or other subsidiary energy for industrial or commercial use along with electrical energy from URE sources and can inject surplus energy into the SIN.

The URE Law establishes conditions and regulations for URE self-generators and cogenerators, including supply limitations, remuneration rates, installation of measurement systems, and connection and reinforcement works.

If URE self-generators or cogenerators need to connect to the SIN, they must sign a contract with the National Electricity Administration (ANDE). This contract will be signed after obtaining the URE licence.

URE generators

Generators are licensed to produce electrical energy from URE sources for supply to ANDE. These generators cannot exceed the capacity allowed by the licence and can sign contracts for up to 15 years. ANDE must acquire energy from URE generators through bidding processes.

URE exporters

URE exporters are licensed to produce electrical energy from URE sources for export purposes.

ANDE must provide non-discriminatory access to the available capacity of its transmission facilities to facilitate international interconnection, provided that using the transmission capacity does not jeopardise the supply to national consumers.

URE exporters must sign a contract with ANDE, outlining the rights and obligations related to the transmission of electrical energy. Additionally, URE exporters will pay a toll to ANDE for the use of transmission lines, based on the contracted available capacity. The toll value will be set by the MOPC, through the VMME, based on ANDE's recommendation.

In case of insufficient transport capacity, the exporter can undertake new works to expand the SIN, which will become ANDE's property.

Incentives

The URE Law provides certain fiscal incentives for individuals and legal entities involved in the production, manufacturing, implementation, and use of energy from URE sources. The MOPC, through the VMME, will annually define the minimum investment amounts required to access these fiscal incentives. To date, no resolution from the VMME setting these amounts exists.

Benefits can be applied for under:

- Law 60/1990;

- Law 117/1991 "Investment Law"; and
- Law 5592/2015 "Investment Guarantees Law".

The benefits are granted for five years, provided the project begins effective execution within one year of project approval. "Effective execution" is defined as making expenditures associated with the project of at least 15% of the total investment.

The benefits extend to the importation and acquisition of equipment, machinery, supplies, and imported accessories necessary for the production of energy from URE sources, including capital goods, civil, electromechanical, and assembly works, and other related services that make up a functional generation plant for producing electrical energy from URE sources. This includes equipment for transforming, transmitting, and interconnecting electrical energy to the SIN.

The regulatory decree of the URE Law mandates that the MOPC, through the VMME, will annually publish a detailed and exhaustive list of the types of equipment and/or machinery eligible for fiscal exemptions. Items not on the VMME published list will not be eligible for fiscal incentives.

Eligible projects for incentives under the URE Law include, upon demonstrating physical, technical, environmental, and financial feasibility, all public, private, mixed, corporate, and co-operative energy production installations from the following sources:

- Wind farms and isolated windmill applications with installed power not exceeding 50 MW in total.
- Any type of electro-solar (photovoltaic) installations at any power level.
- Thermosolar (concentrated solar power) installations of up to 120 MW per plant.
- Power plants using biodegradable biomass gases as the main fuel with installed power not exceeding 80 MW per thermodynamic unit or plant.
- Market for Excess Energy Commercialisation

The Hydrogen Bill

The Hydrogen Bill, still under study, establishes the regulatory framework for activities related to the production, use, commercialisation, storage, transportation, distribution, and export of hydrogen.

Enforcement authority

The MOPC, through the VMME, is the enforcement authority and co-ordinator of the Interinstitutional Hydrogen Table (IHT). The IHT will consist of government institutions to co-ordinate and regulate hydrogen-related activities, especially setting quality and safety standards.

Registry

A single registry for individuals and legal entities engaged in hydrogen value chain activities will be created, implemented by the MOPC, through the VMME, in co-ordination with the Ministry of Industry and Commerce (MIC).

Authorisation regime

Administrative authorisation is required for facilities intended for:

- hydrogen production;
- hydrogen transportation and distribution;
- hydrogen storage;
- hydrogen export; and
- hydrogen commercialisation.

Fiscal incentives
Entities involved in hydrogen-related activities can benefit from fiscal incentives established in Law No 60/90. Hydrogen used as vehicular fuel will be exempt from the selective consumption tax.

Certification
The enforcement authority, together with the Ministry of Environment and Sustainable Development (MADES), will set the conditions and certification scheme for hydrogen in the value chain. Low-carbon and green hydrogen can be certified, with associated incentives regulated.

Decarbonisation Promotion Fund
A fund to promote decarbonisation and develop hydrogen projects is to be created, financed by resources from the National Fund for Public Investment and Development (FONACIDE) or the General Budget of the Nation, as well as contributions from international organisations, inheritances, and donations from individuals, companies, and public or private entities, both national and international. Additionally, fines collected will be allocated to this fund.

Infrastructure

Paraguay faces a significant infrastructure gap that hinders its economic growth and development. Paraguay struggles with inadequate transportation networks, limited access to clean water, and sanitation issues. However, Paraguay has recognised the importance of addressing this issue and has implemented laws such as the Public–Private Partnership Law and Law 5074 (the "Turnkey Law") to help bridge the infrastructure gap.

The PPP Law

Law No 5102/13 (the "PPP Law") on public–private partnerships (PPP) regulates PPP projects for the design, construction and operations of public infrastructure projects and services with a value of at least around USD4 million. The private party may also maintain or operate services associated with the infrastructure.

Projects may be presented by the government but also by private parties (unsolicited proposals).

The financing of the projects may be made by the private party alone or jointly with the governmental agency. Payments are generally linked to performance.

Projects that can be carried out by means of PPP include the following.

- Waterways, dredging, signalling and maintaining the navigability of the Paraguay River or other rivers.
- International airports.
- Construction, rehabilitation and maintenance of national routes and highways.
- Construction, extension and operation of the railway line service.
- Construction and maintenance of national and international bridges.
- Drinking water supply, sanitation services and treatment of effluents.
- Generation, transmission, distribution and commercialisation of electric power.
- Road infrastructure in urban areas.
- Social infrastructure, including hospitals, health centres, educational centres.
- Jails or criminal conviction institutions.
- Improvement, equipment and urban development with the participation of the contracting governmental agency.
- Aqueducts, polyducts, pipelines and gas pipelines.

- Production of goods and provision of services that are carried out by state-owned companies.
- Production and commercialisation of cement.
- Production, refinement and commercialisation of hydrocarbons, fuels and lubricants.
- Telecommunication services.

Recently, Decree No 1467/2024 (the "New Decree") came into force, regulating the PPP Law, and repealing the previous regulation (Decree No 4183/2020). Below, the authors summarise the most important changes of the New Decree.

Role of the Ministry of Economy and Finance (MEF) through the Directorate General of Public Investment (DGIP)

The DGIP, under the Vice Ministry of Economy and Planning of the MEF, will assume the functions of preparation, evaluation, structuring, and development of projects carried out under the PPP modality. This new role as the governing body of PPP policies, programs, and projects was previously performed by the Public–Private Partnership Projects Unit, which depended on the Technical Planning Secretariat.

Option for single-envelope offer submission and evaluation

The New Decree authorises the inclusion in the respective terms of reference of a system for submitting offers that combines:

- the economic offer;
- administrative background; and
- technical and economic evaluations in a single envelope.

However, the previous system of submitting and evaluating offers in two or more envelopes may still be used.

Awarding in the case of a single bidder

While the previous decree required the contracting administration to declare the bidding void if only one offer was submitted, the New Decree allows contracting administrations to award the contract to the sole bidder. This is subject to the justification of the economic and financial aspects of the submitted offer and its subsequent validation by the MEF.

Option to unify contractual guarantees

The New Decree permits the inclusion of both construction phase and operation phase guarantees in a single instrument. Nonetheless, the option to constitute them independently remains valid.

Reduction of project review and evaluation timelines

As a result of the new functions assumed by the MEF, the New Decree reduces the required timelines for the review and evaluation of projects.

Turnkey Projects

The Turnkey Law regulate a particular modality of public procurement for public infrastructure projects in which the bidder may design, construct, equip and finance a project.

The bidders compete for technical quality, price and financing conditions. The offer must comply with a 25% Paraguayan participation requirement, which may consist on services or workforce.

The government issues upon completion of certain milestones, payment certificates or CRPAGOs. The CRPAGOs are issued with the sovereign guarantee of the Paraguayan State and constitute public-external debt of Paraguay. The certificates are irrevocable, unconditional, and assignable. Therefore, the right to receive

payments under the CRPAGOs and the right to receive compensation, in case of early termination of the contract, may be assigned to third parties as collateral for financing purposes (eg, securitisation structures). The assignment of collection rights may be complete or partial and can be done at any time after the execution of the contract with the government agency, provided the assignment is previously authorised by the contracting agency.

The parties may freely choose the applicable law and the respective jurisdiction of the assignment agreement. However, any matter related to the project contract or CRPAGO is governed by Paraguayan law and is subject to the dispute resolution mechanism established in the contract.

Law 5074/13 provides general aspects of the contracting. The main provisions governing each project is determined in the tender documents on a case-by-case basis.

PERU

Law and Practice

Contributed by:
Jesús A. Ramos Angeles, Alvaro Echeandía, Alfred Kossuth Wieland and Rodrigo Varillas Cueto
Thorne, Echeandía & Lema Abogados

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Thorne, Echeandía & Lema Abogados is a multi-service law firm based in Lima that provides high quality legal representation to businesses and private clients. It is a specialised firm in tax law, international trade and intellectual property. Others law practice includes corporate law, labour, M&A, contracts, real estate and administrative law. With over 15 years in the market and a highly specialised team of lawyers, the firm has a proven track record for delivering effective and tailored legal solutions in the most time- and cost-efficient manner. Its main clients are China Harbour Engineering Company (CHEC), Accenture International, Banexcoin, Prom Perú, GWDC Great Wall Drilling Company, Camino Resources, Dell Acqua, Nexa Resources, among others. The firm's lawyers combine sound judgement and vast experience in advising companies of various sizes and business sectors, including some of the key players in local and global markets.

Authors

Jesús A. Ramos Angeles is a partner at Thorne, Echeandía & Lema Abogados, leading its tax practice, providing legal services on corporate tax, tax controversy, intercompany advisory, transfer pricing, international tax and digital taxation. Jesús holds a Master's degree in Corporate Taxation from the Universidad ESAN with top honours. He has postgraduate diplomas in International Tax and Finance from Universidad Carlos III de Madrid, Universidad Complutense de Madrid and Universidad de Lima. He is a professor of postgraduate tax programmes at Universidad ESAN, Universidad del Pacífico and Universidad Peruana de Ciencias Aplicadas.

Alvaro Echeandía is a partner at Thorne, Echeandía & Lema Abogados and head of the industrial and intellectual property department at the firm. He holds a Master's degree in Business Law from the Graduate School of the Universidad de Lima. He has a diploma specialising in Industrial Property from the Robert Schuman University and a diploma in Competition Law, Unfair Competition and Distinctive Signs from the Universidad de Salamanca.

Contributed by: Jesús A. Ramos Angeles, Alvaro Echeandía, Alfred Kossuth Wieland and Rodrigo Varillas Cueto, **Thorne, Echeandía & Lema Abogados**

Alfred Kossuth Wieland is a partner at Thorne, Echeandía & Lema Abogados with extensive experience advising local and foreign companies, and private clients. He specialises in corporate law, M&A, transactional tax, international structuring, and fintech law, among others. Alfred holds a law degree from the Universidad de Lima and an LLM from Duke University School of Law. He also completed a Compliance and Good Corporate Practices Programme at Universidad del Pacifico and a Fintech Programme at Harvard University. He has written several articles in Peruvian and foreign legal publications (including the United Kingdom and Austria).

Rodrigo Varillas Cueto is a partner in the labour law practice at Thorne, Echeandía & Lema Abogados. He provides specialist advice to companies from different economic sectors in labour law, social security, procedural litigation, and conflict resolution. Rodrigo is a lawyer from the Faculty of Law at Pontificia Universidad Católica del Perú and has a Master's degree in Labour Law and Social Security from the IDEC-Universitat Pompeu Fabra. He is the author of "Licencias y Permisos Remunerados o Compensables en el Régimen de la Actividad Privada" (Pacific Institute, 2023) and several academic articles. He has been a professor at the Universidad Nacional Mayor de San Marcos.

Thorne, Echeandía & Lema Abogados

434 José Pardo Avenue
Office 404–405
(Lit One Building)
Miraflores
Peru

Tel: +51 1 3372281
Email: contacto@thelema.pe
Web: www.thelemabogados.pe/en/

Contributed by: Jesús A. Ramos Angeles, Alvaro Echeandía, Alfred Kossuth Wieland and Rodrigo Varillas Cueto, **Thorne, Echeandía & Lema Abogados**

1. Legal System

1.1 Legal System and Judicial Order

Peru has adopted a civil law legal system, which means that the law and regulations are the main source to administer justice in the country. For that purpose, the current regulations are divided in order of relevance from the most important to the least, providing a subordinated legal system.

In the first place, there is the Political Constitution, which establishes the most basic aspects of the Republic, such as fundamental rights and the structure of the government. The current document was created and enacted in 1993 with a social market economy approach. Given its importance, the Constitutional Court was established as an autonomous institution with the sole responsibility of resolving conflicts related to constitutional content, as well as being responsible for the interpretation and control of constitutionality.

Following on from the Political Constitution, there are the International Treaties that Peru has entered into with other countries, laws created by the legislature, laws created by the executive with prior authorisation, and other regulations.

Peru, as a democratic republic, divides its government organisation into three branches with equal hierarchy. Although they have different responsibilities, the government structure is designed to provide checks and balances to prevent any branch from overusing its power. The Executive Power is elected every five years and is represented by the President of the Republic, who selects its own team of ministers.

- The executive has one minister designated to lead each ministry, who is responsible for issuing regulations and has the exceptional power to submit bills to the legislature.
- The legislative power is composed of 130 members of congress who represent the nation in government, with the primary aim of creating laws. Their term lasts for five years and they are elected simultaneously with the President of the Republic.
- The judicial power is the institution that administers justice in accordance with the laws already enacted. However, it can also establish mandatory guidelines such as jurisprudence and binding precedents. The judicial power, adhering to the right to multiple instances in a judicial process, has the following structure:
  - (a) a Superior Court judge resolves in the first instance;
  - (b) the Superior Tribunal resolves the appeal in the second instance; and
  - (c) the Supreme Court will resolve the cassation, that is not a third instance, but an exceptional instance used to correct a misinterpretation of the law.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

In general terms, foreign investments do not require any approval or authorisation by any Peruvian authority. This is because the Peruvian Constitution provides that local and foreign investments are subject to the same conditions.

Peruvian law assures equal treatment before the law to foreign investors and investments; hence, equality of rights and obligations between foreign and national investors is guaranteed.

Likewise, foreign investors are guaranteed respect for their private property, the right to resort to arbitration, and freedom of trade, among other guarantees to protect their investments.

2.2 Procedure and Sanctions in the Event of Non-compliance

Notwithstanding the foregoing, Peruvian law establishes certain restrictions for foreigners for national security and defence purposes.

The Peruvian Constitution provides that foreigners cannot acquire or own assets within 50 kilometres of the borders, unless authorised by a supreme decree issued by the Council of Ministers in cases of public necessity. Failure to comply with such prohibition could trigger expropriation by the Peruvian State.

Along the same line, Peruvian regulations establish restrictions on foreign investments in sectors such as commercial aviation, private security and surveillance, commercialisation of weapons and explosives, radio broadcasting services, maritime transportation of hydrocarbons and water transportation.

2.3 Commitments Required From Foreign Investors

Within the framework of the promotion of foreign investments, local legislation provides the execution of Legal Stability Agreements with the Peruvian State.

The purpose of such agreements is to stabilise the guarantees applicable to the foreign investors with respect to the tax regime, the free availability of foreign currency and the right of free remittance of profits, dividends and royalties.

Foreign investors who execute Legal Stability Agreements must comply with certain requirements: (i) channel the investments through the National Financial System and (ii) make a monetary contribution of at least USD10 million (in the mining and hydrocarbon sectors) and USD5 million (in other sectors).

The term of the Legal Stability Agreements is ten years, except in the case of concessions where the term is subject to the term of the concession. Likewise, any disputes that may arise between foreign investors and the Peruvian State shall be submitted to an arbitration tribunal.

The agreements executed between the Peruvian State and investors have the force of law and cannot be modified unilaterally by any of the parties.

2.4 Right to Appeal

The Peruvian Constitution establishes the plurality of instances as a principle of the jurisdictional function.

In this way, in accordance with the guarantee of equal treatment before the law, foreign investors shall exercise the right of appeal against any judicial decision or administrative resolution applicable to them (complying with the corresponding procedures, formalities and deadlines).

With respect to arbitration, Peru has signed the Convention on the Settlement of Investment Disputes; consequently, foreign investors may submit to arbitration under ICSID rules.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

Sociedad Anonima Ordinaria (SA)

The most common type of corporate vehicle available in Peru is the *Sociedad Anonima Ordinaria* (SA), which is equivalent to a corporation and is suitable for private and public companies, and for every type of business.

The main characteristics of the SA are the following.

- It must be incorporated by at least two shareholders (natural persons or legal entities).
- The liability of the shareholders is limited to their contributions to the capital.
- The duration can be for a determined or indeterminate term.
- There is no legal requirement to allocate a minimum capital; however, depending on the activity conducted by the company (such as insurers, banks and custom agencies), minimum capital allocations can be required. Non-monetary contributions (with the exception of services) and credit rights are also permitted.
- The capital is divided into freely negotiable shares, unless the shareholders decide to limit temporally such right in the by-laws or by a shareholders' agreement. All the shares must be nominative, issued and paid in at least 25% of their nominal value.
- Right of first refusal and tag/drag along rights are permitted.
- The general shareholders' meeting is the supreme corporate power of the company.

Sociedad Anonima Cerrada (SAC)

The SAC, or closely held corporation, is usually associated with small or medium-sized companies and family businesses, although there are no limitations to the amount of the capital or the commercial transactions that can be conducted.

In addition to the previously described main characteristics of the SA, the SAC has the following specific characteristics:

- it cannot have more than 20 shareholders nor list its shares in the Public Register of the Securities Market; and
- all shareholders have the right of first refusal unless the by-laws waive such right.

Having a board of directors is optional.

Sociedad Anonima Abierta (SAA)

The SAA (open corporation) is usually associated with large companies that comply with at least one of the following requirements: (i) have 750 or more shareholders; (ii) have made a public primary offer of shares or obligations convertible to shares; (iii) have more than 35% of the capital owned by one 175 or more shareholders, without considering shareholders whose individual stock does not meet two per 1,000 or more than 5% of the capital; (iv) it is incorporated as an SAA; and (v) all the shareholders with voting rights unanimously approve to adopt such corporate form.

In addition to the previously described main characteristics of the SA, the SAA has the following specific characteristics:

- must register all its shares in the Public Register of the Securities Market;
- is supervised and controlled by the Superintendence of the Securities Market (SMV); and
- the shares cannot be subject to any of the following stipulations (i) limitations to the free transfer of the shares; (ii) any form of restriction to negotiate the shares; and (iii) any right

of first refusal in favour of the shareholders or the company.

3.2 Incorporation Process

The incorporation process takes approximately three weeks and includes the following steps.

- Search and reservation of the corporate name with the local public registry (not mandatory but recommended).
- Subscription of the incorporation minute and by-laws by the founding partners.
- Subscription of the directors' acceptance letters (only if the corporation has a board of directors).
- Payment of the initial capital (in the case of monetary contributions) or issuance of the valuation report (in the case of non-monetary contributions and credit rights).
- Subscription of the public deed with a public notary.
- Registration of the company with the local public registry.
- Activation of the tax number, password and authorisation for the issuance of invoices with the tax authority.
- Opening of the bank accounts.
- Purchase and legalisation of the corporate books.
- Issuance of the share certificates.

3.3 Ongoing Reporting and Disclosure Obligations

Changes to management must be filed and registered with the local public registry. Filing with the tax authority is only required if the representative has tax powers.

Amendment to articles of incorporation must be filed with the local public registry. Filing with the tax authority is only required in specific cases, such as change of name, domicile or corporate purpose.

Financial statements must be approved by the shareholders' meeting and included in the corporation's annual sworn statement filed with the tax authority.

Legislative Decree 1372 establishes the obligation of legal persons and/or legal entities (including private companies) to report the identification of ultimate beneficial owners before SUNAT (Peruvian tax authority). The ultimate beneficial owner is defined as a natural person who (i) holds at least 10% of the capital stock of the legal entity, or (ii) exercises effective control of the legal entity, by means other than ownership, in both cases, directly or indirectly. In case no one is identified under these criteria, it will be the person with the highest administrative position.

The filing of the ultimate beneficiary statement is made gradually according to the deadline established by the tax authority by means of a superintendence resolution.

3.4 Management Structures

One-tier (general manager) and two-tier (board of directors and general manager) management structures are available in the most common legal entities.

A one-tier management structure is only available in an SAC. Two-tier management structures are mandatory in an SA and SAA.

3.5 Directors', Officers' and Shareholders' Liability

Directors are unlimited and jointly liable before the corporation, the shareholders and third parties, for the damages caused by the agreements or acts contrary to the law, the by-laws or those

conducted with intent, abuse of powers or gross negligence.

Managers are liable before the corporation, the shareholders and third parties for the damages caused by failure to fulfil their obligations, intent, abuse of powers and gross negligence. Managers are also liable, jointly with the members of the board of directors, when they participate in acts that trigger the liability of the latter or when, knowing the existence of such acts, do not inform them to the board of directors or the shareholders' meeting.

Peruvian legislation does not include a concept of "piercing the corporate veil". However, some local jurists consider that such doctrine can be applied, exceptionally, in cases of abuse of law and fraud on the legal entity, only if there is no other available solution in the legal framework.

4. Employment Law

4.1 Nature of Applicable Regulations

The Peruvian legal system is governed by the Political Constitution of Peru, which regulates the fundamental right to work, as the basis of social well-being and a means of personal fulfilment. In addition, the Peruvian State, in labour matters, is bound by the standards established in the fundamental conventions of the ILO, which are part of the legal system and of constitutional rank. In relation to these, the ILO Governing Body identified ten conventions, within the full range of international instruments, that were described as "fundamental" to guarantee the basic labour rights of all people in the workplace. Of the ten, eight fundamentals have been ratified by Peru. These ILO conventions deal with: association and syndical freedom and the effective recognition of the right to collective bargaining; elimination of any forced or compulsory labour; effective abolition of child labour; the elimination of discrimination in employment and occupation; and respect and promotion of a safe and healthy work environment.

Peru contemplates the co-existence of labour regimes. The main ones are the general working regime (regulated in the Single Harmonised Text of Legislative Decree No 728, Labour Productivity and Competitiveness Law, approved by Supreme Decree No 003-97-TR), special regime for the micro and small businesses (MYPE), the special agrarian regime (Law No 27360) and the civil construction regime (regulated by various collective conventions by branch of activity). These regimes apply to more than 90% of the formal workers in the private sector.

The establishment of special regimes for the private sector comes, generally, with fewer labour rights in comparison to the general labour regime, which include the following labour social rights and benefits: compensation for time of service (one monthly remuneration for each year of service); legal gratifications (two ordinary remunerations annually); vacations (30 calendar days for each passed year of service); utilities (percentage to be distributed depending on the firm's line of business); minimum vital remuneration (PEN1,025); social security in pensions (at the worker's expense between 12 and 13%) and in health (at the employer's expense of 9% with each worker's monthly remuneration as base).

In matters of occupational safety and health, all economic and service sectors must comply with Law No 29783, Law on Safety and Health at Work, which applies to all employers and employees subject to the labour regime of the private sector, regardless of the nature of their relationship, whether it be training or civil.

4.2 Characteristics of Employment Contracts

The characteristics of an employment contract depend on whether it is an indefinite-term or a fixed-term contract. As a general rule, if the activity to be contracted satisfies a permanent need of the company, it must be hired for an indefinite term; however, the labour law provides exceptions to this rule, provided that the contract corresponds to the type regulated as temporary, occasional, or for specific work or service, and complies with its legal requirements for use. In these cases, the employer must conclude the contract in writing, state the term and objectively support the temporary nature of the contract to avoid labour fraud, the sanction for which is the conversion of the contract to an indefinite one.

The labour law also regulates the possibility of hiring a part-time worker, defined as those whose workday, divided into five or six days (depending on the company's usual working hours), averages less than four hours a day. Such contracts must be concluded in writing and submitted to the Administrative Labour Authority for registration.

4.3 Working Time

The ordinary working day is limited to eight hours daily or 48 hours weekly. However, certain workers aren't constrained to this limit, such as managerial, trusted staff, trusted personnel, and those employees whose work is not under direct supervision (eg, work outside the employer's premises).

Overtime

For workers who are subject to the maximum limit of the ordinary working day, overtime is paid at a rate of 1.25 times the regular remuneration for the first two hours and 1.35 times for any additional hour. Working on a day of rest or holiday is compensated with a 100% surcharge or with the corresponding financial compensation.

4.4 Termination of Employment Contracts

According to the labour law, the employment contract is terminated for the following reasons:

- the death of the worker or employer (if a natural person);
- the voluntary resignation or retirement of the worker;
- the termination of service or work;
- the fulfilment of the resolutory condition and the expiry of the term in contracts legally concluded under modality;
- mutual dissent between worker and employer;
- permanent absolute disability;
- retirement;
- dismissal, in the cases and manner permitted by law; and
- termination of the employment relationship for objective reasons.

Collective Dismissals

Collective dismissal for objective reasons is carried out when at least 10% of the payroll is affected, following the procedure established by law, and reporting to the Administrative Labour Authority, which decides on its approval.

According to the labour law, termination for objective reasons includes the following cases: fortuitous event or force majeure; economic, technological, structural, or similar reasons; the dissolution and liquidation of the company, and bankruptcy; and asset restructuring.

Individual Dismissals

The individual dismissal of a worker who has exceeded the trial period and works four or more

hours daily on average may only proceed if there is a justified cause related to conduct or capacity as contemplated by law and duly verified.

To carry out a disciplinary dismissal for serious misconduct, the employer must send the worker a letter of "prior notice" of dismissal, specifically stating the fault committed, informing the legal basis, explaining the facts and means of proof that substantiate the commission of the infraction, and granting a period of no less than six calendar days for the worker to present a defence in writing in the case of serious misconduct related to work conduct, and 30 calendar days in the case of misconduct related to capacity.

Dismissal without cause or that cannot be proven in the process leads to an indemnity payment for arbitrary dismissal. Workers who have exceeded the trial period established by law and work for four or more hours daily on average are entitled to an indemnity payment for arbitrary dismissal. For indefinite-term contracts, the indemnity amounts to 1.5 remunerations per complete year of service up to 12 remunerations, and for fixed-term contracts, 1.5 remunerations for every month remaining until the contract's expiry date.

In cases of null, unjustified, and fraudulent dismissals, workers may apply to the courts for reinstatement in their jobs and be compensated for the damages caused as a result of the dismissal.

4.5 Employee Representations

Membership of trade unions by workers is optional. Workers have the fundamental right to freedom of association. This right allows workers to organise without the need to seek authorisation from anyone, in order to promote, protect and develop their rights and interests.

Trade unions must meet a series of formal requirements for registration and must also be made up of at least 20 workers. For trade union organisations to achieve their objectives of promoting the rights of their members, they use the following mechanisms.

Collective Bargaining

It is the good faith negotiation of the employer and the union whose objective is to reach a collective agreement that implies benefits for both parties, among them are improvements in working conditions, economic benefits, productivity goals, among others.

Collective Accords

Collective accords the products of collective bargaining and constitute a source of rights for the parties. Their minimum duration is one year, however, the parties may agree on the duration they deem appropriate. In the event of non-compliance with the collective agreement, workers may choose to use administrative remedies or exercise the right to strike.

Strike

A strike is a labour right that involves the collective suspension of work agreed upon by the majority and carried out voluntarily and peacefully by the workers, with abandonment of the workplace. In order to exercise this right, workers must meet a series of requirements, including prior notification to the employer and the Administrative Labour Authority.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

Income Tax

Workers pay income tax based on the salary earned, which either comes from independent or subordinated labour.

The tax rate in both cases is the same and it will be applied progressively to the total income as the amount gets higher:

- 8% for income under 5 UIT;
- 14% for income in between 5 UIT and 20 UIT;
- 17% for income in between 20 UIT and 35 UIT;
- 20% for income in between 35 UIT and 45 UIT; and
- 30% for income over 45 UIT.

For reference, the updated UIT (taxation unit) to the 2024 is PEN5,150.

Independent workers

Since there is no permanent employment relationship, the worker is the one who has the responsibility to keep a record of the perceived payments and to fulfil the tax obligation on its own, when applicable.

In general, most companies are assigned as "withholding agents" where they will withhold 8% of the payout if the collected amount is PEN1,500 or more. Independent workers who earn less than PEN45,063 annually will not be taxed and therefore may request the suspension of withholdings, bearing in mind the income projection for the year.

Withheld tax will be a credit against annual income tax when an affidavit must be presented before the tax authority, if applicable.

The minimum amount to tax will be PEN36,050 annually if the income comes from activities as a corporate manager, trade union directive, business manager and similar job positions.

Subordinated workers

Since there is a labour relationship, the taxation base comes from the salary earned by the worker, but it is the employer who is responsible for that payment to the tax administration. The taxation is calculated for the whole year, divided into 14 sections that represent the total payments that the worker will receive in that year (12 months plus two gratifications in July and December) and then deducted evenly from the monthly salary. To pay the income tax as a subordinated worker, the salary perceived by year must be PEN45,063 or more.

If a worker has only obtained subordinated labour income, no annual tax return needs to be presented.

For independent workers, a deduction of 20% from gross income can be applied, plus 7 UIT deduction and limited percentages for the likes of restaurants, accommodation, national tourism, and many other. On the other hand, dependent workers can only deduct the 7 UIT. Both categories can deduct an additional 3 UIT for additional fixed expenses (such as professional services, leasing, medical expenses, and hotels, among others).

Social health insurance

In Peru, the social contribution for health is directed to the government institution known as "EsSalud" which provides health coverage, paid

breaks due to maternity, injury, temporary disability, and other related benefits. The deducted amount for this concept is equivalent to 9% of the salary of the subordinated worker, with the taxpayer being the employer. Exceptionally, this tax will apply to those incorporated by Special Law.

Pension system

This social contribution aims to provide savings to the worker for retirement. Workers can choose between a private pension system called AFP (Private Pension Fund Administration), which operates with a savings and investment model, or a public system called ONP (National Pension System), which operates with a trust-based system where pensions are funded from contributions made during the same period. ONP tax rate is 10%, that must be withheld by the employer from the worker's salary.

5.2 Taxes Applicable to Businesses

Corporate Income Tax (CIT)

CIT applies to worldwide income received by a resident company within a specified period. To qualify as such, the entity must be incorporated in Peru. The taxable base is determined by calculating Peruvian source net income after deductions of expenses and costs, specified in the Peruvian tax law, when applicable. Peruvian net source income and foreign net source income form global net income that must be taxed.

The General Income Tax Regime applies on net income with a 29.5% tax rate. Monthly advanced payments apply to this regime. The monthly advanced payment will be 1.5% of the net income or the coefficient, depending on the amount that is higher.

VAT

The general sales tax (IGV) is an indirect and territorial tax that affects consumption by taxing the provision of goods and services.

VAT taxpayers are Peruvian companies, and the tax rate is 18% (16% for VAT and 2% for the municipal promotion tax). The VAT to be paid and declared on a monthly basis before SUNAT results from the difference between sales VAT and acquisitions VAT.

Substantial and formal requirements apply for the deduction of input VAT from purchases of goods and services.

Exportation of goods and services are exempted from VAT, under certain conditions. In this case, a right to obtain a cash flow reimbursement of input VAT can be exercised, called "balance in favour of the exporter".

Anticipated recovery of input VAT regimes are also available under certain conditions.

Excise Tax

Excise tax is applied to reduce the consumption of taxed goods affecting the health and well-being of the consumer. This tax applies to alcoholic beverages, sugary drinks, fuel and cigarettes, among others. Rates vary depending of different variables.

Financial Transaction Tax (ITF)

All transactions using financial and banking entities regulated by the SBS (Superintendence of Banking and Insurance) are taxed with the ITF. The applicable rate will be 0.005% of the amount of the transaction, the bank being the withholding agent. The owner or beneficiary of the bank account must pay the ITF directly, with the exception of certain conditions.

Corporate Assets Tax (ITAN)

This tax is levied to companies' owners of net assets included in the General Income Tax Regime or in the MYPE Income Tax. A tax rate of 0.4% will be applied to the value of net assets if it exceeds the amount of PEN1 million.

To calculate the book value of these assets, the age of the asset, and the inflationary adjustment, among others, will be considered for carrying out the valuation with the corresponding depreciation and amortisation.

Withholding Tax for Non-residents

For non-domiciled individuals, income obtained by a non-domiciled person who performs work within Peruvian territory will be taxed with 30% income tax on gross income with no deductions available (if the services are provided in a civil, no-labour relationship, a 24% tax rate will apply).

In the case of "technical assistance" services, a 15% rate will be applied (if an individual is the provider, a 24% tax rate will apply). To qualify within this concept, an independent service must be performed where skills with special procedures, arts, or techniques are used and a transmission of knowledge occurs, that is essential for the core business of the user company, regardless of whether it is provided in Peru or abroad. A list of technical assistance services is available in Peruvian tax law (for example, engineering services).

In respect of interest on foreign credits, 4.99% will be taxed on the interest generated, under certain conditions. If the loan is granted between related parties, a 30% tax rate will be applied.

For royalties, for non-domiciled residents a tax rate of 30% is applicable.

In the case of dividends and other distributions of profit by a Peruvian company, the applicable withholding tax will be 5%. This tax will not be applicable if the beneficiary of the dividend is also a resident company.

In respect of capital gains, in general, a tax of 5% applies to stock-listed transactions. In other cases, a tax rate of 30% may apply.

Other Peruvian source income and tax rates may be applicable under specific scenarios.

In addition, Peru has a double-tax treaty (DTT) network negotiated under the OECD model, with countries including Brazil, Canada, Chile, Mexico, Portugal, Switzerland, Korea, and Japan. The Andean Community Treaty (578 Decision) involves Peru, Bolivia, Colombia and Ecuador.

DTT can reduce or eliminate income tax, when applicable, providing a Tax Residency Certificate has been issued by the tax authority from the resident country.

5.3 Available Tax Credits/Incentives

Agriculture

Among the most relevant benefits in this sector are exemptions for agricultural products, exemption from VAT for sales less than 50 UIT per year, exemption from the obligation to withhold tax income for workers in the sector, and a 15% reduction to the income tax.

Amazonian Regime

Regarding the Amazon, some of the benefits are the exemption of excise tax and VAT on fuel in the regions of Loreto, Ucayali, and Madre de Dios, exemption from VAT for the sale of goods or services within the Amazon area, application of special tax credit, and a reduction in the income tax rate by 5% for the "low jungle" area

or 10% for the "high jungle" one, divided by geographic position, and under certain specific conditions.

Mining

Mining concessions can be amortised over a period corresponding to the projected lifespan of the mine, taking into account both proven and probable reserves. This begins in the earlier of (i) the year when mining operations commence, or (ii) the year when the minimum production threshold must be met.

Special Economic Zones (SEZ)

This is the name given to certain strategic geographic areas since they have greater exposure to investment and trade, which promotes the economic development of the country. For this reason, tax incentives are granted to the area, dividing them into three types according to the type of business developed in the area, which are Permanent Free Zone, Permanent Special Zone and Temporary Free Zone.

Most important free zones are located in Tacna, Ilo and Paita. The tax benefit applied to these zones is the exemption of income tax, VAT, municipal promotion tax, excise tax, ad valorem tariff, and other tax obligations, except for the health insurance charge.

Aquaculture

Aquaculture companies with revenues below 1,700 UIT qualify for a reduced corporate income tax rate of 15% until 2030. They are eligible for a credit equivalent to 10% of reinvested profits, capped at 70% of total profits. Investments in canals and harvesting infrastructure can be depreciated at a rate of 20%.

Forestry and Wildlife

Companies involved in forestry and wildlife activities, also with revenues under 1,700 UIT, benefit from a 15% corporate income tax rate until 2030. They can receive a credit of 10% on reinvested profits, up to 70% of total profits. Investments in infrastructure for forest and wildlife management can be depreciated at a 20% rate.

Small and Medium-Sized Businesses

Small and medium-sized enterprises earning less than 1,700 UIT face a 10% corporate income tax rate on their net income up to 15 UIT, and 29.5% on any income exceeding this threshold. Monthly advanced payments apply to this regime being 1% if the net income is less than 300 UIT and 1.5% or coefficient when the net income is over said amount.

5.4 Tax Consolidation

As of 2024, there is no tax consolidation regime in force in Peru.

5.5 Thin Capitalisation Rules and Other Limitations

The current CIT considers interest from debt as a deductible expense for the determination of net income, when the loan amount is used to obtain taxable income or maintain the source of income.

Also, the law sets a limit to the deducted interest of 30% of the tax EBITDA (earnings before interest, taxes, depreciation and amortisation) from last year, however, if the company exceeds this amount, it can be applied to the taxation base from the next four years.

The limit of 30% does not apply to certain circumstances such as financial and insurance companies, taxpayers with less than 2,500 UIT

as net income, taxpayers involved in public procurement and the interests generated from that relationship, among others.

5.6 Transfer Pricing

Transfer pricing (TP) rules are in force in Peru. The value of transactions between related parties must be set under TP rules at an arm's length value. Also, TP rules apply to transactions with countries with low or no taxation known as "tax havens" and with subjects whose income from these transactions is designated under a preferential tax regime.

Adjustment to the price only will be mandatory if a tax prejudice occurs. Peruvian law establishes the methods and procedures for the determination of TP value. The OECD TP Guidelines are a supplementary source.

Annual reporting TP obligations are regulated (local report, master file and Country By Country Report).

5.7 Anti-evasion Rules

Under the current tax regulation, there are general anti-avoidance rules, empowering the tax authority to demand tax payments or reduce credits or losses upon detecting tax avoidance. In this context, tax avoidance refers to actions that either wholly or partially prevent a taxable event, reduce the taxable base or tax debt, or improperly generate credits, balances, or losses through acts that meet two criteria: (i) they are artificial or unsuitable for achieving their intended purposes, and (ii) their legal or economic effects, apart from tax benefits, are equivalent or similar to those achievable through proper or customary acts.

Also, specific anti-avoidance rules may apply, for example, in M&A transactions, cross-border loans, intercompany loans, and tax haven expenses, among others.

Tax planning is legal in Peru, but is limited to transactions not involving avoidance. As an "option economy", this limits taxpayers' ability to engage a tax saving unless they can demonstrate that actions were motivated by economic, financial, corporate or other reasons other than solely obtaining tax advantages.

6. Competition Law

6.1 Merger Control Notification

In Peru, business concentration operations are regulated under Law No 31112 to protect and promote effective competition. Such law aims to prevent certain transactions from creating significant competition restrictions, thereby avoiding the formation of monopolies or dominant positions that could harm consumers and the economy.

The law covers various types of concentration operations: mergers, acquisition of control, establishment of joint ventures and acquisition of productive assets. Such operations must be notified to INDECOPI if the companies reach certain financial thresholds. Currently, notification is mandatory if a company's sales, gross annual income or assets amount to at least 118,000 UIT and at least two companies individually reach 18,000 UIT in the same period.

To require prior authorisation from INDECOPI, companies must simultaneously meet two criteria in the previous fiscal year: the total sum of sales, gross annual income or asset value must be equal to or exceed 118,000 UIT and at least two companies must each reach or exceed 18,000 UIT in sales, gross annual income or

asset value. The value of the UIT for this year is PEN5,150.

If neither or only one of such criteria is met, notification is voluntary and no prior authorisation from INDECOPI would be required.

6.2 Merger Control Procedure

Before formalising the request for authorisation with INDECOPI, a non-binding preliminary consultation can be conducted for guidance on the law and requirements.

The mandatory procedure for the prior control of business concentration operations in Peru includes the following.

- Submission of the request – economic agents submit the application with all required background information and preliminary data on the effects in relevant markets.
- Preliminary evaluation by the technical secretariat – initial verification to meet legal requirements. The secretariat communicates its evaluation within ten business days, with possible requests for additional information and deadlines for rectification.
- Evaluation by the Commission for the Defence of Free Competition.
  - (a) First phase – determination if the operation falls within the scope of the regulation and initial assessment of anti-competitive risks within up to 30 business days.
  - (b) Second phase – detailed assessment in case of concerns, extendable up to 90 business days with a possible 30-day extension.
- Issuance of the final resolution – the Commission issues a reasoned resolution authorising the operation without conditions, with conditions to mitigate anti-competitive effects or denying them. The resolution can be appealed before the competent court.

6.3 Cartels

The Competition Law of Peru, regulated by Supreme Decree No 030-2019-PCM, provides a comprehensive framework to regulate and penalise anti-competitive practices such as cartels, abuses of dominant position, and horizontal and vertical collusive practices.

Horizontal collusions involve agreements among competitors that restrict competition through price fixing or customer allocation, with both absolute and relative prohibitions.

Vertical collusions entail agreements among entities at different levels of the supply chain that restrain competition. Such norm outlines procedures for investigating, determining and sanctioning these practices, empowering INDECOPI to conduct inspections, gather evidence, and issue interim measures. Penalties may include fines, changes in business practices, and publication of resolutions.

6.4 Abuse of Dominant Position

Supreme Decree No 030-2019-PCM, establishes the prohibition of abuse of dominant position, describing specific exclusionary conducts such as refusal to satisfy demands and applying unequal conditions, among others. Additionally, it explains that these rules can be applied when abuse occurs within Peruvian territory or when its effects manifest in the Peruvian market, ensuring effective regulation of economic competition.

7. Intellectual Property

7.1 Patents

The protection of inventions in Peru (either through a patent or a utility model) is regulated by Decision 486, Common Regime on Industrial Property and by Legislative Decree No 1075, which contains complementary provisions of local application to Decision 486. The requirement of novelty of the invention is of worldwide scope, so that the disclosure of the invention prior to the filing of the application in Peru breaks the novelty requirement (except for the exceptions to the disclosure expressly included in Decision 486).

Patents will be granted for inventions, whether products or process, in all fields of technology, provided that they are new, have an inventive level and are susceptible of industrial application. Uses are not protectable via patent of invention.

Patent applications are filed before the INDECOPI (DIN) and may claim priority from the Paris Convention or from a member country of the CAN or may be filed before the DIN as an international receiving office or as a national phase entry under the PCT.

The applicant must file the application together with the technical documents (report, abstract, claims, drawings, if applicable); copy of the power of attorney (which does not require any certification); invention assignment agreement in case the inventor is a person other than the applicant; certified copy of the application whose priority is claimed; payment of the official fees. In the case of PCT national phase entry, a Spanish translation of the technical documents must also be submitted, as well as the request and the invention assignment agreement in case the Patent scope does not contain the assignment of the invention in favour of the applicant.

Annual fees must be paid in advance to maintain the validity of the application and/or the invention patent once granted (the annual maintenance fee for an invention patent does not apply to industrial designs or utility models).

The process of granting a patent of invention involves the publication of the application for opposition purposes, with 60 working days being the term for third parties to file an opposition. Objections to the patentability of the invention contained in the patentability examination must be resolved within 60 working days of notification (extendable for an additional 60 working days). If the application is not resolved within this term, the application will be decided based on the contents of the patentability examination and, if applicable, will be rejected. Although the resolution that rejects the patent can be appealed, it cannot be based on the modification of the description, claims or drawings.

The patent is granted for a term of 20 years calculated from the filing date of the application. The term for the granting of an invention patent takes about four years, while the term for the granting of a utility model is reduced to half of the term for invention patents.

Registrations before the DIN are constitutive of rights, so the absence of protection prevents infringement actions against unauthorised third-party users.

Actions for infringement of industrial property rights are administrative proceedings before the DIN of INDECOPI, which may entail the granting of precautionary measures of cessation of use, confiscation or immobilisation. The process

is followed in double administrative instance with the Intellectual Property Chamber of the INDECOPI Court (SPI) acting as the second and last administrative instance. Within three months following its notification, the final decisions of the SPI may be challenged before the Administrative Court of the Judicial Power (PJ) via a contentious-administrative lawsuit (DCA). The filing of a DCA before the PJ does not suspend the effects of the challenged SPI decision, unless the PJ issues a non-innovative injunction.

7.2 Trade Marks

The protection in Peru of distinctive signs (product trade marks, service marks, commercial slogans, trade names) is regulated by Decision 486, Common Regime on Industrial Property and by Legislative Decree No 1075, which contains complementary provisions of local application to Decision 486. Peru is a member of the Nice Agreement and as such applies the Nice Classification to classify goods and services for trade mark registration purposes.

The Directorate of Distinctive Signs of INDECOPI (DSD) acts as the first instance and the Intellectual Property Chamber of the Court for the Defense of Competition and Intellectual Property of INDECOPI (SPI) acts as the second instance. The only exception is when the Commission of Distinctive Signs of INDECOPI (CSD) acts as second instance in cases of appeals against resolutions of the DSD that reject ex officio trade mark applications. Within three months after its notification, the final decisions of the SPI may be challenged before the Contentious Administrative Court of the Judicial Power (PJ) via a contentious-administrative lawsuit (DCA). The filing of a DCA before the PJ does not suspend the effects of the challenged SPI decision, unless the PJ issues a non-innovative injunction.

The process of registering a trade mark involves the publication of the application for opposition purposes, with the term for third parties to file opposition being 30 working days. If the application for registration of a trade mark faces opposition from third parties, the terms of resolution are extended to no less than nine to 12 months per instance. For the registration of a trade mark, it is suggested to make a previous search of antecedents. If the trade mark is free, the applicant must file the application for registration with the complete data of the applicant; identify the trade mark (include design if applicable; in colours if applicable); clearly identify the goods/services to be protected; the class; identify the priority application to claim foreign priority and the date and country of the same (it must be claimed within six months of the original application, while the certified copy of the priority application may be submitted within three months after the expiration of the term to claim priority); attach a copy of the power of attorney (which does not require any certification); and pay the corresponding official fee. The registration process of a trade mark, within a procedure in which the application and all the complete documentation has been filed, without any opposition from third parties, has a duration of two to three months until the registration certificate is obtained.

On the other hand, in the process of renewing the ten-year validity of a trade mark registration, the renewal application must be filed with the complete data of the applicant; identify the registration number of the trade mark and class; attach a power of attorney (which does not require any certification); and pay the corresponding official fee. Provided that it is a procedure in which the application and all the complete documentation have been submitted, it will take approximately one month.

Although there is a supranational norm that regulates, at the level of the Andean Community of Nations (CAN), the exclusive rights granted on distinctive signs, there is no Andean Community Trade Mark. However, it is important to note that trade marks applied for and/or granted under the scope of Decision 486 have some supranational effects, namely: (i) base an opposition on a mark previously applied for and/or registered in a CAN member country other than the country where the opposition will be filed; (ii) prove use of the mark in the country where it is registered by evidence of use coming from a CAN member country other than the country where the mark is registered and has been summoned in cancellation for non-use; and (iii) prove the notoriety of a mark with the recognition of such notoriety that would have been granted in a different CAN member country.

The registration of a trade mark is constitutive of rights, and its validity of ten years starts to be computed from the date of its concession. Used and unregistered distinctive signs are not considered trade marks. It is not required to prove the use of the trade mark in the country to register it as such. Nor is it required to prove the use of the trade mark to obtain its renewal or to keep it in force beyond three years. From the third anniversary of its registration, the trade mark may be cancelled for lack of use by any interested party, being the only case in which it is necessary to prove the use of the trade mark. The exhaustion of trade mark rights is international.

The commercial slogan is always protected in association with a trade mark (whether registered or pending), which must be clearly identified in the application and is granted or denied based on the attributes of the phrase that integrates the commercial slogan regardless of the associated trade mark.

Trade names, which are signs that identify an economic activity, an enterprise, or a commercial establishment, enjoy protection by the mere fact of their use in the market. Indeed, the protection of a trade name is acquired by its first use in commerce and ends when the use of the name ceases or when the activities of the company or establishment using it cease. The registration of a trade name with the DSD is not constitutive of rights but is merely declaratory of rights (it recognises and declares the date of first use). The owner of a used but unregistered trade name may prevent third parties not only from using in commerce an identical or similar distinctive sign capable of causing confusion but may also prevent the registration of an identical or similar trade mark applied for to protect goods or services similar or related to the economic activities identified by such trade name capable of causing confusion with it.

The exclusive right over a trade mark confers on its owner the right to prevent any third party from performing, without their consent, the following acts:

- applying or affixing the mark or a distinctive sign identical or similar on goods for which the mark has been registered;
- removing or modifying the mark for commercial purposes, after it has been applied or affixed on the goods for which the mark has been registered;
- manufacturing labels, containers, wrappings, packaging or other materials that reproduce or contain the mark, as well as marketing or holding such materials;
- using in commerce a sign identical or similar to the trade mark in respect of any goods or

services, when such use could cause confusion or a risk of association with the owner of the registration;
- using in commerce a sign identical or similar to a well-known trade mark in respect of any goods or services; and
- using publicly a sign identical or similar to a well-known trade mark, even for non-commercial purposes, when such use could cause a dilution of the distinctive force or of the commercial or advertising value of the trade mark.

Actions for infringement of trade mark rights are administrative proceedings before the DSD of INDECOPI, which may lead to the granting of precautionary measures of cessation of use, confiscation or immobilisation. The process is followed in double administrative instance, with the Intellectual Property Chamber of the Court of INDECOPI (SPI) acting as the second and final administrative instance. Within three months after its notification, the final decisions of the SPI may be challenged before the Administrative Court of the Judicial Power (PJ) through a contentious-administrative lawsuit (DCA). The filing of a DCA before the PJ does not suspend the effects of the challenged SPI decision, unless the PJ issues a non-innovative injunction.

Licences granted for the use of trade marks must be in writing and registered with the DSD in order to be enforceable against third parties. In turn, acts of disposition of trade marks must be registered before the DSD, since the lack of such registration will cause the transfer to be ineffective against third parties.

A trade mark may be declared absolutely invalid at any time – either ex officio by the DSD or at the request of third parties – provided that it has been granted contrary to the absolute prohibitions of registration. Up to five years from the date of grant of a trade mark, a relative nullity of a trade mark may be declared – either ex officio by the DSD or at the request of third parties – provided that it has been granted in contravention of the relative prohibitions of registration.

7.3 Industrial Design

The protection of industrial designs in Peru is regulated by Decision 486, Common Regime on Industrial Property and by Legislative Decree No 1075, which contains complementary provisions of local application to Decision 486.

The appearance of a product resulting from any meeting of lines or combination of colours, or from any two-dimensional or three-dimensional external shape, line, contour, configuration, texture or material, without changing the destination or purpose of such product, shall be considered as an industrial design. The novelty requirement of the industrial design is of worldwide scope, so that the disclosure of the same prior to the filing of the application in Peru breaks the novelty requirement (except for the exceptions to disclosure expressly set forth in Decision 486).

Industrial design applications are filed before the Directorate of Inventions and New Technologies of INDECOPI (DIN) and may claim priority from the Paris Convention or from a member country of the CAN. The protection of creations via industrial design includes flat designs, three-dimensional designs, colour designs. Together with the application for registration of the industrial design, the following must be submitted: the drawings with all the views including a perspective drawing (isometric); the agreement of assignment of the design in case the designer is a person other than the applicant; the certified copy of the application whose priority is claimed; the copy of the power of representation which

does not require any certification; and the payment of the official fees. The industrial design registration application is published for the purpose of opposition by third parties, who may file the opposition within the following 30 working days. The term of the process for the granting of an industrial design is usually six months. Industrial designs are protected for a term of ten years and are not renewable upon expiration. The registrations before the DIN are constitutive of rights, so the absence of protection prevents the exercise of infringement actions against unauthorised third-party users.

Actions for infringement of industrial property rights are administrative proceedings before the INDECOPI, which may lead to the granting of injunctions for cessation of use, confiscation or immobilisation. The process is followed in double administrative instance with the Intellectual Property Chamber of the Court of INDECOPI (SPI) acting as the second and last administrative instance. Within three months following its notification, the final decisions of the SPI may be challenged before the Administrative Court of the Judicial Power (PJ) via a contentious-administrative lawsuit (DCA). The filing of a DCA before the PJ does not suspend the effects of the challenged SPI decision, unless the PJ issues a non-innovative injunction.

7.4 Copyright

The protection of copyrights in Peru is regulated by Decision 351, Common Regime on Copyrights and Related Rights and by Legislative Decree 822, Law on Copyrights. The latter adapts the local legislation not only to Decision 351 but also adapts it to several international conventions to which Peru is a party (Berne Convention for the Protection of Literary and Artistic Works; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; WTO Treaty – Annex 1C TRIPS).

Among others, all works of genius, in the literary or artistic field, whatever their genre, form of expression, merit or purpose, are protected by copyright law, namely: literary works; musical compositions; dramatic, dramatic-musical, choreographic, pantomimic and scenic works in general; audiovisual works; works of plastic arts; works of architecture; photographic works; illustrations, maps, sketches, plans; slogans and phrases insofar as they have a form of literary or artistic expression, with characteristics of originality; computer programs; or any other production of the intellect in the literary or artistic domain, which has characteristics of originality and is susceptible of being disclosed or reproduced by any means or process, known or to be known. Rights related to copyright (the rights of artists, performers, phonogram producers, and broadcasting organisations, etc) are also protected under copyright law.

Only a natural person (who is the natural or physical person who creates the work) can be considered the author, so that the moral rights are only recognised in favour of that person, being the following: right to disclosure; to paternity; to integrity; to modification or variation; to withdrawal of the work from commerce; to the right of access. On the other hand, the economic rights may be assigned by the author in favour of a legal person who may act as applicant and be declared the owner of such rights. The economic rights are the following: reproduction of the work by any form or process; communication to the public of the work by any means; distribution to the public of the work; translation, adaptation, arrangement or other transformation of the work; importation into the national territory of copies of the work made without authorisation of the

owner of the right by any means, including by transmission; any other form of use of the work.

The protection of economic rights is for a term that includes the whole life of the author and 70 years after their death, after which it falls into the public domain. The exhaustion of the author's economic rights is territorial.

It is not compulsory to register the copyright of a work before the Copyright Office of INDECOPI (DDA), since the original work acquires immediate and automatic protection by the mere fact of its creation. The registration of the work before the DDA is merely declaratory of rights. The validity of the copyright registration is presumed as long as it is not expressly declared null and void. Any reproduction, communication, distribution, or any other form of exploitation of the work, in whole or in part, that is made without the prior written consent of the copyright owner is presumed to be unlawful.

Applications for registration of copyrightable works are filed before the Copyright Directorate of INDECOPI (DDA). The applicant must submit the application; the support of the work; copy of the power of attorney (which does not require any certification); agreement of assignment of the economic rights of the work in case the applicant is a person other than the author; and payment of the official fees. The term for the DDA to issue a resolution and the author's certificate may take one to two months provided that all the required documents have been submitted.

Copyright infringement actions are administrative proceedings before the DDA of INDECOPI which may entail the granting of precautionary measures of cessation of use, confiscation or immobilisation. The process is followed in double administrative instance with the Intellectual Property Chamber of the Court of INDECOPI (SPI) acting as the second and last administrative instance. Within three months following its notification, the final decisions of the SPI may be challenged before the Administrative Court of the Judicial Power (PJ) via a contentious-administrative lawsuit (DCA). The filing of a DCA before the PJ does not suspend the effects of the challenged SPI decision, unless the PJ issues a non-innovative injunction.

7.5 Others

Article 4 of Decision 351, Common Regime on Copyright and Related Rights, states that computer programs and databases are considered works, and Article 23 states that computer programs are protected on the same terms as literary works, while Article 28 states that databases are only protected to the extent that the selection or arrangement of materials constitutes an intellectual creation. Furthermore, according to Article 5 of Legislative Decree 822, Law on Copyright, software is considered a work. As such, it is protected by copyright regulations and must be registered with the Copyright Directorate of INDECOPI. For more information on the process to follow, please refer to **7.2 Trade Marks**.

Article 260 of Decision 486, Common Provisions on Industrial Property, states that the protection of trade secrets shall be given whenever it concerns undisclosed information, which may be used in any productive, industrial or commercial activity, and which is susceptible of being transmitted to a third party, provided that it is secret, has a commercial value because it is secret, and has been the subject of reasonable measures taken by its legitimate holder to keep it secret. In turn, Legislative Decree No 1075, which contains complementary provisions of local application to Decision 486, recognises in

Article 3 that trade secrets constitute a constituent element of industrial property. The protection of a trade secret entails that its holder shall be protected against disclosure, acquisition or use of such secret in a manner contrary to fair trade practices by third parties. The protection of trade secrets lasts as long as the conditions laid down in Article 260 above exist.

8. Data Protection

8.1 Applicable Regulations

The Political Constitution of Peru establishes that individuals have the fundamental right that computer services (whether computerised or not, public or private) do not provide information that affects their personal and family privacy.

In addition, Law No 29733, Law on Personal Data Protection, governs the processing of personal information in the country. Enacted in 2011, this law establishes the principles, rights and obligations related to personal data protection, aiming to guarantee the exercise of the right to privacy and informational self-determination of Peruvian citizens. The law sets forth principles such as informed consent, the purpose of processing, data quality, and information security and grants data subjects various rights, including access, rectification, cancellation, and opposition (ARCO rights). Additionally, it establishes the creation of the National Authority for the Protection of Personal Data (ANPDP), which is responsible for overseeing compliance with the law and ensuring adequate protection of personal data in the country. Law No 29733 is an important pillar in the Peruvian legal framework for the protection of privacy and personal information security.

The Supreme Decree No 003-2013-JUS, Regulation of Law No 29733 was enacted in 2013 and establishes specific procedures and technical guidelines for the effective implementation of Law No 29733. Among the most notable aspects of the Regulation are the definition of key concepts related to data protection, the regulation of the rights and obligations of those responsible for processing personal data as well as the rights of data subjects. Additionally, the Regulation provides detailed guidelines on the procedure for exercising ARCO rights (Access, Rectification, Cancellation, and Opposition) and for the registration of databases in the National Registry of Personal Data Protection. It also establishes the security measures that must be implemented by data processors to ensure the integrity and confidentiality of personal information. In summary, Supreme Decree No 003-2013-JUS complements Law No 29733 by providing a detailed and specific regulatory framework for personal data protection in Peru, thereby contributing to its effective application and safeguarding the privacy rights of citizens.

8.2 Geographical Scope

Article 3 of Law No 29733 establishes the scope of application of the law, stating that it applies to personal data contained or intended to be contained in databases of both the public and private administration, whose processing is carried out within the national territory.

On the other hand, Article 5 of the Regulation of Law No 29733 establishes the territorial scope of application of the Law and the Regulation. The article expands the scope of the law to the processing of personal data carried out in an establishment located in Peruvian territory corresponding to the holder of the database or the data controller, even when the processing is carried out by a data processor regardless of their location. In addition, the Law and the Regulation are applicable if the database holder or data

controller is not established in Peruvian territory but is subject to Peruvian legislation by contractual provision or international law or if they use means located in Peruvian territory for data processing, with some exceptions.

In summary, Article 3 of Law No 29733 establishes the general scope of application of the Law, while Article 5 of the Regulation expands this scope by establishing specific conditions under which the Law and the Regulation apply to foreign companies operating in Peru or collecting data from Peruvian citizens, even if they do not have a physical presence in the country.

8.3 Role and Authority of the Data Protection Agency

The National Authority for the Protection of Personal Data (ANPDP), which is attached to the Ministry of Justice, is the authority responsible for enforcing data protection laws in Peru. The main role of such authority is to oversee compliance with the Personal Data Protection Law (Law No 29733) and its associated regulations, as well as to ensure the adequate protection of personal data in the country.

The ANPDP has the authority to impose sanctions and corrective measures in case of non-compliance with legal provisions related to data protection. Additionally, it is empowered to provide advice and guidance to organisations and citizens on compliance with data protection regulations.

In summary, the ANPDP plays a crucial role in the effective enforcement of data protection standards in Peru, ensuring respect for citizens' privacy rights and promoting good practices in the handling of personal information.

9. Looking Forward

9.1 Upcoming Legal Reforms

Among others, the Peruvian Parliament has recently passed Law No 32089, which will allow the Executive Power to legislate on various matters until 3 October 2024.

- Regarding taxation, VAT would apply to B2C digital services and provision of goods through marketplaces, to increase tax revenue. Also, payments on account of income tax on capital gains from indirect sale of shares for natural persons will be modified. The rules on advance agreements and other transfer pricing methods will also be refined.
- A series of measures will be taken to promote public, private and public-private investment projects, with various administrative simplification measures and modifications to guarantee legal stability, as well as promote private investment.
- Likewise, improvements will be established to simplify and optimise the processes for promoting investment in public-private partnerships and projects in assets.

In addition, Peru has concluded negotiations with the UK to conclude a Double Taxation Agreement (DTA) for both countries in hopes of promoting the economic development between them. Is expected that in a couple of months, the treaty will be signed and come into effect.

Plans to initiate negotiations for a DTA with China have also been mentioned, which is highly anticipated.

Finally, the Peruvian government recently announced their intentions to declare the mega port of Chancay (in Lima) and its area of influence as a Special Economic Zone (SEZ). If a

bill is approved, this will grant tax benefits for companies that invest in the area, with the goal to attract foreign direct investment and boost economic development.

PHILIPPINES

Law and Practice

Contributed by:
Raoul R Angangco, Sylvette Y Tankiang, Katrina V Doble, Rashel Ann C Pomoy, Richard Henrick I Beltran, Danielle Francesca T C San Pedro and Fritz Julius V Casama
Villaraza & Angangco

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Villaraza & Angangco was established in 1980 and is a full-service law firm based in the Philippines with consistently recognised expertise in the areas of litigation and dispute resolution, corporate and commercial law, intellectual property, and labour and employment. The firm is headed by legal luminaries and practitioners who are deemed experts in their respective fields and has about 70 lawyers and 100 highly trained non-legal staff who capably provide comprehensive, multi-layered, innovative and practical solutions to both foreign and domestic clients. With decades of experience in serving at the forefront of the evolving landscape of Philippine law, Villaraza & Angangco continues to gain the confidence of prominent individuals, multinational corporations and business leaders across practice areas, and to establish itself as one of the leading firms in both the international and domestic legal spheres offering professional service of the highest calibre.

Authors

Raoul R Angangco is a senior partner at Villaraza & Angangco with special expertise in M&A, insurance, infrastructure, mining, real estate and construction. His almost 40 years of practice have been marked with distinction, and he has been recognised as a leading individual by various international legal review publications. Raoul served as one of the youngest presidents of the Integrated Bar of the Philippines, the mandatory Bar association of all lawyers in the country, from 1995 to 1997. He currently serves as a director in several Philippine public and private corporations engaged in insurance, manufacturing, mining, and real estate development.

Sylvette Y Tankiang is Villaraza & Angangco's managing partner and chief financial officer. She has special expertise in the fields of taxation, M&A, banking and finance, securities, real estate, mining, natural resources and power and energy. She is sought after for her creative solutions in corporate, contract and transaction structuring. Her key clients include Jolliville Holdings Corporation, ZhongXing TianTong Technology Co, Lalamove Philippines, China Telecommunications Corporation, Shopee Philippines and Mitsubishi Estate Co.

Contributed by: Raoul R Angangco, Sylvette Y Tankiang, Katrina V Doble, Rashel Ann C Pomoy, Richard Henrick I Beltran, Danielle Francesca T C San Pedro and Fritz Julius V Casama, **Villaraza & Angangco**

Katrina V Doble is a partner in the intellectual property department of Villaraza & Angangco. With over 18 years of experience in intellectual property law, she has covered the full spectrum of IP practice. In recent years, she has focused on trade mark law, IP commercialisation and IP litigation. Due to her breadth of experience, she is heavily involved in the growth of Villaraza & Angangco's trade mark prosecution practice, including the firm's foray into domain name registration and audit. She maintains the trade mark portfolios of several of the firm's largest clients.

Rashel Ann C Pomoy is a partner of Villaraza & Angangco's labour law department and is experienced in both advisory and litigation aspects of Philippine labour law practice. Ms Pomoy represents domestic and international clients on all aspects of employment and industrial relations, including general employment advisory and assistance, employee investigation, employment and industrial relations disputes, international transfers and global mobility matters, large-scale reductions in workforce and corporate restructures and the employment aspects associated with corporate transactions. Ms Pomoy frequently assists clients in drafting employment policies, handbooks, releases and severance agreements, as well as non-competition agreements.

Richard Henrick I Beltran is a partner in the corporate and commercial law department of Villaraza & Angangco. His practice areas include corporate law, mergers and acquisitions, TMT, foreign investments, banking and financial services, natural resources and data privacy. Richard has extensive experience in conducting due diligence, negotiating contracts, and preparing relevant documents for mergers and acquisitions of companies across multiple industries. He also provides legal advice to clients in the telecommunications and financial technology industries on matters relating to their regulatory compliance, including licensing applications. He handles project financing transactions for clients from multiple industries.

Danielle Francesca T C San Pedro is a new partner of Villaraza & Angangco with over seven years of experience in IP. Her practice focuses on trade mark prosecution and litigation, and she assists in maintaining the extensive trade mark portfolio of the firm's local and foreign IP clients. She also handles multi-disciplinary matters involving novel issues, such as: IP commercialisation, licensing and franchising; copyright and broadcast rights vis-à-vis new technologies and the internet; data privacy; legal implications and regulatory requirements for over-the-top (OTT) services; and e-commerce promotion and advertisement of medical devices.

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Fritz Julius V Casama is a senior associate of Villaraza & Angangco's commercial and corporate law department. Fritz is primarily involved in various law practices such as mergers and acquisitions, energy, taxation, capital markets, securities regulation, real estate and dispute resolution.

Villaraza & Angangco Law

V&A Law Center
11th Avenue corner 39th Street
Bonifacio Global City 1634
Metro Manila
Philippines

Tel: + 632 89886088
Fax: + 632 89886000
Email: www.thefirmva.com
Web: info@thefirmva.com

Contributed by: Raoul R Angangco, Sylvette Y Tankiang, Katrina V Doble, Rashel Ann C Pomoy, Richard Henrick I Beltran, Danielle Francesca T C San Pedro and Fritz Julius V Casama, Villaraza & Angangco

1. Legal System

1.1 Legal System and Judicial Order

The Philippine legal system is a mixture or hybrid of civil law and common law. The Philippine Constitution safeguards a broad spectrum of rights including the protection of environmental rights, assurance of labour rights, and the restriction on foreign ownership and control of certain industries. The Civil Code of the Philippines, the primary law that governs the civil rights of persons, encapsulates the principles and statutes of civil law that govern private relationships and obligations while the Revised Penal Code, including other special penal laws, defines and punishes crimes. Aside from the codified laws, jurisprudence – ie, decisions of the Supreme Court interpreting a provision of law, are binding on lower courts, and become part of the legal system. The judicial system comprises the Supreme Court, the highest court of the land, followed by the appellate collegiate court such as the Court of Appeals and Court of Tax Appeals and finally, the lower-level courts such as the Municipal or Metropolitan Trial Court and Regional Trial Court. As a general rule, the Philippine judicial system requires strict observance of the court hierarchy, which requires initiatory pleadings to be filed on the lowest-level court before raising their issues to the next level court.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Foreign individuals, corporations or other entities are allowed to engage in business in the Philippines, without need of prior approval. Foreign nationals, however, must first register with the Securities and Exchange Commission (SEC), or with the Bureau of Trade Regulation and Consumer Protection (BTRCP) of the Department of Trade and Industry (DTI) in the case of single proprietorships, before they may do business in the Philippines.

Unless participation of foreigners in the enterprise is prohibited or limited under Philippine law, foreigners may do business or own up to 100% of a domestic enterprise.

Under the Philippine Constitution and special laws, the extent of equity held by foreigners in some business activities is restricted or limited as enumerated in the "Negative List" issued pursuant to the "Foreign Investments Act of 1991" (FIA). The maximum amount of equity held by a foreigner in a corporation will therefore depend on the type of activity that the entity will engage in.

Among the business activities which are included in the Negative List, and are therefore subject to limitations on foreign equity, are the following: mass media; practice of professions; retail trade enterprises with paid-up capital of less than PHP25 million; small-scale mining; exploration, development and utilisation of natural resources; ownership of private lands; ownership and management of public utilities; lending companies; financing companies; and domestic market enterprise with paid-in equity of less than USD200,000.

2.2 Procedure and Sanctions in the Event of Non-compliance

As mentioned in **2.1 Approval of Foreign Investments**, foreign investments do not require approval, but a foreign corporation must register its investment in the Philippines by submitting the relevant documents before the SEC or with the DTI.

Under the Revised Corporation Code of the Philippines (RCC), a foreign corporation transacting business in the Philippines without a licence shall not be permitted to maintain or intervene in any action, suit or proceeding in any court or administrative agency of the Philippines. However, such corporation may be sued before the Philippine courts or administrative tribunals on any valid cause of action recognised under Philippine law.

Once registered with either the SEC or the DTI, the foreign investor must also undergo the registrations with the (i) Bureau of Internal Revenue (BIR) and (ii) local government unit (LGU) for the application for a business permit. In addition, if the foreign investor will have employees in the Philippines, registrations with the Department of Labor and Employment (DOLE), Social Security System (SSS), Philippine Health Insurance Corporation (PhilHealth), and Home Development Mutual Fund (HDMF) are necessary.

Corresponding sanctions including fines, imprisonment and closure of business, may be imposed for operating a business without the registrations with the BIR, LGU, SSS, PhilHealth, and HDMF.

2.3 Commitments Required From Foreign Investors

Certain laws require foreign investors to maintain a certain amount of investments, not as a condition for the registration or approval of foreign investment, but to allow foreigners to own a certain percentage of the equity of the business. For example, under the FIA, domestic market enterprises which have more than 40% foreign equity must have a minimum paid-in equity of at least USD200,000. “Domestic market enterprises” are enterprises which produce goods for sale, or render services to the domestic market entirely. Retail trading also has a prescribed minimum capital requirement for foreigners. Under the Retail Trade Liberalization Act, foreign retailers must have and must maintain a minimum paid-up capital of PHP25 million at all times.

2.4 Right to Appeal

The RCC provides that the SEC may investigate an alleged violation of the RCC, or of a rule, regulation, or order of the SEC. Under the SEC Rules of Procedure, the SEC allows the filing of petitions concerning the registrations of corporations, provided that the registration matter involves violation of laws and rules. The action shall be brought and heard at the principal office of the SEC and shall be acted upon by the SEC Company Registration and Monitoring Department (CRMD). The action shall commence upon the filing of a verified petition, accompanied by any relevant documents with the CRMD.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity Available Corporate Vehicles

Acceptable corporate vehicles in the Philippines typically take on the form of subsidiary, branch office, representative office, regional headquarters and regional operating headquarters. Corporations are granted a separate juridical personality from their shareholders, except branch offices, which are considered an extension of the head office. Thus, except for branch office, the liabilities of corporations are not considered the liabilities of their shareholders.

General Characteristics of Corporations

The decision-making power of corporations is vested in the board of directors. The corporate decision must be approved by the majority of the directors constituting a quorum. Except

for foreign-owned corporations, foreign retailers or businesses engaged in certain types of activities (eg, lending activities, insurance, etc), there is no minimum share capital requirement. Generally, there is also no minimum number of shareholders for corporations. However, it is recommended that corporations have at least three shareholders to avoid deadlock situations.

Subsidiaries are generally free to engage in any type of business that is not declared illegal in the Philippines. The branch office of a foreign corporation typically carries out the business activities of the head office and derives income from the host country. A representative office deals directly with the client of the parent company but does not derive income from the host country and is fully subsidised by its head office. Similarly, a regional headquarters acts as a supervisory, communications and co-ordinating centre for their affiliates, subsidiaries, or branches in the Asia-Pacific Region and other foreign markets. Neither the representative office nor regional headquarters earn income from the Philippines. However, regional operating area headquarters are allowed to derive income in the Philippines.

Due to the absence of separate juridical personality of branch offices and limitations of business activities that may be engaged by representative offices, regional headquarters and regional operating headquarters, foreign investors opt to incorporate a subsidiary to do business in the Philippines.

3.2 Incorporation Process

All corporations planning to operate in the Philippines must be registered with the SEC, which is the government agency charged with the supervision of the corporate sector, capital market participants, and the securities and investment instruments market. Initially, incorporators are required to reserve their desired corporate name and provide general information about the juridical entity such as company type and sub-type, company classification, number of incorporators, company sub-class, major industry classification and principal place of business. The availability of the reserved company name and completeness of information provided will take one day to process.

Once the SEC confirms that the company name is available and the general nature of the company is completely provided, the incorporators will submit the incorporation documents such as the Articles of Incorporation (AOI), by-laws, Foreign Investments Act Form No F-100 (if the new corporation has more than 40% foreign equity), endorsement/clearance from appropriate government agencies depending on the company's line of business, and if the incorporator is a foreign entity, notarised and apostilled/consularised board resolution authorising the subscription of shares and designating an authorised representative for the incorporation and registration of the corporation. The SEC usually takes two to three weeks to complete its evaluation of submitted documents.

After the SEC determines that the submission is complete, the SEC will assess application filing fees which must be paid within 45 days from issuance of the payment assessment form. Thereafter, the Certificate of Incorporation may be released within two weeks to one month from payment.

3.3 Ongoing Reporting and Disclosure Obligations

Corporations are generally required to submit their General Information Sheet (GIS), which contains a declaration of the ultimate beneficial owner and Audited Financial Statements (AFS).

Changes in the GIS (eg, change of directors/officers) must also be reported to the SEC. Branch office, representative office, regional operating headquarters and regional headquarters, aside from the GIS and AFS, are also required to submit a notification update form in case of change of principal office address, accounting period, list of directors and officers, subsidiaries and affiliate and other notifications to the SEC. Some corporations issued with secondary licences by the SEC (eg, issuer of securities, broker/dealer in securities, transfer agent, financing and lending companies, etc), have additional reporting requirements. Changes in the AOI and by-laws require prior consent of the shareholders and board of directors and approval of the SEC, while the AFS requires the approval of the board of directors.

3.4 Management Structures

Unless otherwise provided in the RCC, the corporation shall act through a board of directors, which shall exercise the corporate powers, conduct all business and control all properties of the corporation. The board of directors must be composed of a minimum of two individuals and a maximum of 15 individuals and may be composed of foreign directors, depending on whether the activity of the corporation is partly nationalised or not. Under the RCC and/or the shareholders' agreement, certain corporate actions, however, may require the approval of the shareholders aside from the board of directors, such as amendment of the AOI and by-laws, sale of substantially all corporate property, incurring indebtedness, merger or consolidation and dissolution.

3.5 Directors', Officers' and Shareholders' Liability

Section 30 of the RCC provides that directors who willfully and knowingly vote for or assent to patently unlawful acts of the corporation or are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any interest in conflict with their duty shall be liable for all damages resulting therefrom. Penal provisions of special laws may also impose fines and imprisonment to responsible officers and directors of the erring corporation.

Piercing of the Veil Doctrine

Philippine law also recognises the concept of "piercing the corporate veil" as an exception to the general rule that the corporation has a legal personality distinct and separate from its shareholders, directors, or officers. To warrant the piercing of the corporate veil, the total and absolute control of the parent company over the finances, policies, and business practices of the subsidiary, such that the latter has no separate mind of its own, must be demonstrated. Furthermore, it must be shown that such control is being used to perpetuate fraud or violation of legal duty.

4. Employment Law

4.1 Nature of Applicable Regulations

The Philippines has a very robust and comprehensive framework for labour relations and standards that govern labour protection, promote equal work opportunities, and regulate employment relationships. The Philippine Constitution is the basic and paramount law in the Philippines to which all other laws, including the Philippine Labor Code and employment statutes, must conform. The Constitution prescribes a balanced treatment of labour and capital. It recognises the right of labour to its just share in the fruits of production on one hand, and on the other, the right of enterprises to reasonable returns on investments and to expansion and

growth, while acknowledging the indispensable role of the private sector and encouraging private enterprise. The legal landscape of Philippine labour and employment is molded primarily by the Philippine Labor Code, special labour legislation, Supreme Court decisions and administrative rules and regulations. These govern the relationship of labour and capital in all aspects including labour standards, labour relations, pre-employment, and post-employment matters.

4.2 Characteristics of Employment Contracts

There is no legally required format for employment contracts in the Philippines, nor is there a requirement for it to be in writing. It is nevertheless recommended to be written in order to clearly specify the terms and conditions of employment.

In the Philippines, the relationship between capital and labour is not merely contractual. It is so impressed with public interest that labour contracts must yield to the Philippine Labor Code and other regulations made by the state. In other words, labour contracts are not ordinary private contracts; rather, they are imbued with public interest and a proper subject matter of police power measures. The duration of employment would depend on the type of employment relationship; however, all regular employees have the right to security of tenure.

4.3 Working Time

The normal hours of work of an employee must not exceed eight hours a day and should be exclusive of the one-hour daily lunch break. Philippine laws, however, do not prohibit work done for less than eight hours. Overtime pay is regulated by law. The Labor Code of the Philippines sets an employee's overtime pay rate at 25% of their hourly rate on regular working days. However, this can change if a company or a collective bargaining agreement (a legal contract between a business and a worker's union) sets more generous pay rates.

4.4 Termination of Employment Contracts

Philippine labour laws allow employers to terminate their employees only under either just or authorised causes, and upon due compliance with the prescribed procedure. This is anchored on the principle of security of tenure, which is not only statutorily provided, but is also guaranteed by the Philippine Constitution.

The following are just causes for termination:

- serious misconduct or wilful disobedience;
- gross and habitual neglect of duties;
- fraud or wilful breach of trust;
- commission of a crime or offence by the employee against their employer, the employer's immediate family or their duly authorised representatives; and
- other causes analogous to the foregoing. Based on Philippine case law, examples of such analogous causes include: (i) theft committed by an employee against a person other than their employer, if proven by substantial evidence; (ii) gross incompetence or inefficiency, such as the failure to attain a reasonable work quota which was fixed by the employer in good faith; (iii) failure to meet the standards of a bona fide occupational qualification; and (iv) a severe failure to comply with company rules and regulations. Further, no act or omission shall be considered as an analogous cause unless expressly provided in the company rules, regulations, or policies.

On the other hand, the following are authorised causes for termination:

- installation of labour-saving devices;
- redundancy;
- retrenchment to prevent losses;
- closure or cessation of business; and
- disease not curable within six months as certified by a competent public authority, and continued employment of the employee is prejudicial to their health or to the health of their co-employees.

Separation pay, as a result of termination of employment, is set by law and given only in cases of dismissals due to authorised causes.

If the authorised cause is the installation of labour-saving devices or redundancy, the separation pay is equivalent to one month's pay or one month's pay for every year of service, whichever is higher.

If the authorised cause is retrenchment, closure or cessation of business, or an incurable disease, the separation pay is equivalent to one month's pay or one-half month's pay for every year of service, whichever is higher.

The only time employers are not compelled to pay separation pay when terminating due to authorised cause is when they closed their establishment or undertaking due to serious business losses or financial reverses.

On the other hand, if the dismissal is due to any of the just causes enumerated under the Philippine Labor Code, separation pay is not required to be given to employees.

Large numbers of dismissals would still require that they fall under any of the authorised causes for termination: installation of labour-saving devices, redundancy, retrenchment, and closure of business.

4.5 Employee Representations

The Labor Code provides that as part of the workers' rights, they should be able to participate in policy and decision-making processes of the establishment they are employed in if the same will directly affect their rights, benefits and welfare. There is no express requirement that an agreement should be reached, as long as the consultation requirement has been satisfied, facilitated by labour-management councils, if any.

While the workers are given the right to participate in policy and decision-making processes if the same will directly affect their rights, benefits and welfare, including in cases of redundancy, an agreement does not need to be ultimately reached with them. Thus, regardless of whether or not the employees agree to the restructuring after consultation, it is still the prerogative of management to implement a redundancy programme.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

The National Internal Revenue Code (the "Tax Code") adopts a schedular system of taxation where a fixed and variable tax is imposed depending on the individual's annual gross income for a particular taxable year. The individual tax rate ranges from 15% to 35%. The reach of taxation depends on the employee's citizenship and residency status in the Philippines. If the employee is a citizen, they are taxable on all income derived within and outside the Philippines while a non-resident citizen. An alien individual is only subject to tax for income derived within the Philippines.

Substituted Filing of Returns

In order to facilitate collection of taxes from employees, the Tax Code mandates the employer to withhold and file the income tax returns of employees purely receiving compensation income from one employer. Aside from the withholding tax on compensation, employers are also obligated to contribute their share, deduct statutory contributions from employees' salary and remit such amount to the Social Security System, Philippine Health Insurance Corporation, and Home Development Mutual Fund accordingly.

5.2 Taxes Applicable to Businesses

General Taxes Applicable to Corporations

In general, corporations formed and organised under the laws of the Philippines (ie, domestic corporations) are subject to corporate income tax of either 20% or 25%, depending on their net taxable income and total assets. Aside from corporate income tax, corporations are also required to pay 12% Value-Added Tax (VAT) for imports and sale of goods and services, withholding tax on certain income payments, excise tax on the manufacture or production of certain goods for domestic sale or consumption as well as services performed in the Philippines. Interests received by domestic corporations are generally subject to 15% final income tax while local-sourced dividends are not subject to tax. Foreign-sourced dividends are subject to income tax except when the dividends are reinvested in the business operations in the Philippines within the next taxable year to fund working capital requirements, capital expenditures, dividend payments, investment in domestic subsidiaries, and infrastructure project and the domestic corporation holds directly at least 20% of the outstanding shares of the foreign corporation for at least two years at the time of dividend distribution. Other passive income such as capital gains from sale of shares of stock, including land and/or buildings, are subject to final tax.

Situs of Taxation

Domestic corporations are taxable on all income derived from sources within and outside the Philippines, while foreign corporations, whether engaged or not in trade or business in the Philippines, are taxable only on income derived from sources within the Philippines.

The Philippines has neither implemented Pillar Two of the OECD which set forth a global minimum tax at 15% for multinational enterprises with turnover of more than EUR750 million nor introduced a domestic top-up tax.

5.3 Available Tax Credits/Incentives

Tax Credits

Subject to certain limitations and proof of payment, the Tax Code allows taxes paid in foreign countries as tax credit or deduction in the taxable income of a taxpayer. Additionally, the BIR may issue tax credit certificates in case of overpayment of taxes.

Fiscal Incentives

To boost and attract foreign investment, the Tax Code also offers tax incentives to business engaged in certain activities and industries as listed in the Strategic Investment Priority Plan (SIPP) such as green ecosystems, health-related activities, defence-related activities, industrial value-chain gaps, food security-related activities, etc. The SIPP is valid for a period of three years, subject to review and amendment thereafter unless a supervening event necessitates an earlier review.

These tax incentives include (i) income tax holiday; (ii) special corporate income tax rate; (iii) enhanced deductions; (iv) duty exemption on

importation of capital equipment, raw materials, spare parts, or accessories; and (v) VAT exemption on importation and VAT zero-rating on local purchases. The availability and period of tax incentives depends on several factors such as (i) whether the entity is a domestic market enterprise or export enterprise which must export at least 70% of its output; (ii) the tier in which the registered activity is classified; and (iii) the location of the registered business activity.

5.4 Tax Consolidation

The Philippine government does not implement a tax consolidation scheme for corporations. Corporations are granted a separate juridical personality from their shareholders, natural or juridical. Consequently, each corporation is tasked to handle their respective tax filings, regardless of it belonging to a group of company.

5.5 Thin Capitalisation Rules and Other Limitations

There are no formal rules and regulations in the Philippines prescribing a maximum debt-to-equity ratio to be maintained by domestic corporations. However, the SEC checks the debt-to-equity ratio of a Philippine branch of a foreign corporation against a benchmark value of 3:1.

5.6 Transfer Pricing

Based on the transfer pricing rules in the Philippines, a transaction entered into between related parties must comply with two main requirements: (i) the transaction should be made at arm's length (ie, it should be made under comparable conditions and circumstances as a transaction with an independent party); and (ii) transfer pricing documentation must be maintained by the corporation to demonstrate that their transfer prices are consistent with the arm's length principle. For transfer pricing purposes, two or more entities are deemed related if one participates directly or indirectly in the management, control or capital of the other.

The BIR Transfer Pricing Audit Guidelines introduced standardised audit procedures to be used by the BIR applicable to audit of taxpayers with related-party transactions. With this issuance, which requires a covered taxpayer to file a prescribed tax form along with transfer pricing documentation when certain conditions are met, it is expected that the BIR may aggressively conduct transfer pricing audits and impose deficiency tax assessments on related-party transactions.

5.7 Anti-evasion Rules

The Tax Code grants the Commissioner of Internal Revenue the ability to distribute, apportion or allocate gross income or deductions among related entities if it is determined that such distribution, apportionment, or allocation is necessary to prevent evasion of taxes or clearly to reflect the income of such organisation, trade or business.

The Tax Code also imposes criminal penalties on taxpayers who have purposely attempted to evade the payment of taxes. To facilitate the collection against tax evaders, the Tax Code extends the prescriptive period to assess and collect taxes to within ten years after the discovery of the falsity, fraud or omission.

6. Competition Law

6.1 Merger Control Notification

Mandatory Notification

Based on Philippine Competition Commission (PCC) Resolution No 01-2024, parties to mergers, acquisitions and joint ventures shall be required to provide notification when: (i) the Size

of Party exceeds PHP7.8 billion; and (ii) the Size of Transaction exceeds PHP3.2 billion.

"Acquisition" refers to the purchase or transfer of securities or assets, through contract or other means, for the purpose of obtaining control, while "merger" refers to the joining of two or more entities into an existing entity or to form a new entity. "Joint venture" refers to a business arrangement whereby two or more entities or group of entities contribute capital, services, assets, or a combination of any or all of the foregoing, to undertake an investment activity or a specific project, where each entity shall have the right to direct and govern the polices in connection therewith, with the intention to share both profits and risks and losses subject to agreement by the entities.

Tests for Mandatory Notification

The "Size of Party" test refers to the aggregate annual gross revenues in, into or from the Philippines, or value of assets in the Philippines of the ultimate parent entity of at least one of the acquiring or acquired entities, including that of all entities that the ultimate parent entity controls, directly or indirectly. The "Size of Transaction" test refers to the (i) aggregate value of the joint venture partners' assets that will be combined in the Philippines or contributed into the proposed JV, or (ii) the gross revenues generated in the Philippines by assets to be combined in the Philippines or contributed into the proposed joint venture.

6.2 Merger Control Procedure

A compulsory merger notification with the PCC must be filed within a period of 30 days from the signing of the definitive agreement. The PCC has a period of 15 days to conduct its sufficiency review (the "Sufficiency Period"), and in the event a Notice of Deficiency (NOD) is issued by the PCC, the filing parties will have 15 days to submit compliance with the NOD.

The PCC then assesses if the NOD was complied with, within the period remaining from the 15-day Sufficiency Period, which in no case shall be less than five days from submission of compliance with the NOD. If it believes the compliance with NOD is insufficient or the parties did not comply within the period provided, the PCC may return the Notification Form without prejudice to refiling. Otherwise, if found sufficient, the PCC will issue the order of payment of filing fee which must be settled within ten days. The Phase 1 review shall commence on the first business day following the payment of filing fees and must be completed within 30 days thereafter. Thus, assuming that the periods given are fully utilised by the parties and by the PCC, Phase 1 approval of the PCC can be secured within 105 days from signing the definitive agreement.

If, after the conduct of Phase 1 review, the PCC is unable to conclude that the notified merger does not raise competition concerns, it will provide the merger parties a notice and request for additional information for the purpose of commencing a Phase 2 review. The PCC shall post its decision on its website. If no PCC decision is released within the 60-day period, the transaction shall be deemed approved by the PCC.

6.3 Cartels

The Philippine Competition Act (PCA) prohibits, among others, anti-competitive agreement and/or abuse of dominant position. Anti-competitive agreements are those that substantially prevent, restrict, or lessen competition. The agreement may be any type or form of contract, arrangement, or understanding between or among businesses to fix prices or manipulate bids. It does not matter if the agreement is formal or infor-

mal, explicit (ie, written or announced) or tacit, or in written or oral (ie, verbal) form. It is illegal for business rivals to act together in ways that can limit competition or hinder other businesses from entering the market.

The following are examples of anti-competitive agreements.

- Price fixing – competitors collude with one another to fix prices for goods or services, rather than allowing prices to be determined by market forces.
- Bid rigging – parties participating in a tender process co-ordinate their bids, rather than submit independent bid prices.
- Output limitations – competitors agree to limit production or set quotas, or else to co-ordinate investment plans.
- Market sharing – competitors agree to restrict their sales to specific geographic areas, effectively creating local monopolies for each of them.

A cartel is an organisation formed by competitors in a specific industry, which enables them to set prices or control levels of production. Agreements to form cartels or to collude are considered anti-competitive agreements.

6.4 Abuse of Dominant Position

The PCA likewise penalises abuse of dominant position or the conduct of an entity, whether a company or an individual, with dominant position, that substantially prevents, restricts, or lessens competition in the market. It is not illegal per se to be dominant, provided that the business does not take advantage of its dominance to substantially lessen competition in the market.

According to the PCC, a "dominant position" refers to a position of economic strength that an entity holds, making it capable of controlling the relevant market independently from any or a combination of: (i) competitors; (ii) customers; (iii) suppliers; or (iv) consumers. There shall be a rebuttable presumption of market dominant position if the market share of an entity in the relevant market is at least 50%. The PCC, however, may also set a new market share threshold for any particular sector, and it shall, from time to time, determine and publish the threshold for dominant position or minimum level of share in the relevant market that could give rise to a presumption of dominant position.

The PCC considers other factors in determining the existence of a market dominant position, including:

- its market share in the relevant market and whether it is able to fix prices unilaterally or restrict supply in the relevant market;
- the existence of barriers to entry;
- the existence and power of its competitors;
- the possibility of access by its competitors or other entities to its sources of inputs;
- the power of its customers to switch to other goods or services;
- its recent conduct; and
- such other criteria that it may deem to be relevant.

In particular, the PCC has noted that the imposition of restrictions on the sale or trade of goods concerning where, to whom or in what form goods may be sold or traded, such as fixing prices, is a form of abusive anti-competitive behaviour.

Remedial Measure

The PCC can minimise the threat of abuse of dominance by requiring players with dominant position to comply with ex ante rules, which

are preventive measures (ie, significant market power (SMP) obligations) to help big businesses avoid anti-competitive practices, provide safeguards for non-dominant businesses, and ensure that the market remains competitive.

7. Intellectual Property

7.1 Patents

Definition

A patent is an exclusive right granted to an inventor over a product, process, or an improvement thereof, that provides a technical solution to a problem in any field of human activity which is new, involves an inventive step, and is industrially applicable.

Length of Protection

The term of a patent is 20 years from its filing date, subject to the payment of annual fees starting on the fifth year after the application was published and on each subsequent anniversary of such date.

Registration Process

Patent applications are filed online through the Philippine Intellectual Property Office (IPOPHL) website, except for voluminous applications. Upon submission of the complete documents, the application is accorded a filing date and undergoes formality examination and then a prior art search. The application will be published for opposition in the E-Gazette together with the IPOPHL's search report after the expiration of 18 months from the filing or priority date of the application, and any person may present observations on the invention's patentability within six months from the publication date. The application will be deemed withdrawn unless a written request for its substantive examination is filed within six months from its date of publication. If the application is deemed to have met the requirements, the IPOPHL will grant the patent and issue the Letters of Patent Certificate.

Enforcement and Remedies

The making, using, offering for sale, selling, or importing of a patented product or a product obtained directly or indirectly from a patented process, or the use of a patented process, without the authorisation of the patent owner, constitutes patent infringement.

An action for patent infringement may be administrative, civil and/or criminal in nature. If infringement is repeated after the finality of the judgment of the court against an infringer, the offender will also be criminally liable. The owner of the patent may recover damages and obtain any of the following remedies:

- impounding of sales invoices and other documents evidencing sales during the pendency of the action;
- preliminary and/or permanent injunction; and
- disposal or destruction of the infringing goods and/or paraphernalia used for infringement.

Independent of the civil and administrative sanctions imposed by law, criminal cases confer the penalties of imprisonment from six months to three years and/or a fine ranging from PHP100,000 to PHP300,000 at the court's discretion. The criminal action prescribes in three years from the date of commission of the crime.

A patent owner may also record their patent with the Bureau of Customs (BOC) on the basis of which the BOC will monitor and inspect suspect imports to determine if they are liable to seizure and forfeiture, and/or further action before other government agencies or the courts.

7.2 Trade Marks

Definition

A mark is any visible sign capable of distinguishing the goods (trade mark) or services (service mark) of an enterprise. It also includes stamped or marked containers of goods.

Length of Protection

A trade mark registration lasts for ten years (from the date of registration) and is renewable for periods of ten years. It must also be kept active by filing a Declaration of Actual Use (DAU), together with proofs of use of the mark in the Philippines within the following periods:

- three years from the filing date;
- one year from the fifth anniversary of the registration date;
- one year from the renewal date; and
- one year from the fifth anniversary of the renewal date.

Registration Process

The Philippines follows the first-to-file rule for trade mark registration. Trade mark applications are filed online through the IPOPHL website. An application is granted a filing date upon the filing of complete requirements, then undergoes substantive examination to determine registrability. Once a mark is deemed registrable, it will be published for opposition in the IPOPHL E-Gazette. If no opposition is filed within 30 days from the publication date, the mark will be granted registration, and an electronic Certificate of Registration will be issued. The IPOPHL will only issue a physical certificate upon request and payment of the required fee.

Enforcement and Remedies

The use of any reproduction or colourable imitation of a registered mark, or the same container or a dominant feature thereof in commerce without the consent of the registered owner is considered trade mark infringement. Any person who employs deceptive or fraudulent means to pass off their own goods and/or services for another's by giving them the general appearance of another's goods or using the mark of another, whether registered or not, shall be guilty of unfair competition.

An action for trade mark infringement and/or unfair competition may be administrative, civil and/or criminal in nature. The owner of the mark may recover damages and obtain any of the following remedies:

- impounding of sales invoices and other documents evidencing sales during the pendency of the action;
- preliminary and/or permanent injunction; and
- disposal or destruction of the infringing goods and/or paraphernalia used for infringement.

Independent of the civil and administrative sanctions imposed by law, criminal cases confer the penalties of imprisonment from two to five years and a fine ranging from PHP50,000 to PHP200,000.

A registered trade mark owner may also record their mark with the BOC on the basis of which the BOC will monitor and inspect suspect imports to determine if they are liable to seizure and forfeiture, and/or further action before other government agencies or the courts.

7.3 Industrial Design

Definition

Industrial design is the ornamental or aesthetic aspect of an article. It is any composition of lines, colours, or any three-dimensional form, whether or not associated with lines or colours, which

gives a special appearance to and can serve as a pattern for an industrial product or handicraft.

Length of Protection

An industrial design registration is valid for five years from the filing date of the application, renewable for only two consecutive five-year terms.

Registration Process

Applications are filed online through the IPOPHL website. Once the complete documents are submitted, the application will be accorded a filing date and undergo formality examination and then publication for 30 days. In general, an industrial design application will not undergo substantive examination, but the Director of Patents has the discretion to require the examiner to issue a registrability report to confirm the novelty of the industrial design at any time prior to the issuance of the Certificate of Registration.

Enforcement and Remedies

The actions and remedies granted to a patent owner shall apply to an industrial design registrant.

7.4 Copyright

Definition

Copyright is the legal protection granted to the creators of original literary, scientific, and artistic works, and to their successors-in-interest. Persons or entities involved in making copyrighted works available to the public through the application of substantial creative, technical, or organisation skills, such as performers, producers, and broadcasting organisations, are also granted neighbouring or related rights.

Length of Protection

Works are protected from the moment of creation and generally extend for the lifetime of the author plus 50 years after. Different rules apply to the following works.

- Anonymous or pseudonymous works – 50 years from the date of their first lawful publication, or if un-published, 50 years from their date of creation.
- Works of applied art – 25 years from their date of creation.
- Photographic works – 50 years from the date of their first publication, or if un-published, 50 years from their date of creation.
- Audio-visual works – 50 years from the date of their first publication, or if un-published, 50 years from their date of creation.

An author's right to attribution lasts their lifetime and in perpetuity after their death, while other moral rights are coterminous with the economic rights.

Registration Process

Registration is not necessary for the protection of a copyrighted work. Nonetheless, copyright registrations can be obtained from the National Library or the IPOPHL-Bureau of Copyright and Related Rights (BCRR) to put in official records the registrant's ownership claim over a work and to put others on notice of such claim. After submission of the complete documentary requirements and payment of fees, the granting body will issue the Certificate of Registration. The IPOPHL-BCRR can deny an application for registration if: (i) the work does not fit the statutorily defined categories of works under the copyright law; or (ii) the work is the subject of a prior registration.

Enforcement and Remedies

Copyright infringement occurs when one: (i) directly commits an infringement (ie, violates an economic right of a copyright owner or of the

owner of a related right); (ii) knowingly benefits from the infringing activity of another who commits an infringement; or (iii) knowingly induces, causes, or materially contributes to the infringing conduct of another.

An action for copyright infringement may be administrative, civil and/or criminal in nature. The copyright owner may recover damages and obtain any of the following remedies:

- impounding of sales invoices and other documents evidencing sales during the pendency of the action;
- preliminary and/or permanent injunction; and
- disposal or destruction of the infringing goods and/or paraphernalia used for infringement.

Independent of the civil and administrative sanctions imposed by law, criminal cases confer the penalties of imprisonment from one to nine years and fines ranging from PHP50,000 to PHP1.5 million, depending on whether it is the first, second, third, or subsequent offence.

A copyright owner may also record their right with the BOC on the basis of which the BOC will monitor and inspect suspect imports to determine if they are liable to seizure and forfeiture.

7.5 Others

Trade Secrets

A trade secret is a plan or process, tool, mechanism or compound known only to its owner and those of its employees to whom it is necessary to confide it. Trade secrets are not registered with the IPOPHL. Philippine laws are instead tailored towards preventing compulsory disclosure of such secrets, and parties usually resort to non-disclosure agreements.

Databases

Derivative works, including compilations of data, are copyrightable by reason of the selection, coordination, or arrangement of their contents.

Software

Software and computer programs are explicitly recognised as copyrightable "literary and artistic works" under Section 172.1 (n) of the IP Code. Thus, the source code, the architecture of the software, and its interface are all protected by copyright. In contrast, computer programs are not patentable unless claimed as computer-implemented inventions.

8. Data Protection

8.1 Applicable Regulations

The Data Privacy Act protects the sanctity of personal information, sensitive personal information (collectively, "Protected Information"), and privileged information by imposing administrative, civil and criminal penalties against unauthorised processing, improper disposal, and malicious and unauthorised disclosure of Protected Information, among others. As a guiding principle, the Data Privacy Act generally requires personal information to be (i) collected for specific and legitimate purpose; (ii) processed fairly and lawfully; (iii) accurate and updated; (iv) retained when only necessary; and (v) kept in a form which permits identification of data subjects. Confidentiality of information may also be protected through contractual stipulation among the parties.

8.2 Geographical Scope

The provisions of the Data Privacy Act apply to acts done or practice engaged in and outside of the Philippines as long as:

- the information pertains to a Philippine citizen or resident; and
- the processing entity has a link in the Philippines such as when:
  (a) the contract is executed in the Philippines;
  (b) the processing entity is unincorporated in the Philippines but has central management and control in the country;
  (c) the processing entity has a branch, agency, office or subsidiary in the Philippines and its parent or affiliate has access to personal information;
  (d) the entity carries on business in the Philippines; or
  (e) the personal information was collected or held by an entity in the Philippines.

8.3 Role and Authority of the Data Protection Agency

The Data Privacy Act created the National Privacy Commission (NPC) tasked to administer and implement the provisions of the Data Privacy Act, as well as monitor and ensure compliance of the country with the international standards set for data protection. The NPC is also vested with investigatory and adjudicatory powers, including authority to grant ancillary remedies, to facilitate settlement of complaints involving data privacy.

9. Looking Forward

9.1 Upcoming Legal Reforms

To stimulate tax collection to meet revenue goals, the following bills are expected to pass in the future:

- VAT on Digital Service Providers;
- Excise Tax on Single-Use Plastic Bags;
- Excise Tax on Sweetened Beverages and Junk Food;
- the Real Property Valuation Assessment Reform (RPVAR); and
- the VAT refund for non-resident tourists.

The RPVAR bill seeks to increase tax collections by updating valuations of real property without increasing or imposing new taxes.

The IPOPHL has also submitted a bill to Congress seeking to introduce reforms in the Intellectual Property Code such as the power to take down online sites with violations of the intellectual property rights as well as enabling copyright owners to claim damages from these infringing sites.

Trends and Developments

Contributed by:
Patricia A O Bunye, Christianne Grace F Salonga, Carriz Andrea F Nana and Frances Mickaella Noreen M Chavez
Cruz Marcelo & Tenefrancia

Cruz Marcelo & Tenefrancia (CMT), established in 2013, is a top-tier, full-service law firm in the Philippines with proven expertise in, among others, corporate and special projects, litigation and dispute resolution, intellectual property, and mining and natural resources and energy. Its other practice areas include: infrastructure, transportation and public utilities; taxation; labour and employment; trade; telecommunications; data privacy; competition; financial technology; family law; and information and communications technology. Its multi-disciplinary approach, involving collaboration among the firm's different departments, guarantees its clients effective and comprehensive legal solutions and representation. CMT's lawyers consistently demonstrate exceptional proficiency in their respective practice areas, earning acclaim from peers, as well as industry accolades.

Authors

Patricia A O Bunye heads the mining and natural resources department and the energy practice group of CMT. She is also a senior partner in the firm's intellectual property department. In her mining and natural resources practice, she is recognised and highly ranked among the foremost mining lawyers in the Philippines.

Christianne Grace F Salonga is a senior associate of CMT's corporate and special projects department. Her practice areas include capital markets, securities regulations, competition, corporate and commercial law, M&A, and project finance. In 2008, Ms Salonga obtained her Juris Doctor degree from the Ateneo Law School, graduating among the top 20 students of her class. In 2012, she earned her Master of Laws degree from the University of Sydney, Australia. Ms Salonga formerly served as a Court Attorney at the Supreme Court, and as a Director at the Office of the President.

Contributed by: Patricia A O Bunye, Christianne Grace F Salonga, Carriz Andrea F Nana and Frances Mickaella Noreen M Chavez, **Cruz Marcelo & Tenefrancia**

Carriz Andrea F Nana is a junior associate of CMT. Her practice areas include corporate and commercial law. She obtained her Juris Doctor degree from the University of the Philippines (UP) College of Law in 2023 with a Dean's Medal for Academic Excellence and as a member of the Order of the Purple Feather, the official honour society of UP Law. In 2018, she earned her degree in Bachelor of Arts in Speech Communication from UP Diliman, where she graduated magna cum laude and ranking third in her class.

Frances Mickaella Noreen M Chavez is a junior associate of CMT. Her practice areas include criminal and civil litigation. She earned her Juris Doctor degree cum laude from the University of Santo Tomas in 2023, ranking third in her class. She was also a Foundation for Liberty and Prosperity Scholarship Awardee. In 2021, her team won the Best in Creative Solution Generation Award at the Asia-Pacific Commercial Mediation Competition. In 2019, she graduated magna cum laude with a Bachelor of Science in Business Administration degree, minor in Finance, from the University of the Philippines, Diliman.

Cruz Marcelo & Tenefrancia

9th, 10th, 11th and 12th Floors
One Orion,
11th Avenue corner University Parkway
Bonifacio Global City, Taguig 1634
Metro Manila
Philippines

Tel: +632 8810 5858
Fax: +632 8810 3838
Email: info@cruzmarcelo.com
Web: www.cruzmarcelo.com

Contributed by: Patricia A O Bunye, Christianne Grace F Salonga, Carriz Andrea F Nana and Frances Mickaella Noreen M Chavez, **Cruz Marcelo & Tenefrancia**

Delving Into the Regulatory Framework for Doing Business in the Philippines

Philippine economic overview

Gross domestic product and foreign investments

The Philippine Statistics Authority (PSA) reported that the gross domestic product (GDP) grew to 5.7% in January–March 2024, higher than the 5.5% GDP growth in the fourth quarter of 2023, but lower than the 6.4% expansion posted in the first quarter of 2023, and the GDP growth forecast of 5.9% GDP for the first quarter of 2024.

The growth was mainly driven by financial and insurance activities (10%), wholesale and retail trade and the repair of motor vehicles and motorcycles (6.4%), and manufacturing (4.5%). Agriculture, forestry and fishing grew by 0.4%, while industry and services posted gains of 5.1% and 6.9%, respectively.

The National Economic and Development Authority (NEDA) stated that construction projects slowed down due to prolonged periods of extreme heat, and household spending was adversely affected due to elevated prices of major food items and the heat wave. NEDA emphasised that the government continues to alleviate the impact of El Niño while preparing for La Niña. The government is also working with distribution utilities to manage the electricity demand and with private water concessionaires to ensure water security.

On 21 May 2024, the Philippines and the United States agreed to collaborate on training Filipinos in the construction and operation of nuclear power plants, a move aimed at boosting the Philippines' electricity supply. This is in accordance with the Agreement for Cooperation in Peaceful Uses of Nuclear Energy between the United States and the Philippines, which became effective on 2 July 2024. The aim of this Agreement is to boost co-operation between the two nations in the fields of clean energy and energy security, as well as to reinforce their long-term bilateral diplomatic and economic ties.

Committed foreign direct investments (FDI) in the Philippines declined in the first quarter of 2024 to 63% year-on-year. The government approved FDI pledges of PHP148.43 billion, which represents the FDIs committed to the Philippines economic zones. These are from Singapore (47.2%), Netherlands (26.2%) and South Korea (13.6%). The major industries relevant to the committed FDIs, accounting for 73.6%, are electricity, gas, steam, and air-conditioning supply.

Economic drivers in the Philippines

Due to their income and growth potential, the top industries in the Philippines, according to the Philippine Chamber of Commerce and Industry, are mining, tourism, agribusiness, information technology-business process outsourcing, manufacturing, and creative industries. In particular, the agribusiness industry has the potential to contribute as much as 35% to the country's gross domestic product. Meanwhile, the mining and mineral industry was able to boost the country's growth by PHP102 billion in 2020 during the pandemic, while the manufacturing industry contributed 17.2% in 2022.

During the Sixth Indo-Pacific Business Forum (IPBF) on 21 May 2024, President Ferdinand Marcos Junior asserted that the Philippines can serve as a strategic gateway for companies aiming to access the approximately 600-million-strong Southeast Asian consumer market. The aim of the government to be a manufacturing hub is complemented by the 185 infrastructure flagship projects (IFP), with an estimated worth of PHP9.14 trillion, which NEDA has approved.

On 30 April 2024, Executive Order No 59 was signed to order the streamlining of the permitting process for IFP.

The Philippine government is also keen to enhance its capacity to address climate hazards. Thus, it seeks to bolster access to climate finance that supports low-emission development and climate-resilient projects in the sectors of agriculture, energy, biodiversity conservation, environment, transportation, and waste, among others. The Philippines recently secured a USD10 million grant from the Green Climate Fund to support the government's capacity to address climate hazards.

Tourism in the Philippines has recovered from the COVID-19 pandemic as evidenced by the country welcoming 5.45 million tourists in 2023. Notably, airlines companies have anticipated a growing demand for flights across their network arising from a long-term travel boom across Southeast Asia following the pandemic. For instance, Philippine Airlines is set to receive 13 Airbus A321neos and nine Airbus A350-1000 jets by 2025 and 2027, while Cebu Pacific has reached a preliminary agreement to buy 152 single aisle jets from Airbus SE worth USD24 billion, as announced on 2 July 2024.

Key laws and regulations

Doing business in the Philippines

Republic Act (RA) No 7042, or the Foreign Investments Act of 1991 (FIA), as amended, enumerates activities that may constitute "doing business" in the Philippines, including: soliciting orders and service contracts; opening offices, whether they are "liaison" offices or branches; appointing representatives or distributors domiciled in the Philippines or who, in any calendar year, stay in the Philippines for a period or periods totaling 180 days or more; participating in the management, supervision, or control of any domestic business, firm, entity, or corporation in the Philippines; and performing any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or the purpose and object of the business organisation.

In addition to these activities, Philippine courts employ a two-fold test, known as the "Mentholatum Test," which provides that "doing business" in the Philippines encompasses transactions or a series of transactions conducted in pursuit of the primary business of the foreign corporation, with the intention of continuing such primary business within the country.

Revised Corporation Code (RA No 11232)

RA No 11232, or the Revised Corporation Code of the Philippines, introduced several reforms aimed at improving the ease of doing business in the country, which include granting corporations perpetual existence by default, allowing the formation of one-person corporations, and eliminating the mandatory minimum capital stock requirement for corporations, except when specified by special laws. Additionally, the Revised Corporation Code permitted the use of remote communication during board and stockholder meetings, such as videoconferencing and teleconferencing.

Foreign Investments Act (FIA), as amended (RA No 8179)

Foreign investments in the Philippines are primarily governed by FIA, which liberalised the entry of foreign investment into the country. Under the FIA, foreigners can own 100% equity in domestic market enterprises, except in areas

specified in the Twelfth Regular Foreign Investment Negative List (the "Negative List"). Domestic market enterprises produce goods or provide services exclusively for the domestic market. If they export a portion of their products, they do not consistently export at least 60% of their output.

The Negative List enumerates industries and activities with foreign ownership limitations under the FIA and other existing laws, including mass media, exploration, development and utilisation of natural resources, and ownership of condominium units.

Public Service Act, as amended (RA No 11659)

RA No 11659 amended Commonwealth Act No 146, or the Public Service Act (PSA) to introduce a definition of a "Public Utility" as that referring to a public service that operates, manages or controls for public use any of the following: distribution of electricity; transmission of electricity; petroleum and petroleum products pipeline transmission systems; water pipeline distribution systems and wastewater pipeline systems, including sewerage pipeline systems; seaports; and public utility vehicles. These Public Utilities are subject to 40% foreign equity ownership limit. The amendments to the PSA enable the liberalisation of key public services by allowing full foreign ownership of public services that are not classified as Public Utilities such as airports, railways, expressways, and telecommunications.

Retail Trade Liberalization Act, as amended (RA No 11597)

On 10 December 2021, RA No 11595, or the Retail Trade Liberalization Act of 2000, was amended by RA No 11595. It provides that foreign-owned partnerships, associations, and corporations may, upon registration with the Securities and Exchange Commission (SEC), or in case of foreign-owned single proprietorships, upon registration with the Department of Trade and Industry (DTI), engage or invest in the retail trade business, under the following conditions: (i) the foreign retailer shall have a minimum paid-up capital of PHP25 million; (ii) the foreign retailer's country of origin does not prohibit the entry of Filipino retailers; and (iii) if the foreign retailer shall engage in retail trade through more than one physical store, each store must have at least PHP10 million investment.

Renewable Energy Act (RA No 9513)

RA No 9513 or the Renewable Energy (RE) Act of 2008 was enacted primarily to accelerate the exploration and development of RE resources, including, but not limited to, biomass, solar, wind, hydro, geothermal, and ocean energy sources.

In 2022, the Department of Justice (DOJ) issued a legal opinion on the maximum foreign equity participation allowable in the exploration, development, and utilisation of solar, wind, hydro, and ocean or tidal energy resources, stating that these natural resources should not be subject to the 40% foreign equity limitation under Section 2, Article XII of the Philippine Constitution. The DOJ opinion clarified that "natural resources" pertains to properties that can be appropriated. In this context, the DOJ pointed out that the sun, wind, and ocean, as energy sources, are inexhaustible and thus cannot be appropriated. Consequently, these energy sources do not fall under the definition of "natural resources" subject to the 40% foreign equity limitation.

In light of the DOJ opinion, the Department of Energy (DOE) issued Department Circular No 2022-11-0034, amending Section 19 of Department Circular No DC2009-05-0008 or the RE Act Implementing Rules and Regulations (IRR),

which effectively removed the nationalisation requirement for the aforementioned RE resources. This allows entry of foreign capital into the country's RE industry, lowering the costs of RE projects and making cleaner energy more accessible to the greater public. The DOJ, however, emphasised that its opinion is subject to the Water Code and jurisprudence limiting to Filipino citizens or juridical persons the appropriation of waters, direct from the source, for power generation, unless repealed or reversed.

Business structure

Domestic entities

Subject to legal requirements, foreign investors may establish the following domestic entities:

(i) Sole proprietorship

A sole proprietorship is a business structure registered with the DTI and is owned by an individual (sole proprietor), who possesses complete control over the enterprise and holds exclusive ownership of all assets and profits generated by the business.

(ii) Partnership

A partnership is registered with the SEC and involves two or more individuals who commit to contributing money, property, or industry to a common fund with the intention of sharing the profits among themselves.

A partnership may take the form of either (i) a general partnership, wherein the partners have unlimited liability for the debts and obligations of the partnership, or (ii) a limited partnership, wherein the limited partners' liability is restricted to the extent of their capital contributions.

(iii) Regular corporation

A regular corporation is registered with the SEC and has a juridical personality separate and distinct from that of its shareholders. Shareholders are liable only to the extent of their equity investments.

The minimum paid-up capital of a regular corporation with foreign equity participation exceeding 40% of its outstanding and voting capital stock, which will operate as a domestic market enterprise, must be at least USD200,000.

(iv) One-person corporation

A one-person corporation (OPC) is a corporation with a single shareholder, who can only be a natural person of legal age, trust or estate.

A foreign natural person may set up an OPC, provided that it complies with the applicable capital requirement (minimum of USD200,000 for domestic market enterprises) and provided that the line of business is not subject to constitutional and statutory restrictions on foreign ownership.

Foreign corporations

Foreign investors may register with the SEC any of the following foreign corporations:

(i) Branch office

If a foreign investor desires to carry out the business activities of its parent company, and to derive income from the Philippines, then it may register a branch office. A branch office is treated as an extension of its parent foreign corporation. It must have at least USD200,000 as initial funding, which may be reduced to USD100,000 if the branch office will engage in a business that involves advanced technology, or directly employs at least 50 employees.

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(ii) Representative office

A representative office is not allowed to derive income from the Philippines and acts merely as a liaison office between its head office and the latter's Philippine-based clients. Its activities are limited to information dissemination, promotion and quality control of the head office's products, and the like.

(iii) Headquarters

The foreign corporation may establish a Regional or Area Headquarters (RHQ) or a Regional Operating Headquarters (ROHQ) in the Philippines.

- RHQ – an RHQ acts as an administrative branch in the Philippines of a multinational company engaged in international trade. It serves as a supervision, communications and co-ordination centre for its subsidiaries, branches or affiliates in the Asia-Pacific region and other foreign markets. It is not allowed to earn or derive income in the Philippines. It is required to submit an undertaking that it will remit annually at least USD50,000 or its equivalent in other foreign currencies to cover its operations in the Philippines.
- ROHQ:
  (a) An ROHQ is a branch established in the Philippines by a multinational company, which is engaged in any of the following qualifying services: general administration and planning; business planning and co-ordination; sourcing and procurement of raw materials and components; corporate finance advisory services; marketing control, sales and promotion; training and personnel management; logistics services; research and development services and product development; technical support and maintenance; data processing and communication; and business development.
  (b) It is allowed to derive income in the Philippines but is prohibited from offering its qualifying services to entities other than its affiliates, branches, or subsidiaries. It is likewise prohibited from selling and distributing goods and services.
  (c) An ROHQ is required to submit an undertaking that, within 30 days from its receipt of the SEC Certificate of Registration, it will remit to the Philippines such sufficient amount to cover its operations in the Philippines, which in no case is less than USD200,000 or its equivalent in other foreign currencies.

Merger control

Merger control in the Philippines is governed by RA No 10667, or the Philippine Competition Act (PCA), which prohibits anti-competitive agreements between or among competitors, and M&A which have the object or effect of substantially preventing, restricting, or lessening competition.

Under the PCA, the Philippine Competition Commission (PCC) must be notified when an M&A or joint venture transaction satisfies: (i) the size of party (SOP) and (ii) the size of transaction (SOT) tests. The SOP test is met when the aggregate annual gross revenues in, into or from the Philippines, or value of assets in the Philippines of the ultimate parent entity (UPE) of at least one of the acquiring or acquired entities, including that of all entities that the UPE controls, directly or indirectly, exceeds PHP7.8 billion. Meanwhile, the SOT test is met if the value of the transaction exceeds PHP3.2 billion. It refers to the value of the assets being acquired and/or gross revenues generated by the assets being acquired, or of the acquired entity and entities it controls.

Parties to a joint venture transaction shall meet the SOT test if either (i) the aggregate value of the assets that will be combined in the Philippines or contributed into the proposed joint venture exceeds PHP3.2 billion, or (ii) the gross revenues generated in the Philippines by assets to be combined in the Philippines or contributed into the proposed joint venture exceed PHP3.2 billion.

To date, the PCC has reviewed 293 M&A transactions, collectively valued at over PHP5.49 trillion, with 289 of these being notified to the PCC. In 2023 alone, the PCC received 24 notifications of M&A transactions worth nearly PHP610 billion, primarily from the real estate, electricity and gas, and information and communication sectors.

Incorporation and post-incorporation registration

Incorporation with the SEC

The incorporation of OPCs and regular corporations are done through the SEC – Electronic Simplified Processing of Application for Registration of Company (eSPARC), which allows the applicant to submit the proposed company name and input the required details and information for review of the SEC.

eSPARC is an implementation of the SEC's Digital Transformation and Technology Modernization Roadmap. It offers real-time updates on the status of registration applications through its inquiry facility. Connected to eSPAYSEC, the Electronic System for Payments to the SEC, it allows applicants to complete their transactions with the Commission via online banking or digital wallets.

Post-incorporation registrations

(i) Business permit from the Local Government Unit (LGU)

All business entities are required to secure a business permit for a fee from the LGU, where they hold business.

(ii) Tax registration with the Bureau of Internal Revenue (BIR)

Before the commencement of business, all business entities are required to register with the BIR for a Certificate of Registration (COR) and Tax Identification Number (TIN). They must apply for authority to print receipts and/or invoice and to register books of account.

(iii) Registration with Social Security System (SSS), Philippine Health Insurance Corporation (PHIC), Home Development Mutual Fund (HDMF), and Department of Labor and Employment (DOLE)

All business entities are required to register with the SSS, PHIC, HDMF, and the DOLE before they start operating, and to remit the mandatory contributions (both the employer's and employee's shares) to such agencies within the deadlines prescribed.

Taxes

The passage of RA No 10963, or the Tax Reform for Acceleration and Inclusion (TRAIN Law), as amended by RA No 11534, or the Corporate Recovery and Tax Incentives for Enterprises Act (CREATE Act), has lowered the tax rates imposed on corporations in order to encourage investments in the Philippines. The TRAIN Law implemented comprehensive reforms encompassing individual taxation, transfer taxes, indirect taxes, excise tax, documentary stamp tax,

and other tax categories, while the CREATE Act concentrates on the income taxation of corporate entities and the streamlining of fiscal incentives provided under existing investment promotion laws.

On 5 January 2024, RA No 11976 or the Ease of Paying Taxes Act (EOPT Act) was signed into law. It aims to modernise tax administration, provide mechanisms for proper and easy compliance, and update the taxation system. Key features of the EOPT Act include classifying taxpayers into micro, small, medium, and large categories, with special concessions for micro and small taxpayers. Additionally, it allows for both electronic and manual filing of returns and payment of taxes to the BIR, and through any authorised agent bank or authorised tax.

Corporate income tax

(i) Domestic corporations

Domestic corporations' income from sources within and without the Philippines are taxed at the rate of 25% of their net taxable income. If the domestic corporation's net taxable income does not exceed PHP5 million and its total assets do not exceed PHP100 million, excluding land on which the particular business entity's office, plant, and equipment are situated during the taxable year for which the tax is imposed, it shall be taxed at 20%. Meanwhile, proprietary educational institutions and non-profit hospitals are subject to an income tax rate of 10% on their taxable income, in certain conditions.

Regardless of the industry in which the corporation is engaged, a minimum corporate income tax (MCIT) of 2% of the gross income is imposed on a corporation, beginning in the fourth taxable year immediately following the year in which such corporation commenced its operations, when the MCIT is greater than the tax computed at the regular corporate income tax rate.

(ii) Foreign corporations

Resident foreign corporations are taxed only on income from sources within the Philippines and are subject to a tax rate of 25% of their net taxable income. There is also an MCIT of 2%.

Meanwhile, a different income tax rate is imposed upon the following resident foreign corporations: International Carriers (2.5% of their gross Philippine billings); Regional or Area Headquarters of Multinational Companies (exempt); and Corporation Covered by Special Laws (rate specified under the respective special laws).

Non-resident foreign corporations are taxed at 25% of the gross income received during each taxable year from all sources within the Philippines, such as interest, dividends, rents, royalties, salaries, premiums (except reinsurance premiums), annuities, emoluments or other fixed or determinable annual, periodic or casual gains, profits and income, and capital gains.

VAT

Notwithstanding the nationality and residence of the corporation, every sale, barter or exchange of goods or properties is subject to a VAT equivalent to 12% of the gross selling price or gross value in money of the goods or properties sold, bartered or exchanged, such tax to be paid by the seller or transferor.

Other taxes

Taxes are also imposed on the passive income of domestic and resident foreign corporations, such as interest income, royalties, dividends, and capital gains from the sale of land and shares of stock not traded on the stock exchange. Addi-

tionally, taxes on the passive income of non-resident foreign corporations are interest on foreign loans, intercorporate dividends, and capital gains from the sale of shares of stock not traded on the stock exchange.

Conclusion

The Philippine government acknowledges the critical role of attracting investment in driving economic growth and development. Consequently, it has enacted various laws and regulations to cultivate a favourable business environment. With its strategic location, skilled workforce, and pro-business policies, the country provides an ecosystem conducive to business success and prosperity.

POLAND

Law and Practice

Contributed by:
Agnieszka Janicka and Krzysztof Hajdamowicz
Clifford Chance

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Clifford Chance opened in Warsaw in 1992, combining strong local expertise with the significant depth and range of resources across five continents offered by Clifford Chance as a single, fully integrated, global partnership. The firm strives to exceed the expectations of its clients, which include corporates from all the commercial and industrial sectors, governments, regulators, trade bodies and non-profit organisations, and aims to provide them with quality advice and legal insight. Today, the team in Warsaw consists of over 110 lawyers (including ten partners), who support clients across all sectors and practice areas in some of the largest and most innovative transactions in the region.

Authors

Agnieszka Janicka is managing partner of Clifford Chance's Warsaw office and head of its corporate and M&A practice. She has worked for the firm since the establishment of its Warsaw office in 1992 and has over 30 years of corporate experience in many industry sectors, with a special focus on energy and resources, TMT, financial services, consumer goods and healthcare. In particular, she has advised on some of Poland's largest M&A transactions, privatisations and international equity offerings.

Krzysztof Hajdamowicz is a counsel at Clifford Chance and has extensive experience in M&A transactions and cross-border corporate reorganisations in the CEE region. He also co-ordinates the team advising on intellectual and industrial property, data protection and new technologies laws. Krzysztof focuses particularly on consumer goods and retail, TMT, energy and infrastructure, and the private equity sectors, and is a member of the relevant Clifford Chance global sector focus groups.

Clifford Chance

ul. Lwowska 19
00-660 Warsaw
Poland

Tel: +48 22 429 9646
Email: warsawinfo@cliffordchance.com
Web: www.cliffordchance.com

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1. Legal System

1.1 Legal System and Judicial Order

Poland's legal system is based on the civil law tradition. During the period between 1989 and 2004, the Polish legal system underwent substantial changes to accommodate the transition to a free-market economy and the implementation of EU legislation, and has continued to evolve.

The basic legislative framework for business activities in Poland is currently provided by the Civil Code of 1964, the Commercial Companies Code of 2000 and the Act on Entrepreneurs of 2018. The Act on Rules of Foreign Entrepreneurs' and Other Foreign Persons' Involvement in Trading in Poland of 2018 covers foreign investment.

Courts

The Polish Constitution of 2 April 1997 vests judicial powers in the Supreme Court, the common courts (district, regional and appeal courts), the administrative court (provincial administrative courts and the Supreme Administrative Court) and military courts. The judicial order is based predominantly on the common courts. The role of administrative courts is to control the activity of the public administration.

Proceedings before a common court generally consist of two stages (although extraordinary cassation appeals to the Supreme Court are available in certain circumstances). The first stage of civil proceedings is conducted in a district court, whose rulings may be appealed before a regional court. However, where a case is heard by a regional court in the first instance, it is appealed before an appeal court.

The Supreme Court's role is to ensure uniformity and accuracy of interpretations of the law and to issue opinions on statutes.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

In general, foreign investment in Poland does not require special approval from the authorities. As a member state of the EU, Poland applies the principle of free movement of capital and the principle of non-discrimination. Therefore, investors from EU, European Economic Area (EEA) or European Free Trade Association (EFTA) member states may invest according to the same principles as Polish citizens, and are not treated as foreigners.

However, in order to enjoy the same rights as Polish citizens, foreign investors need to meet certain criteria – eg, obtain a residence permit in Poland. Otherwise (save for where international treaties provide differently), an investor may only participate in a limited liability company, joint-stock company, limited partnership or partnership limited by shares.

Moreover, there are limitations on foreign equity participation with regard to some sectors of the economy, such as aviation and radio and television broadcasting.

Limitations

Certain limitations apply regardless of the investor's origin, with regard to certain regulated activities where a concession, licence or registration in the register of regulated activities may be required.

If so, the relevant regulatory bodies may be authorised to revoke licences for state security interest reasons. In some sector regulations, the regulators have the express right to revoke a licence upon change of control.

Consents

Some consents (eg, antitrust approval or consent of the Polish Financial Supervisory Authority to acquire certain stakes in a bank or certain other, regulated financial institutions) may be required, regardless of whether the investor is foreign or domestic.

The government may also veto investment in specific strategic Polish companies in protected sectors (the regulation currently applies to 17 named companies but may change at the government's discretion). The same restrictions apply to domestic investors investing in strategic Polish companies on the list, so this is not a typical foreign direct investment (FDI) regime.

FDI Regime

The FDI regime introduced in response to the COVID-19 pandemic is set to expire on 24 July 2025. It applies to foreign investors as follows:

- in the case of natural persons – persons who are not citizens of an EU/EEA/OECD country; or
- in the case of other entities – entities that do not have their registered office in an EU/EEA/OECD country and/or entities that have not had their registered office in an EU/EEA/OECD country for at least two years.

This regime also applies to indirect acquisitions by foreign investors. The list extending the application of the rules is broad and includes the following in particular:

- acquisitions made through subsidiaries;
- acquisitions made at the request of a foreign investor (including acquisitions by investment portfolio managers made for their clients); and
- acquisitions made by entities acting in concert with a foreign investor.

An FDI transaction is one that results in a foreign investor:

- acquiring a stake equal to or greater than 20% or 40% of the total number of votes in a Polish company or, in the case of a Polish partnership, making a contribution to a Polish partnership equal to or greater than 20% or 40% of the total contributions in the partnership;
- acquiring a participation in the profit of a Polish company equal to or greater than 20% or 40%; or
- otherwise acquiring a significant participation in, or a dominant position over, a Polish company – eg, via the acquisition or lease of an organised part of the enterprise from a Polish company, entering into a control (management) agreement and/or a profit transfer agreement in relation to a Polish company or the acquisition of a majority of votes in a Polish company.

If the FDI transaction concerns a company that operates in any of the sectors that are deemed "strategic" or a company that conducts "strategic" activities, it is subject to the new FDI regime and requires prior clearance from the Polish Competition Authority (PCA).

The regime affects the following:

- companies that conduct economic activity across a wide range of sectors, including

energy, science, technology, telecommunications, medicine and food produce;
- companies active in the development or modification of software across sectors including energy, water, science, technology and commerce, and food supply, and all software – regardless of sector – that is used for data gathering and processing;
- companies that own "critical infrastructure" (as defined in a separate act); and
- all Polish public companies listed on the Warsaw Stock Exchange (WSE), regardless of the sector in which they operate.

A de minimis exemption applies for Polish target companies with Polish revenue below EUR10 million in either of the two financial years preceding the notification. Furthermore, the Polish government is entitled to introduce additional exemptions.

Permit to Acquire Real Property

The acquisition of real property (including the so-called perpetual usufruct right in real property) by foreigners requires a permit from the minister of the interior and administration. This restriction also applies to the acquisition of shares by a foreigner where this results in the takeover of control over a company owning real property and to the purchase of shares in a company owning real property that is a controlled entity. In general, agricultural land may only be purchased by individual farmers; all other entities must first obtain permission from the president of the National Agriculture Support Centre, and this is subject to the fulfilment of strict requirements.

Therefore, regulatory requirements, if any, must always be double-checked at an early stage of the preparations for a proposed investment.

2.2 Procedure and Sanctions in the Event of Non-compliance

General

Where a permit issued by the minister of the interior and administration is required for the acquisition of real property or shares in companies that own real properties, acquisition without such a permit will be null and void. It may take several months to obtain a permit; the actual duration of the proceedings may vary depending on the circumstances.

In respect of certain sectors, where the formal consent of the regulator is not required but a change in the shareholding would trigger certain rights for the regulator, it is usually recommended, where feasible and practicable, for the proposed investor to introduce itself to the regulator before making the investment in order to determine whether the investment would raise any concerns for the regulator.

In addition, both criminal sanctions (from six months to five years of imprisonment) and financial penalties (PLN100 million) result from a failure to notify the acquisition of a dominant/significant participation in protected Polish companies listed by name in the governmental regulation.

FDI Regime

Procedure

In respect of the FDI regime, the approval of the PCA is generally required prior to the completion of an FDI transaction (although in some instances the filing can be made only by the target entity after completion of the acquisition). Moreover, the notification procedure should be commenced prior to:

- entering into any agreement resulting in an obligation to acquire or achieve a significant participation/dominance;

- the acquisition of a company listed on the Warsaw Stock Exchange (WSE), prior to announcement of the tender offer; or
- any other event resulting in the acquisition or achievement of a significant participation/domination.

However, in a multi-stage transaction, before the signing of the last agreement resulting in the acquisition or achievement of a significant participation/domination, the PCA accepts notifications on the basis of, for example, a conditional/preliminary agreement or a letter of intent.

Following the notification, the PCA has 30 business days to complete the initial proceedings and approve the FDI transaction or initiate additional control proceedings, which may last up to 120 calendar days. However, the PCA may extend this deadline substantially by asking questions, as the clock stops ticking each time the PCA sends out its question, to resume only when the response is actually delivered to it. There is no pre-notification procedure.

Sanctions

Any FDI transaction made in breach of the FDI regime will be null and void, and the investor will not be able to exercise its rights attached to the acquired shares (including any voting rights).

Moreover, non-compliance with the FDI regime constitutes a criminal offence subject to a penalty of imprisonment from six months to five years and a fine of PLN50 million. A penalty of imprisonment from six months to five years and a fine of PLN5 million may also be imposed on managers of target companies who fail to notify the PCA of the shareholders' non-compliance with the FDI regime, and on those who attempt to exercise voting rights in breach of the FDI regime.

2.3 Commitments Required From Foreign Investors

While the authorities do not make approval conditional upon certain commitments, some commitments will usually be required if an investor (whether foreign or domestic) applies for state aid for its investment.

Certain regulators – eg, the Polish Financial Supervisory Authority – expect various specific commitments from both foreign and domestic investors who wish to acquire large stakes in regulated financial institutions.

2.4 Right to Appeal

There is no specific authorisation procedure; however, where licences, concessions and permits are required, they are granted in administrative proceedings and any unsatisfactory decision may be challenged.

In contrast to regular competition law proceedings before the PCA (where one may appeal to a special court), the FDI regime will follow the standard administrative appeal route; appeals will be decided by administrative courts.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

Foreign investors usually operate in Poland through one of the available domestic entities. However, it is not uncommon for investors (especially from the EEA) to register an overseas company as having a branch or representative office in Poland, without incorporating a new Polish legal entity.

The choice of an appropriate legal form usually depends on the nature of the contemplated business.

Most Common Forms of Legal Entities in Poland

Limited liability company

A limited liability company (*spółka z ograniczoną odpowiedzialnością*, or sp. z o.o.) is the most popular form of corporate vehicle in Poland, which can be established for nearly all business purposes, except in situations where the applicable law requires another form of legal entity (only a joint-stock company can be listed on the stock exchange). The minimum share capital of a limited liability company is PLN5,000 and the nominal value of one share may not be less than PLN50. There is no minimum number of shareholders, so the company may have only one shareholder. However, the company may not be formed by another sole-shareholder limited liability company.

The governance structure includes the following corporate bodies:

- shareholders' meeting;
- management board; and
- where applicable, supervisory board (or audit committee).

The appointment of a supervisory board or audit committee is optional as long as the company's share capital does not exceed PLN500,000 and there are no more than 25 shareholders.

Management board

The management board manages the affairs of the company and consists of at least one member appointed from among the shareholders or outsiders. Unless the articles of association provide otherwise, the members of the management board are appointed and dismissed by way of a resolution passed by the shareholders' meeting.

Shareholders' meeting

The shareholders' meeting makes the decisions on the company's most crucial affairs, as stipulated in the Commercial Companies Code or in the articles of association. The Commercial Companies Code distinguishes between "ordinary" and "extraordinary" shareholders' meetings. The first must be held within six months of the end of each financial year and should adopt resolutions to approve the management board report, the financial statement for the previous financial year, the distribution of profits or financing of losses, and the discharge of duties by members of the company's corporate bodies.

Supervisory board

The supervisory board or audit committee, if appointed, must be composed of at least three persons. The role of the supervisory board is to exercise day-to-day supervision over all areas of the company's activity. The supervisory board may give the management board instructions, but they are not binding. The audit committee's duties are limited to reviewing the financial statements and the management board's motions to distribute profit and cover loss.

The shareholders of a limited liability company are not personally liable for the company's liabilities. The company is treated as a legal entity separate from its shareholders. Therefore, the shareholders may lose only their investment in the company.

A limited liability company is quite a flexible vehicle, suitable for numerous purposes.

Joint-stock company

In general, a joint-stock company (*spółka akcyjna*, or S.A.) is quite similar to a limited liability company in its three corporate bodies (the general meeting, the management board and the

supervisory board), which share most characteristics and competences. The fundamental difference is that a joint-stock company may raise its capital by public subscriptions and issue shares in the form of securities. Therefore, a joint-stock company is usually used by businesses intending to raise capital through an IPO or when Polish law requires this form of company (eg, in the case of financial institutions, banks, pension funds and insurers).

Boards

The management board deals with the company's affairs, and members are appointed and removed by the supervisory board, unless the statutes provide otherwise. Some issues listed in the Commercial Companies Code or the statutes require resolutions adopted by the general meeting.

A supervisory board is a requirement in a joint-stock company. Its role is to monitor the company's activities and review the financial statement and management report on company activity. Its members are appointed by the general meeting, but the statutes may provide otherwise. In principle, the supervisory board acts collegially, but it may also delegate certain activities.

Shareholders

Shareholders are not liable for the company's liabilities. The minimum share capital of a joint-stock company is PLN100,000 and the nominal value of one share may not be less than PLN0.01. All shares in joint-stock companies are dematerialised (ie, no share certificates are in place going forward). Each share transfer becomes effective upon registration in the shareholders' register, and shareholders are no longer able to remain anonymous.

There is no minimum number of shareholders, so the joint-stock company may have only one shareholder. However, it may not be formed by a sole-shareholder limited liability company.

Simple joint-stock company

A simple joint-stock company (*prosta spółka akcyjna*, or P.S.A.) is a new type of corporate vehicle. The intention was to create a type of company best suitable for start-ups, as the founder will not be obliged to obtain the amount needed for share capital and the shares can be subscribed for in exchange for any contribution that has economic value, in particular the provision of labour or services (prohibited for other companies). It cannot, however, undergo an IPO.

Its organisational structure is very flexible. Corporate governance in the simple joint-stock company may be based on either the two-tier or one-tier model, where a board of directors is appointed with executive and non-executive directors.

Governing bodies

Corporate governance in a simple joint-stock company may be based on either the two-tier model (similar to a limited liability company) or the one-tier model (only a board of directors is appointed, on which there are executive and non-executive directors).

Shareholders

The minimum share capital is PLN1 and all shares are dematerialised (ie, there are no share certificates). The shares have no par value, do not form part of the share capital and are indivisible. There is no minimum number of shareholders, so the simple joint-stock company may have only one shareholder. However, similar to other Polish companies, it may not be formed by a sole-shareholder limited liability company.

The shareholders are not liable for the company's liabilities.

Subject to a few exceptions (eg, a change in the statutes, mergers and demergers), shareholders' meetings may also take place outside Poland, and minutes do not need to be drawn up by a notary public. Therefore, holding a shareholders' meeting is less burdensome than for joint-stock companies.

Less Common Types of Corporate Vehicles in Poland

General partnership

A general partnership (*spółka jawna*, or sp.j.) is a basic type of partnership. Although it does not have a legal personality, it has the capacity to acquire rights, incur debts, sue and be sued.

It is managed and represented by its partners. In principle, each of the partners is entitled to deal with the general partnership's affairs and represent it; however, the partnership deed or a resolution of the partners may provide that the partnership is managed by one or several partners. Moreover, the management of the partnership may be entrusted to third parties, but not in a way that excludes all the partners.

Decisions on matters beyond the ordinary scope of the partnership's business require the consent of all the partners (including those with a limited right to manage it). Regardless of such limitations, all the partners have the unlimited right to be informed of the state of the partnership's assets and its business, and the right to review its books and documents. All the partners are jointly and severally liable for the general partnership's debts, but this liability is subsidiary – ie, the partnership's creditors should first seek satisfaction from the partnership's assets. If that proves ineffective, they may institute enforcement against a partner's assets. The partners' liability may not be limited.

There is no minimum share capital requirement in a general partnership, but it must have at least two partners. Most often, a general partnership is used when a large amount of capital is not required, the partners wish to have a personal impact on the business and the business itself is not risky.

Professional partnership

A professional partnership (*spółka partnerska*, or sp.p.) is designed for certain groups of freelancers (such as lawyers, doctors, tax advisers and architects) for the purpose of exercising their professions in a partnership. Only natural persons licensed to practise their professions may be partners in a professional partnership.

Each partner has the right to manage the partnership's affairs individually. In addition, the professional partnership may be managed and represented by a management board, modelled on the one in a limited liability company. At least one of the partners must sit on the board.

The partners' liability is similar to that in a general partnership, but the partners are not liable for the partnership's obligations arising in relation to the practice of professions by the other partners or resulting from acts or omissions of the partnership's employees who are supervised by another partner. As in a general partnership, there is no minimum share capital requirement. A professional partnership must have at least two partners. This type of partnership is designated for certain groups of professionals.

Limited partnership

In a limited partnership (*spółka komandytowa*, or sp.k.), there are two groups of partners:

- general partners who have unlimited liability; and
- limited partners whose liability is limited.

The status of the general partners is similar to the status of partners in a general partnership; they represent the limited partnership and manage its affairs. Limited partners may represent the partnership only on the basis of a power of attorney granted by the partnership; although management of the partnership is the general partners' right and duty, decisions on matters exceeding the ordinary scope of the partnership's business activity require the consent of the limited partners as well.

The general partners are liable for the partnership's obligations to the extent of all their personal assets, whereas the limited partners are liable up to the declared limited contribution (*suma komandytowa*). There is no minimum share capital requirement. A limited partnership must have at least one partner who is the general partner and at least one partner who is the limited partner.

Partnership limited by shares

A partnership limited by shares (*spółka komandytowo-akcyjna*, or S.K.A.) is a combination of a joint-stock company and a limited partnership, and has two corporate bodies:

- the general meeting; and
- the supervisory board.

A partnership limited by shares does not have a management board; instead, it is managed and represented by the general partners. However, certain matters listed in the Commercial Companies Code or partnership deed require the resolution of a general meeting.

Both the general partners and the shareholders participate in the general meeting, but only the latter are entitled to vote. A supervisory board is not mandatory unless the partnership has more than 25 shareholders, and must have at least three members. Once appointed, the supervisory board exercises permanent supervision over the partnership's activities.

The general partners' liability is unlimited, whereas the shareholders are not liable for any of the partnership's debts and may lose only their investment in the partnership. The minimum share capital of a partnership limited by shares is PLN50,000 and the nominal value of one share may not be less than PLN0.01. From 1 March 2021, all shares in a partnership limited by shares are dematerialised. A partnership limited by shares must have at least one general partner and at least one shareholder. Most often, a partnership limited by shares is used in atypical venture capital/private equity investments.

Other forms

Other forms are also available, such as a co-operative (*spółdzielnia*), a European company (*Spółka Europejska*, or *Societas Europea*) or foundations (*fundacja*).

A new entity was introduced in May 2023, called a family foundation (*fundacja rodzinna*). In practice, a family foundation should be considered as a mechanism of succession by owners of medium and large family businesses or owners of private assets of significant value. A family foundation may carry out business activities such as joining commercial companies, taking out loans or buying and selling shares or securities.

3.2 Incorporation Process

All legal entities must be registered in the National Court Register. There are two ways of establishing the companies – ie, traditional and electronic. Family foundations are registered in a separate register.

Traditional Establishment

The process begins with signing the articles of association or deed of formation. In the case of companies and limited partnerships or partnerships limited by shares, the articles of association or statutes must be executed before a Polish notary public in the form of a notarial deed.

The next step is to file an application to enter the company in the National Court Register, which usually takes several weeks. A partnership is established upon registration. Companies come into existence upon the conclusion of the articles of association, but receive legal personality upon registration.

Electronic Establishment

General partnerships, limited partnerships and companies may be established electronically through a special internet portal, in which case there is no requirement to draft the articles of association in the form of a notarial deed. Instead, they are concluded based on the template provided in the system.

However, the template has basic wording and any amendments to it must be in the form of a notarial deed and must be registered with the court. This method of incorporation is usually simpler and faster than the standard procedure. However, it is not always suitable for more complex investments, but rather for the quick creation of SPVs.

3.3 Ongoing Reporting and Disclosure Obligations

Disclosure Obligations

Polish private companies and partnerships are subject to disclosure obligations, which are of an informational nature.

Companies are obliged to notify the registry court of any changes to information disclosed in the register, such as:

- the composition of their decision-making bodies;
- rules of representation;
- registered office and address;
- the amount of share capital; and
- the names of their shareholders or partners.

Companies must also report any amendments made to the articles of association. Applications to the registry court are filed electronically.

After the end of each financial year, a company must file approved financial statements, the management board's report on the company's activity and the auditor's opinion (if required). Currently, these financial documents are only filed electronically.

Companies are obliged to electronically file declarations with the Central Register of Beneficial Owners to record or update the company's beneficial owners.

Reporting Duties

Ongoing tax and employment-related reporting duties will also apply (eg, in respect of taxes and various social security contributions). Certain additional reporting duties vis-à-vis the National Bank of Poland may apply regarding, among others, foreign exchange transactions and other financial matters. The company will usually be

expected to provide certain data to the statistical authorities, on a periodic basis.

Depending on the type of business, certain other ongoing duties will apply (eg, waste disposal or other duties related to the environment). If regulated, other regulatory duties may also apply.

3.4 Management Structures

Under Polish law, there is a two-tier management structure. The management board manages a company's affairs and has executive directors, whereas the supervisory board (with non-executive directors) or, less commonly, the audit committee monitors its activities.

Please refer to the relevant company's or partnership's description in **3.1 Most Common Forms of Legal Entity** for more details.

3.5 Directors', Officers' and Shareholders' Liability

Each officer of the company is obliged to act in its interests and is liable to the company for any damage caused by acts or omissions in breach of the law or articles of association. Members of the corporate bodies are liable for any damage caused by lack of required diligence in the course of performance of their functions or a breach of the duty of loyalty towards the company, resulting in the damage.

The members of the management board (and directors of the simple joint-stock company) may be jointly and severally liable for the company's debts in terms of all their assets if enforcement against the company proves ineffective (ie, if the company's assets are insufficient to cover the claims). However, a member of the management may be released from this liability in certain circumstances – for example, if they can prove that a petition to have the company declared bankrupt was filed in due time (or delayed without their fault).

As the burden of proof will rest entirely with the management board member, it may sometimes be very difficult for the member to succeed in being released from liability. Similar rules regarding the personal liability of management board members apply to taxes and certain other public charges. Finally, a breach of certain duties (eg, reporting duties) may also trigger criminal liability.

In practice, the members of the management board (as executive directors) are more exposed to each type of liability than the members of the supervisory board (as non-executive directors), which is worth considering when deciding on the structure and composition of the boards. Polish law does not currently recognise the concept of "piercing the corporate veil", and attempts to introduce the concept have so far been unsuccessful. As it stands, shareholders are liable to the company only to the extent that they fail to make agreed contributions or that they receive unlawful distributions, or under the general principles of tort law.

A major amendment to the Commercial Companies Code came into force on 13 October 2022, changing the rules of the liability of members of the corporate bodies and introducing a regulated group concept and related holding company law. A member of the management board or supervisory board is not liable for damage caused to the company when acting within the limits of a justified economic risk on the basis of information, analyses and opinions that should be taken into consideration in the relevant circumstances. However, this does not override the duty to act with professional due diligence or to comply with the obligation of loyalty to the com-

pany, which was also introduced and applies to the members of the management board and supervisory board of a limited liability company and a joint-stock company.

The right of a parent company to issue a binding instruction to a subsidiary was also introduced. However, under certain circumstances a subsidiary is entitled to refuse to carry out the instruction issued. The members of the management board, the supervisory board or audit committee and the liquidators of a subsidiary and a parent company are exempt from liability for damage caused by the execution of a binding instruction if they acted in the interest of the group. Accordingly, the liability of the parent company is correspondingly enhanced, creating the possibility of holding a parent company liable for damage caused by its binding instructions given to a subsidiary, the minority shareholders of a subsidiary or the creditors of a subsidiary. Establishment of the group and, therefore, application of these regulations is not mandatory.

4. Employment Law

4.1 Nature of Applicable Regulations

Employment regulations are contained in a number of legal sources, including statutes of law, collective bargaining agreements and other collective arrangements based on statutes and regulations issued by the employer. Statutes of law on employment are of a semi-imperative nature, which means that collective bargaining agreements, other collective arrangements and internal regulations may modify statutory provisions, but only for the benefit of employees. The same applies to individual employment contracts.

4.2 Characteristics of Employment Contracts

An employment contract should be concluded in writing (wet ink). However, failure to satisfy this requirement does not result in the invalidity of the contract – an employment contract can be concluded orally or even per facta concludentia. Where the contract has not been concluded in writing, the employer is obliged to confirm the arrangements regarding the parties to the contract, the type of contract and the conditions of the contract in writing, before the employee begins working. Any change to the terms of employment should be made in writing.

Polish law provides for three types of employment contracts, based on the period for which the contract is concluded:

- an employment contract for a probationary period;
- an employment contract for a fixed term; and
- an employment contract for an indefinite term.

The purpose of a probationary period contract is to verify an employee's suitability for the given position. It may be concluded for no longer than three months (with the possibility to extend the probationary period for periods of holidays and any other authorised absences) and, in principle, can be concluded only once in relation to a specific position.

A fixed-term contract can be for a maximum of 33 months. Contracts can be added together, but no more than three times. If these limits are exceeded, the contract automatically becomes a contract for an indefinite term. The law provides for certain exceptions where the limits may be exceeded without the contract becoming a contract for an indefinite term, including the conclu-

sion of a contract for a term of office or a situation where the employer can objectively justify exceeding the limit.

4.3 Working Time

Employees may work full-time or part-time, and there are no minimum working hours. However, the law provides for a maximum of eight hours a day and 40 hours a week. These limits may be modified based on the system and work time schedule adopted. However, the average weekly working time may not exceed 48 hours in a settlement period. The employer must ensure minimum periods of uninterrupted rest – ie, a minimum of 11 hours per day and 35 hours once a week.

Overtime work is, in principle, permitted for the employer's justified needs or the need to carry out a rescue action. Overtime should not exceed 150 hours annually, but the employer may modify this limit to up to 416 hours per annum.

For overtime work, employees are entitled to their regular remuneration plus an addition of 50% or 100% of their salary, depending on the day the overtime was worked; the higher addition applies if overtime work is performed at night, on a Sunday or a holiday, or on a day off granted to an employee for work on a Sunday or holiday, and also for every hour of overtime exceeding the weekly limit of working hours (ie, 48 hours). Instead of remuneration, employees may also be granted time off for overtime work.

4.4 Termination of Employment Contracts

Employment contracts may be terminated with or without notice, or by means of a termination agreement. The notice period depends on the type of contract and the duration of employment. For employment contracts for a fixed term or an indefinite term, the notice period is:

- two weeks if the period of employment lasted less than six months;
- one month if the period of employment lasted at least six months; and
- three months if the period of employment lasted at least three years.

Termination by the Employer

To terminate a fixed-term or indefinite contract, the employer must state the reason for termination in the termination notice. The reason must be real, specific and serious enough to justify termination. Moreover, if present, the employer must consult the trade union representing the relevant employee on the intention to terminate the contract, although the employer is not bound by the opinion of the trade union.

Some categories of employees are protected from termination – eg, those who are of pre-retirement age or pregnant. There is no obligation to make any additional payments to an employee whose contract is being terminated with notice (apart from regular remuneration until the end of the notice period or payment in lieu of holiday leave). In certain circumstances, including the following, the employer may terminate an employment contract without notice through the fault of the employee:

- severe violation of basic employee duties;
- committing a crime that makes it impossible to continue employment in a given position; and
- loss of the qualifications to perform work in a given position through the fault of the employee.

The employer may also terminate the contract without notice without the fault of the employee if the employee remains on sick leave for a certain period (longer than three or nine months, depending on the duration of employment) or where the employee's justified absence for other reasons lasts longer than one month. There is no obligation to make any additional payments to the employee in the case of termination without notice.

Termination by the Employee

An employee can terminate an employment contract with or without notice. Termination without notice can take place where a doctor diagnoses a detrimental effect of work on the health of the employee and they are not transferred to another position, or where the employer severely breaches its basic duties to the employee. In the latter case, the employee is entitled to compensation in the amount of their remuneration for the notice period applicable to their contract or, in the case of a contract for a fixed term, for the remainder of the term of the contract, provided it is not longer than the notice period.

Termination by Mutual Agreement of the Parties

The terms of termination agreements are agreed by the parties, and it is common for the employer to make an additional severance payment to the employee, although this is not a legal requirement.

Collective Redundancies

If an employer with at least 20 employees terminates employment contracts for reasons not attributable to the employees, it is referred to as "collective redundancy" if the termination involves:

- ten or more employees, where the employer has fewer than 100 employees;
- 10% or more of the employees, where the employer has at least 100 employees but fewer than 300 employees; or
- at least 30 employees, where the employer employs 300 employees or more and the redundancies are made during 30 consecutive days.

The employer is obliged to consult the trade unions (if present) regarding the intention to carry out collective redundancies, and must also notify the trade unions of the reasons for the planned redundancies, the number of employees to be made redundant and the period during which the redundancies will take place, among other things. This information must be submitted to the relevant labour office. If there are no trade unions at the employer's establishment, the relevant rights are exercised by employee representatives.

Within 20 days of the date of notification, the employer must conclude an agreement with the trade unions regulating the collective redundancies process. If an agreement cannot be reached, the employer unilaterally regulates the collective redundancy process in relevant by-laws. If there are no trade unions at the employer's establishment, the employer issues the by-laws after consulting the employee representatives. The relevant labour office must be notified of the agreement concluded or the by-laws issued.

Employees whose contracts are terminated in a collective redundancy procedure are entitled to additional severance pay of one, two or three months' remuneration, depending on the duration of their employment (respectively: less than two years, from two to eight years, or longer than eight years).

4.5 Employee Representations

In principle, there is no legal requirement to have any kind of employee representation, nor for the employer to inform or consult employees. However, a company that has more than 50 employees is obliged to inform employees of the possibility of setting up a works council. Works councils have consultation and information rights, but they do not participate in the management of the company.

Employees of privatised companies have certain rights of representation on the supervisory board. If the company has more than 500 employees on average over the year, the employees have the right to elect one member of the management board.

Trade unions, if present at the company, retain significant influence; negotiations with trade unions may be required in some situations, particularly if there is a planned collective redundancy or a transfer of an employment undertaking. In general, under Polish law, there are no requirements to negotiate with trade unions or works councils when a Polish company or its assets are being acquired (unless the acquisition of assets results in a transfer of the employment undertaking). However, such negotiations are common when the company being sold is state-owned or information obligations may apply.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Personal Income Tax (PIT)

In principle, employees in Poland are subject to PIT at the rate of 12%, provided that a 32% rate applies on the portion of the taxable profit exceeding PLN120,000 in the tax year. Certain incomes are taxable at 19% or 20% flat PIT rates. Incomes from different sources are not mixed, and tax is calculated for each source of income separately.

Tax-reducing amounts apply, ranging from PLN3,600 (if the annual income is PLN120,000) to PLN10,800 (if the annual income exceeds PLN120,000). No tax is effectively payable on an annual income of up to PLN30,000.

Income of up to PLN85,528 received by a person under the age of 26 is exempt from PIT.

A limited number of reliefs and allowances may be available to employees – eg, for the use of the internet and for certain donations made to charity and/or if they have children who are:

- under 18;
- under 25 and continuing their education without having their own income; or
- disabled and receiving special benefits.

From 2022, social security and health insurance contributions are no longer tax-deductible costs for employees. However, certain employees who create IP rights as part of their duties may be eligible for lump-sum costs at the rate of 50% of the portion of their remuneration allocated to such IP rights (provided that such costs do not exceed PLN120,000 in total).

Social Security Contributions

Social security contributions (to finance retirement, disability pensions and sick leave benefits) may total up to 29.97% – ie, 13.71% payable by the employee (as a non-deductible cost) and 16.26% payable by and tax-deductible for the employer. The basis for calculation of the retirement and disability pensions contributions is capped at PLN234,720 for 2024.

Additional occupational accident contributions and some other social security contributions payable by and tax deductible for employers may apply, depending on the circumstances and the type of business and work carried out, and the number of employees employed by the employer. Generally, the contributions amount to the following:

- for retirement – 19.52% of the basis of assessment;
- for disability pensions – 8% of the basis of assessment; and
- for sick leave benefits – 2.45% of the basis of assessment.

Social security contributions may differ slightly from the above (for accident contributions, the rate varies from 0.67% to 3.33%, of which the accident contribution for a small company employing up to nine people is 1.67%).

Payment of Tax and Reporting Duties

The employer is obliged to calculate and remit the tax advances to the relevant tax office, and the health insurance and other social security contributions to the Social Security Office (ZUS).

Employees are obliged to make annual tax filings (which may be done electronically). Employees who do not intend to take advantage of any allowances or deductions and who settle under the general rules (tax scale at 12% and 32% rates) and only receive income settled through a remitter (eg, employer or principal) may leave the tax settlement to the tax office.

5.2 Taxes Applicable to Businesses

Company Income Tax (CIT)

Legal entities in Poland are obliged to pay CIT on their income in Poland, at the rate of 19%. A reduced 9% rate applies to taxpayers in the first year of starting a business and to those taxpayers whose annual income (including VAT) does not exceed EUR2 million.

In respect of partnerships that are tax-transparent, tax is payable by partners (CIT for partners that are legal entities; PIT for individuals). Partnerships limited by shares and limited partnerships are treated as CIT payers (ie, non-tax-transparent entities), with special tax reliefs for limited partners.

The CIT Act provides for specific rules to determine whether or not an item may count as a tax-deductible cost. The Act expressly identifies a list of items that cannot constitute tax-deductible costs. Certain allowances and reliefs may be available (eg, a 50% allowance in respect of the acquisition of new technologies).

The tax basis is calculated separately for capital gains (as defined in the CIT Act) and other incomes.

“Minimal” CIT of 10% came into force in 2024. Therefore, an entity that has incurred an income loss (other than capital gains source) or whose tax yield in the basket of so-called operating profits does not exceed 2% is taxed at 10% of the taxable base. The CIT Act also provides for a number of other exemptions from the “minimal” tax for certain entities.

Polish CIT provides for several tax reliefs and exemptions for specific business types.

In addition, tax capital groups and entities whose revenues exceed EUR50 million are obliged to prepare and publish information about their tax strategy.

Poland has not succeeded in implementing the Pillar 2 directive in time. To date, the appropriate legislation introducing the so-called national minimum tax, which ensures that the so-called top-up tax (simplified to an effective rate of 15%) is applied in the member state where entities are operating at a lower-than-expected level of taxation, has not been enacted. In the absence of implementation of the national minimum tax, the taxation mechanism according to the Pillar 2 directive stipulates that the tax on, for example, low-taxed Polish companies belonging to a global capital group will be collected outside Poland – for instance, in the country of residence of the parent company (not necessarily an EU member state) – in accordance with the so-called income inclusion rule.

Taxation of Sole Traders

Individuals running businesses as sole traders (for which certain requirements need to be met) may elect whether to pay taxes in the following manners:

- according to the same rules and rates as employees (except the actual tax-deductible costs, subject to statutory limitations similar to those applicable to CIT payers, would apply instead of lump sums);
- at a flat rate of 19%; or
- according to special rules, in respect of some types of smaller businesses (eg, a lump sum of 2% to 17% of gross income or by means of the so-called tax card, where the amount of tax is a lump sum payable irrespective of income or profit).

From 1 January 2022, the basis of assessment for health insurance contributions is determined depending on what type of business activity the remitter conducts and what form of taxation is applied to the income from that activity.

Any person conducting business activity who pays social contributions for their own insurance was required to submit an annual health insurance contribution return for the first time in 2023. For example, for an individual running a business as a sole trader who settles tax based on a tax scale for January 2024, the lowest contribution assessment basis is still PLN3,490 (ie, the minimum salary in effect from 1 January 2023 to 30 June 2023), and the minimum contribution is PLN314.10.

The new amount of the minimum wage (PLN4,242) will be the lowest contribution base only for the contributions due for February 2024, and will be in effect until January 2025.

As of 1 July 2024, it will not be increased with the next increase in the amount of the minimum wage to PLN4,300 in 2024.

Withholding Tax

Polish income tax laws provide for withholding tax on payments made to non-Polish residents at the rate of:

- 20% on interest, royalties and certain services (eg, legal, advisory, management, data processing, HR and financial services); and
- 19% on dividends and other capital gains and interest payable to individuals on some debt instruments.

Lower rates or exemptions from withholding tax may apply if provided for under bilateral treaties. Moreover, under the provisions of the Parent-Subsidiary Directive and the Interest and Royalties Directive, which have been implemented into the Polish tax system, dividends, interest and royalties payable to a company with its registered office in an EU country are, in principle, exempt from withholding tax, provided that the

company receiving the interest (its beneficial owner) holds at least 10% (in the case of dividends) or 25% (in the case of interest and royalties) of the shares in the company making such payments for at least two years. This holding period may end after the payments have been made.

The tax remitter is obliged to act with due care when verifying the requirements to apply such lower rates or exemptions on payments to a single entity of up to PLN2 million per annum.

Under the withholding tax pay-and-refund mechanism, if the total amount of "passive" payments (ie, dividends, interest and royalties) to a single taxpayer that is a related party exceeds PLN2 million in the relevant tax year, the tax remitters will be obliged to collect withholding tax on said payments on the day they are made, at the standard Polish rates (ie, 19% in the case of dividends and 20% in the case of interest and royalties) on the surplus over PLN2 million, without the possibility of waiving collection of the tax under the relevant double tax treaty and without taking into account the exemptions or reduced rates as determined under special provisions or double tax treaties.

In such a case, the taxpayer or the tax remitter (if it paid the withholding tax from its own funds and bore the economic burden of the withholding tax) may claim a withholding tax refund. However, a tax remitter may apply reduced withholding tax rates or withholding tax exemptions if:

- the tax remitter provides the tax authority with a written statement confirming, under threat of tax criminal liability for breach, that all the requirements for a lower rate or an exemption have been fulfilled; or
- a tax remitter or a withholding tax payer receives an opinion on the applicability of the withholding tax exemption from the tax authority, valid for three years.

Significant fines apply if, in the absence of an exemption, a tax remitter does not collect the statutory withholding tax.

Value Added Tax

In principle, anyone whose total sales of goods and/or services in the previous year exceeded PLN200,000 (provided that such threshold shall be reduced pro rata if the activity was conducted only for part of the previous year) must register as a VAT payer. The basic VAT rate is 23% (reduced rates of 8%, 5% or 0% may apply to some goods and services).

VAT rules are fairly strict and under some circumstances provide for the joint and several liability of members of the supply chain for its payment. Under certain circumstances, additional penalty rates of 15%, 20%, 30% or 100% may apply. An electronic accounting ledger detailing all VAT-able transactions must be submitted to the tax authorities on a monthly basis, or quarterly in some cases (VAT return).

The split payment mechanism applies to some B2B transactions, whereby the payment that corresponds to the VAT amount of the invoice is paid into a special bank account of the supplier – the VAT subaccount. This mechanism is compulsory in the case of payments for certain goods and services.

The reverse charge in VAT for the supplies of certain energy products came into force on 1 April 2023 and will remain in force until 28 February 2025.

In January 2022, the Polish Ministry of Finance introduced a National e-Invoice System (an electronic invoice system), which is currently a voluntary option but will become mandatory from 1 February 2026 for entrepreneurs whose value of sales (including the amount of tax) exceeded PLN200 million in 2025, and for other entrepreneurs from 1 April 2026.

In 2023, new tax provisions for VAT groups (tax-neutrality within the group) came into force.

Other Taxes

Other taxes may apply from time to time, depending on the type of business, such as property tax, excise duty, tax on civil law activities, tax on means of transport or tonnage tax.

5.3 Available Tax Credits/Incentives

Subject to the restrictions and limitations resulting from the EU state aid laws, some tax incentives (such as income and property tax reliefs) may be available to investors that obtain a permit to invest in the so-called Special Economic Zones.

Some tax relief may also be available for the purposes of restructuring.

5.4 Tax Consolidation

A tax group that enables a participating company to be treated as a single CIT payer (and consolidate the profits and losses of the group members) is available to Polish companies that meet the following criteria:

- the registered share capital per participating company in the group is not lower than PLN250,000 on average;
- a parent company directly holds at least 75% of the shares in the remaining group members;
- no group member is in arrears in respect of taxes;
- no group member may benefit from any tax exemptions or reliefs; and
- all transactions between the tax group members and their affiliates outside the tax group must be on an arm's length basis.

A written agreement to form a tax group for a period not shorter than three tax years must be concluded and registered with the tax office. Members of the tax group are jointly and severally liable for the CIT liabilities of the group for the period during which the tax group agreement remains in force. If the status of a tax group is lost as a result of a breach of the applicable obligations, each participating company will have to adjust its tax filings for the three most recent tax years (as if the tax group did not exist) and, where applicable, settle any outstanding taxes.

5.5 Thin Capitalisation Rules and Other Limitations

Since 2022, taxpayers are obliged to exclude from tax-deductible costs the costs of debt financing for the part in which the excess of the costs of debt financing exceeds PLN3 million (this does not apply to debt financing costs associated with obtaining funding from a family foundation, directly or indirectly) or 30% of taxable EBITDA. In addition, the costs of debt financing obtained from affiliated entities are not regarded as a tax-deductible expense for the part in which they were earmarked directly or indirectly for capital transactions, particularly the purchase or acquisition of shares (stock), the acquisition of all rights and obligations in a partnership without legal personality, additional contributions, share capital increases or the purchase of own shares for redemption. Costs that are not deducted in a given year due to the

above mechanism may be carried forward for up to five consecutive tax years.

5.6 Transfer Pricing

In Poland, transactions between related parties (defined on the principle of a 25% ownership stake interpreted broadly, including not only shares but, for example, certificates in investment funds or similar instruments) should be done on an arm's length basis. Where applicable, transfer pricing documentation must demonstrate that all relevant transactions have been executed on terms that would have been applicable to unrelated parties.

The requirement to prepare the transfer pricing documentation applies in respect of transactions with a value of:

- PLN10 million for commodity and financial transactions; and
- PLN2 million for services and other transactions not included above.

Lower thresholds of PLN2.5 million in the case of a financial transaction and PLN500,000 in cases other than a financial transaction apply to transactions with related parties based in countries that would be tax havens under the OECD rules. The transfer pricing rules include a simplification whereby a mark-up of 5% is applied to certain low-value services, such as accounting, human resources, IT services and general services of an administrative and office nature, in recognition that these services are provided at arm's length.

It is possible to obtain an advance pricing arrangement from the tax authorities.

5.7 Anti-evasion Rules

In 2016, Poland introduced rules on counteracting tax avoidance – ie, any act that satisfies both of the following conditions:

- it was effected primarily for the purpose of obtaining a tax advantage that, in the given circumstances, is an advantage contrary to the subject and purpose of tax law; and
- the party that carried out the act acted in an artificial manner.

If the tax authorities identify an act effected primarily with the aim of achieving a tax advantage, the tax consequences of the relevant act are determined based on the state of affairs that would have existed if an "appropriate act" had been effected. Where circumstances indicate that the achievement of a tax benefit was the only purpose of carrying out the act, the tax consequences are determined in such a way as if the act had not been carried out.

To obtain protection against the application of anti-avoidance rules in respect of a transaction in the future, a company or individual may apply for a so-called security ruling. The authority decides on the application over six months, and may refuse to issue a ruling if the application relates to a case of tax avoidance.

Mandatory Disclosure Rules

The Polish law provisions adopting mandatory disclosure rules implementing the DAC6 Directive have a broader scope than those under the DAC6 Directive, and also include some specific local Polish hallmarks mainly applicable to distributions from Poland.

6. Competition Law

6.1 Merger Control Notification

The following transactions are subject to mandatory merger control by the PCA:

- mergers;
- acquisitions of direct or indirect control (be it sole or joint) over one or more undertakings and/or assets; and
- the creation of a joint venture (including non-full-function joint ventures).

The PCA must be notified of a transaction if the following occur in the financial year preceding the concentration:

- the combined global turnover of the parties exceeds EUR1 billion; and/or
- the combined turnover of the parties exceeds EUR50 million in Poland.

Turnover includes the turnover of each party's capital group and part of the turnover of their jointly controlled entities (but the seller's turnover is excluded).

The notification obligation is triggered if either of these thresholds is met; the thresholds may be met by one party only.

Exemptions

A transaction does not have to be notified if any of the following exemptions applies:

- in the case of the acquisition of control and/or assets – if the target's turnover in Poland did not exceed EUR10 million in either of the two financial years preceding the concentration;
- in the case of mergers or the creation of a joint venture – if the turnover of any party to the merger or joint venture did not exceed EUR10 million in Poland in either of the two financial years preceding the concentration; and
- in the case of inter-related transactions (simultaneous or subsequent acquisitions from one and the same capital group of assets and/or control over an undertaking or undertakings that occur within a two-year period) – if the combined turnovers of all the acquired targets and targeted assets generated in Poland did not exceed EUR10 million in either of the two financial years preceding the most recent concentration.

Other Transactions

The following transactions fall outside the merger control system:

- intra-group transactions;
- acquisitions of shares, on a temporary basis, by a financial institution or by an undertaking for the purpose of securing liabilities; and
- acquisitions of control or assets in bankruptcy proceedings (if the target does not compete with the buyer's capital group).

6.2 Merger Control Procedure

There is no formal pre-notification procedure in Poland, although consultations with the PCA prior to a transaction are possible. There is no statutory deadline by which a notification must be made to the PCA. However, the parties may not close the transaction until the PCA's clearance has been obtained or the statutory period for a decision to be issued by the PCA has lapsed (the standstill obligation).

As a general rule, the PCA should examine the transaction within one month of the date the merger control proceedings are instituted (Phase 1). The PCA may extend the proceedings for an additional four months (Phase 2) if:

- the case is complex;
- the transaction raises competition concerns; or
- a market survey is required.

The statutory time limit for issuing a clearance decision is suspended each time the PCA requests additional information and/or documents (it resumes only when the response is actually delivered to it).

When a proposed concentration threatens to significantly limit effective competition, the PCA informs the parties in writing of its objections to the concentration. In order to enable clearance to be given, the PCA may accept a party's proposed commitments (remedies) – eg, divestment.

Sanctions

The PCA may impose a fine on an undertaking taking part in a concentration (in the case of the acquisition of control and/or assets – only on the buyer) of up to 10% of its turnover for a breach of the standstill obligation or failure to notify the transaction. The PCA may also impose a fine of up to 50 times the average wage in Poland on individuals from the management who have failed to give notification of an intended concentration.

6.3 Cartels

Like EU competition law, the Polish Act on Competition and Consumer Protection prohibits agreements/concerted practices between undertakings (or associations of undertakings) that have as their object or effect the elimination, restriction or other infringement of competition (Article 6). The non-exhaustive statutory list of infringements includes the following in particular:

- price fixing;
- limiting or controlling production/sales/investments;
- market sharing;
- imposing onerous/discriminatory contract terms;
- restricting access to the market; and
- collusive tendering (between tender participants or with the awarding entity).

The PCA also has the right to apply EU competition law directly (Article 101 of the TFEU) if the infringement affects trade between EU member states.

The PCA may impose a fine on undertakings and individuals for involvement in anti-competitive agreements. An undertaking may be fined up to 10% of the turnover of the entire capital group generated in the year preceding the year the fine is imposed. The PCA may also impose a fine of up to PLN2 million on management who allow the undertaking to conclude a prohibited anti-competitive agreement through their deliberate actions or omissions (except in the case of bid-rigging).

Under Polish law, leniency (immunity or reduction of a fine) is available for both horizontal and vertical agreements.

An agreement that violates competition law is invalid in its entirety or in the anti-competitive part. The PCA may also enforce abandonment of the practice, or order the offending undertaking to remedy its effects.

6.4 Abuse of Dominant Position

Like EU competition law, the Polish Act on Competition and Consumer Protection prohibits abuse of a dominant position within a relevant

market (Article 9). The abuse may consist of the following in particular:

- imposing unfair prices or trading conditions;
- limiting production, market sale or technical development;
- applying onerous/discriminatory contract terms to third parties;
- preventing the development of competition; and
- market sharing.

A dominant position is held by an undertaking if it is able to prevent effective competition in the relevant market and to act independently of competitors, contracting parties and consumers to a significant degree. In Poland, there is a presumption of a dominant position if an undertaking has a market share exceeding 40%. However, this presumption may be challenged by the undertaking involved.

The PCA may impose a fine for abuse of a dominant position only on undertakings (not individuals), which are liable to a fine of up to 10% of the turnover of the entire capital group generated in the year preceding the year in which the fine is imposed.

Any legal transactions that constitute abuse of a dominant position are invalid in their entirety or in the relevant part. The PCA may also enforce abandonment of the practice, or order the offending undertaking to remedy its effects.

Significant amendments to the Polish competition law (implementing the ECN+ Directive) came into force on 20 May 2023, relating in particular to the leniency programme, liability for infringement (introduction of parental liability), levels and methods of the calculation of fines, the dawn raids procedure, legal professional privilege and international co-operation of the PCA with other national competition authorities.

7. Intellectual Property

7.1 Patents

In addition to the rights registered with the Polish Patent Office (see below and **7.2 Trade Marks** and **7.3 Industrial Design**), it is possible to apply for protection over inventions, trade marks and other industrial properties through international channels. For trade marks and industrial designs, it is possible to obtain protection throughout the EU with a single application.

Patents protect inventions that are new, have an inventive step and are capable of industrial application. An “inventive step” means that the invention is not obvious to a person skilled in the given field; “capability of industrial application” means that, based on the invention, a product may be obtained or a method used in any industrial activity. Patent protection lasts up to 20 years (subject to the payment of annual maintenance fees).

To obtain a patent, the application must be filed with the Patent Office and must contain a motion, a description of the invention, claims and an abstract of the invention. If the application is not filed by the creator, it is necessary to ensure the acquisition of the right to obtain a patent by the entity applying for patent protection (future patent holder). If statutory requirements are met, the Patent Office then issues a relevant decision, provided that the fee for the first protection term is paid. When a patent is granted, this is entered in the patent register.

Claims concerning infringement of a patent are heard before a court in civil proceedings. The

patent holder may demand cessation of the infringement or the surrender of any unlawfully obtained benefits. If the infringement is culpable, the patent holder may also demand reparation of damage in accordance with general principles or by the payment of a sum of money in the amount of a licence fee or other relevant remuneration that would be due and payable to the patent holder for consenting to use of the invention. In addition, the patent holder may demand that the ruling concerning the infringement be made public.

7.2 Trade Marks

A trade mark is any mark capable of distinguishing the products (or services) of one entity from those of another, and enables determination of the scope of protection in a clear and precise manner. A word (including a name), picture, letter, digit, colour, object (eg, the shape of a product or its packaging) or sound may constitute a trade mark.

Upon registration, trade mark protection rights last ten years and may be extended for subsequent ten-year periods, provided that the fee is paid. However, a protection right over a trade mark expires (and the trade mark is eligible for invalidation) if the registered trade mark is not in genuine use within five years of the date protection was granted.

Protection Rights

To obtain a protection right, a relevant application describing the trade mark and listing the products (or services) it covers (based on the classes of goods and services set out in the Nice Classification) must be filed with the Patent Office. The Patent Office examines the content of the application and the capability of registering the trade mark, but at this stage it will not examine any potential conflict with prior registrations or other third-party rights. If the statutory requirements are met, the Patent Office publishes notification of the application in the Patent Office Bulletin.

Third parties have three months to file an opposition to a trade mark application on the basis of their earlier trade marks or other rights. The opposition may be brought in respect of one, some or all of the classes of the Nice Classification. If successful, the Patent Office may grant protection for those classes that have not been challenged, unless the opposition has been proved to be unfounded, or refuse protection.

Claims concerning infringement of a protection right over a trade mark are heard before a court in civil proceedings. In addition to the remedies available in the case of infringement of a patent, the trade mark holder may demand that the infringing party ceases placing a mark identical or similar to the registered trade mark on packaging, labels and tags, or ceases offering, marketing, importing, exporting and storing such packaging, labels and tags.

7.3 Industrial Design

Industrial design is a new and original appearance of a product, or part thereof, resulting from the features of the lines, contours, shape, colours, texture and/or materials of the product itself and/or its ornamentation. The right conferred by the registration of an industrial design is granted for 25 years, divided into five-year periods.

To register an industrial design, an application containing an illustration of the industrial design must be filed with the Patent Office. If the industrial design meets the statutory requirements for granting protection, the Patent Office issues a decision granting protection.

Claims concerning an infringement of a right conferred by registration of an industrial design are heard before a court in civil proceedings. The remedies are the same as in the case of an infringement of a patent.

7.4 Copyright

Copyright protects any manifestation of human creative activity of an individual nature in any form, regardless of its value, purpose or manner of expression.

Copyright consists of economic rights and moral rights. Economic rights entitle the copyright holder to use and dispose of a work and receive remuneration for the use of it, and these rights may be transferred or assigned. Along with the economic rights, there is also the exclusive right of the author to authorise the use of derivative rights to the original work (eg, translation).

Moral rights entitle the author to sign the work with their name, decide on its first publication and allow modification thereof. Moral rights cannot be transferred, assigned or licensed. However, it is common practice to oblige the author in contracts transferring economic copyrights not to exercise the moral rights. Economic rights are generally protected until 70 years after the death of the author of the work; moral rights last indefinitely.

Economic rights may be transferred (or licensed) only within the fields of exploitation explicitly specified in an agreement. A field of exploitation means any manner of exploitation considered technically and economically independent in trading practice. Omitting a field of exploitation in the agreement deprives the acquirer (or licensee) of the rights to exploit a field not listed therein. The fields of exploitation make it possible to seek remuneration for each of them.

Copyright protection does not depend upon a registration process or satisfaction of any formal requirements. Once the work is established (even if not completed), it automatically receives protection.

In the event of an infringement of economic rights, the author may demand cessation of the infringement, remedy of the results of the infringement, damage compensation and the surrender of any unlawfully obtained benefit. The author may also request publication of an announcement in the press or payment of an appropriate sum of money to the copyright holder, determined at twice the amount of remuneration that would be required for a licence to use the work.

7.5 Others

There is no special regime for the protection of software, which basically enjoys protection covered by copyright law with minor differences when compared to the works described in **7.4 Copyright**.

Databases that are collected in a way requiring substantial investment of effort to compile, verify or present their content, in terms of quality or quantity, are protected by the Act on the Protection of Databases. Such protection does not depend on registration and lasts for 15 years. Regardless, databases may be protected by copyright if they can be considered a “work”.

Business Secrets

Business secrets are protected under the Polish Act on Combating Unfair Competition. A business secret may be violated if unlawfully disclosed, used or obtained. In the event of violation of a business secret, the entrepreneur may demand cessation of the violation, removal of the effects of the violation, a relevant state-

ment, redress of damage, the surrender of any unlawfully obtained benefits, or the award of an appropriate sum of money for social purposes associated with supporting Polish culture or protecting the national heritage.

In addition, the entrepreneur may demand that the ruling concerning the violation of the business secret is made public.

8. Data Protection

8.1 Applicable Regulations

Data protection issues are principally regulated by the EU General Data Protection Regulation (Regulation 2016/679 – the GDPR). The following local acts supplement the GDPR:

- the Personal Data Protection Act of 2018;
- the Act Amending Certain Acts in Relation to Ensuring Compliance with Regulation 2016/679;
- the Act on the Rules of Obtaining Information of a Clean Criminal Record of Persons Seeking Employment and Persons Employed in Financial Sector Entities; and
- the Labour Code (which regulates the processing of employees' data).

It is worth noting that local employment laws provide for stricter rules than those of the GDPR in regard to the scope of data and the admissibility of monitoring. In particular, background screening of employees and candidates (especially in regard to any criminal record) is substantially restricted, except in the financial sector, where a specific act applies, and for some specific positions in other sectors where, by law, the employee must have a clean criminal record.

8.2 Geographical Scope

Local law does not modify the applicability rules of the GDPR. The geographical scope of application stems directly from the GDPR.

8.3 Role and Authority of the Data Protection Agency

The local data protection agency is the President of the Data Protection Office (*Prezes Urzędu Ochrony Danych Osobowych*). The main role of the Data Protection Office is to control and monitor the processing of personal data, review complaints of data subjects, conduct inspections, issue decisions and impose fines, oversee accreditation, grant certifications and issue interpretations and guidelines.

9. Looking Forward

9.1 Upcoming Legal Reforms

Employment Law

Whistle-blowing

The draft Act on the Protection of Whistle-blowers implementing the Directive of the European Parliament and of the Council on the protection of persons reporting infringements of Union law has been prepared by the government, and the Polish Parliament's work is currently underway. Based on the pace of work, it is estimated that the Act will come into force at the end of 2024 or the beginning of 2025. The Directive affects all businesses and government organisations employing 50 or more employees, which must introduce a procedure for their employees to report wrongdoings and implement systems and procedures to monitor and act on the reports filed.

SAUDI ARABIA

Law and Practice

Contributed by:
Dana Halwani and Leanne Farsi
Derayah LLPC

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Authors

Dana Halwani is a senior lawyer who practises in the areas of capital markets law, competition law and corporate law. She received a Bachelor of Laws from King Abdulaziz University in Jeddah, Saudi Arabia, and a Master of Laws from New York University School of Law in the United States. She was admitted to the New York State Bar and obtained her Saudi law licence in 2013.

Leanne Farsi is a lawyer who practises in the areas of corporate law, labour law, competition law and litigation. She received a Bachelor of Laws from SOAS School of Law, University of London and a Master of Laws in Intellectual Property and Information Technology Law from Fordham University in New York. She was admitted to the New York State Bar in 2022.

Derayah LLPC

Office Number 113
First Floor
Saudi Business Centre
Madina Road, Al Baghdadiyah
Jeddah 21442
Saudi Arabia

Tel: +966 12 650 4475
Fax: +966 12 657 2007
Email: secretariat@saudilegal.com
Web: www.saudilegal.com

1. Legal System

1.1 Legal System and Judicial Order

Islamic Law

Since the creation of the Kingdom of Saudi Arabia on 23 September 1932, it has been the government's express policy that the country is governed by Islamic law (Sharia). This was confirmed in 1992 by the Basic Law of Rule (Royal Order No A/90 of 27 Sha'ban 1412 Hejra corresponding to 1 March 1992), which is, in effect, the country's constitution. Historically, the Hanbali school of Islamic law has been dominant in the territory that is now Saudi Arabia. The Islamic law texts that Saudi jurists regard as authoritative were compiled during the 13th to 17th centuries CE; as such, they reflect the concerns of a pre-industrial society and do not address many commercial, business or economic issues.

There are numerous areas of law where Islamic law offers few or no guidelines, and where government-made legislation is, therefore, the only law. For example, company law, capital markets law, foreign investment law and employment law are governed by largely self-contained codes. However, until recently the Saudi Arabian government was reluctant to legislate in areas where a given subject matter is covered in some detail in the authoritative Islamic law texts. This has changed with an ambitious reform programme under the supervision of the Main Committee for the Preparation of Judicial Legislation, who have been working on a modern model of legislation consistent with Islamic law principles and international norms. The Evidence Regulation was enacted under Royal Decree No M/43 of 26 Jumada Awwal 1443 Hejra corresponding to 30 December 2021, the Personal Status Regulation under Royal Decree No M/73 of 6 Sha'ban 1443 Hejra corresponding to 9 March 2022, and the Civil Transactions Regulation under Royal Decree No M/191 of 29 Shawwal 1444 Hejra corresponding to 18 June 2023. Taking their cue from the codes of other Arab states as well as European and North American laws, these new Regulations are primarily a codification of Islamic law rules with guidance from internationally accepted principles where Islamic law is silent or unclear. Therefore, they are not a radical departure from Saudi law, but rather have consolidated and clarified existing rules, with some changes where this is possible without conflicting with Islamic law. For example, Article 385 of the Civil Transactions Regulation confirms the clear Islamic law rule that agreements to charge or pay interest are void, while Article 137 permits awarding damages for loss of anticipated income, which was traditionally opposed by the Saudi judiciary without being based on a clear Islamic law prohibition.

An obvious advantage of the new Regulations is that one no longer has to ascertain legal principles with reference to 400 to 800-year-old texts, the language of which requires a specialist education to understand – the equivalent of reading Blackstone's commentaries in their original language.

Contract law

The Civil Transactions Regulation entered into force on 20 December 2023, with retroactive effect except for relevant conflicting regulations and judicial principles. It codifies Saudi Arabian contract law, liabilities for harm caused other than in contract, and property rights. There is a section on general principles of contract law, and another section covering nominate contracts such as sales, leases, loan agreements, service contracts, agencies, bailments and partnerships that are not covered by the Companies Regulation. Areas of law which are covered by existing legislation remain largely unaffected; for

example, the sections on employment contracts and insurance merely confirm that they are governed by the existing statutes.

Article 104 of the Civil Transactions Regulation confirms the established rule that clear contract terms must be applied as written, reflecting the Islamic law maxim "the contract is the law of the parties" (*Al Aqd Shari'at Al Muta'aqdin*). Courts may only seek to ascertain the parties' common intention if the contract's wording is unclear. In such situations, judges may have regard to, for example:

- custom;
- the circumstances and nature of the transaction; and
- equality in bargaining power.

Courts and Tribunals

Saudi Arabia has courts that are administered by the Ministry of Justice, and specialised tribunals. The General Courts (also known as the Sharia Courts), the Commercial Courts and the Labour Courts are under the administration of the Ministry of Justice.

Other specialised tribunals (whose names mostly explain their scope of jurisdiction fully) include the following:

- the Administrative Court, also known as the Board of Grievances, which has exclusive jurisdiction over disputes to which the government or government agencies are party;
- the Committee for the Resolution of Securities Disputes, which deals with disputes falling within the ambit of the Capital Markets Regulation and its Implementing Rules;
- the Committee for Banking Disputes; and
- the Committee for the Settlement of Insurance Disputes.

Administration of justice

The past decade has seen considerable change to the administration of justice in Saudi Arabia, which was initiated under the Judiciary Regulation (Royal Decree No M/78 of 19 Ramadan 1428 Hejra corresponding to 1 October 2007). The Board of Grievances used to have jurisdiction in commercial disputes, but this was transferred to the newly formed Commercial Courts in October 2017, and the definition of commercial disputes was widened to include construction cases and commercial property disputes. Labour disputes used to be administered by the Ministry of Labour's Commission for the Settlement of Labour Disputes, but this jurisdiction was transferred to the new Labour Courts in October 2018.

Commercial Courts

Furthermore, the Commercial Courts Regulation (Royal Decree No M/93 of 15 Sha'ban 1441 Hejra corresponding to 8 April 2020) came into force on 16 June 2020, and brought about further innovations to the Commercial Courts. Greater emphasis is placed upon mediating commercial disputes instead of resorting to litigation, and Article 6 provides that, where both parties to a commercial transaction are merchants, they may utilise alternative forms of dispute resolution.

Electronic procedures

Commercial Courts may now engage the services of the private sector for functions such as mediation, notification and judgment delivery. Electronic filing procedures have been introduced, and several court-related procedures may be performed online, such as the exchange of judgments, memoranda and objections.

Parties seeking to litigate commercial claims are subject to a limitation period of five years from the date on which the cause of action arose.

Exceptions to this rule exist, such as where the court deems that the plaintiff has a valid excuse for bringing the claim after the expiry of the limitation period.

The past few years have also seen a shift from court proceedings being held in person to being held on online platforms, in no small part in response to the COVID-19 pandemic. Even after regular governmental services resumed in June 2020 following the initial lockdown in the Kingdom, hearings are now mainly held online.

Evidence

The Evidence Regulation regulates civil and commercial transactions. It contains provisions controlling the presentation, examination and interpretation by the courts of evidence, and regulates admissions, oral testimonies, cross-examinations, the taking of oaths, expert evidence and written and digital evidence.

Experts

Where technical or complex financial issues are raised, it is common for the judges to appoint an expert or experts as advisers to the tribunal. The tribunal has discretion over who it appoints as an expert, although as per Article 110 of the Evidence Regulation, should the parties agree on the selection of one or more experts, the court shall abide by their agreement. The court also has discretion over whether or not it accepts or disregards all or part of the expert's findings; however, ordinarily, the determination of technical or complex financial issues falls to the expert.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Until the year 2000, the opportunities for foreign investment in Saudi Arabia were extremely restricted, being limited essentially to foreign minority shareholdings in industrial development projects involving technology transfer to Saudi Arabia. Foreign participation in service or trading businesses was not possible. At the time, the economy was dominated by state-owned monopolies.

With the assistance of the World Bank, a new foreign investment framework was created through the enactment of the new Investment Regulation and the creation of the Saudi Arabian General Investment Authority (SAGIA) in April 2000. Until then, foreign direct investment in Saudi Arabia had been treated as a privilege. Under the new law, all business activities were opened to foreign investment, unless they were expressly excluded from foreign investment under the so-called Negative List.

These reforms immediately opened most forms of industry and services to 100% foreign ownership. Trading activities remained restricted to Saudi nationals until 2007, when the sector was opened up to 75% participation. 100% ownership of trading businesses has been possible since 2016, but is subject to high entry requirements.

In 2020, SAGIA became the Ministry of Investment of Saudi Arabia (MISA). Foreign investors must now obtain approval from MISA before establishing a presence in Saudi Arabia. Approval is obtained after meeting certain conditions (depending on the investment activity) and providing the required documentation. There are

various limitations on foreign ownership of joint stock companies, which can vary depending on the nature of the activity carried out by such companies. For example, foreign ownership limits apply to banks, insurance companies and telecommunications companies.

In addition, the Negative List sets out a number of activities that foreign investors are prohibited from undertaking, such as real estate development in the holy cities of Makkah and Madinah.

Until June 2019, foreign investors could not generally own more than 49% of the issued shares or convertible debt instruments of a listed company. The Capital Market Authority has now lifted the maximum foreign ownership limit, permitting foreign investors to increase their investments in some sectors, with the restriction that their shares cannot be sold until they have owned them for two years.

2.2 Procedure and Sanctions in the Event of Non-compliance

Foreign investors are required to obtain an investment licence from MISA. The process requires the submission of several documents by each foreign shareholder; the required documentation may differ depending on the activity of the company to be incorporated.

For example, the following documents are required for a foreign company to obtain a trading licence from MISA in connection with a limited liability company:

- a commercial registration certificate;
- articles of association; and
- financial statements for the previous financial year.

Until recently, these documents had to be authenticated in accordance with the authentication process in their country of origin, and attested by the Saudi embassy in the same country before being authenticated in Saudi Arabia. On 7 December 2022, Saudi Arabia acceded to the Convention Abolishing the Requirements of Legalisation for Foreign Public Documents, aka the Apostille Convention. Theoretically, documents now only require an apostille in the country of origin and an Arabic translation to be considered authenticated in the Kingdom; however, some government ministries have yet to adopt these changes.

The name of the company would then have to be reserved through the filling out of the designated form in person at the Ministry of Commerce (MOC).

An application for the foreign investment licence takes place online, and requires the applicant to:

- provide some general information with respect to each shareholder, including contact information;
- specify the activities that will be carried out by the company in Saudi Arabia; and
- provide some general information with respect to the investment in Saudi Arabia, including the capital and estimated number of employees to be employed by the company.

MISA charges an annual services fee of SAR12,000 for the first year, and SAR260,000 for five years.

Once the online application is complete, it can take up to five business days from the date all the required documents are submitted to obtain the licence.

Carrying on unlicensed economic activities or investing in Saudi Arabia without an investment licence is an offence under the so-called Anti-fronting Regulation (Royal Decree No M/22 of 4 Jumada Awwal 1425 Hejra corresponding to 22 June 2004). The parties involved may be imprisoned and fined, and the assets used in the business may be seized. In addition, a non-Saudi may be deported, and a Saudi may have their commercial registration cancelled and be prohibited from practising the same activity for up to five years. Participation in unlicensed economic activities also often involves tax fraud, in respect of which please refer to **5.7 Anti-evasion Rules**.

2.3 Commitments Required From Foreign Investors

Depending on the industry for which the investment licence is issued, certain restrictions may be imposed upon the investor. For example, an investment by a non-Saudi interest in retail and wholesale activities with a Saudi shareholder would be subject to the following requirements:

- at least 25% Saudi Arabian participation;
- a minimum foreign investment of SAR20 million (USD5.3 million);
- a restriction of opening a maximum of one shop per district; and
- training a minimum of 15% Saudi employees each year.

Non-Saudi interests can invest in a wholly owned trading venture subject to the following requirements:

- Alternative 1 – foreign investment of SAR300 million (USD80 million), with a minimum of 30% Saudi employees trained each year.
- Alternative 2 – foreign investment of SAR200 million (USD53 million), with a minimum of 30% Saudi employees trained each year, coupled with one or more of the following:
  (a) manufacturing – a proportion of not less than 30% of products distributed locally to be manufactured in the Kingdom;
  (b) research and development programmes – a minimum of 5% of total sales to be allocated to the establishment of research and development programmes in the Kingdom; or
  (c) logistical services and distribution – a centre to provide such services and after-sales services to be established.

2.4 Right to Appeal

When an application for an investment licence is rejected, the applicant may lodge an objection with MISA's board within 30 days of receiving the rejection notice. The board considers and rules on the objection within 30 days of submission. If the board dismisses the objection, the applicant may appeal to the Administrative Court.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The new Companies Regulation (Royal Decree No M/132 of 1 Dhul Hijja 1443 Hejra corresponding to 30 June 2022) and its Implementing Rules came into effect in January 2023, replacing the Companies Regulation (Royal Decree No M/3 of 28 Muharram 1437 corresponding to 10 November 2015), the Professional Companies Regulation (Royal Decree No M/17 of 26 Muharram 1441 Hejra corresponding to 25 September 2019) and the Implementing Rules of the Professional Companies Regulation which were issued on 23 April 2020.

Companies incorporated in Saudi Arabia are usually incorporated as limited liability compa-

nies (LLCs) or joint stock companies (JSCs). An LLC can be owned by a single person, and there is no limit on the maximum number of shareholders. There is no minimum share capital requirement for LLCs, but the capital of a company must be sufficient for carrying out the company's activities.

A JSC can be incorporated by one or more persons, whether natural persons or corporate entities. The JSC's capital on establishment must be sufficient to achieve its object, and in any event must not be less than SAR500,000.

Under the 2022 Companies Regulation, a new form of entity called a "simplified joint stock company" can also be created. A simplified joint stock company can be incorporated by one or more persons, and there is no minimum share capital requirement for such companies.

3.2 Incorporation Process

The first step towards incorporating an entity with non-Saudi shareholders is obtaining an investment licence from MISA, as further detailed under **2.2 Procedure and Sanctions in the Event of Non-compliance**. Once the licence has been obtained, the shareholders must submit the company's draft articles of association to the MOC for review and approval. After they have been approved, the articles must be notarised and published. The next step is to obtain the commercial registration certificate from the MOC, a process which includes the appointment of management.

The timing for incorporating a company from the date of receiving a MISA licence up to the issuance of the commercial registration certificate is usually two to three weeks, if the draft articles of association do not deviate too far from the standard articles issued from time to time by the MOC.

Once the commercial registration certificate is issued, the company is incorporated and must complete the post-incorporation registrations with the following government authorities:

- the Ministry of Municipal and Rural Affairs;
- the Ministry of Human Resources and Social Development;
- the General Organisation for Social Insurance;
- the Zakat, Tax and Customs Authority (ZATCA); and
- the General Authority for Competition (if applicable).

The company may also need to obtain additional approvals from other relevant authorities regulating its activities, depending on the business it will be carrying out. The time to complete these post-incorporation procedures varies widely depending on what registrations with government authorities are required.

3.3 Ongoing Reporting and Disclosure Obligations

Any amendments to the articles of association of a company must be submitted to the MOC for review and approval, and must be notarised and published. This includes any change in shareholding, any increase or decrease in the capital of the company, or any change to the activities of the company. Furthermore, the names of the general manager or members of the board of directors are included in the commercial registration certificate of a company, so any change in management must be reported to the MOC for amendment of the commercial registration certificate.

Companies are required to upload their financial statements in respect of each financial year to the MOC, through the online portal Qawaem.

3.4 Management Structures

JSCs are managed by a board of directors, consisting of not fewer than three members, which has the widest powers to manage the company towards achieving its objectives, subject to the limitations set down by the shareholders' general assembly. The board members may be shareholders, or other persons, and are elected by the shareholders in the ordinary general assembly. The first board can be appointed by resolution of the founders or in the JSC's by-laws. The company's by-laws or the shareholders specify the mode of management of the company.

LLCs have more flexibility than JSCs to put a management structure in place that suits the company's shareholders. An LLC can be managed by one or more managers, who can be shareholders or other persons. The shareholders can appoint a board of managers if there are multiple managers. The manager(s) can be appointed via the articles of association or via separate contracts. The company's articles of association or resolutions of the shareholders determine the mode of management of the company.

3.5 Directors', Officers' and Shareholders' Liability

As per Article 28 of the 2022 Companies Regulation, "the manager and members of the board of directors shall be responsible by way of joint liability to compensate the company or partners or shareholders or third parties for damage arising by reason of a violation of the provisions of the Regulation or of the company's articles of association or by-laws, or by reason of any error, neglect or default on their part in the performance of their work; any condition providing otherwise shall be void ab initio."

A manager or member of the board of directors who fails to call a shareholders' meeting upon being made aware of the losses of the company reaching 50% may be imprisoned for up to a year and/or fined up to SAR1 million.

Article 242 (1) of the 2022 Companies Regulation provides that the managers or the board of directors of the company must, before the company, the general assembly or the shareholders, pass a resolution to dissolve the company and prepare a declaration stating that they have investigated the financial position of the company, confirming that the assets of the company are sufficient to discharge its debts at the end of the liquidation period proposed, and that the company is not in default under the Bankruptcy Regulation (Royal Decree No M/50 of 28 Jumada Awwal 1439 Hejra corresponding to 14 February 2018) as amended by Royal Decree No M/89 of 9 Rajab 1441 Hejra corresponding to 4 March 2020. This declaration must be presented within 30 days from the date of its separation to the partners, the general assembly or the shareholders for the passing of a resolution to dissolve the company.

Article 242 (2) provides that in a situation where the partners, the general assembly or the shareholders pass a resolution to dissolve the company, when it is apparent from the declaration that the assets of the company are not sufficient to discharge its debts or that the company is in default under the Bankruptcy Regulation, they shall be liable by way of joint liability for any debt outstanding against the company.

Therefore, if a company continues trading while insolvent, eventually the shareholders may be

held personally liable for the company's debts, which can only be evaded by either infusing new capital or making an application for a procedure under the Bankruptcy Regulation. Under the Bankruptcy Regulation, a company's manager, member of its board of directors or board of managers, or any of its officers or any other person participating in the establishment or management thereof, or an analogous person, risks imprisonment of up to five years and/or a fine of up to SAR5 million, by "continuing to carry on the activity of the debtor in the absence of the possibility of avoiding liquidation".

4. Employment Law

4.1 Nature of Applicable Regulations

Main Statutes

The main Saudi statutes governing relations between employers and employees are:

- the Labour Regulation (Royal Decree No M/51 of 23 Sha'ban 1426 Hejra corresponding to 27 September 2005), as amended most recently by Royal Decree No M/5 of 7 Muharram 1442 Hejra corresponding to 26 August 2020; and
- the Labour Regulation Implementing Rules (Ministerial Resolution No 1982 of 28 Safar 1437 Hejra corresponding to 6 April 2016), as amended most recently by Ministerial Resolution No 142906 dated 13 Sha'ban 1441 Hejra corresponding to 6 April 2020.

The Labour Regulation lays down certain mandatory minimum standards for the treatment of employees, and any agreement reducing an employee's minimum rights is void.

The Nitaqat System

The basic rule under the Labour Regulation is that Saudi employees shall not represent less than 75% of the total workforce, but that the Minister of Labour may decrease the percentage temporarily. In 2011, the Saudi Ministry of Labour – now the Ministry of Human Resources and Social Development (HRSD) – implemented a detailed list of quotas, known as the Nitaqat system, which are determined by the business sector and size of the business entity, with the percentages of Saudi employees currently classed in Red, Low Green, Medium Green, High Green and Platinum sections. These quotas are updated frequently.

Labour Reforms

On 4 November 2020, the HRSD announced new labour reforms which, as stated in the Labour Reform Initiative Services Guidebook (the "LRI Guidebook") published by the HRSD in 2020, aim to improve working environments and the labour market in the Kingdom, and strengthen human resources. To that end, the LRI Guidebook outlines the following three online services, each of which is subject to certain conditions that are elaborated upon within the guide:

- employee mobility, which is a service that allows expatriate workers to apply to transfer their employment between private sector establishments;
- automatic exit and re-entry visas, which is a service allowing expatriate workers to apply to exit and re-enter Saudi Arabia while their employment contract is valid; and
- automatic exit visas, which is a service that enables expatriate workers to apply to leave the Kingdom during the period that their contract is valid, or following the expiry of their contract.

4.2 Characteristics of Employment Contracts

The online platform Qiwa provides a standard employment agreement which companies can use to contract with their employees. These online templates are amendable to a certain extent. The Implementing Rules of the Labour Regulation also set out a standard employment contract, certain provisions of which are mandatory. A written employment contract must be executed, but the provisions of the Labour Regulation apply if the employer fails to do so.

Employment contracts with non-Saudis must be on a fixed-term basis, but Saudi employees can be employed on fixed-term contracts or indefinite-term contracts. If a fixed-term contract expires and the parties continue the relationship, it becomes an indefinite-term contract for Saudi employees. If a fixed-term contract contains a renewal provision, it can be renewed twice for less than four years and remains a fixed-term contract. If the contract is renewed three times or the employment period exceeds four years, the contract becomes indefinite for Saudi employees. Accordingly, a Saudi national who has been employed by the same employer for more than four years or whose contract has been renewed three times will automatically be employed on an indefinite-term basis.

4.3 Working Time

As a general rule, working hours are eight hours per day for six days per week, with a total of 48 hours per week. During Ramadan, working hours for Muslims are reduced to six hours per day for six days per week, with a total of 36 hours per week. Article 99 of the Labour Regulation provides that statutory working hours may be increased to nine hours per day or decreased to seven hours per day for certain work categories. According to Article 101 of the Labour Regulation, workers may not work continuously for more than five hours at a time, with breaks for meals, rest and prayers of not less than half an hour at a time. Breaks are not counted as working hours, but workers may not remain at the workplace for more than 11 hours per day.

Article 106 of the Labour Regulation provides that the maximum actual working hours may be increased to up to ten hours per day or up to 60 hours per week without a day of rest in certain circumstances, including “if the worker is intended to face extraordinary work pressure”. In such situations, overtime is payable at 150% of the employee’s base wage.

The circumstances brought about by the COVID-19 pandemic resulted in reductions in the working hours of many employees. In light of this and other changes to contractual relationships caused by the pandemic, the HRSD issued Resolution No 142906 of 13 Sha’ban 1441 Hejra corresponding to 6 April 2020, inserting Article 41 into the Implementing Rules of the Labour Regulation, which is applicable to situations where the government has taken measures in relation to a situation that necessitates a reduction in working hours or has implemented precautionary measures to prevent the worsening of a situation. It allows employers to take certain measures to lessen the adverse impact of the pandemic within six months of the beginning of government-imposed restrictions taking effect. Such options include reducing an employee’s salary in proportion to a decrease in their working hours.

On 13 January 2021, the HRSD announced that Article 41 would no longer be effective in relation to the COVID-19 pandemic.

4.4 Termination of Employment Contracts

Under Saudi Arabian law, staff can be dismissed in the following circumstances:

- non-renewal of a fixed-term contract;
- for a cause listed under Article 80 of the Labour Regulation; and
- termination of an indefinite-term contract under Article 75 of the Labour Regulation.

Fixed-Term Contract

A fixed-term contract comes to an end when its term expires. Therefore, an employee can be dismissed by being given notice that the contract will not be renewed. In such circumstances, no compensation is payable other than the statutory end-of-service award, and repatriation costs for non-Saudis.

Article 80

Article 80 allows an employer to terminate a contract for certain specified causes, most of which involve misconduct. Article 80 (2) permits termination "if the worker fails to perform his essential obligations arising from the employment contract, or to obey legitimate orders, or if, in spite of written warnings, he deliberately fails to observe the instructions related to the safety of work and workers as may be posted by the employer in a conspicuous place".

This is a catch-all provision and is applicable to any breach of the essence of the contract of employment, but the breach must be material. Ordinary, trivial errors are punishable only by disciplinary measures. Any dismissal under Article 80 requires that the employee be given a chance to justify their conduct. For this, a meeting must be called, at which at least two management representatives must be present, and which must be minuted. If the employee fails to respond within a reasonable time, it may be assumed that they have no valid objection to the termination, or that they are not interested in prolonging the employment relationship. Dismissal under Article 80 can only be invoked in isolated instances, and not, for example, to reduce a company's workforce.

Article 75

Article 75 of the Labour Regulation permits the termination of an indefinite-term contract for lawful cause, upon 60 days' notice, although the term "lawful cause" is not defined. In principle, it can include any reason, such as:

- the Labour Regulation and other applicable laws;
- contractual obligations;
- social, religious and customary rules;
- public policy;
- impossibility or frustration of purpose;
- the employer's by-laws and work rules; and
- real business considerations.

However, anything that appears arbitrary or discriminatory will not be accepted by the Labour Courts.

Compensation

When a fixed-term contract is terminated prematurely without cause, Article 77 of the Labour Regulation requires the courts to award compensation to the end of the contract (however long this may be), with a minimum of two months' salary. The right to compensation applies not only when the employment contract is terminated early by the employer, but also when the employee terminates early without good cause.

When an indefinite-term contract is terminated without cause, the employee receives 15 days' salary for each year of service, or pro rata for an

incomplete year, with a minimum of two months' salary, unless compensation for unlawful termination is set out in the employment contract. The compensation is in addition to the end-of-service benefits (ESBs) that are payable in any event.

Under Article 84 of the Labour Regulation, when an employment contract comes to an end, as a general rule the employee is entitled to:

- one-half of one month's wages for each of the first five years of employment (or pro-rated part thereof); and
- a full month's wages for each year of employment thereafter (or pro-rated part thereof).

Where an employee has resigned for reasons other than force majeure, the ESB is calculated as follows:

- one-third of the Article 84 ESB for two to five years of employment;
- two-thirds of the Article 84 ESB for six to ten years of employment; and
- the full Article 84 ESB for employment of more than ten years.

A waiver of the right to ESB is ineffective under Saudi Arabian law. The ESB is calculated with reference to the employee's gross remuneration, which includes housing and transport allowances, regular bonuses, etc. Where housing and transport are provided to the employee, the actual value or fair market value of such benefits is taken as the basis of the calculation.

4.5 Employee Representations

There are no trade unions in Saudi Arabia; employees' interests are represented by the HRSD. The Labour Regulation sets out rules governing the investigation of complaints by labour inspectors.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

There is no personal income tax in Saudi Arabia. The government imposes charges on expatriate employees, which are proportional to the term of the employee's work licence period. The fees are as follows:

- Expats equal to or fewer than the number of Saudi employees:
  - (a) SAR2,100 for a 3-month licence period;
  - (b) SAR4,200 for a 6-month licence period;
  - (c) SAR5,600 for a 9-month licence period; and
  - (d) SAR8,400 for a 12-month licence period.
- Expats exceeding the number of Saudi employees:
  - (a) SAR2,400 for a 3-month licence period;
  - (b) SAR4,800 for a 6-month licence period;
  - (c) SAR7,200 for a 9-month licence period; and
  - (d) SAR9,600 for a 12-month licence period.

Small businesses with a total workforce of nine employees or less, including the owner, are relieved of the obligation to pay this charge on employees for three years.

In addition, a monthly charge is imposed on expatriates' dependants. While the charges on expatriate employees must be borne by the employer, many employers do not cover the levy on dependants, which is therefore, in effect, a form of income tax.

5.2 Taxes Applicable to Businesses

Zakat

Saudi Arabian interests pay zakat, which is a religious wealth tax based on the taxpayer's net worth, not income. The effective rate is 2.5% of the net worth of natural persons and 2.5% of the total capital resources of companies. For companies, the tax base for the calculation of zakat excludes fixed assets, long-term investments and deferred costs from total capital resources, but includes profits from foreign investments that do not consist of investment in real property.

Under the Income Tax Regulation (Royal Decree No M/1 of 15 Muharram 1425 Hejra corresponding to 7 March 2004), most foreign interests that conduct business in Saudi Arabia pay income tax at a flat rate of 20% of the profits. Oil and hydrocarbon production income are taxed at a rate of 50% to 85%. When a company has Saudi and non-Saudi shareholders, the Saudi shareholders pay zakat, and the non-Saudi shareholders pay income tax.

Withholding Tax

Payments to a non-resident with no permanent establishment in Saudi Arabia for any amount realised from a source in the Kingdom are subject to withholding tax at the following percentages of the gross payment:

- management fees – 20%;
- royalties or proceeds, or payments for services to a head office or related company – 15%;
- payments for rent, technical and consulting services, air tickets, air freight and maritime freight, international telecommunications services, dividends, loan charges, or insurance or reinsurance premiums – 5%; and
- other payments – 15%.

VAT

Since 1 July 2020, value-added tax (VAT) has been payable at a rate of 15%.

5.3 Available Tax Credits/Incentives

Net operating losses may be carried forward by non-Saudi investors from one year to the next. Any loss that has been carried forward may be deducted from the tax base of future taxable years until the cumulative loss is fully offset.

In March 2020, ZATCA launched an initiative granting amnesty in relation to tax filing and payment penalties for excise tax, VAT, withholding tax, income tax and zakat. The initiative was initially set to run for the period of 18 March 2020 to 30 June 2020, but has been extended multiple times since its launch. The latest resolution by the Minister of Finance – Resolution No 2303 dated 7 Dhul Qada 1442 Hejra corresponding to 21 January 2021 – extended the amnesty period until 30 June 2021.

The Regional Headquarters Tax Rules (issued by resolution of the Board of Directors of the Zakat, Tax and Customs Authority No. (24-1-9) dated 23 Rajab 1445 Hejra corresponding to 4 February 2024), allows qualifying multinational companies which relocate their regional headquarters (RHQ) to Saudi Arabia to benefit from a 30-year income tax exemption, and a 30-year withholding tax exemption in relation to approved RHQ activities, subject to renewal. Aside from needing to fulfil the necessary criteria with MISA, RHQs need to fulfil the following requirements to qualify for the incentives:

- possessing a valid MISA licence, and carrying out only those activities which are within the scope of the licence;

- having adequate premises in the Kingdom suitable for the business activities of the RHQ;
- managing and directing their activities in the Kingdom, including holding board meetings for the RHQ where strategic decisions will be made;
- incurring operational expenditures in the Kingdom, commensurate with the RHQ's activities;
- generating revenue from eligible activities in the Kingdom;
- having at least one director that is resident in the Kingdom;
- employing an adequate number of full-time employees in a tax year that is proportionate to the level of activity carried out by the RHQ; and
- employees of the RHQ possessing the requisite qualifications and skills necessary to execute their duties and fulfil their responsibilities.

5.4 Tax Consolidation

For zakat payment purposes, Article 15 of the Implementing Regulation for Zakat Collection permits companies owned by the same partner, or holding companies and their wholly owned subsidiaries both inside and outside Saudi Arabia, to submit consolidated accounts and consolidated declarations.

5.5 Thin Capitalisation Rules and Other Limitations

There are no thin capitalisation rules.

Deduction of interest is limited to either the loan charge accumulated during the tax year (if related to taxable income) or the sum of a taxpayer's income from loan charges, whichever is lower, and 50% of taxable income (minus loan charge income and expenses).

5.6 Transfer Pricing

Article 63 (c) of the Income Tax Regulation gives ZATCA the power to reallocate income and expenses between related parties as may be necessary to reflect the income that would have been realised if the parties had been independent and unrelated. While this rule has been in force since 2004, it was not widely applied until 2019. On 15 February 2019, ZATCA introduced transfer pricing by-laws based on the OECD's Base Erosion and Profit Shifting Recommendations. In July 2022, ZATCA issued an amended draft of Transfer Pricing By-laws, inviting comments from the public.

5.7 Anti-evasion Rules

Under the Income Tax Regulation, failure to pay income tax results in a fine of 1% of the unpaid tax for each 30 days of the delayed payment, plus an additional 25% of the unpaid tax if fraud is involved.

6. Competition Law

6.1 Merger Control Notification

Under Article 7 of the Competition Regulation (Royal Decree No M/75 of 29 Jumada Thani 1440 Hejra corresponding to 6 March 2019), businesses that plan to engage in a transaction resulting in an economic concentration must notify the General Authority for Competition (GAC) at least 90 days before the transaction is completed, if the total value of the annual sales for all the enterprises taking part in the economic concentration surpasses SAR100 million. On 29 March 2023, the GAC announced that this minimum threshold for reporting an economic concentration was to be raised to SAR200 million. In November 2023, the GAC announced additional reporting limits for economic concentrations:

A. The total worldwide annual sales value of the parties to the economic concentration must exceed SAR200 million;

B. The total worldwide annual sales value of the target establishment must exceed SAR40 million; and

C. The total annual sales value in Saudi Arabia of all of the parties to the economic concentration must exceed SAR40 million.

The reporting limits B and C do not apply to joint venture transactions. The threshold for notifying the GAC of a joint venture transaction is only triggered by the total value of the annual sales for all the enterprises taking part in the economic concentration exceeding SAR200 million.

The Guidelines for Reporting Economic Concentrations issued by the GAC on 6 Sha'ban 1441 corresponding to 30 March 2020 specify that, when determining whether the threshold has been reached, the GAC considers the pertinent annual sales to be the aggregate value of sales achieved by all the relevant enterprises on a global level.

Article 1 of the Implementing Rules of the Competition Regulation issued by the GAC Board Resolution No (337) dated 25 Muharram 1441 Hejra corresponding to 24 September 2019 defines an economic concentration as "any action that results in a total or partial transfer of ownership of assets, rights, equity, stocks, shares or liabilities of a firm to another by way of merger, acquisition, takeover or the joining of two or more managements in a joint management, or any other form that leads to the control of a firm(s) including influencing its decision, the organisation of its administrative structure, or its voting system". Therefore, a full merger or acquisition is not necessary to trigger the reporting requirement; for example, the formation of an unincorporated joint venture or a consortium may also be sufficient.

Depending on the parties' activities, it may also be necessary to obtain approvals and comply with the additional requirements of sector-specific regulatory bodies, such as the Saudi Central Bank (SAMA) for banks and insurance companies or the Communications and Information Technology Commission (CITC) for telecommunications companies.

Special rules apply to mergers and acquisitions involving listed companies, which are set out in the Merger and Acquisitions Regulations (Resolution of the Board of the Capital Market Authority No 1-50-2007 of 21 Ramadan 1428 Hejra corresponding to 3 October 2007), as amended by Resolution No 3-45-2018 of 7 Sha'ban 1439 Hejra corresponding to 23 April 2018.

6.2 Merger Control Procedure

Under the 2019 Competition Regulation and its Implementing Rules, the parties to an economic concentration exceeding the threshold must submit a report for GAC approval at least 90 days before the completion of the action. This report is submitted through the GAC's website and must contain the following information:

- the basic information concerning the operation of the economic concentration and the parties thereto;
- the sectors and markets concerned;
- the likely effect of the economic concentration on competition generally;
- the most prominent customers; and
- the most prominent competitors.

The report must also contain any other data the GAC requires to review the economic concentration.

Certain documents must also be submitted to the GAC in connection with the buyer, seller and target entities, namely:

- their articles of association;
- their commercial registration certificate or an equivalent document; and
- their financial statements for the past two years.

Once the report and required documents are received, the GAC may publish basic information on the economic concentration and request comments from the public. The GAC must evaluate the application in light of the following factors:

- the structure and level of competition in the market in Saudi Arabia, and abroad in situations where the competition has an impact on the Saudi market;
- the financial positions of the parties to the economic concentration;
- the availability and accessibility of alternative commodities;
- the distinctness of the commodities;
- consumer interests and welfare;
- the probable effect of the economic concentration on prices, quality, diversification, innovation or development in the market;
- advantages and disadvantages to competition arising from the economic concentration;
- the growth and direction of supply and demand in the market;
- the barriers to entry and exit or the expansion of enterprises in the market, including regulatory barriers;
- the likelihood that the economic concentration will create or enhance influential market strength or the dominant position of the enterprise in any particular markets;
- the degree and history of practices prejudicial to competition in the relevant market; and
- the views of the public, the parties related to the economic concentration, and the sector regulators.

At the conclusion of the enquiry, the GAC may approve or reject the application, or may set conditions for its approval. If no ruling is made within 90 days of submission of the application, the application is deemed to be approved.

6.3 Cartels

Article 5 of the 2019 Competition Regulation prohibits practices that have the effect or intention of disturbing competition. Such practices can involve express or implied agreements between businesses, but a single entity can also be guilty of engaging in anti-competitive practices.

Article 5 sets out a non-exclusive list of practices that are considered anti-competitive, as follows:

- fixing or proposing prices for goods, consideration for services, conditions of sale or purchase, and the like;
- fixing the volumes, weights or quantities of production of commodities or the performance of services;
- restricting the freedom of flow of commodities or services to the markets, or wholly or partially removing them therefrom by concealing or storing them without right, or refusing to deal therein;
- any conduct tending to impede the entry of an enterprise to the market, or excluding it therefrom;

- withholding commodities or services available on the market wholly or in part from a particular enterprise or enterprises;
- dividing up the markets for the sale or purchase of commodities or goods, or allocating them in accordance with any criterion, particularly according to geographical areas, distribution centres, types of customers, or seasons and periods of time;
- freezing operations of manufacture, development, distribution and marketing and all other modes of investment, or restricting them; and
- colluding or co-ordinating in bids or offers in governmental or other auctions or tenders in such a manner as to disturb competition.

The GAC has both an investigation department and a tribunal that adjudicates on violations of the Competition Regulation. The decisions of the Committee for the Determination of Violations of the Competition Regulation are appealable to the Administrative Court, but such appeals have so far, for the most part, been unsuccessful. Since the GAC was established in 2004, originally as the Competition Protection Council, it has taken to court and convicted enterprises in a variety of industries, including cement, medical gases, rice, sugar and soft drinks.

6.4 Abuse of Dominant Position

Under the 2019 Competition Regulation, a dominant entity is defined as having a 40% market share or the ability to influence a particular market.

Dominant businesses may not abuse their position, nor disturb or limit competition. Article 6 of the 2019 Competition Regulation sets out the following non-exclusive list of practices that are prohibited for dominant businesses:

- selling a commodity or service at a price less than the total cost, in order to exclude enterprises from the market or to expose them to grave loss, or to impede the entry of potential enterprises;
- fixing or imposing prices or conditions for the resale of commodities or services;
- reducing or increasing the available quantities of products in order to control prices or fabricate a non-genuine abundance or shortage;
- discriminating in dealings between enterprises in respect of similar contracts with regard to the prices of commodities, consideration for services, or conditions of sale or purchase thereof;
- refusing to deal with another enterprise without objective cause, in order to restrict its entry to the market;
- imposing a requirement on an enterprise that it should refrain from dealing with another enterprise; and
- making the sale of a commodity or the provision of a service conditional upon the assumption of obligations or the acceptance of goods or services that – by their nature or under commercial usage – are unconnected with the commodity or service that is the subject matter of the original contract or transaction.

7. Intellectual Property

7.1 Patents

Originally, intellectual property rights were administered and protected by three different government authorities:

- King Abdulaziz City for Science and Technology (KACST) for patents;
- the MOC for trade marks; and
- the Ministry of Media for copyrights.

These functions are now handled by the Saudi Authority for Intellectual Property (SAIP), which aims to organise, support, sponsor, protect and promote intellectual property in the Kingdom, in accordance with global best practices.

Patents

There are currently two overlapping patent systems in Saudi Arabia. The GCC Patents of Inventions Regulation of 2001 was approved in Saudi Arabia by Royal Decree No M/28 of 2001 and is an amendment of an earlier statute of 1992. It permits the registration of patents with effect throughout the GCC countries. The GCC Patent Office is based in Riyadh.

Patents are governed by the Patent, Layout Designs of Integrated Circuits, Plant Varieties, and Industrial Models Regulation (Royal Decree No M/27 of 20 Jumada Awwal 1425 Hejra corresponding to 17 July 2005), which gives effect to the Paris Convention for the Protection of Industrial Property under Saudi law. This law was amended in 2023 to extend the period of protection for industrial designs from ten to 15 years. Additionally, the law now formally recognises the Hague Agreement and the World Intellectual Property Organization.

A protection document is granted by the SAIP, which gives full protection within the Kingdom to an invention, a layout design of an integrated circuit, a plant variety or an industrial design. The protection document grants the owner the right to commercially exploit the subject matter of protection.

In accordance with the provisions of the Patent, Layout Designs of Integrated Circuits, Plant Varieties, and Industrial Models Regulation, a patent may be granted for an invention if it is novel, involves a creative step and is capable of industrial application. The invention may be a product or an industrial process, or may relate to either.

Applications for protection documents can now be filed through the SAIP website by filling out a template which requires the input of:

- a summary;
- a full description;
- the elements being protected; and
- drawings (if any) for the invention being patented.

For certain patent applications, the patent application fast track examination programme is also available, which provides a potentially quicker avenue for obtaining a protection document.

The protection document is the personal right of the owner, who may transfer or assign it, or grant a contractual licence to others to commercially exploit the subject matter of protection. Protection is granted to the owner for:

- 20 years for an invention;
- 15 years for an industrial design; and
- 20 to 25 years for a new plant variety.

These periods are renewable, for an annual fee.

Disputes arising from patent infringement are handled by the Commercial Courts.

7.2 Trade Marks

Trade marks are regulated under the Trade Marks Regulation (Royal Decree No M/21 of 28 Jumada Awwal 1423 Hejra corresponding to 8 August 2002), which defines a trade mark as:

"… anything having a distinctive form such as names, words, signatures, letters, figures, drawings, logos, titles, hallmarks, seals, pictures,

engravings, packs or any other mark or group of marks if used or intended to be used either to distinguish goods, products or services of a facility or other facilities or to indicate the rendering of a service or the control of inspection of goods or services."

Applications for the registration of trade marks are made online. The process is as follows:

- Authorisation must be obtained to register the trade mark.
- A power of attorney must be obtained to register the trade mark.
- A request must be submitted to register the trade mark, which includes the payment of a SAR1,000 consideration fee.
- The request is examined. The SAIP may allow the applicant to modify the trade mark if the SAIP finds the trade mark is not fit for registration.
- If the trade mark is accepted, the SAR500 publication fee must be paid to proceed.
- The trade mark is published for 60 days.
- If no objections are made during the publication period, once it lapses, the applicant must pay the final invoice within 30 days of its issuance, and the trade mark certificate will be issued. The trade mark registration and certificate issuance fees are SAR5,000.

In November 2023, two significant developments took place in Saudi trade mark law:

- The 12th Edition of the Nice Classification was adopted by Saudi Arabia and is now required when new trade mark applications are filed.
- The Saudi Cabinet approved the Kingdom's accession to the Madrid Protocol for international trade mark registration.

In Saudi Arabia, it is not permitted for anyone other than the rightful owner to register a trade mark that is similar to an internationally known mark. Registration of a trade mark provides the holder with protection for ten years from the date of registration, renewable for similar periods. Any renewal must be specifically applied for before the end of the year of expiry of the registration, and the procedure for renewal is the same as that for the initial registration of the trade mark. A trade mark is deemed to be owned by the person who effects the registration. Once the registration is effected in the trade marks register, the party who has registered the trade mark shall be considered the owner thereof, to the exclusion of others.

A trade mark can be licensed, pledged or transferred by the rightful owner. The trade mark may be deleted or cancelled if it is not used for five consecutive years.

Penalties for infringement of a valid trade mark include imprisonment for a period of no more than one year, and a fine of no less than SAR50,000 and no more than SAR1 million. The Commercial Courts preside over infringement-related disputes.

7.3 Industrial Design

An industrial design is defined as "a collection of two-dimensional lines or colours, or a three-dimensional form that gives any industrial product or product of traditional crafts a special appearance, provided that it is not merely for a functional or technical purpose, including textile designs". The industrial design is protected by a protection document called an "industrial design certificate".

Industrial designs are governed by the Patent, Layout Designs of Integrated Circuits, Plant Vari-

eties, and Industrial Models Regulation. A protection certificate shall be granted for an industrial model if it is novel and has features that distinguish it from known industrial models. The industrial model shall be deemed novel if it was not disclosed to the public through publication anywhere in a tangible form, by use or by any other means, prior to the date of filing the registration application or the priority application.

Protection is granted to the owner for ten years for an industrial design. The above-mentioned regulation gives the owner of an industrial model protection certificate the right to initiate an action before the Commercial Courts against any person who infringes the industrial model by exploiting it for commercial purposes without their consent within the Kingdom through the manufacture, sale or importation of a product that includes or represents a wholly or substantially copied industrial model.

Note that the procedure for applying for a protection certificate for an industrial design is similar to the procedure for registering a patent, as described in **7.1 Patents**.

7.4 Copyright

The Copyright Regulation (Royal Decree No M/41 of 2 Rajab 1424 Hejra corresponding to 30 August 2003) and its Implementing Rules define copyright protection to include architectural designs, speeches and theatrical, musical, photographic and cinematographic works, as well as works for radio and television, maps, video tapes and computer software. The Regulation gives the author financial and moral rights to:

- print or publish the work;
- make amendments or delete the work;
- withdraw the work from circulation; and
- assign the work as they wish.

The SAIP has launched a copyright registration service for computer software, apps and architectural designs. To register, applicants must complete the registration application on the SAIP website and pay the requisite examination fee.

Upon successful registration, the copyright holder is issued a registration certificate.

In general, the duration of protection afforded to different types of copyrighted works is as follows:

- protection of copyright for the author of a work lasts for the duration of their life and for 50 years following their death;
- protection for works where the author is a corporate entity, or where their name is unknown, lasts 50 years from the date of the first publication of the work;
- the protection period for sound works, audio-visual works, films, collective works and computer programs lasts 50 years from the date of the first show or publication of the work, regardless of republication;
- protection for applied art (handcrafted or manufactured) and photographs lasts 25 years from the date of publication;
- protection for broadcasting organisations lasts 20 years from the date of the first transmission of a programme or broadcast materials; and
- protection for the producers of audio recordings and performances lasts 50 years from the date of performance or the first recording, as the case may be.

Disputes arising from copyright infringement are handled by the Commercial Courts. Infringers of copyright may be punished with a fine of up to SAR250,000 for first-time offenders, which may

be doubled to SAR500,000 for repeated infringement.

7.5 Others

The Regulations for the Protection of Confidential Commercial Information, issued by the Minister of Commerce and Industry's decision No 3218 dated 25 Rabi Awwal 1426 Hejra corresponding to 4 May 2005, as amended by His Excellency's decision No 431 dated 1 Jumada Awwal 1426 Hejra corresponding to 8 June 2005, enumerate a list of situations where information is considered a commercial secret, namely where:

- the information in its basic constituents or its final form is not generally known, and is difficult to obtain by practitioners of the type of business to which the information pertains;
- the information is commercially valuable due to its confidentiality; or
- the owner of the information takes steps to safeguard its confidentiality.

The obtainment, usage or disclosure of commercial secrets without the owner's consent, through a manner that is deemed to be "inconsistent with honest commercial practices", is deemed an abuse of commercial secrets under the Regulation.

Activities considered contrary to honest commercial practice include:

- the breaching of contracts concerning commercial secrets;
- breaching or encouraging the breaching of confidential information; and
- obtaining commercial secrets from a third party who is known to have obtained the information through one of these activities.

Persons harmed by an abuse of commercial secrets may file a lawsuit to claim compensation for damages they have sustained.

8. Data Protection

8.1 Applicable Regulations

The Personal Data Protection Regulation (PDPR) (Royal Decree No M/19 of 9 Safar 1443 Hejra corresponding to 16 September 2021) amended by Royal Decree No M/148 of 5 Ramadan 1444 Hejra corresponding to 27 March 2023 governs the collection and processing of data in the Kingdom. The regulation places a strong emphasis on obtaining the consent of data owners for the collection of their data, and maintaining transparency with data owners regarding how their personal information is processed.

Controlling entities, which is to say public bodies, natural persons or private bodies corporate that determine why and how personal data is processed (whether they themselves are processing it or whether this is done through a processing entity), may only (with certain exceptions) collect personal data directly from the owner of the data in question, and process such data solely for the purpose for which the data was collected. Privacy policies need to be adopted by controlling entities and made available to the owners of data. These privacy policies must inform data owners of:

- the reason for their data's collection;
- the contents of the personal data that must be collected;
- the method of data collection, storage and processing;
- the means of deleting the data; and

- the rights of the data owner in connection therewith, as well as the manner in which such rights may be exercised.

A number of industries are also currently governed by regulations that set out measures to protect data collected in those fields. Examples include the following:

- The Health Profession Practice Regulation (Royal Decree No M/59 of 4 Dhul Qada 1426 Hejra corresponding to 6 December 2005), which provides that a medical practitioner must not disclose any confidential information obtained during the course of their work. The regulation lists a few exceptions to this rule, such as a court order requiring disclosure.
- Article 5 of the E-Commerce Regulation (Royal Decree No M/126 of 7 Dhul Qada 1440 Hejra corresponding to 9 July 2019) which provides that online merchants may not retain consumer data beyond the period required for an electronic commerce transaction, and that online merchants must adopt the necessary safeguards to protect consumer data while it is retained. The same regulation prohibits online retailers from the unauthorised disclosure and usage of consumer data.

8.2 Geographical Scope

The PDPR applies to any processing of the personal data of individuals, carried out in the Kingdom by any means whatsoever, including the processing of personal data relating to individuals resident in the Kingdom, by any means whatsoever, by any entity residing outside the Kingdom.

Article 2 (b) of the 2018 E-Commerce Regulation details the provisions and sanctions in place to safeguard the protection of consumer data, and also applies to traders outside Saudi Arabia who provide products or services inside the country by offering them in a manner that enables the consumer to obtain them.

8.3 Role and Authority of the Data Protection Agency

Although each government authority supervising an activity is responsible for enforcing its specific data protection rules, the National Data Management Office is the national data regulator of Saudi Arabia, and creates laws, regulations and policies to facilitate the protection of data.

The PDPR makes reference to a "competent authority" which will oversee the application of the regulation. For a period of two years, this is to be the Saudi Authority for Data and Artificial Intelligence (Council of Ministers Resolution No 98 of 7 Safar 1443 Hejra corresponding to 14 September 2021).

9. Looking Forward

9.1 Upcoming Legal Reforms

Between 5 April 2023 and 5 May 2023, the SAIP issued a draft intellectual property law for public feedback, with the aim of updating the current framework for intellectual property law to be in line with international standards.

From 25 October 2023 to 25 December 2023, ZATCA proposed a new Income Tax Law and Zakat & Tax Procedures Law for public consultation. The intention is for current tax laws to be updated in line with international best practices.

SERBIA

Trends and Developments

Contributed by:
Bogdan Gecić and Hristina Kosec
Gecić Law

Gecić Law is the foremost innovative law firm in South-Eastern Europe. Committed to redefining the role of law firms in this burgeoning regional market, Gecić Law advises international and local clients from various industries and both the public and private sectors to help them navigate the region's complex legal landscape across multiple practice areas. Founded in 2015 by leading independent legal minds and industry professionals united by a shared vision, the firm's team comprises graduates from prestigious universities in the USA and Europe, each bringing a wealth of local and international professional experience. This diversity of backgrounds enables it to offer innovative, practical solutions even in the most intricate legal matters. Gecić Law is a proud member of two elite global alliances, expanding its reach worldwide. The firm is also the proud recipient of numerous awards and recognitions in different practice areas from reputable global industry committees.

Authors

Bogdan Gecić is the founding partner at Gecić Law. His practice focuses on competition law and state aid, EU law, international trade law, and administrative and regulatory. Bogdan is also active in emerging fields, including AI and ESG law. He is among the region's few practitioners who have advised before the European Commission and other institutions. He has represented private and public sector entities in high-profile cases and negotiations with the EU. Bogdan graduated from the University of Belgrade and earned his LLM from Harvard Law School. He is a member of the Belgrade Bar and fluent in English, Bosnian, Croatian, Montenegrin, and Serbian.

Hristina Kosec is a partner and the head of operations at Gecić Law. She is responsible for developing and implementing the firm's business development and operations strategies. Hristina leads the firm's business development, marketing, CSR, and client service activities. She also leads recruitment, team development, and professional empowerment activities. Hristina comes from a corporate background, with over 15 years of management experience in various industries, including banking and finance, and telecommunication. Hristina earned her LLB and LLM from the University of Belgrade, Faculty of Law. She is fluent in English and Serbian (Montenegrin, Bosnian, Croatian).

Contributed by: Bogdan Gecić and Hristina Kosec, **Gecić Law**

Gecić Law

Nikole Spasića 2
11000
Belgrade
Serbia

Tel: +381 11 4043 570
Email: office@geciclaw.com
Web: www.geciclaw.com

Introduction

Serbia has repeatedly been recognised as one of the fastest-growing economies in Europe and a regional leader in the emerging markets of the Western Balkans. In 2022, Belgrade was recognised as a city with the most significant economic potential, competing with the 100 largest cities in the Emerging Europe region. Serbia has topped the global FDI performance index rankings for several years as a leading investment destination worldwide.

Due to its favourable geographical location and traditionally well-developed economic relations with diverse countries and regions, Serbia has open access to a market of more than 1.3 billion people free of customs and duties. This is in alignment with the country's industrialisation efforts, as it has the potential to serve as a hub for a broad array of trade destinations.

Economic Overview and Trends

In recent years, the Serbian economy has experienced notable growth and development. Key sectors such as information technology, manufacturing, and agriculture have driven this progress. Serbia has attracted significant foreign direct investment (FDI) primarily owing to its favourable geographic position, well-educated and highly skilled workforce, and competitive operating costs. Economic reforms to improve the business environment and enhance fiscal stability have also played a crucial role.

Serbia's GDP growth is projected to accelerate to 3.5% in 2024 (up from 2.5% in 2023) and 4% in 2025. This surge is expected to be driven by increased private consumption, lower inflation, and higher investment. The agriculture and construction sectors are set to make substantial contributions due to recovery from previous droughts and lower real estate and construction activity in the last year.

After peaking at 16.2% year-on-year in March 2023, Serbia's inflation has declined, reaching 5% in April 2024. It is expected to continue decreasing and return to Central Bank target levels. Prudent fiscal management remains a priority, with the 2024 budget being tight yet accommodating necessary public investments.

Manufacturing remains a cornerstone of Serbia's economy, particularly in the automotive, machinery, and textile industries. In recent years, efforts to reindustrialise the country have brought major international companies, which has boosted production and exports. Serbia is increasingly integrating into EU supply chains, benefitting

from its strategic location and free trade agreements with various global markets.

Agriculture is a traditional and vital sector of the economy. Serbia is a leading producer and exporter of grains, fruits, and vegetables. Technological innovations in the sector have contributed to greater productivity in recent years.

The construction and real estate sectors are recording rapid growth, offering significant opportunities for foreign investors in several large-scale projects expected to boost overall economic development.

Tourism in Serbia has been experiencing solid double-digit annual growth, attracting increasing international visitors. Efforts are underway to present Serbia as an attractive hub for major international conferences and sports competitions. Upcoming global events hosted in Serbia, such as the Expo 2027, are expected to boost investment in tourism infrastructure, including hotels and recreational facilities, further bolstering this growth and making tourism an even more notable contributor to the economy.

Information technology is another critical growth sector. In recent years, Serbia has become a regional centre attracting domestic and foreign investment. Exports from the industry have steadily increased in value, becoming a significantly important part of the GDP. Establishing science and technology parks in major city centres, institutes, and incubators has supported the ICT sector. At the same time, the research and development activities of major tech companies also contribute to accelerated growth.

In recent years, substantial public infrastructure investments have been made, especially in roads and railways, energy infrastructure, and healthcare facilities. Further ambitious projects are planned under the "Leap into the Future – Serbia 2027" development plan, cantered around Expo 2027. These investments are crucial for long-term growth and will focus on improving environmental infrastructure, waste management, air quality, and irrigation. Additionally, there are efforts to enhance public sector competitiveness, particularly in the green and digital transitions.

Serbia is accelerating its green energy transition, focusing on scaling up renewable energy capacity through hydropower, wind, and solar projects, primarily moving away from coal as the primary energy source. Serbia is committed to investing EUR17 billion in the sector over the next two decades. The country is also a member of the Energy Community, which brings it closer to the rules that govern the EU energy market. Aligning with the EU Green Deal objectives, Serbia aims to become carbon neutral by 2050. Significant investments are also planned in energy efficiency improvements, reducing greenhouse gas (GHG) emissions in industry, reforestation, and wastewater treatment.

Investment Environment

Serbia's robust foreign direct investment (FDI) landscape demonstrates resilience and growth amid global economic challenges. Between 2020 and 2024, Serbia attracted a record-breaking EUR15.9 billion in FDI, with a significant portion directed towards the processing industry, which is crucial for exports. In 2023, Serbia received EUR4.5 billion in FDIs, representing about 6.1% of GDP. The sectors that have been primarily attracting investment projects include automotive (17%), agriculture, food and beverage (15%), textiles (7.5%), electrical and electronics (6.2%), and construction (5%).

Foreign investors are afforded the same status and rights as national entities and enjoy complete legal protection for their investments. The country's Investment Act creates the general framework for investments in the Republic of Serbia. Serbia allows anyone to start a business or invest freely. Foreign investors can establish companies, subsidiaries, or representative offices and are entitled to acquire ownership rights on buildings and land under conditions equal to those applicable to domestic entities. However, establishing a company in specific sectors – namely health, pharmacy, veterinary products and services, financial services, transport, arms and munitions, insurance, gambling, construction, energy, and mining – requires specific authorisation. Foreign investors' acquisition of agricultural land is also heavily restricted and entails fulfilment of criteria such as Serbian residency and the capability to cultivate the land. Currently, this right is exclusively granted to citizens of the EU.

Serbia has recently made significant efforts to simplify, fully digitise, and speed up the company registration process. Under the recent changes, electronic registration with the Serbian Registration Agency is now mandatory. The Serbian Business Registry ensures that the incorporation registration is decided within five days without delaying the registration approval.

Serbia values the importance of foreign investors, who can bring in fresh capital, innovative technologies, employment opportunities, and collaboration, helping local businesses thrive and boosting the overall economy. To this end, Serbia offers a robust programme of incentives to attract foreign investors, including financial grants ranging from EUR2,000 to EUR10,000 per employee for job creation in research and development, production, and services, exemptions from customs duties for importing equipment, provided it meets environmental regulations, special cash grants for greenfield and brownfield investments, a ten-year corporate income tax holiday for investments over EUR8.5 million and employing more than 100 people. The tax holiday begins once the company starts making a profit.

Serbia, therefore, offers a favourable business climate characterised by the lowest corporate tax rate in Europe for qualifying investments, at 10%, a skilled and well-trained workforce, and central geographical positioning. Additionally, the government's proactive stance on reforms and supporting agreements with the IMF and EU further enhance the investment landscape.

Serbia is also actively expanding its international trade. In 2023, Serbia's main export products reflected a diverse industrial base. Electrical machinery and equipment (16.6%) were prominently featured, followed by other machinery, including computers (8.6%), mineral fuels, including oil (6.1%), and metals and products, such as copper, iron, and steel. Other essential export products include rubber, plastics, vehicles, and food products, such as fruits and cereals.

This structure indicates Serbia's increasingly integrated role in the global supply chain, particularly with the EU market, where most exports are directed. Germany is the leading destination, receiving 15.2% of Serbia's total exports. Other notable export partners include Bosnia and Herzegovina (6.9%), Italy (6.2%), Hungary (5.5%), and Romania (5%). European Union countries accounted for 64.9% of Serbia's exports, clearly showing the EU's leading role in Serbia's trade dynamics. This reflects the country's close geographical proximity and the progressive align-

ment of Serbia's economic policies and legal framework with EU standards, encouraging increased trade and financial connections.

Serbia has established a strong network of international agreements to support foreign trade and investment across diverse geographies. The country has signed 61 double taxation treaties and is committed to expanding this network to include more countries across different continents. Moreover, Serbia has established free trade agreements with countries like China, Russia, the UK, and Turkey, as well as preferential arrangements with the United States, Australia, and Japan.

Serbia also engages in numerous international and regional trade agreements that enhance its global trade relationships and economic integration. One of the key agreements is the Central European Free Trade Agreement (CEFTA), which promotes free trade within the Western Balkans region. Another significant association is the Open Balkans Initiative. Serbia, Albania, and North Macedonia seek to enhance the free movement of goods, services, capital, and labour within member states by reducing bureaucratic barriers and improving cross-border co-operation. Furthermore, Serbia has a comprehensive Stabilisation and Association Agreement (SAA) with the European Union, which determines Serbia's EU accession process and enhances trade and economic co-operation with EU member states.

Serbia's strategic incentives, sectoral opportunities, and ongoing reforms position it as an attractive destination for foreign investors looking to capitalise on a growing and dynamic market.

Labour Market

Foreign investors in Serbia gain a competitive advantage through the country's highly qualified and well-educated workforce. Serbia's education system is highly regarded, contributing to a labour pool that is both skilled and valued across various industries, including engineering, medicine, IT, construction, and agriculture. This reputation for educational excellence ensures that employees are in intense domestic and international demand.

The labour market exhibits robust performance, with the unemployment rate at 9.7% in 2023, marking a historic low. This rate is anticipated to decline further as employment growth aligns with the broader economic recovery. This positive trend is supported by increasing private sector activity and targeted programmes to boost employment.

However, unfavourable demographic trends and labour migration have become a significant concern. Serbia has responded to the increasing demand for foreign labour by updating its immigration laws, addressing labour shortages, economic expansion, and globalisation. Recent amendments to the Foreigners Act and the Foreigners' Employment Act have introduced significant changes aimed at simplifying the procedures for foreign workers. Notable among these is the introduction of a single integrated permit for both residence and work, which can now be applied online, and a streamlined decision-making process. The amendments also extend the maximum duration for temporary residence permits from one to three years and relax conditions for obtaining permanent residency. These reforms are poised to make Serbia an attractive destination for a skilled and diverse global workforce, streamlining bureaucratic processes and promoting economic integration.

Taxation

Serbia boasts a competitive and structured tax regime that significantly influences business operations nationwide. The critical elements of this tax system include VAT, corporate income tax, capital gains tax, and personal income tax, each designed to facilitate straightforward financial planning and compliance.

The standard VAT rate is 20%. A reduced rate of 10% applies to basic foodstuffs, listed medicines, daily newspapers, hotel services, gas, the first transfer of ownership on residential buildings, etc. Finally, VAT is exempt for the export of goods, transport, and other services directly related to exports, transit, or temporary import of goods.

The corporate income tax rate is competitive, at 15%. In addition, a reduced rate of 10% for qualifying investments may apply to promote economic growth within specific sectors and regions.

Personal income tax is imposed on various types of income at flat rates. Wages are taxed at 10%, while other types of income, such as income from capital, capital gains, and other incomes, are taxed at 10%, 15%, or 20%, respectively. Individuals who exceed a certain threshold are subject to an additional annual tax.

Key Opportunities

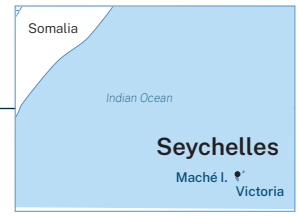
Serbia recently secured the opportunity to host the high-profile international exhibition EXPO 2027. Serbia has taken decisive steps toward planning and implementing the exhibition and declared it a project of national significance. Preparations for the event are expected to involve a wide range of infrastructure projects, including transportation networks, public spaces, and facility upgrades with a lasting impact. The event aims to showcase Serbia's readiness to host global events and highlight its potential as a business and investment destination.

A national development plan, "Leap into the Future – Serbia EXPO 2027", aims to invest around EUR17.8 billion in various projects over the next few years. This includes the construction of the National Football Stadium, residential buildings, and the Expo complex itself, which will feature energy-efficient and sustainable buildings spread over approximately 70,000 square metres.

The Special Procedures Act for the International Specialized Exhibition Expo Belgrade 2027 aims to simplify and expedite procedures for construction and development, thereby ensuring efficient project implementation. This includes streamlined processes for permits and exemptions from specific fees, making it an attractive opportunity for investors. In support of this investment project of national importance, the government or the local municipality may sell construction land it owns at a price lower than the market value.

The Expo is expected to have a significant economic impact, attracting around three million visitors and having an estimated total economic impact of EUR1.1 billion. This includes direct and indirect economic effects from increased tourism, new jobs, and further investments in digitalisation, artificial intelligence, roads, railways, hospitals, and schools. Investors are advised to stay informed and take advantage of the opportunities offered by this significant event, as well as these and other benefits Serbia offers.

SEYCHELLES



Law and Practice

Contributed by:
Valery Freminot, Salina Sinon, Ruby Simeon and Hazel Naiken
Rivard Nariman

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Rivard Nariman was founded in 1991 as Pardiwalla and Twomey. In the mid-90s, the firm took on the name of Pardiwalla Twomey Lablache, but legally changed its name to Rivard Nariman in 2020, with its official launch taking place in 2022. The current partners are Pesi Pardiwalla, Conrad Lablache, Divino Sabino and Zara Pardiwalla. Rivard Nariman started as a general litigation outfit but has increasingly focused on corporate, banking and financial work, providing advisory, transactional and litigation services to both domestic and international clients. The firm maintains excellent working relationships with leading international law companies, ensuring seamless and high-quality services to clients in cross-border transactions. As a member of the Eversheds Sutherland Africa Alliance since 2014, it continues to participate in the innovative platform for collaboration and best legal practices across Africa.

Authors

Valery Freminot is an associate at Rivard Nariman. Admitted as an attorney at law in 2022, she is a law graduate of the University of London. Valery specialises in corporate and commercial transactions and private client work, particularly in the area of investments and property acquisitions.

Salina Sinon is an associate at Rivard Nariman, and was admitted as an attorney at law in 2023, having received her law degree from the University of Southampton. Prior to joining Rivard Nariman, Salina worked as the senior legal officer of the Electoral Commission and as legal officer of the Fair Trading Commission. Her main areas of practice are litigation and dispute resolution, consumer protection, electoral law, commercial and corporate, employment law, family law, succession and private client.

Ruby Simeon is an associate at Rivard Nariman and joined the firm in 2023. Ruby is a law graduate of the University of London. Prior to joining Rivard Nariman, she worked as a public prosecutor at the Attorney General's office for four years and was a legal adviser to the ministry of health. Her main areas of practice are litigation and dispute resolution, commercial and corporate, regulatory and taxation.

Hazel Naiken is an associate at Rivard Nariman who joined the firm in 2023. Hazel is a law graduate of the University of London. Prior to joining Rivard Nariman, she worked as a legal officer at the Fair Trading Commission for four years. Her areas of practice are consumer protection, competition law, mergers and acquisitions, and corporate and commercial transactions.

Rivard Nariman

Suite 109 Premier Building
Albert Street
Victoria,
Mahe,
Seychelles

Tel: +2484321071
Fax: +248324100
Email: info@rivardnariman.sc
Web: www.rivardnariman.sc

RIVARD NARIMAN

1. Legal System

1.1 Legal System and Judicial Order

The Seychelles operates a mixed legal system, having been a French and a British colony. As a result, its substantive civil law is governed by a Civil Code based on the French Napoleonic Code, which forms the basis of its contract law, law of property and law of succession. Court processes are based on English procedures. More modern laws are derived from British or western models, such as company and insolvency laws. The court system sees the Court of Appeal as the apex and final court. Despite its nomenclature, the Supreme Court of Seychelles falls under the Court of Appeal, dealing with large and complex civil claims in addition to serious criminal cases. It also hears appeals from lower courts and tribunals. Adjacent to the Supreme Court of Seychelles is the Constitutional Court, which deals with constitutional petitions. Below these are the Magistrates Courts, which hear smaller civil claims and less serious criminal cases. Beneath these in the hierarchy are various lower tribunals and boards. The legal profession is fused, and lawyers in the country are admitted as attorneys at law with full rights of audience before all of the local courts, engaged to conduct all legal work. There are also notaries, who primarily draft and authenticate documents. Most attorneys at law are also notaries. The law has also created a number of legal practitioners with limited rights of practice.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Approval of Foreign Investments

The Seychelles Investment (Economic Activities) Regulations 2022 provide for a wide range of economic activities in which those who are not native to the Seychelles may invest. However, there are certain economic activities that are reserved for those of Seychellois nationality only, and such activities are set out in the Reserved Economic Activity Policy. Additionally, there are categories of economic activities in which a non-native can only invest jointly with a Seychellois, and these are set out in the Second Schedule of the Seychelles Investment (Economic Activities) Regulations 2022. Apart from these restrictions, a non-native may, subject to the economic needs test, invest in any other economic activities.

A non-native cannot acquire or lease immovable property in the Seychelles without having first

obtained the permission of the government. If an investment results in them acquiring rights in immovable property, they must therefore obtain the approval of the government before executing any transfer instrument or lease.

Procedure and Sanctions in the Event of Non-Compliance

Investment process

In practice, a non-native investor must submit a business plan together with the relevant documents to the Seychelles Investment Board (SIB). If the application is in order, the business plan/project will be registered with the SIB within 48 hours. The SIB will liaise with the relevant government departments or authorities for their comments and recommendations on the business project. The SIB usually provides feedback to the investor within 14-30 days, depending on the type of investment.

If the investment is for an economic activity that is not covered in the Seychelles Investment (Economic Activities) Regulations 2022, an economic needs test must first be performed. The business plan/project will be submitted to the Economic Needs Test Committee for its evaluation and consideration.

The government departments and/or authorities must have no objections to the business plan/project for the investor to be able to implement the business/project. It is very unlikely that a non-Seychellois investor will be able to invest without their approval.

2.2 Procedure and Sanctions in the Event of Non-compliance

Obtaining Approval

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Rights in Immovable Property

A non-native must submit an application for approval and pay the application fee to the Ministry of Lands and Housing. The application will be considered by the Ministry and a decision is usually communicated within a month.

Any sale or lease of an immovable property to a non-Seychellois without the prior approval of the Minister is unlawful and void. The applicant could be liable to a fine or imprisonment.

2.3 Commitments Required From Foreign Investors

Depending on the type of investment, the government departments and/or authorities may approve the business plan/project subject to certain conditions – eg, that planning permission

is obtained for the construction of buildings or structures; that health and safety requirements are met; that an environmental permit is sought; that the applicant is granted permission for the purchase or lease of the immovable property; and that a licence is obtained for the business in question.

2.4 Right to Appeal

If a non-native investor is not satisfied with the decision of a government department or authority with regards to its investment, they may apply to the Investment Appeal Panel for a review of the decision taken. Their application must be made in writing, specifying the reasons for the review, and an application fee must be paid.

The Investment Appeal Panel must make a decision within 30 days of the date of submission of the application. The panel may dismiss the application altogether, recommend the annulment in whole or in part of any unauthorised act or decision, or the remedying of any omission of the government department and/or authority or the re-evaluation of an application, specifying the grounds for its recommendation.

A non-native investor who is not satisfied with the decision of the Investment Appeal Panel has a further right of appeal to the Supreme Court.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The most commonly used corporate vehicles for business activities in the Seychelles are entities incorporated under the Companies Act 1972, and the law makes it a requirement that certain types of activities (such as banking or insurance operations) conducted locally can only be carried out through "1972 companies". These are similar in structure to British companies, with shareholder liability limited and governance placed under the control of directors. An interesting but somewhat antiquated feature of these companies is that they must have at least two shareholders and two directors. In contrast, the most popular entity for activities conducted outside of the Seychelles is the International Business Company (IBC), incorporated under the International Business Companies Act 2016, often referred to as an "offshore companies" in the media. Information on the shareholders and directors of these companies is not readily available to the public, and they are often used in holding structures.

3.2 Incorporation Process

The process of incorporating a 1972 company or IBC are distinct, and takes place through separate registries. A 1972 company may be incorporated by anyone, although, in practice, it is more expedient to use an attorney at law. Information on the company's purpose and rules, shareholders and directors must be submitted to the Registrar of Companies. Incorporation typically takes a few weeks. For an IBC, information on the company's purpose, rules, and shareholders and directors must be submitted to a Corporate Service Provider, which may incorporate the entity within a day or two.

3.3 Ongoing Reporting and Disclosure Obligations

All companies are required to submit information on their directors and shareholders. This information is submitted to a publicly accessible registry for 1972 companies, but the details submitted to the Corporate Service Provider on an IBC might not be disclosed to the public. Additionally, both types of companies must submit beneficial ownership information to the Financial Intelligence Unit, but the beneficial owner-

ship register is not available for public access. In addition, 1972 companies are required to file annual returns at the Registrar of Companies.

3.4 Management Structures

Both types of company are governed by directors (one-tier).

3.5 Directors', Officers' and Shareholders' Liability

In both types of entity, directors have a fiduciary duty to act in the best interests of the company. The concept of piercing the corporate veil exists, with UK legal precedent on the matter considered a persuasive authority.

4. Employment Law

4.1 Nature of Applicable Regulations

The employment relationship is governed by the Employment Act 1995 and Employment (Conditions of Employment) Regulations 1991. Case law developments have affected practice, but are not considered a source of law. Government employees are required to adhere to certain codes and practices as prescribed in Public Service Orders.

4.2 Characteristics of Employment Contracts

Legally, employment contracts must be prepared in writing, be signed by the employer, and must specify the following:.

- the names of the employer and worker;
- the nature of the employment;
- in the case of a fixed-term contract, either the term or the specific scheme or project or specific work on which the worker is to be engaged;
- in the case of a contract of continuous employment, the probation period, if any;
- the place where the work is to be performed;
- the remuneration or wages to be paid, and the periods of payment and any other benefits the worker is to receive;
- the number of working hours per week;
- the requirements for overtime work, where applicable; and
- such other particulars as may be prescribed.

4.3 Working Time

There is a minimum working time of eight hours per day, or 40 hours per week. There is a maximum working time of 12 hours per day, or 60 hours per week, and, exceptionally, 15 hours per day.

Overtime is regulated and a maximum number of hours is set (15 hours exceptionally) and the rate at which it is paid.

4.4 Termination of Employment Contracts

Termination of Employment Contracts by the Employee

Fixed-term contracts can be terminated in accordance with the termination clause of the contract. This typically allows the employee to terminate by giving three months' notice or accepting payment in lieu thereof. In such a case, the employee is paid any annual leave accumulated and any benefits as agreed under the contract; in most cases, this benefit would have been forfeited for early termination of the contract.

Continuous employment can be terminated by the employee by giving the statutory one-month notice or notice of seven days if the employee is still on probation, or the agreed notice as per the employment contract, or payment in lieu of

notice. In this case, compensation for length of service and any accumulated annual leave is due.

Termination of Employment Contracts by the Employer

For both fixed-term and continuous employment, the employer may terminate in cases of serious disciplinary offences. In this case, the employee will only be entitled to payment of any accumulated annual leave, and not to compensation for length of service.

Redundancies

Employers may opt for this where the business has ceased to operate, in whole or part; where there is a temporary suspension of business, in whole or part; or where there is an introduction of new technology, rendering some employees redundant. To terminate the contract of an employee due to redundancy, the employer needs to initiate a negotiation procedure through the Ministry of Employment which will determine whether this is a suitable case for termination due to redundancy. If it is found that it is a suitable case, employees are entitled to compensation and payment for accumulated annual leave. It is not uncommon for employers to voluntarily pay the employee(s) between one and six months' of salary in these cases.

4.5 Employee Representations

Employee representation and consultation within the workplace is not mandatory. However, if the terms of an employee's contract are to be varied, this needs to be mutually agreed by and between the employee and employer.

On a national level, it is mandatory for trade unions/workers' unions to be consulted by the Ministry of Employment before laws are made/changes are made to existing laws regarding conditions of employment (such as minimum wages, working hours, and leave entitlement). These unions may also assist employees before the Employment Tribunal and in negotiations with employers in cases of termination, changes to contracts or redundancies.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

In the Seychelles, profits earned by companies through permanent establishments located abroad are not taxed. However, profits from foreign activities not connected to a permanent overseas establishment are taxable.

If a Seychelles company has sufficient economic sway in the country, it can be exempt from tax on passive income from foreign sources. However, excluding income from patents (or similar rights) connected to R&D conducted within the Seychelles, income from foreign intellectual property rights is taxable.

Corporate Income Tax

A company that is tax resident in the Seychelles must pay corporate income tax (or business tax). Corporate income tax is progressive, and is levied on companies as follows:

- taxable income of up to SCR1 million – 15%;
- taxable income above SCR1 million – 25%.

VAT

The standard VAT rate is 15%.

Withholding Tax on Dividends/Interest

The withholding tax rate depends on the category of income, and whether it is being paid to a Seychelles resident or non-resident:

- Dividends, interest, royalties, natural resource amounts, or technical services fee paid to a non-resident are taxed at 15%.
- Dividends paid under Section 62, whether by a resident incorporated entity to a resident incorporated entity or by a resident incorporated entity to a resident unincorporated entity, do not have withholding tax applied.
- Remuneration paid by a promoter, agent, or similar person to a non-resident entertainer or sportsperson in respect of a performance or sporting event in Seychelles is taxed at 5%.
- Managerial fees paid to a non-resident by a financial institution operating in Seychelles are taxed at 33%.
- Insurance premium paid to a non-resident are taxed at 5%.
- Interest on current accounts, fixed deposits and call deposits of residents and non-residents (in Seychelles rupees or foreign currency) are taxed at 5%.
- Interest on savings account, bank to bank transfers and non-residents bank interest do not have withholding tax applied.
- Managerial fees paid to a non-resident by a financial institution operating in Seychelles are taxed at 33%.
- Interest on bearer bonds is taxed at 15%.
- Interest paid by a person, being a non-financial institution, to a person that is also not a financial institution is taxed at 15%.
- Treasury bills (where the recipient is not a resident or a non-resident financial institution as defined in the Financial Institutions Act 2004 or carrying on the business of an insurer as regulated under Insurances Act, 2008) is taxed at 15%.
- The rate of withholding from the gross payment made to a specified business listed in the Fourth Schedule of the Business Tax Act is 15%.

5.2 Taxes Applicable to Businesses

Pillar Two of the OECD

Pillar Two of the OECD has not been implemented in the Seychelles.

Domestic Top-Up Tax

This has not been introduced in the Seychelles.

5.3 Available Tax Credits/Incentives

Allowable Tax Deductions

In the Seychelles, various deductions are available for expenses such as losses and outgoings, repairs, loss on property acquired for profit making, depreciation, bad debts, payments to shareholders, directors, associated persons and relatives, subscriptions to associations, contributions to the Seychelles Pension Scheme, and gifts.

Special Tax Rates

For businesses involved in land cultivation, livestock raising, or dairy production in the Seychelles, special tax rates are applicable.

Tax Depreciation

The rates of depreciation allowable on capital investments (other than buildings) for farming and fisheries, as well as for tourism operators such as hotels, restaurants, transport, tour operators, and travel agents are as follows:

- 30% in year 1;
- 25% in year 2;
- 20% in year 3;
- 15% in year 4; and
- 10% in year 5.

5.4 Tax Consolidation

There is no group taxation or tax consolidation in the Seychelles.

5.5 Thin Capitalisation Rules and Other Limitations

There are no thin capitalisation rules in the Seychelles.

5.6 Transfer Pricing

Transfer pricing rules are applicable in the Seychelles.

The rules apply to an entity participating in controlled arrangements and with an annual turnover exceeding SCR1 million.

Transfer Pricing Methods

There are no specific transfer pricing methods in the Seychelles. However, the country relies on the OECD transfer pricing guidelines and the UN Practical Manual on Transfer Pricing for Developing Countries.

Reporting Obligations

Applicable entities are expected to file a "Related Party Dealings Schedule" with their tax return. Additionally, they should provide transfer pricing documentation upon request from the local tax authority.

Documentation

Applicable entities must prepare documentation verifying that their controlled arrangements align with the arm's length principle. The documentation should include, among other items, details about the business's operations, organisational structure, financial accounts and competitors.

Transfer pricing documentation and related information must be retained for seven years.

The documentation should be submitted in one of three languages, English, French, or Creole.

Failure to Comply With Transfer Pricing Rules

Entities should be aware that penalties can be imposed for various violations, including failure to provide documentation, providing false or misleading documentation, and neglecting to retain, and maintain relevant documents.

Furthermore, the Revenue Commissioner has the authority to distribute, apportion, or allocate income or gains and expenses between businesses if they are carried out by associated persons or by the same person, in order to reflect the outcome that would have occurred in a transaction between independent parties dealing with each other at arm's length.

5.7 Anti-evasion Rules

General Anti-avoidance Rules

The Revenue Commissioner is empowered to:

- determine the nature of a transaction or an aspect of a transaction that forms part of a tax avoidance scheme;
- disregard a transaction lacking substantial economic effect;
- determine the nature of a transaction if its form does not reflect its substance; and
- treat separate businesses operated by the same person as a single business if the business activity has been divided under a tax avoidance scheme.

Other Anti-avoidance Rules

Economic sway

In the Seychelles, a resident company is required to provide the local tax authority with specific details regarding its physical office, staff, and active directors. A non-resident company must furnish evidence of its connection to a permanent overseas establishment.

The legislation mandates that companies operating in certain sectors must have sufficient substance; this includes trading companies (distribution and service centres), holding companies, fund management companies, financing and leasing companies, IP holding and licensing companies, shipping companies, and banking and insurance companies.

For a company to have sufficient economic sway, it must adhere to all filing requirements under the Companies Act or the International Business Companies Act. Additionally, it should have adequate human resources and premises in Seychelles for holding and managing investment assets. If the company engages in activities related to the acquisition, holding, or disposal of assets, it must make necessary strategic decisions, manage and bear principal risks in the Seychelles, and incur adequate expenditures related to the acquisition, holding, or disposal of assets.

6. Competition Law

6.1 Merger Control Notification

Circumstances That Trigger Notification

Mergers in the Seychelles are regulated by the Fair Trading Commission (the "Commission"), as mandated by the Fair Trading Act, 2022.

Section 131 (1) of the Act lists the types of transaction that trigger the Merger Control Regime. They range from complete acquisition of an enterprise to a change of control over the part of a business by a competitor or supplier, consumer or other enterprise. The transactions, whether direct or indirect, are as follows:

- sale or purchase of shares or assets;
- sale or purchase of shares or assets in exchange of shares;
- lease of assets;
- amalgamation/combination (joint ventures).

Change of control is defined in Section 131 (2) of the Act as gaining ownership of more than one half of the issued share capital of the enterprise; a parent company gaining an International Business Company ("IBC") as a subsidiary; gaining a majority vote or the ability to control the voting of the majority of the votes; and acquiring the ability to veto the appointment of the directors.

Under the Fair Trading Act the parties to the proposed merger are required to submit an application to the Commission. The Commission determines whether the proposed merger is notifiable. The notification threshold is set at the combined annual turnover or value of assets in the Seychelles equalling or exceeding SCR10 million as calculated at the end of the most recent financial year.

This is calculated by adding together the annual turnover value or value of assets of the enterprise concerned, its subsidiaries, parent companies and the other subsidiaries of its parent company.

It is a requirement for the proposed merger to have a minimum trading activity in the Seychelles.

6.2 Merger Control Procedure

Any enterprise proposing a merger must submit an application form to the Fair Trading Commission with payment of a non-refundable application fee of SCR1,500. Upon approval of the merger, the parties concerned will be subject to an approval fee calculated on the basis of their

combined turnover from the preceding financial year.

If the threshold for combined turnover or asset value exceeds SCR10 million, the fee is set at 0.1% of combined turnover and asset value. If it exceeds SCR25 million, the fee is set at 0.5%.

Once the Commission has received the application, it has 120 days to review the proposed merger, make its decision and submit it to the Fair Trading Tribunal for approval. The Commission may recommend that the Tribunal allow the merger without conditions, or allow it subject to certain conditions, or it may recommend that it prohibit the operation altogether. The conditions recommended by the Commission constitute necessary and reasonable steps to mitigate any adverse competitive behaviour.

The Tribunal may accept the recommendations of the Commission with or without modifications, or issue any instructions that it may consider appropriate. Any merger not permitted by the Tribunal has no legal effect, and any rights or obligation imposed on the parties to the merger will not be enforceable.

6.3 Cartels

The Fair Trading Act 2022 prohibits two types of anti-competitive agreement: horizontal and vertical anti-competitive agreements.

Horizontal Agreements

Section 126 of the Act prohibits enterprises in a horizontal relationship from engaging in anti-competitive agreements and concerted practices.

Anti-competitive agreements/practices may take the form of price fixing, division of markets, collusive tendering, bid rigging and control of production in the market.

Also, any agreement between enterprises that has the object or effect of preventing, restricting or distorting competition in a market is prohibited. Acceptable grounds of exemption are technological progress, efficiency purpose and public interest gains.

Vertical Agreements

Section 127 of the Act prohibits enterprises in a vertical relationship to engage in anti-competitive agreements or concerted practice if the object or effect is to prevent, restricts or distort competition in the market. If a party can prove technological, efficiency or other pro-competitive gains which outweigh the effect, then this prohibition would not apply.

In a vertical relationship, the practice of minimum/maximum resale price maintenance is prohibited. A supplier/producer may prevent this practice by recommending a minimum/maximum resale price to the reseller of goods or services.

Prior Authorisation

Section 128 of the FTA, however provides, that an enterprise that seeks to enter into an anti-competitive agreement may seek authorisation from the Fair Trading Commission to carry out the agreement or practice. The Commission then recommends to the Fair Trading Tribunal whether to grant the authorisation provided that it is satisfied that the agreement or practice is likely to promote public benefit and is reasonable in the circumstances.

Before the Tribunal grants or refuse the authorisation, the parties to the agreement are notified

and invited to submit their written representations within 30 days of the notice.

6.4 Abuse of Dominant Position

To establish whether there is an abuse of dominance, the Commission has to determine firstly whether an enterprise holds a dominant position. As per Section 125 (1) of the Fair Trading Act 2022, an enterprise holds a dominant position if, by itself or in connection with another enterprise, it occupies a position of economic strength which enables it to operate in a market without effective constraints from its competitors.

Where the Commission, in its opinion, is satisfied that the enterprise holds a substantial share of the market or it has market power, this is also considered as holding a dominant position.

Section 125 (4) of the Fair Trading Act 2022, list practices that amount to an abuse of dominant position. These includes predatory pricing, exclusive dealing, tied selling, bundling, discriminatory activities, unfair trading conditions, restricting production or market access, and exclusionary activities.

An enterprise that may have been found to be engaging in this prohibited conduct may rely on the following grounds as a defence:

- proof that the aim of the concerned behaviour was exclusively directed to improving the production or distribution of goods or promoting technical or economic progress which benefited consumers as a result;
- the prohibited conduct is a result of its superior competitive performance on the market; and/or
- the enterprise was enforcing its right under their copyrights, patent, registered trade mark or design, provided that those rights do not have the effect of substantially lessening competition in a market and impede or prevent the transfer and dissemination of technology.

In recent years, since 2021, the Fair Trading Commission has not received nor investigated any complaint about any case of abuse of dominant position.

7. Intellectual Property

7.1 Patents

The Industrial Property (Patents) Regulations 2014 defines a patent as an exclusive right granted for an invention, which is a product or a process that provides a new way of doing something, or offers a new technical solution to a problem.

To be granted a patent, technical information about the invention must be disclosed to the public in a patent application, which must be made to the National IP Office of Seychelles. Patents in Seychelles are granted for 20 years from the date of the filing of the patent application.

A patent application must include the following:

- request – title of the invention, date of filing, priority date and bibliographic data of the applicant and inventor;
- description of the invention;
- visual materials – drawings, plans, or diagrams that describe the invention (if necessary);
- claims – a clear and concise definition of the invention for patent protection is being sought; and

• abstract – a summary of the invention.

A patent application attracts the following charges: an application fee, an examination fee, as well as an annual maintenance fee.

Patents are territorial rights, meaning the exclusive rights conferred by patents are only effective in Seychelles – ie, where the patent has been granted.

A patent proprietor can take legal action in accordance with the Industrial Property Act 2014, including filing for injunctive relief and/or claiming damages from persons infringing the patent. The court may grant damages adequate to compensate the losses the patent proprietor has suffered as a result of the infringement.

7.2 Trade Marks

A trade mark is defined under the Industrial Property (Marks) Regulations 2014 as a sign capable of distinguishing goods or services of one enterprise from those of other enterprises.

In Seychelles, trade mark protection may be obtained through registration, by filing an application for registration with the National IP Office and paying the required fees. At the international level, you may either file a trade mark application with the trade mark office of each country in which you are seeking protection, or use the World Intellectual Property Organization's Madrid System.

The term of trade mark registration is ten years. It can be renewed indefinitely every seven years on payment of additional fees.

Trade mark registration will confer an exclusive right to the proprietor of the registered trade mark. In case of any infringement of the trade mark, an action may be brought under the Industrial Property Act 2014.

As with other industrial property, the proprietor of a trade mark is entitled to injunctive relief and damages.

7.3 Industrial Design

An industrial design constitutes the ornamental aspect of an article. The visual appearance of a product is protected, but not the way it works.

Industrial designs that may be protected are required to be independently created and new. To be protected, the Industrial Property (Industrial Design) Regulations 2014 requires that the industrial design be registered at the IP Office.

The owner of a registered industrial design may prevent third parties from making, selling or importing articles bearing or embodying a design which is a copy of the protected design, when such acts are undertaken for commercial purposes.

The length of protection is five years, extendable for two further terms of five years each.

The industrial designs owner may file for injunctive relief and/or claim damages against infringers.

7.4 Copyright

Copyright is the right that creators have over their literary and artistic works. Copyright exists automatically when an original work is created in one of the categories that is protected by the Copyright Act 2014. These include but are not limited to:

• books, pamphlets, articles and other writings;

- speeches, lectures, addresses, sermons and other oral works;
- dramatic, choreographic works and other works created for stage productions;
- musical works;
- works of architecture;
- works of drawing, painting, sculpture and other works of fine art,
- photographic works;
- computer programs, databases; and
- illustrations, maps, plans, sketches, topography or architecture.

Derivative works (eg, translations, adaptations, or traditional cultural expressions) are also protected by the Copyright Act 2014.

Registration of those works is not required for protection. However, Seychelles implements a voluntary registration system. This allows rights holders to voluntarily apply for registration of their works under the Copyright Act 2014. This is highly recommended, to establish a legal record of ownership. A creator seeking to register a copyright may apply by filing an application at the IP Office and upon payment of a fee.

Copyright gives an author two types of right:

- economic rights, which allow the rights owners to derive financial reward from the use of their creative works by others; and
- moral rights, which protect the non-economic interests of the author.

These rights are protected during the life of the author and for 50 years after their death, regardless of registration of the copyright.

Where copyright is infringed, the court may grant, on the application of the owner, preliminary injunctions to prohibit the continuance of the infringement and/or impound the infringing works.

In addition to the court ordering the infringer to desist from acts causing infringement, the owner may be entitled to damages suffered as a consequence of the act of infringement and resulting expenses.

7.5 Others

Geographical Indications (GI)

GIs are place names used to identify the origin and quality, reputation or other characteristics of products. To be registrable, a GI must be capable of distinguishing goods originating from a particular territory, region or locality, or possess characteristics attributed to its geographical origin.

Once a GI is registered at the IP Office, it is protected as long as the specific characteristics, quality or reputation which have been the basis for the grant of the protection exist. The term of a GI registration in Seychelles may thus be indefinite.

Once registered, the producers of a GI-conforming good may take action against other persons who misuse that GI in Seychelles. They are entitled to injunctive relief and damages.

8. Data Protection

8.1 Applicable Regulations

No information provided in this jurisdiction.

8.2 Geographical Scope

No information provided in this jurisdiction.

8.3 Role and Authority of the Data Protection Agency

No information provided in this jurisdiction.

9. Looking Forward

9.1 Upcoming Legal Reforms

Government agencies have circulated a draft Virtual Assets Service Provider Bill. The draft proposal seeks to define what virtual assets are and to regulate dealing in virtual assets by prescribed entities in or from Seychelles.

The government's Employment Department has also been holding a series of consultations with various stakeholders with a view to revising the country's employment laws. As of mid-2024, the process is at the stage of consultations on the policy development.

Trends and Developments

Contributed by:
Divino Sabino and Olga Lablache
Rivard Nariman

Rivard Nariman was founded in 1991 as Pardiwalla and Twomey. In the mid-90s, the firm took on the name of Pardiwalla Twomey Lablache, but legally changed its name to Rivard Nariman in 2020, with its official launch taking place in 2022. The current partners are Pesi Pardiwalla, Conrad Lablache, Divino Sabino and Zara Pardiwalla. Rivard Nariman started as a general litigation outfit but has increasingly focused on corporate, banking and financial work, providing advisory, transactional and litigation services to both domestic and international clients. The firm maintains excellent working relationships with leading international law companies, ensuring seamless and high-quality services to clients in cross-border transactions. As a member of the Eversheds Sutherland Africa Alliance since 2014, it continues to participate in the innovative platform for collaboration and best legal practices across Africa.

Authors

Divino Sabino is a partner at Rivard Nariman. He is a graduate of the University of Warwick and was called to the bar at Lincoln's Inn. He was admitted as an attorney-at-law of the Supreme Court of Seychelles in 2007 and appointed as a notary in 2012. Divino's main areas of practice are in civil litigation, securities, commercial and corporate transactions, regulatory and AML. Divino is the incumbent President of the Bar Association of Seychelles.

Olga Lablache is an associate at Rivard Nariman. She is an LLB and LLM graduate of Bangor University. Her main areas of practice include data protection, private client, intellectual property and taxation.

Rivard Nariman

Suite 109 Premier Building
Albert Street
Victoria,
Mahe,
Seychelles

Tel: +2484321071
Fax: +2484324100
Email: info@rivardnariman.sc
Web: www.rivardnariman.sc

RIVARD NARIMAN

The Seychelles Economy

The pillars of the Seychelles economy are tourism, fishing and the offshore financial sector.

Virtual assets

There are no laws that specifically regulate virtual assets or cryptocurrencies in the Seychelles. As such, Seychelles International Business Companies (IBC) are utilised as vehicles to supply cryptocurrency or virtual asset services to the public. With the lack of regulations and certain investments going awry, this has led to negative publicity for the country and consequently has led to an increase in litigation before the Supreme Court of Seychelles against such IBCs. In an apparent move to address the situation, the government has proposed laws regulating virtual asset service providers. A draft bill has been circulated amongst stakeholders, but no timeline has been set on when the proposed law could come into force.

Acquisition of residential property

The Seychelles is known for its sandy beaches and crystal waters. Take a hike or a drive to the hilltops and there you will also come across some breathtaking views. It is no wonder that acquiring property in the Seychelles, whether on the beachfront or in secluded mountaintops, is popular amongst high net worth individuals. However, this requires government sanction, and processes are in place to ensure that the identity of the ultimate beneficial owners and source of funds are known to the government. Numerous other checks and disclosures are required by the government from potential buyers of property. Such acquisitions, however, have driven up the prices of property. In an apparent bid to curb the trend, the government has in place a policy wherein they have restricted sanction approvals. This policy restriction does not apply to property that forms part of Integrated Resort Schemes.

Increase in immovable property tax

The government introduced immovable property tax in 2020 for foreign-owned residential property. The original tax rate was 0.25% of the market value of the property per annum. For 2024, this tax rate has doubled to that of 0.5% of the property's market value per annum. Late payment of property taxes can lead to high penalties being imposed on the taxpayer.

Investment climate

Investments in tourism accommodation projects continue. Multinational hotel chains continue to invest in the development projects in the country. To cater for the demand for flights, many of the large regional airlines service the country with frequent flights. As tourism arrival numbers are expected to increase, the country is expected to develop its infrastructure to cater for increasing pressure on existing facilities, such as the provision of utilities and telecommunication services.

Port, shipping and marine services

The Seychelles is an important transhipment hub in the region. The development of its port infrastructure and facilities is an ongoing process by the government and key stakeholders. Ship registration is aligned with modern practices.

Revision of employment laws

The government is in the process of consulting with various stakeholders with a view to revising employment legislation. Instead of a wholesale revision, the current process seeks to remedy issues that have arisen under the existing employment regime. Proposals include introducing a new category of leave to cater for unpredictable circumstances that warrant workers having to stay at home, unable to work, as precipitated by the COVID-19 outbreak. The much-disputed compulsory 13th-month salary introduced a few years ago, favoured by work-

ers, but which put a significant strain on employers, is being proposed to be entirely based on performance of the worker.

SOUTH KOREA

Law and Practice

Contributed by:
Ho Kyung Chang, Daniel Joonwu Park, Eunjee Kim, Seung-Wan Chae, Hyun A Kim, Jihyun Kim, Kwang Hyun Ryoo and Alan Peumjoo Lee
Bae, Kim and Lee LLC

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Contributed by: Ho Kyung Chang, Daniel Joonwu Park, Eunjee Kim, Seung-Wan Chae, Hyun A Kim, Jihyun Kim, Kwang Hyun Ryoo and Alan Peumjoo Lee, **Bae, Kim and Lee LLC**

Bae, Kim and Lee LLC (BKL) was founded in 1980 and is one of the premier law firms in South Korea. Based in Soeul, the firm provides market-leading legal services in every practice area, including corporate/M&A, capital markets, finance, dispute resolution, antitrust, tax, IP, employment, real estate, TMT, maritime and insurance. With over 700 attorneys and other professionals located throughout its offices in Seoul, Beijing, Hong Kong, Shanghai, Hanoi, Ho Chi Minh City, Yangon and Dubai, the firm has a diverse mix of Korean attorneys, foreign attorneys, tax advisers, industry analysts, former government officials and other specialists in various practice areas. The firm advises a broad range of clients, such as Korean conglomerates and government organisations, major international financial institutions and multinational corporations with headquarters in the USA, Europe and throughout Asia. BKL is a member of the World Law Group, with its global network of over 50 law firms, and has strong relationships with financial, tax and accounting advisers in various jurisdictions worldwide.

Authors

Ho Kyung Chang joined Bae, Kim & Lee LLC in 2009 and has since worked extensively advising major domestic and international private equity funds and multinational companies on a broad range of general corporate and transactional matters, including cross-border M&A, private equity transactions, financial transactions and corporate governance, among other areas of practice. Throughout his career, he has represented private equity funds in high-profile domestic and cross-border transactions, including investment in major domestic and foreign companies. Moreover, Ho Kyung has represented top domestic and multinational corporations on major inbound and outbound transactions relating to share and asset purchases, joint ventures, divestments, spin-offs, and corporate restructurings.

Daniel Joonwu Park is a senior foreign attorney at Bae, Kim & Lee LLC. He has represented and advised foreign and Korean clients, including private equity and venture capital firms, on cross-border and multi-jurisdictional M&A and investment transactions. Daniel received his BA from the University of Michigan and JD and MBA from Boston College.

Contributed by: Ho Kyung Chang, Daniel Joonwu Park, Eunjee Kim, Seung-Wan Chae, Hyun A Kim, Jihyun Kim, Kwang Hyun Ryoo and Alan Peumjoo Lee, **Bae, Kim and Lee LLC**

Eunjee Kim was admitted to the Korean Bar and the Californian Bar and is a certified public labour attorney in Korea. Her practice at Bae, Kim & Lee LLC focuses on various labour and employment matters experienced by multinational companies operating business in Korea. As chief legal officer and compliance officer at various multinational companies headquartered in the United States or France, Ms Kim has actively resolved issues covering internal compliance and government relations. In particular, she has accumulated concrete and extensive experience in preventing and resolving legal issues that may arise in the context of employment relations with individual employees and collective legal relations with labour unions.

Seung-Wan Chae is a certified public accountant at Bae, Kim & Lee LLC (BKL), specialising in international tax. He started his career at the international tax and legal service of Samil PricewaterhouseCoopers in 2000 and has worked at BKL since 2005. Based on his extensive practical experience and understanding, he advises on a broad range of areas, including overseas investment by domestic institutional investors, outbound investment of domestic companies, inbound investment by foreign investors, tax matters for foreign-invested companies, foreign corporations and non-residents, and cross-border transactions.

Hyun A Kim is a partner at Bae, Kim & Lee LLC. Her practice covers the full spectrum of antitrust matters, including merger control filings, cartels, abuse of dominance, and unfair transactions. She was named as a "recommended lawyer" in antitrust and competition in 2018 and as a "leading practitioner" in competition in 2020 and 2021. Hyun has lectured in the academic world based on her experience in corporate law, intellectual property rights, and the Monopoly Regulation and Fair Trade Act. She previously served as vice-chair of the IPBA Antitrust Committee and is currently a member of the IBA Antitrust Committee Cartel Working Group.

Jihyun Kim specialises in advising and representing clients in the area of intellectual property rights at Bae, Kim & Lee LLC. Her legal practice focuses on consultation and compliance services related to corporate trade secret protection, large-scale civil/criminal disputes involving trade secrets, and legal advice and litigations related to trade marks, copyright, design, and unfair competition issues. In addition, as a female attorney-at-law in the area of intellectual property rights, she has actively participated in various commissions and major organisations with respect to intellectual property rights. Jihyun has also given lectures on practical affairs in intellectual property rights, etc, at the Graduate School of Law in Korea.

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Kwang Hyun Ryoo is a partner at Bae, Kim & Lee LLC with wide experience in the areas of telecommunications, data privacy and e-commerce who has advised frontier companies home and abroad on their state-of-the-art business fields. He served as a counsellor at the Korea Communications Commission and the Ministry of Economy and Finance. Based on his knowledge and experience in computing systems, he has also represented major companies in their cases concerning data privacy and system integration projects. Kwang Hyun graduated from the Seoul National University Department of Law and Duke Law School, and was admitted to the Bar of New York.

Alan Peumjoo Lee is a partner at Bae, Kim & Lee LLC, specialising in cross-border M&As and corporate law. He also has extensive experience in the automotive sector in Korea, providing regulatory and commercial advice to automotive clients. Alan joined the firm in 2014, and completed his LLM at UC Berkeley Law School. He is admitted to both the Korean Bar and the State Bar of California.

Bae, Kim & Lee LLC

Centropolis B
26 Ujeongguk-ro
Jongno-gu
Seoul 03161
South Korea

Tel: +82 2 3404 0000
Fax: +82 2 3404 0001
Email: bkl@bkl.co.kr
Web: www.bkl.co.kr

Contributed by: Ho Kyung Chang, Daniel Joonwu Park, Eunjee Kim, Seung-Wan Chae, Hyun A Kim, Jihyun Kim, Kwang Hyun Ryoo and Alan Peumjoo Lee, **Bae, Kim and Lee LLC**

1. Legal System

1.1 Legal System and Judicial Order

The South Korean legal system is a civil law system under which the laws codified as statutes serve as the primary source of jurisprudence. Specifically, the laws of South Korea are found in the following sources:

- the Constitution;
- Acts;
- Enforcement Decrees to Acts enacted by the President;
- Enforcement Rules of Acts enacted by the Prime Minister or the various ministries;
- Municipal Ordinances enacted by the various municipal councils; and
- Municipal Regulations enacted by the head of the municipalities.

The list of statutes above is in the order of precedence, and subordinate statutes may not prescribe anything that conflicts with superior statutes. Court precedents do not have the same legal effect as statutory laws but have persuasive authority, especially decisions rendered by the Supreme Court.

The highest court in the South Korean court system is the Supreme Court (the final appellate court), reviewing the decisions of the intermediate appellate courts. Immediately below the Supreme Court are the High Courts and the intermediate appellate courts. Below the High Courts are the District Courts, the trial courts of first instance having general jurisdiction to hear the full range of civil and criminal matters, including administrative and bankruptcy cases.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

In general, there are no limits on foreign investment in South Korea, except in sectors and businesses specifically restricted under the Foreign Investment Promotion Act (FIPA).

Under the FIPA:

- a total of 61 sectors – such as public administration, diplomatic affairs and national defence – are closed entirely to foreign investment; and
- a total of 30 sectors are open to foreign investment as long as the investments meet certain conditions, of which:
  - (a) 16 sectors – such as the farming of beef cattle, wholesale selling of meat and publishing of newspapers – place limits on the foreign investment ratio;
  - (b) 11 sectors – such as power generation (except nuclear power generation) and disposal of radioactive waste – impose specific requirements on the foreign investment; and
  - (c) three sectors (nuclear power generation, radio broadcasting and terrestrial broadcasting) are closed entirely to foreign investment but can be opened in the future.

In addition, under the FIPA, if investment by a foreign investor in a Korean company qualifies as foreign investment, the foreign investor must file a foreign investment report with the Korea Trade-Investment Promotion Agency (KOTRA) or a designated foreign exchange bank in South Korea before such investment. While the foreign investment report must be filed with and accepted by the KOTRA or foreign exchange bank prior

to completing the investment, this report is generally a matter of formality and will be cleared in one to two business days without an extensive review and approval process (in the absence of exceptional circumstances).

A "foreign investment" for the purposes of the FIPA means, among others, the investment by a foreign investor of KRW100 million or more in a Korean company, by which the foreign investor acquires:

- a 10% or greater voting equity interest in the company; or
- an equity interest in the company and a contractual right to appoint one or more directors or statutory auditors of the Korean company.

In addition to the foreign investment report, investments in certain industries may require approval from the relevant oversight body. For example, under the FIPA, if a foreign investor intends to acquire shares of a defence industry company, they must obtain prior permission from the Ministry of Trade, Industry and Energy (MOTIE).

Other approvals and their procedural requirements may be specified in the laws and regulations governing the industry in question, eg, the MOTIE's approval is required for a foreign company to operate passenger or cargo air transport services, while approval from the Financial Services Commission is needed for a foreign bank to establish or close branches, or engage in the banking business in South Korea.

Recently, the "Special Measures Act on Strengthening and Protecting Competitiveness of National High-Tech Strategic Industry" (the "Strategic High-Tech Industry Act") came into effect as of 4 August 2022. The Strategic High-Tech Industry Act introduces foreign investment restrictions on companies holding "national strategic high-tech" (Strategic High-Tech) and administrative support for such companies.

If a foreign investor seeks to acquire shares in, merge with or establish a joint venture with a company holding Strategic High-Tech, such foreign investor will be required to obtain prior approval from the MOTIE. The MOTIE may deny approval or even unwind the transaction post hoc if such transaction poses a material threat to national security due to leakage of Strategic High-Tech.

2.2 Procedure and Sanctions in the Event of Non-compliance

If a foreign investor acquires existing shares of a Korean company without filing a foreign investment report, it may be subject to an administrative fine of up to KRW10 million. If a foreign investor acquires shares of a defence industry company without the MOTIE's approval or violates the terms of a conditional approval:

- it is prohibited from exercising voting rights in such shares;
- the MOTIE may order that such shares be disposed of; and/or
- it may be subject to criminal penalties, including imprisonment (for the individuals involved) of up to one year or a fine of up to KRW10 million.

For FIPA investments subject to certain conditions, if it is ultimately determined that the foreign investor made an investment that failed to satisfy the relevant conditions, the MOTIE may issue a corrective order or impose other remedial measures on the foreign investor. If the foreign investor fails to take such measures, it may be subject to criminal penalties, including imprison-

ment (for the individuals involved) of up to one year or a fine of up to KRW10 million.

2.3 Commitments Required From Foreign Investors

As foreign investment is generally not limited to South Korea, most investments do not require approvals other than filing a foreign investment report.

However, in industries where approval of the oversight body is required, the approvals may be subject to conditions. For example, a foreign investor acquiring shares of a defence industry company may be required to ensure continuity of production of the relevant defence materials and maintenance of security or divest defence industry facilities to the government or a Korean company and not participate in the company's management.

2.4 Right to Appeal

The FIPA does not specifically provide for an appeal procedure to challenge the authorities' decision; however, a foreign investor may seek cancellation of the authorities' decision by filing an administrative lawsuit with the administrative court within 90 days of the decision.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The three most common types of legal entities under the Korean Commercial Code (KCC) are:

- the *chusik hoesa* (commonly described as a "joint stock company");
- the *yuhan hoesa* (commonly described as a "limited company"); and
- the *yuhan chegim hoesa* (commonly described as a "limited liability company").

Generally, all three entity forms have certain similar characteristics, including limited liability, and are treated similarly under the laws of South Korea.

The *chusik hoesa*, the most common form of incorporation, is a legal entity that provides limited liability to its shareholders and is governed by a board of directors. Other than certain matters conferred by law or in the articles of incorporation of the company (AOI) to the authority of the general meeting of shareholders (GMS), the board may make decisions on important corporate policies and management matters (except for regular day-to-day business matters decided by the representative director). Unless the AOI provides otherwise, all actions and resolutions of the board are adopted by the affirmative vote of a majority of the directors attending a properly constituted board meeting.

The *chusik hoesa* is typically appropriate for a large enterprise that will need substantial capital since it is the only type of legal entity eligible to list its shares on the Korea Stock Exchange or that may issue corporate bonds. Subject to certain restrictions, it may issue:

- multiple classes of shares with different dividend rights and liquidation preferences; and
- non-voting, convertible and/or redeemable preferred shares.

In contrast, a *yuhan hoesa* is a closely held limited liability company, which can be described as a mixture of a joint stock company and a partnership. Like a joint stock company, each member's liability is limited to the amount of their contribution to the company. A *yuhan hoesa* form is typically appropriate for small- or medium-sized businesses owned by a small number of individuals or entities. It is required to have at least one

director regardless of size and has the option to have a statutory auditor.

In comparison with a *chusik hoesa*, a *yuhan hoesa* is also subject to other limitations. For example, a *yuhan hoesa* may not issue corporate bonds, may not invite subscription for capital contributions by means of public advertisement, or otherwise, units of contribution in a *yuhan hoesa* cannot be listed on any stock exchange, and it cannot issue debentures or other securities.

The *yuhan chegim hoesa* is a legal entity newly introduced in the Korean Commercial Code in 2012. This form of legal entity is modelled after the limited liability company (LLC) in the US and can be described as a mixture of a corporation and a partnership. However, unlike LLCs, a *yuhan chegim hoesa* is not taxed as a partnership and does not offer particular tax benefits. Nevertheless, a *yuhan chegim hoesa* is increasingly preferred by foreign companies as the form of their local entity since it is subject to public disclosure requirements more lenient than those applicable to other corporate forms and is also exempt from the external audit requirement. It is required to have at least one manager (similar to a director) regardless of its size and has the option to have a statutory auditor.

While none of these entity types is subject to minimum paid-in capital requirements or requires a minimum number of shareholders/unitholders greater than one, an investment of at least KRW100 million is required to qualify as a foreign investment under the FIPA (as explained above).

3.2 Incorporation Process

The steps below describe the incorporation of a *chusik hoesa*, the most common entity form. However, the steps are substantially the same for a *yuhan hoesa* or a *yuhan chegim hoesa*.

In the case of foreign investment, the foreign investor must first file the foreign investment report as mentioned above. After the foreign exchange bank accepts the foreign investment report, the incorporation procedures may begin as follows.

- The foreign investor must remit the funds for the company's initial capitalisation and subscription of the shares to a foreign exchange bank. Once the foreign exchange bank receives the funds, it will send a confirmation receipt.
- Under the Korean Commercial Code, an inaugural shareholders' meeting of the company must be held prior to the registration of the company's incorporation, at which the shareholders will approve the election of the initial directors and statutory auditor and the adoption of the AOI. In practice, such inaugural shareholders' meetings can be convened and presided over by the shareholders' adviser pursuant to a power of attorney issued by the shareholders. The company must have at least one director unless its paid-in capital is at least KRW1 billion, in which case it must have at least three directors and one statutory auditor. There are no nationality or residence requirements for directors or statutory auditors, but directors and statutory auditors must be natural persons, and a director, officer or employee of the company may not serve concurrently as the statutory auditor.
- Once elected, the board of directors must hold a meeting to elect at least one representative director from among the directors (unless the company has one or two directors). If permitted under the AOI, the representative director may be elected at the

inaugural shareholders' meeting instead of the board meeting. The representative director, who acts in a capacity equivalent to that of a chief executive officer in other jurisdictions, oversees the company's day-to-day operations.
- After completing the above steps, the company must register its establishment with the corporate registry office of the district court having jurisdiction over it. It generally takes two or three business days to complete the company registration. Please note that the registration tax of 0.48% (1.44% if the company's registered office is located within the Seoul metropolitan area) of the paid-in capital is payable at the time of the registration.
- The company must then complete its business registration with the relevant district tax office, which takes up to five business days.
- Finally, the company must register as a foreign-invested company after its incorporation pursuant to the FIPA, which generally takes one or two business days.

3.3 Ongoing Reporting and Disclosure Obligations

As a general matter, for all three entity types, important corporate matters must be registered with the corporate registry office, including:

- appointment/resignation/dismissal/renewal of the term of office of directors and statutory auditors;
- change of corporate name or address;
- change of authorised share capital; and
- increase/decrease of paid-in capital.

A *chusik hoesa* must publicly disclose its balance sheet once the financial statements of the company are approved at the GSM and have its annual financial statements audited by an external auditor if certain requirements are met:

- if its assets are KRW50 billion or more;
- if its revenue is KRW50 billion or more; or
- if it meets at least two of the following criteria:
  (a) assets of KRW12 billion or more;
  (b) liabilities of KRW7 billion or more;
  (c) revenue of KRW10 billion or more; or
  (d) 100 or more employees as of the previous year-end.

The audit report (including the audited annual financial statements) must be submitted to the Securities and Futures Commission within two weeks after the GSM and disclosed on a publicly accessible website (DART, which is similar to EDGAR in the US).

Due to a recent amendment of the Act on External Audit of Stock Companies, these requirements for *chusik hoesa* since 2020 became applicable to *yuhan hoesas* that meet certain criteria:

- if its assets are KRW50 billion or more;
- if its revenue is KRW50 billion or more; or
- if it meets at least three of the following criteria:
  (a) assets of KRW12 billion or more;
  (b) liabilities of KRW7 billion or more;
  (c) revenue of KRW10 billion or more;
  (d) 100 or more employees; or
  (e) 50 or more members.

As with a *chusik hoesa*, the audit report must be submitted to the relevant authorities and disclosed on a publicly accessible website (DART).

In addition, if a company is required to submit audited annual financial statements as mentioned above and has 500 or more shareholders, it must submit a disclosure report to the Financial Services Commission immediately after the occurrence of material business/operation

events (such as a merger or transfer of a material business or asset).

As noted above, a *yuhan chegim hoesa* is exempt from such external audit requirements and increasingly used by foreign investors to minimise the burden of mandatory disclosures.

3.4 Management Structures

In the case of a *chusik hoesa*, ownership and ultimate control lie with the shareholders. Overall governance rests with the board of directors, whom the shareholders elect. The board of directors presides over and makes decisions on important policies, business transactions and other managerial matters other than those reserved for shareholder approval pursuant to applicable laws and/or the AOI.

A *chusik hoesa* with paid-in capital of KRW1 billion or more must have at least three directors and one statutory auditor, whereas if it does not meet the foregoing paid-in capital threshold, it needs only one director and is not required to have a statutory auditor. The statutory auditor is a board-level in-house position whose role is to monitor the company's financial affairs and the directors' performance of duties. The statutory auditor is distinguished from the external auditor, appointed to conduct the required audit on the annual financial statements when certain requirements are met.

Authority to carry out the day-to-day management is vested in the representative director, functionally equivalent to a chief executive officer. The representative director is appointed from among the directors by resolution of the board (or by the shareholders if appointment authority is conferred on the shareholders instead of the board). A representative director has broad authority to represent the company in its dealings and has the power to represent and bind the company in all of its external affairs. A company may have more than one representative director. In such cases, the representative directors may be designated either as independent, with each representative director having the authority to represent the company severally, or as joint representative directors who must act in co-operation when exercising their representative powers.

3.5 Directors', Officers' and Shareholders' Liability

Under the Korean Commercial Code, each company director has a duty of care and fiduciary duty of loyalty to the company. The Korean Commercial Code also provides certain derivative principles of such duties, including the following:

- non-competition duty – no director may, without the approval of the board of directors, engage in any transaction (whether for their own account or that of a third party) that falls within the class of businesses of the company or become a member with unlimited liability or a director of any other company whose business purposes are the same as those of the company;
- restriction on self-dealing – a director may engage in a transaction with the company for its own account or the account of a third person only if it has obtained the approval of the board of directors; and
- non-disclosure duty – directors may not divulge their knowledge of the company's business secrets while performing their duties.

Additionally, the Supreme Court has ruled that directors have a duty to monitor the acts of other directors, particularly as to the legality of

such acts. Directors will be deemed to have discharged this duty as long as they perform their duties in good faith and with reasonable care based on their reasonable knowledge.

The Korean Commercial Code provides that if directors have violated any laws, regulations or the AOI, or have neglected to perform their duties, they will be jointly and severally liable for damages incurred by the company. Furthermore, under the Korean Commercial Code, if any such act has been performed pursuant to a board resolution, the directors who have assented to such resolution will all be liable. Additionally, the Korean Commercial Code provides that if directors have neglected to perform their duties wilfully or by gross negligence, they will be jointly and severally liable for damages to any third person.

While there is no statutory basis in the Korean Commercial Code for piercing the corporate veil, the courts have pierced the corporate veil vis-à-vis controlling shareholders in certain limited and exceptional situations based on the general principle of good faith under the Civil Code. The criteria established by the courts in applying the "piercing the corporate veil" doctrine are very strict and, as a result, there have only been a few instances where this doctrine has been invoked.

4. Employment Law

4.1 Nature of Applicable Regulations

The legal rules that govern the employment relationship are the Constitution, the Labour Standards Act (LSA), other labour-related laws, individual employment contracts, internal work regulations and collective bargaining agreements.

Of these rules, the basic principles of employment are enshrined in the Constitution, which states that all citizens have the right to work. The LSA sets minimum standards for various working conditions, including just dismissal of employees, working hours, wages, annual leave, treatment of minors and worker's compensation. Any provisions of an employment contract, internal work regulations or collective bargaining agreement that attempt to establish lower standards are invalid.

The following laws govern other key aspects of the employment relationship:

- various minimum standards – the Minimum Wage Act, the Act on the Guarantee of Workers' Retirement Benefits, the Act on the Protection of Temporary Agency Workers, and the Act on the Protection of Fixed-term and Part-time Workers;
- mandatory hiring guidelines – the Employment Security Act, the Equal Employment Opportunity and Work-Family Balance Assistance Act, the Act on Promotion of Employment and Vocational Rehabilitation of Disabled Persons, and the Act on Honourable Treatment of and Support of Persons of Distinguished Services to the State;
- mandatory social insurances – the National Pension Act, the National Health Insurance Act, the Unemployment Insurance Act, the Worker's Industrial Accident Compensation Insurance Act, and the Wage Claim Guarantee Act; and
- labour unions and labour-management relations – the Labour Union and Labour Relations Adjustment Act covers labour union activity and collective bargaining, and the Act on the Promotion of Workers' Participation and Co-operation covers labour-management councils (LMC).

In principle, when two sources of employment regulations conflict, the more favourable provisions for the employee will take precedence.

4.2 Characteristics of Employment Contracts

Under the LSA, when entering into an employment agreement, an employer must specify specific matters, including the items constituting wages, wage calculation and payment methods, prescribed working hours, holidays, and annual paid leave.

In addition, the Act on the Protection of Fixed-term and Part-time Employees further provides that when an employer enters into an employment contract with a fixed-term or part-time employee, it must clearly state, in writing, each of the following matters:

- term of employment;
- working hours and recess;
- wages, including constituent items and calculation and payment methods;
- holidays and leave;
- place of work and duties; and
- workdays and working hours for each workday (only applicable to part-time employees).

An employer may specify the above items in the employment agreement or, if already stipulated in internal work regulations, the employer may elect only to specify provisions relevant to individual employees.

4.3 Working Time

Under the LSA, employees are allowed to work up to 40 hours per week and eight hours per day, excluding recess. During working hours, employees must be given a minimum recess time of one hour for eight hours and 30 minutes for four hours. An employee may consent to a maximum of 12 additional work hours per week.

An employer violating the overtime threshold under the LSA will be subject to strict criminal liability, meaning that the employer will be subject to imprisonment of up to two years or a criminal fine of up to KRW20 million.

The LSA permits employers to adopt any of the following "alternative working hours systems" under a separate written agreement between the employer and an employee representative.

- Flexible working hours system – extending working hours on a particular day or week while shortening working hours on other days or weeks so that the average hours worked over a certain period are within the statutory standard working hours. Under this system, hours worked during a certain period may exceed the statutory standard working hours without incurring overtime allowances.
- Selective working hours system – employees are free to select the start/end times of working hours and/or workdays as long as the average hours worked over a certain period (not exceeding one month) are within the statutory standard working hours.
- Deemed working hours system – when it is difficult or impossible to calculate working hours because employees carry out all or part of their duties outside the workplace, they are deemed to have worked for prescribed working hours.
- Discretionary working hours system – for certain professions where the performance of duties is left to the employees' discretion, prescribed working hours agreed upon between the employer and the employees' representative will apply.

For work performed beyond the statutory standard working hours, the employer must pay on top of ordinary wages at least an additional 50% of ordinary wages as overtime work allowance. A 50% uplift of ordinary wages also applies to any work done between 10pm and 6am as a night-time work allowance. For work during a holiday, the employer must pay an additional 50% of ordinary wages for up to eight hours of work per day. Night-time work, overtime work and holiday work allowances are cumulative, not mutually exclusive; therefore, the employer must pay its employees each additional allowance as applicable.

4.4 Termination of Employment Contracts

South Korea is not an "employment at will" jurisdiction. The LSA requires an employer to establish "just cause" when terminating an employee, interpreted by the courts to mean that such grounds have to be so significant that it would be unduly burdensome for the employer to continue the employment relationship with the employee. In practice, this is a very high threshold to meet. The burden of proof is on the employer to demonstrate that just cause exists.

When terminating an employee, an employer must give the dismissed employee 30 days prior written notice or pay in lieu thereof.

Employees terminated without just cause may challenge their termination by filing a complaint with the Labour Relations Commission or to a court to seek reinstatement and back wages from the point of dismissal until reinstatement.

As with the termination of employment contracts for individual reasons, termination for redundancies attributable to business reasons also require just cause. The LSA considers that just cause exists for business reasons only when all of the following conditions are met:

- an "urgent managerial necessity" exists that the employer is able to demonstrate;
- the employer must exert its best efforts to avoid or minimise dismissals;
- the employer must apply fair and reasonable criteria in designating the employees to be dismissed; and
- in connection with the second and third conditions above, the employer must act in good faith, and, 50 days in advance of such dismissal, consult with the employees' representative (or union).

The LSA does not specify what constitutes an "urgent managerial necessity" but provides that business transfers, mergers or acquisitions needed to continue the business may constitute such a necessity. In determining whether an urgent managerial necessity exists, the court generally adopts a case-by-case approach, considering the totality of circumstances.

Employers are subject to an additional reporting requirement if the number of terminated employees exceeds the applicable thresholds:

- more than ten employees for a company with fewer than 100 employees;
- more than 10% of the employees for a company of 100 to 999 employees; and
- more than 100 employees for a company of 1,000 or more employees.

In these instances, the employer must report to the Ministry of Employment and Labour at least 30 days prior to the mass dismissals:

- the number of employees to be dismissed;
- the reason for dismissal;

- details of consultations with the employees' representative (or union); and
- the timeline for dismissal.

Also, in cases of dismissal for business reasons, the employer must give the dismissed employee 30 days' prior written notice or compensate the dismissed employee in lieu of giving such advance notice.

Upon an employee's departure, the employer must pay the mandatory accrued retirement benefit (severance pay or retirement pension, whichever is applicable) in accordance with the applicable law of South Korea. This requirement applies regardless of whether the employee is dismissed for cause, retires at the statutory retirement age, or resigns voluntarily. In other words, the obligation to pay statutory retirement benefits arises irrespective of the reason for the employee's departure.

Meanwhile, the just cause standard for termination is generally very high, and if just cause for termination is not found by the court or the Labor Relations Commission, the effect of the dismissal automatically becomes null and void, and any wages for the wrongfully dismissed period must also be paid. Therefore, employers often try to induce voluntary separation by offering employees extra compensation on top of their accrued retirement benefit in exchange for a release and waiver.

4.5 Employee Representations

The Act on the Promotion of Workers' Participation and Co-operation (the "Act") requires any business entity with 30 or more employees to form a labour management council (LMC), comprised of three to ten employee-side council members elected by employees through a secret ballot and the same number of employer-side council members from the management. The Act requires the LMC to hold a meeting every three months where most of each side's representatives are present. Resolutions are passed by two thirds of the votes of those in attendance.

In addition, under the Labour Union and Labour Relations Adjustment Act, basic rights include:

- the right to form and join a labour union;
- the right to engage in collective bargaining with the employer; and
- the right to take collective action.

During collective bargaining negotiations, the chairman of the labour union has the authority to speak on behalf of the union members and negotiate with and enter into a collective bargaining agreement with the employer.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Employees are subject to income tax on remuneration and all benefits received from employment, including wages, salaries, bonuses and other amounts received for employment services rendered. Employment income includes the following payments in addition to the basic monthly payroll:

- reimbursement for personal expenses, entertainment expenses and other allowances provided to the employee that is not considered legitimate business expenses of the employer; and
- various allowances for family, position, housing, health, overtime and other similar payments made to the employee.

There are two methods of reporting employment income under the tax laws of South Korea.

First, if employment income is paid by:

- a Korean resident;
- a Korean entity; or
- a domestic branch or representative office of a foreign entity.

The employer is required to report such employment income to a competent tax office through a payroll withholding tax return and pay the applicable withholding tax to the tax office. Second, if the employment income is paid by a non-resident or a foreign entity (excluding a domestic branch or representative office), the employee receiving such employment income is responsible for reporting it through a global individual income tax return (ie, the employment income will be included in the global individual income tax base) and voluntarily paying the applicable global individual income tax (6.6% to 49.5% depending on the applicable progressive individual income tax rates). Alternatively, the employee may pay the applicable tax levied on such employment income through a licensed taxpayers' association that collects and pays the tax on their behalf.

Individual income tax rates (also applicable to employment income) (effective 1 January 2023) are as follows:

- up to KRW14 million taxable income – 6% tax rate;
- from KRW14 million to KRW50 million – 15%;
- from KRW50 million to KRW88 million – 24%;
- from KRW88 million to KRW150 million – 35%;
- from KRW150 million to KRW300 million – 38%;
- from KRW300 million to KRW500 million – 40%;
- from KRW500 million to KRW1 billion – 42%; or
- in excess of KRW1 billion – 45%.

In addition, there is a local surtax of 10% on the foregoing rates resulting in the final rates ranging from 6.6% to 49.5% on the tax base.

5.2 Taxes Applicable to Businesses

A Korean company is required to pay:

- interim corporate income taxes within two months from the end of the first six months of the fiscal year; and
- annual corporate income taxes within three months from the end of the fiscal year. The company must file tax returns along with the tax payment for the interim and annual corporate income taxes.

The corporate income tax rates (effective 1 January 2023) are as follows:

- up to KRW200 million taxable income – 9% tax rate;
- from KRW200 million to KRW20 billion – 19%;
- from KRW20 billion to KRW300 billion – 21%; or
- in excess of KRW300 billion – 24%.

In addition, there is a local surtax of 10% on the foregoing rates, resulting in the final rates ranging from 9.9% to 26.4% on the tax base.

VAT is levied at 10% on the sale of goods and services in South Korea, including imported goods, subject to certain exceptions. Every quarter, a business that sells or provides goods or services to its customers is required to pay the competent tax office value-added tax (out-

put VAT) received from such customers. The amount of VAT to be paid to the tax office is the sum of the output VAT received from its customers minus the value-added tax (input VAT) paid to its suppliers for purchasing goods or services (so-called input VAT deduction).

Certain income – such as dividends, interests or royalties paid to non-residents (Korea-sourced income) – is generally subject to withholding tax at the statutory rate of 22% (inclusive of local surtax) in the absence of an applicable tax treaty between the non-resident's country and South Korea. In order to enjoy the benefits of a lower rate of withholding tax under a particular treaty, the beneficial owner of the Korea-sourced income must submit to the withholding party evidentiary documents demonstrating that the beneficial owner is eligible for the lower rate of withholding tax by virtue of a tax treaty.

With respect to gains earned by a non-resident from the sale of its shares in a Korean company or listed foreign company, capital gains tax must be withheld and paid to the tax office by the purchaser of such shares at the rate of:

- 11% of the sale price; or
- 22% of the net gains (ie, the sum of the sale price minus the acquisition price), whichever is lower.

Such capital gains tax may be exempt by virtue of applicable tax treaties. In addition, the purchaser must withhold and pay securities transaction tax levied on the sale of shares in a Korean company at 0.35% (for the period on or after 1 January 2023) if the seller is a non-resident. For the transfer of shares through the designated Korean stock exchanges, the reduced tax rate of 0.18% (for the period from 1 January 2024 to 31 December 2024) and 0.15% (for the period on or after 1 January 2025) would apply.

5.3 Available Tax Credits/Incentives

Foreign-invested companies that engage in certain hi-tech businesses designated by the government or located in certain designated areas may apply for exemption of customs duties or local taxes if certain conditions are satisfied. Tax credits are also available for certain qualifying expenditures on R&D and investments in energy saving, pollution control, vocational training facilities and employee housing.

5.4 Tax Consolidation

Tax consolidation is available between/among Korean companies in cases where a Korean company owns 90% or more of total value of shares of the other Korean company. The relevant company may elect to choose consolidated tax filing subject to approval from the competent tax office, and such election may not be revoked for at least five years from the election date.

5.5 Thin Capitalisation Rules and Other Limitations

Interest incurred in a business's normal operation is generally recognised as a tax-deductible expense as long as the relevant loan is used for business purposes. A shareholder loan extended by a foreign controlling shareholder to its Korean subsidiary, however, is subject to the thin capitalisation rule, whereby any interest paid on the part of the shareholder loan in excess of two times the paid-in capital of the Korean company contributed by the shareholder (six times if the Korean company is a financial institution) cannot be recognised as a tax-deductible expense and will be subject to corporate tax. Furthermore, the excess interest will be deemed as a dividend and subject to withholding tax at the statutory rate of 22% (inclusive of local surtax) in the absence

of an applicable tax treaty between the non-resident's country and South Korea.

In line with the Organisation for Economic Co-operation and Development's (OECD's) recommendation on the limitation of interest expense deductions (Base erosion and profit shifting (BEPS) Action 4), effective from 1 January 2019, interest expense paid by a Korean company with respect to intercompany loan transactions with overseas related parties in excess of 30% of the "adjusted taxable income" (ie, taxable income before depreciation and net interest expenses) cannot be recognised as tax-deductible expenses and will be subject to corporate tax.

As between the thin capitalisation rule and the OECD rule, the rule that imposes a higher tax burden (ie, recognition of lower tax-deductible expenses) applies.

5.6 Transfer Pricing

International transactions between related parties are governed under transfer pricing rules modelled following the OECD transfer pricing guidelines. Domestic transactions in South Korea are subject to similar rules under the corporate income tax law, ie, income generated from a related-party transaction may be deemed an unfair transaction that is not conducted on an arm's-length basis and may be, for tax purposes, re-computed by a tax authority based on the fair market value applicable to similar transactions between independent companies under comparable circumstances.

5.7 Anti-evasion Rules

The tax laws of South Korea provide for a "substance over form" rule that allows a transaction that meets formality requirements to be recharacterised based on its substance. Under the substance over form rule, each transaction under a series of transactions undertaken for no purpose other than tax avoidance may be recharacterised for tax purposes by a tax authority to reflect the substance of such series of transactions.

6. Competition Law

6.1 Merger Control Notification

Under the Monopoly Regulation and Fair Trade Act (MRFTA), each type of business combination listed below is notifiable when the applicable jurisdictional thresholds are met:

- acquisition of 20% (or 15% in case of listed companies) or more of the voting shares in another company (or acquisition of additional shares by an existing shareholder whose shareholding already exceeds such threshold where the additional share acquisition results in such shareholder becoming the largest shareholder);
- a statutory merger of one company into another;
- acquisition of all or a substantial portion of the business or fixed assets of another company (where such business or assets is at least KRW5 billion or 10% of such company's total assets);
- participation in the establishment of a new joint venture as the largest shareholder; and
- interlocking directorate of a large company, ie, the appointment of an officer or employee of a "large-scale company" (a company with worldwide assets or annual turnover of KRW2 trillion or more on a consolidated basis) as an officer or director of another company.

Business combinations (other than an interlocking directorate) satisfying the turnover and/or total assets thresholds below are notifiable. A

merger is notifiable if a party (ie, the acquiring party or acquired party) has worldwide assets or an annual turnover of KRW300 billion or more and the other party has worldwide assets or an annual turnover of KRW30 billion or more. Total assets and annual turnover are calculated worldwide, including all companies affiliated both before and after the business combination (except that, in case of an asset transfer, total assets and annual turnover of the transferor are determined on a standalone basis).

Further, the MRFTA recently introduced a "size-of-transaction test" to impose a filing obligation even if the target company's turnover or total assets do not meet the foregoing general jurisdictional thresholds. Based on this new standard, a transaction will be notifiable if:

- the transaction value exceeds KRW600 billion; and
- the target company has a "substantial level of activity in the Korean market", including selling or providing products or services in Korea or having R&D facilities or personnel in Korea.

Foreign-to-foreign mergers are notifiable if the nexus requirement is satisfied in addition to the jurisdictional thresholds. The local nexus requirement is satisfied:

- if the acquirer and the acquired party each have a turnover in Korea of KRW30 billion or more; and
- where the acquirer is a Korean entity, and the acquired party is a foreign entity, the acquirer has a turnover in Korea of KRW30 billion or more.

The KFTC intends to reduce the number of merger notifications by expanding the scope of exempted transactions. The following types of mergers, which are generally regarded as not having a substantial impact on the market, will be considered exempted transactions from 7 August 2024 in accordance with the recently amended MRFTA:

- mergers and business transfers between a parent company and a subsidiary when the parent company already holds more than a 50% interest – and therefore sole control – in the subsidiary;
- the establishment of a private equity fund; and
- an interlocking directorate (except in the case of representative director) if no interlocked director serves as a representative director of the target company and the number of interlocked directors constitutes less than one third of the total number of directors in the target company.

6.2 Merger Control Procedure

Filing Deadline

In principle, a merger notification must be filed within 30 days of closing the transaction. However, where one party to the business combination has worldwide assets or an annual turnover of KRW2 trillion or more on a consolidated basis, the business combination becomes a pre-closing notification requirement.

Review Criteria and Timing

The KFTC's review period is 30 days, but the KFTC has absolute discretion to extend the review period by up to 90 days for a total of 120 days. However, for mergers that qualify for a "simplified review", a shorter review period of 15 days will apply.

Recently, KFTC amended its merger review standard to add the following to the type of mergers which qualify for a simplified review:

- additional investments by existing private equity funds;
- concurrent holding of an executive position following investments in new technology or venture businesses;
- acquisition of real estate for investment purposes; and
- other mergers which can be proven to be solely for investment purposes.

From 7 August 2024, the KFTC intends to implement a formal scheme under which a company will submit a voluntary remedy proposal that promptly and effectively resolves anti-competitive concerns surrounding a merger, whereupon the KFTC will review and grant clearance if it believes that the plan is appropriate and sufficient.

This new scheme is anticipated to provide benefits not only in resolving anti-competitive concerns related to proposed mergers, but also in developing remedies that are better suited to the circumstances of the parties involved and easier to implement. Additionally, this new scheme is expected to shorten the KFTC's merger review, thereby enhancing the efficiency of the review process.

Voluntary Pre-notification Review Request

In case of a pre-closing filing, the acquirer needs to file a merger notification soon after the execution of the definitive agreement. However, to shorten the KFTC's formal review period, the acquirer may make a voluntary request for a preliminary review before the agreement is executed. Although a preliminary review does not relieve the acquirer from filing a formal notification, the review period may be shortened to 15 days.

6.3 Cartels

The MRFTA prohibits any agreement on pricing or other terms that unreasonably restrain competition.

Unlawful cartel conduct includes agreements to:

(i) fix prices;
(ii) fix transaction or payment terms;
(iii) restrict production, delivery, transportation, or transaction of goods, or limit the terms of service;
(iv) allocate customers or sales regions;
(v) restrict production capacity;
(vi) restrict the types and specifications of goods or services;
(vii) jointly carry out or manage a principal part of a business;
(viii) determine the successful bidder, bid price or other bid matters;
(ix) exchange competitively sensitive information; and
(x) otherwise restrict competition by interfering with or restricting the business activities of another company.

The KFTC's review standards for cartel conduct differ depending on the type of conduct. In the case of "hardcore" cartel conduct described in (i), (iii), (iv) and (viii) above, an anti-competitive effect is presumed. In contrast, for all other types of cartel conduct, a review is conducted to determine the anti-competitive effect and efficiency-enhancing aspects to determine illegality.

The KFTC may issue a corrective order or impose an administrative fine of up to 20% of the relevant turnover. In addition, participants may be subject to criminal liability, including imprisonment (for the individuals involved) of up to three years or a fine of up to KRW200 million.

A leniency regime exists for an applicant who satisfies the following:

- it must be the first or second-in time to file for leniency;
- it must immediately discontinue the cartel conduct; and
- it must fully co-operate with the investigation.

The first-in leniency applicant is completely exempt from fines and criminal charges, while the second-in applicant receives a 50% reduction in administrative fine, exemption from criminal charges and mitigation of corrective measures. The prosecutor's office introduced its own leniency programme under which:

- the first-in leniency applicant is exempt from prosecution, and the second-in applicant receives a 50% reduction in the level of criminal punishment sought by the prosecutor's office; and
- unlike the KFTC leniency programme, individuals may also apply for leniency separate from the company's leniency application.

6.4 Abuse of Dominant Position

The MRFTA prohibits abusive conduct by market-dominant companies.

Market Dominance

Market dominance is found if a company's market share is at least 50% or if the combined market share of two or three companies is at least 75%. In addition to market share, the KFTC also considers other factors, including entry barriers, competitors, the potential for cartel conduct and the ability to foreclose the market.

Abusive Practices

The following are enumerated in the MRFTA as abusive conduct:

- unreasonably determining, maintaining or changing the price of goods or services;
- unreasonably controlling the output of goods or provision of services;
- unreasonably interfering with the business activities of other companies;
- unreasonably impeding the market entry of new competitors;
- engaging in transactions to unreasonably exclude competitors; and
- engaging in any transaction that may significantly harm consumer welfare.

Illegality

In determining the illegality of the conduct, consideration will be primarily given to whether the act has an anti-competitive impact on the relevant market and whether there was intent or purpose of the market-dominant company to maintain or reinforce its monopolistic position in the relevant market.

Sanctions

The KFTC may issue a corrective order or impose an administrative fine of up to 6% of the relevant turnover. In addition, criminal penalties may apply, including imprisonment of up to three years (for the individuals involved) or a fine of up to KRW200 million.

7. Intellectual Property

7.1 Patents

The invention must have industrial applicability, novelty and inventive step to be patentable. Ideas not utilising the laws of nature or inventions that violate public order or sound morals or are likely to harm public health, are not patentable.

The term of a patent right commences at the time of registration and ends 20 years after

application filing, which is extendable for up to five years where separate regulatory approval or registration is required to practise the patent (such as in the case of pharmaceutical patents).

The Korean Intellectual Property Office (KIPO) is in charge of the registration of patents. Upon the filing of an application, substantive examination proceeds only after the Request for Examination has been filed, which should be filed with KIPO within five years from the international (or Korean) application filing date. It takes about 18 months from filing the Request for Examination for KIPO to render its first official action. A patent infringement action can be brought against:

- direct infringement, such as:
  - (a) making, assigning, leasing, importing, or offering for assignment or lease a patented product without authorisation; or
  - (b) using a patented process or the act of making, assigning, leasing, importing, or offering for assignment or lease a product that is made by the process without authorisation; and
- indirect infringement, such as:
  - (a) making, assigning, leasing, importing, or offering for assignment or lease an article used exclusively for producing a patented product; or
  - (b) making, assigning, leasing, importing, or offering for assignment or lease an article used exclusively for working a patented process.

As amended (as of 11 March 2020), the Patent Act has extended the scope of the protection against infringement of process patents to cover the act of selling patent-infringing software online. Specifically, as the definition for "practising an invention", the amended Patent Act has added the act of "offering the use of the process" to the existing definition of "using the process", thereby including intentional acts of selling patent-infringing software online as an act of patent infringement.

The remedies for patent infringement include an injunction against the infringement, compensatory damages and an order issued against the infringing party to take measures to restore the patentee's reputation. Six district courts (Seoul Central, Suwon, Daejeon, Daegu, Busan and Gwangju) are designated to adjudicate patent infringement cases as the first instance courts. The second instance court (appellate court) is the Patent Court, and the final instance court is the Supreme Court.

The Patent Act was the first among Korea's IP laws to introduce treble damages for intentional patent infringement in January 2019. The defences to patent infringement include proving non-infringement and the invalidation of the patent. The first instance of review for an invalidation trial is the Korean Intellectual Property Trial and Appeal Board (KIPTAB). The second instance is the Patent Court, and the final instance is the Supreme Court.

7.2 Trade Marks

"Trade mark" means a mark used to distinguish goods or services of one from those of others, and "use of a trade mark" means:

- displaying a trade mark on goods or packages of goods;
- transferring, delivering or providing through a telecommunications line goods or packages of goods on which a trade mark is displayed, or exhibiting, exporting or importing such goods for transfer or delivery; and
- displaying a trade mark on advertisements for goods, price tags, transaction documents,

or other means, and exhibiting or giving wide publicity to the trade mark.

The following cannot be registered as a trade mark:

- generic terms;
- a mark customarily used on the goods or describing the features of goods;
- a conspicuous geographical term;
- a common surname or other name;
- a simple and commonplace sign; or
- marks that are identical or similar to another's registered trade mark.

The term of a trade mark right is ten years from the registration date, renewable every ten years.

To obtain trade mark registration, the applicant must file an application with KIPO specifying the mark and the designated goods and/or services. Absent objection from a third party or rejection from KIPO, the registration process takes approximately one year, including eight or nine months from application to publication and three or four months from publication to a registration decision. Since 2023, when there is a list of designated products on the trade mark registration application and only a part of the designated products bears reasons for rejection, KIPO can only reject the part that bears reasons for rejection and have to accept the rest.

Under the amendments enacted in May 2024, a trade mark coexistence consent scheme was introduced, allowing registration of a similar trade mark if the owner of the prior registered trade mark consents to the registration of the similar trade mark under KIPO's review. However, if the trade mark registered based on the trade mark coexistence agreement is used for the purpose of unfair competition and misleads and/or causes confusion for the consumers, such trade mark registration may be cancelled within three years from the date of its registration. This provision serves to provide a safeguard against misuse and protect consumers from deceptive practices.

A trade mark infringement action can be brought against:

- the use of a trade mark identical or similar to another's registered trade mark on goods or services identical or similar to the designated goods;
- delivering, selling, forging, imitating or possessing a trade mark identical or similar to another's registered trade mark to use or cause a third party to use such trade mark on goods identical or similar to the designated goods;
- manufacturing, delivering, selling or possessing equipment to forge or imitate another's registered trade mark or causing a third party to forge or imitate such registered trade mark; and
- possessing goods identical or similar to the designated goods bearing another's registered trade mark or any other similar trade mark to transfer or deliver such goods.

The remedies for trade mark infringement include an injunction against the infringement, compensatory damages, destruction of infringing goods or implementation of other measures necessary to prevent further infringement and restore the reputation of the trade mark owner. Six district courts have been designated to adjudicate trade mark infringement cases as the first-instance courts. The second instance court is the Patent Court, and the final instance court is the Supreme Court.

Following the lead under the Patent Act, treble damages were introduced into the Trademark Act in October 2020 as a remedy for intentional trade mark infringement.

A third party interested in the registration of a trade mark may seek invalidation or cancellation of the trade mark if the trade mark was falsely registered (invalidation) or has been misused or not been used (cancellation). KIPTAB decides the first instance of such trial, the second is the Patent Court, and the final is the Supreme Court.

7.3 Industrial Design

The term "design" refers to the shape, pattern or colour of an article and font; each element invokes a sense of beauty through visual perception.

Under the Design Protection Act, as amended in October 2021, the definition of "design" now includes "image" designs. The term "image" is defined as a design which is "used or functions in the operation of devices with figures and symbols expressed in digital technology or electronic methods". The term of a design right commences at the time of registration and ends 20 years after the application filing. The invention must possess visually aesthetic shapes, patterns and/or colours, as well as novelty, creativity and industrial applicability, to be registrable as a design.

Regarding the novelty requirement, even when a design filed for registration has lost novelty, exceptions are recognised under certain conditions. Under the 2023 December amendment, procedural provisions specifying the timing and deadline for submitting documents required to avoid deemed loss of novelty were removed, providing greater flexibility in applying for exceptions. Furthermore, the amendment extended the period for filing design registrations for related designs similar to one's own registered design (ie, base design) to three years (previously one year) from the filing date of the base design.

The registration process takes approximately eight or nine months from applying with KIPO, absent objections from KIPO. Where the design requires no examination of novelty and/or prior arts, registration takes approximately four or five months.

A design infringement action can be brought against:

- direct infringement, such as making, assigning, leasing, importing, or offering for assignment or lease a product associated with a registered design or any similar design; and
- indirect infringement, such as making, assigning, leasing, importing, or offering for assignment or lease articles used exclusively for producing a product associated with a registered design or any similar design.

The remedies for design infringement include an injunction against the infringement, compensatory damages, destruction of infringing goods or implementation of other measures necessary to prevent further infringement and restore the reputation of the design owner. Six district courts are designated as the first instance courts to review design infringement cases. The second instance court is the Patent Court, and the final instance court is the Supreme Court.

Treble damages were introduced into the Design Protection Act in October 2020 as a remedy for intentional design infringement.

A third party interested in registering a design may file a claim seeking invalidation of the registered design on the grounds of false registration. The first instance of such trial will be before KIPTAB, the second is the Patent Court, and the final is the Supreme Court.

7.4 Copyright

Copyright protects the manifestation of the expression of human thoughts and emotions. Examples of copyrightable works under the Copyright Act are:

- novels, poems, theses, lectures, speeches, plays and other literary works;
- musical works;
- theatrical works, including dramas, choreographies and pantomimes;
- paintings, calligraphic works, sculptures, print-making, crafts, works of applied art and other works of art;
- architectural works, including buildings, architectural models and design drawings;
- photographic works (including those produced by similar methods);
- cinematographic works;
- maps, charts, design drawings, sketches, models and other diagrammatic works; and
- computer program works, including a database.

Copyrights encompass a bundle of rights. An author's moral rights are inalienable personal rights and include the following:

- right to make public;
- right of paternity; and
- right of integrity.

An author's economic rights include the following:

- right of reproduction;
- right of public performance;
- right of public transmission;
- right of exhibition;
- right of distribution;
- right of rental; and
- right of production of derivative works.

Neighbouring rights (ie, copyright-related rights) under the Copyright Act include:

- a performer's:
  (a) right of paternity;
  (b) right of integrity;
  (c) right of reproduction;
  (d) right of distribution;
  (e) right of rental;
  (f) right of public performance;
  (g) right of broadcasting; and
  (h) right of interactive transmission;
- a phonogram producer's:
  (a) right of reproduction;
  (b) right of distribution;
  (c) right of rental; and
  (d) right of interactive transmission; and
- a broadcaster's:
  (a) right of reproduction;
  (b) right of simultaneous broadcasting; and
  (c) right of public performance.

The author's moral and economic rights (copyright) start at the moment of the work's creation and subsist during the author's life and for 70 years after the author's death. The copyright term of a work made for hire is 70 years after publication or creation if the work is not published within 50 years of creation.

A copyright may be registered, but registration is not required; however, statutory damage claims for infringement are available only for registered

copyrights. A copyright infringement action can be brought against:

- infringement of an author's moral or economic rights; and
- infringement of neighbouring rights.

The remedies for copyright infringement include an injunction against the infringement, compensatory damages, destruction of infringing goods, or the implementation of other measures necessary to prevent further infringement and reinstatement of reputation. Copyright infringement actions may be brought in any district court as the court of first instance. The second instance court is the High Court, and the third and final instance court is the Supreme Court.

7.5 Others

The Unfair Competition Prevention and Trade Secret Protection Act (UCPA) regulates unfair competition and trade secret infringement. Unregistered, well-known marks may be protected under the UCPA. However, the outcome of an infringement action under the UCPA is highly fact-specific and thus may not afford an adequate remedy to the rights-holder.

Unregistered designs can be protected under the UCPA for three years following the manufacture or production of a prototype bearing the design.

Unauthorised use of another's technical or business ideas with the economic value provided in the course of business negotiation is an act of unfair competition and is therefore prohibited under the UCPA, except where the recipient was already aware of that idea at the time of provision or such idea is widely known within the industry.

The UCPA also provides a "catch-all provision" that prohibits the misappropriation of another's achievement contrary to commercial customs and results in economic harm.

As of April 2022, illegal acquisition and use of data is also an act of unfair competition. Data which is subject to fraudulent acquisition and use is limited to technical or business information, which:

- is generated for the purpose of the provision to a specific target;
- is managed electronically, such as by restricting access by way of ID and password;
- has accumulated considerable economic value; and
- is not managed as a secret.

The acts resulting in economic damage from unauthorised use of the names, portraits, images, voices, statements, etc, of celebrities are regulated as an infringement of so-called publicity rights since the 2022 amendment. Previously, publicity rights had been recognised in a few court precedents while denied in some cases, as no codified law recognised such rights.

Under the UCPA, the term "trade secret" means information – including a production method, sales method, or useful technical or business information for business activities – that is not known publicly, is the subject of reasonable efforts to maintain secrecy and has independent economic value. Any act of infringing trade secrets, such as acquiring, using or disclosing trade secrets improperly, is prohibited.

The available remedies for violation of the UCPA include an injunction against the infringement, compensatory damages including exemplary damages when infringement of trade secrets

is found to be wilful, destruction of infringing goods, or the implementation of other measures necessary to prevent further infringement and restore the reputation of the trade secret owner. Recently, in 2024, the maximum amount of exemplary damages has been increased to five times the incurred damages.

8. Data Protection

8.1 Applicable Regulations

Data protection in South Korea is mainly governed by the Personal Information Protection Act (PIPA), and financial transaction information is subject to additional regulations under Credit Information Protection. There are also, pursuant to these statutes, various ministry-promulgated regulations and agency-issued standards and guidelines. The Act on Promotion of Information and Communications Network Utilisation and Information Protection (ITNA) regulates the network security of IT services, encompassing virtually all online services and spam prevention.

An array of disclosure and consent requirements under PIPA apply to collecting, using or processing personal information (PI). The framework is similar to the regulatory framework under GDPR, the General Data Protection Regulation of the EU. Any "data handler" (an entity that manages personal information files) must, to process PI, obtain express, specific consent from each data subject (eg, a user in the case of online services) after disclosing various conditions and parameters of the data processing, including purposes, the items of PI targeted and period of retaining the PI. Disclosures must also be explicit about the data subject's right not to consent and the consequences for functionality in that case. Online, required consent can generally be in check box format.

For any online or other public-facing collection of PI, a data handler has to adopt a privacy policy and publish it on its website or app under PIPA. A number of matters are required to be stated in a privacy policy. Among other things, a privacy policy has to spell out:

- the purposes of collecting and using PI;
- the types of PI at issue;
- the retention periods for PI once stored and the method of destroying it at the end of the period;
- information on third parties to which the PI may be passed, including their names, the types of PI to be shared, purposes and retention periods;
- the various rights of the data subjects and methods to exercise such rights;
- information on the installation and operation of tools that automatically collect PI (eg, cookies) and how data subjects may refuse the use of such tools;
- the protection measures taken to ensure the safety of PI; and
- the name and contact information of the person or department in charge of PI.

For transfers of PI, there is an important distinction between "entrustment" (analogous to controller-to-processor transfer, less restricted) versus "third-party provision" (analogous to controller-to-controller transfer, more restricted) of PI to third parties. Generally, entrustment refers to a data handler's passing of PI to third parties for the data handler's purposes (third-party data back-up being a prime example) within the scope of services the data subject signed up for. In contrast, the third-party provision of PI involves passing of PI to a third party for that third party's purposes, eg, in cross-marketing. Third-party provision of PI will, in many instances, require additional disclosures and separate

consents, where entrustment will not, although special constraints apply to the latter in the case of financial institutions.

For an offshore IT service provider – be it a social media site, online marketplace, cloud solutions provider, mobility app, aggregator, etc – two critical features of the laws of South Korea are as follows:

- in the case of active, significant targeting of Korean users (as evidenced by a Korean language website, large numbers of local users and so forth – standards of nexus to the Korean market), the service provider can be seen as subject to PIPA, including its panoply of consent and other requirements; and
- under PIPA, offshore IT service providers lacking a business presence in South Korea must appoint a local representative for data compliance and regulatory oversight purposes if they meet any of several thresholds of scale in revenue or local users, such as by reaching KRW10 billion in relevant Korean revenue or 1 million daily average users.

Additionally, a data handler – including offshore, if subject to ITNA based on nexus – will be subject to requirements of designating a chief privacy officer and a chief information security officer (CISO). There are eligibility standards for these posts, such as engineering or data security training or experience in the case of the CISO. The CISO requirement will entail that the CISO serves exclusively in that capacity if the company meets any of certain special tests for scale, such as having KRW500 billion in assets and a threshold amount of revenue or average daily user traffic.

Also, pursuant to PIPA, online services and other IT service providers, including offshore enterprises depending on nexus (see above), are required to maintain a minimum level of insurance, or reserve, to cover potential liability in case of data breaches or other violations of data safeguards if they meet any of several thresholds of scale, in revenue or local users. Required amounts of insurance/reserve range from a meagre KRW50 million to KRW1 billion, depending on user numbers and revenue metrics.

Key Developments of the Amended PIPA

The PIPA underwent extensive amendments in 2023, which will be implemented in phases starting in September 2023. These amendments introduce several significant changes that align with the increasingly complex landscape of international data regulation:

- data portability;
- rights to refuse automated decision-making;
- expansion, beyond data subjects' consent, in the additional bases for offshore transfers of PI;
- modified rules for "entrustment" (controller-to-processor transfers) and re-entrustment; and
- a framework for PI collection (filming) by mobile devices, such as drones and autonomous vehicles.

Much focus has been, and continues to be, directed to specifying the further conditions and standards necessary in order to fill out these new frameworks. Additionally, the amended PIPA stipulates that fines can be up to 3% of global annual sales (averaged over the previous three years). However, this excludes (i) sales unrelated to personal data processing and (ii) sales that are demonstrated to be unrelated to the violation, primarily those not involving Korean data subjects.

8.2 Geographical Scope

While PIPA does not specifically provide for extraterritorial reach to offshore businesses, ITNA has the extraterritorial reach concept adopted in 2020. Additionally, according to guidelines promulgated in December 2020 by the Personal Information Protection Commission, a key regulator of data privacy and the online space, offshore IT service providers are subject to PIPA, including disclosure and consent requirements for data collection and handling, depending on criteria of nexus to the Korean market and users, including whether they offer their services in South Korea, collect PI of a large number of Korean users and/or do business involving advertising orders from South Korea-based enterprises.

8.3 Role and Authority of the Data Protection Agency

Two major agencies are the Personal Information Protection Commission (PIPC) and the Korea Communications Commission (KCC). KCC oversees IT service providers' security matters under ITNA, including offshore entities that fall under ITNA. PIPC will be the main agency, if any, of concern for businesses operating offshore. PIPC covers general data protection issues under PIPA. PIPC has enforcement authority, including issuing corrective orders and/or imposing administrative fines in the event of violations. Also, there is the Korea Internet & Security Agency, under PIPC and KCC, which occasionally conducts on-site inspections and preliminary investigations of data protection compliance.

9. Looking Forward

9.1 Upcoming Legal Reforms

Foreign Investment

On 8 June 2023, the Ministry of Economy and Finance announced a partial amendment to Korea's foreign exchange transaction regulations, which took effect as of 4 July 2023. Key changes include:

- raising the reporting threshold amount from USD50,000 to USD100,000 per year for cross-border remittance;
- raising the reporting threshold amount from USD30 million to USD50 million for foreign currency borrowings; and
- generally reducing the scope of transactions requiring prior report (which in practice functions as requiring prior approval).

Further loosening of the Korean foreign exchange regulation regime is expected, with a view to further facilitating foreign investment into Korea.

Merger Control

On 22 December 2022, the KFTC announced short-term and mid- to long-term legislative reform plans to overhaul the merger notification and review system. Amendment of relevant laws for key short-term plans became effective in 2023, expanding the scope of transactions not subject to merger control to include the following types of mergers, which are generally regarded not to pose a substantial impact on the market:

- mergers between a parent company and a subsidiary;
- establishment of a private equity fund; and
- interlocking directorate that constitutes less than one third of the total number of directors in the target company.

In the mid to long-term, the KFTC plans to introduce formal phases to its merger review process, in line with practices of other competition authorities.

Lastly, the KFTC intends to (i) abolish the post-closing notification requirement and require only pre-closing notifications and (ii) review the need to raise the merger notification thresholds that better reflect current global economic standards.

Trends and Developments

Contributed by:
Sang Hoon Lee and William Kim
Lee & Ko

Lee & Ko was founded in 1977 and is consistently ranked among the largest and most highly respected law firms in Korea by clients, the wider business community and leading legal industry publications. With more than 800 professionals consisting of experienced attorneys from Korea and abroad, advisers, accountants, experts and consultants, Lee & Ko is organised into over 40 specialised practice areas, each of which is highly ranked in its respective practice group. As a premier full-service law firm delivering top-quality legal services for assignments of all varieties and degrees of complexity across a wide range of industry sectors and disciplines of law, Lee & Ko offers a one-stop-shop service, delivering advice and advocacy tailored to meet clients' businesses and unique requirements by providing practical business-focused solutions.

Authors

Sang Hoon Lee is the head of Lee & Ko's employment and labour practice group, and renowned international legal publications have consistently recognised Mr Lee as one of the top employment and labour lawyers in Korea. With over 25 years of experience, Mr Lee has advised clients on matters including, but not limited to, individual employment relationships (eg, employment agreements, termination, wages), collective labour relationships (eg, collective bargaining agreements, strikes, crisis management), sexual harassment investigations, employment litigations, general compliance matters, and non-competition.

William Kim is a senior foreign attorney and partner in the employment and labour practice group. Mr Kim is experienced in advising foreign clients in all matters related to employment and labour including, but not limited to, employment contracts and other documents, changes to work rules, sexual harassment investigations, general compliance matters, employee discipline, terminations, layoffs, wages and hours, severance pay, pensions and benefits, non-competition, employee privacy, temporary or dispatched workers, unjust labour practice, labour unions relations, employee transfers, mergers and acquisitions, and corporate restructuring. Mr Kim also advises foreign clients in navigating complex employment/labour-related litigations in Korea.

Contributed by: Sang Hoon Lee and William Kim, **Lee & Ko**

Lee & Ko

Hanjin Building
63 Namdaemun-ro
Jung-gu
Seoul 04532
Korea

Tel: +82 2 772 5944
Fax: +82 2 772 4001
Email: William.kim@leeko.com
Web: www.leeko.com

An Inconvenient Truth: A Need for Greater Scrutiny in Workplace Harassment Claims

Introduction

To be clear from the outset, this discussion is not intended to diminish the severity of workplace harassment claims and the need to protect legitimate complainants. The law was designed to protect such employees from workplace harassment, and a vast majority of cases require company intervention to prevent actual or potential harm to the employees and the company. However, recent experience has shown a material increase in the number of possible "bad actors" with co-ordinated claims that are negatively impacting the claims and interests of legitimate complainants. These few bad actors have caused companies and their respective investigation teams and counsel to expend greater resources to investigate, required longer investigation periods for a broader investigation scope, increased the risk of permanent harm to the workplace environments, and delayed remedies and resolutions.

Case scenario

Sitting across from the employee's counsel in the video conference room at our firm, counsel quietly listened as the employee's counsel provided an extensive verbal summary of the alleged acts of workplace harassment suffered by her client over the past six months. Her client joined the interview remotely because she was alleged to have suffered so much mental and emotional suffering that she was admitted to one of the largest general hospitals in Seoul, Korea. On the screen, the complainant appeared in hospital clothes, hair unkempt, and speaking in a voice so unusually soft it was difficult to hear through the medical mask that covered most of her face. Visually, one could conclude that this employee had suffered through the most heinous forms of workplace harassment.

As the external counsel for the employer client, engaged to conduct an objective investigation per the Labour Standards Act, this situation presents a critical question: "In the evolved landscape and practices of workplace harassment claims, how should counsel, on behalf of the client, conduct the investigation to ensure that the process is not unduly influenced by visual and verbal biases, so that the complainant and the alleged harasser are both given a fair and objective review?"

The landscape

An employee can receive medical care and possible employment benefits and protections under

the Industrial Accident Compensation Insurance Act (IACIA) and the Labour Standards Act (LSA), including protections against termination during the treatment period and 30 days after returning from treatment if their medical condition is recognised as an occupational injury. While the IACIA recognises emotional or mental distress as a category of occupational injury, in practice, it is often difficult to demonstrate the causality between the condition and work. Furthermore, companies must:

- investigate workplace harassment claims if a claim is reported or if the company has reason to believe workplace harassment could have occurred;
- separate the complainant from the alleged harasser; and
- investigate confidentially without retaliation against the complainant.

In 2023 and 2024, a notable trend of increasing frequency of workplace harassment claims has caused legal counsel to question a complainant's good faith. To uphold the intent of the law and protect employees, companies must now be prepared to objectively distinguish between legitimate cases and those possibly motivated by alternative objectives.

Case characteristics that might trigger the need for a more comprehensive investigation include the following.

- An employee's internal workplace harassment claim or a petition to the labour office is accompanied by similar claims from other employees at or around the same time against the same alleged harasser(s).
- The claim is often filed after an identifiable event, including a recent meeting to discuss the complainant's sub-par performance issues, discussions about mutual separation, newly announced organisational changes, newly appointed team leaders or country managers, or a whistle-blowing case implicating the complainant.
- The complainant(s) exert/s tremendous effort to bolster their claim(s), including visual cues of severe harm, provision of an extensive document that suggests a deliberate consolidation of facts, witnesses, and audio recordings over a long period, voluntary admission into general hospitals, emails to the head office (outside the local organisation) during the investigation, emails showing intent of bodily harm (even suicidal thoughts), and suggestions of mass resignations and numerous legal actions against individuals and/or the company.

A company's response

In response, companies must now exercise greater objectivity, applying the totality of circumstance standard, including even a review of a complainant's motives – an element that may be deemed taboo.

Here are some suggestions.

- Initially, all claims must be treated equally and responded to in accordance with the law.
- Identify the triggering event(s), if any, for the claim to ascertain the broader context under which the claim(s) was/were brought. This step would better ensure an assessment of the objective severity and credibility of the complainant and subsequent witnesses.
- Ensure reasonable due process during the investigation – not just for the complainant.
- Expressly instruct the investigation team and any engaged external counsel to highlight and focus on the facts without being influenced by the appearance of severity or harm,

even if the investigation requires more time and a broader scope.
- Prepare for case escalation (eg, emails to higher management to exert pressure on the investigation team, threats of media coverage, claims of more extreme bodily harm) – especially when a complainant believes they are not getting the desired results. An effective external counsel can guide on the possible risks and, more importantly, on whether the risks are manageable or defensible.
- Prepare to continue any previously initiated processes that could have triggered the workplace harassment claim, such as any performance improvement plans or discussions on mutual separation or new business initiatives. An effective external counsel can guide the company in neutralising any attempt by a potential bad actor complainant, seeking to disrupt such processes.
- Communicate with both the complainant and the alleged harasser to update them on the investigation process to minimise the risk of escalation and workplace environment deterioration.

The conclusion

A few bad actors in recent periods must not be allowed to dilute the legal measures to protect employees and enhance the workplace environment. By objectively considering the risks above and the measures for identifying and addressing them, companies can help ensure the integrity of their internal investigations and remedial measures even at the cost of a longer investigation and greater resources.

SWITZERLAND

Law and Practice

Contributed by:
Philippe Nordmann, Marion Bähler, Dario Glauser, Christian Hagen and Samuel Lieberherr
Walder Wyss Ltd

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Authors

Philippe Nordmann is a partner and co-head of the employment law team at Walder Wyss. He advises companies as well as executive employees on all aspects of employment law (drafting employment contracts and employee regulations, setting up compensation schemes, support concerning dismissals and plant closures, advising companies in negotiations regarding collective bargaining agreements, assignments of employees, staff leasing, work permits, competition clauses, etc) and has substantial experience in litigation. Philippe has been vice-president of the Personnel Appeals Commission of the canton of Basel-Stadt since 2016. His recent publications include the Swiss contribution to the Chambers Employment 2022 Global Practice Guide.

Marion Bähler is a partner in Walder Wyss's corporate/M&A team. She is a specialist in cross-border and domestic M&A as well as venture capital transactions, joint ventures, and other complex corporate and commercial transactions. She regularly provides guidance to startups and investors on a wide range of venture capital matters, such as financing rounds, acquisitions, participation plans (ESOPs) and exits. Additionally, she offers advice to companies on general corporate law matters, corporate governance, and other legal aspects related to their day-to-day operations.

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Dario Glauser is an associate in the employment law and litigation teams at Walder Wyss. He advises domestic and international clients on contentious and non-contentious employment law matters in general and in connection with employee terminations, bonus schemes, restrictive covenants as well as social security implications. In this context, he also represents parties in court on a regular basis. He is a member of the Basel and Swiss Bar Associations.

Samuel Lieberherr is a counsel in the corporate/M&A team at Walder Wyss. He is a specialist in domestic and international M&A transactions and advises investors on acquisitions, private equity and venture capital transactions. Other preferred areas of practice include corporate law and reorganisations. Additionally, he advises clients on all matters of business law relating to their daily operations and supports them regarding corporate governance and ESG. Samuel is praised for his pragmatic advice and good understanding of the clients' businesses. He is fluent in German and English.

Christian Hagen is a managing associate in the corporate/M&A team at Walder Wyss. He advises clients on all questions of contract law, commercial and corporate law, as well as health and medical law. He specialises in national and international M&A transactions of non-listed companies (private M&A), including venture capital and private equity transactions, management buyouts and financing rounds. His particular focus is on projects in the healthcare, life sciences and IT sectors. In addition, he advises corporate clients on legal matters related to their daily business, corporate law (foundation, capital increase and change, as well as liquidation of all kinds of companies) and questions of group structuring and financing.

Contributed by: Philippe Nordmann, Marion Bähler, Dario Glauser, Christian Hagen and Samuel Lieberherr, **Walder Wyss Ltd**

Walder Wyss Ltd

Seefeldstrasse 123
P.O. Box
8034 Zurich
Switzerland

Tel: +41 58 658 14 50
Fax: +41 58 658 59 59
Email: philippe.nordmann@walderwyss.com
Web: www.walderwyss.com

1. Legal System

1.1 Legal System and Judicial Order

Switzerland has a civil law legal system. The most important source of law is written law. Switzerland's federalist structure has three levels:

- the Confederation (the federal state);
- the cantons (the states); and
- the municipalities (the local areas).

The Federal Constitution ranks first in the order of priority. It allocates certain authorities to the Federal Confederation. Where an area is not allocated to the Federal Confederation, the cantons exercise sovereign rights.

The different forms of written law generally have this order of priority:

- federal laws prevail over cantonal laws;
- constitutional rules prevail over ordinary statutes; and
- statutes enacted by a legislative body prevail over regulations prepared by a government or administrative body.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

The topic of foreign investment control is currently on the political agenda in Switzerland.

Unlike many neighbouring countries, Switzerland has no foreign investment control regime in place. No notification or clearance of a governmental agency is required when a foreign national or a foreign company invests in Switzerland or acquires a Swiss company. However, in specific sectors such as residential real estate, banking, insurance, national defence and electricity, sector-specific restrictions apply.

Depending on the outcome of current political initiatives, Switzerland might implement a limited foreign investment control regime in the foreseeable future. The administration published a piece of draft legislation at the end of 2023 focusing on state-owned investors active in particular critical sectors. There is still opposition to the draft legislation; the argument being that the cost/benefit ratio is unfavourable and the existing regulations are sufficient. It remains subject to the further political process whether and, if so, what foreign investment legislation will be introduced.

Switzerland is one of the world's largest recipients of foreign investment. It is also one of the world's largest investors abroad. Being open to inward foreign investment is important for Switzerland as a business centre. The country, therefore, aims to remain attractive for foreign investment even if a screening of foreign investment is introduced as a result of the current political initiatives.

2.2 Procedure and Sanctions in the Event of Non-compliance

For the time being, no general foreign investment control regime is in place. For current political initiatives, see above under **2.1 Approval of Foreign Investments**. Only in specific regulated sectors do foreign investors need to obtain approvals. The steps vary depending on the process set forth for the regulated sector.

2.3 Commitments Required From Foreign Investors

For the time being, no general foreign investment control regime is in place. For current political initiatives, see **2.1 Approval of Foreign Investments**. In certain regulated sectors, the foreign investors need to undergo a screening regarding the source of funds.

2.4 Right to Appeal

Depending on the regulated sector, the legal process to challenge a decision by an authority may vary. As a general principle, decisions taken by an authority can be challenged in court.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

In Switzerland, there are different ways to engage in commercial activities, either through structures that require capital investment or through personal commitment with associated liabilities. Accordingly, a variety of legal forms are available in Switzerland, including sole proprietorships, general partnerships, limited partnerships, corporations, LLCs, co-operatives and foundations. While Switzerland, as a member state of the Hague Trust Convention, recognises foreign trusts, trusts are not available under Swiss law, and comparable functions are served by foundations.

The most frequently used structures for the development of commercial activities are share corporations and limited liability companies (LLCs), both providing substantial flexibility and enabling the accommodation of a broad range of possible governance and operation setups.

Share corporations have a mandatory share capital of CHF100,000 split into shares of a nominal value that needs to be higher than zero, which can be issued to one or more shareholders. At incorporation, at least CHF50,000 portion of the share capital must be paid in cash or by contribution in kind of assets or rights.

LLCs have a mandatory quota capital of CHF20,000 split into quotas of a nominal value of CHF100 or more, which can be issued to one or more several quota holders. The entire quota capital must be paid in cash or by contribution in kind of assets or rights.

Shareholders of a share corporation are not disclosed in any publicly available register (except under the disclosure rules for listed companies). In contrast, the commercial register reflects the quota holders of all LLCs.

3.2 Incorporation Process

Typically, share corporations and LLCs are incorporated within two weeks, although it is possible to accelerate the process if necessary.

The incorporation requires the filing and registration in the competent commercial register of the canton of the seat of the following documents:

- a public deed on the resolutions of the founders' meeting;
- articles of association;
- proof that the share or quota capital has been paid in and/or proof that contributions in kind were made;
- documentation on the appointment and the acceptance thereof of the board of directors/management and the auditors (if any);
- legalised signature specimens for those directors and other representatives with signatory rights; and
- documentation of the company's domicile.

3.3 Ongoing Reporting and Disclosure Obligations

Corporate Actions

A number of corporate actions and changes need to be registered in the commercial register, including:

- changes in the board/management;
- changes of signatories;
- in the case of an LLC, changes in the quota holder(s); and
- changes to the articles of association, including changes to the company's registered seat, capital, purpose, transfer restrictions, etc.

Reporting to the Equity Holders and Audit Requirements

The directors/management of a private company need to submit the company's business report, consisting of (i) annual financial statements and, for larger entities, (ii) a management report and (iii) consolidated financial statements to the shareholders/quota holders for approval.

While the financial statements of private companies do not have to be filed in a public register or publicly disclosed, listing regulations require listed entities to publish their financials in line with international standards.

Whether an ordinary or a limited audit of the financial statements needs to be performed depends on a company's size and economic relevance. Smaller companies can, with the unanimous consent of their shareholders/quota holders, waive the audit requirement altogether under certain conditions.

The financial statements of private companies are subject to an ordinary audit requirement in case, for two consecutive fiscal years, at least two of the following threshold values are exceeded:

- CHF20 million for the balance-sheet total;
- CHF40 million for revenue; and
- 250 full-time employees.

A company must also undergo an ordinary audit if it must consolidate or if shareholders holding at least 10% of the company's shares request an ordinary audit (opting up). An ordinary audit of the annual financial statements can also be required by the company's articles of association or a resolution of a shareholders' meeting.

If the above criteria are not met, a company's financials are subject to a limited audit.

A company may limit the audit partially (opting down) or fully (opting out) with the sharehold-

ers' unanimous consent if the company does not employ more than ten full-time employees.

Beneficial Owners

Companies are required to keep a register of the beneficial owners of the shares issued by them, and such beneficial owners must be disclosed to the company by the shareholders when the threshold of 25% (on a standalone basis as well as when acting in concert) of the share/quota capital or votes is reached, within one month following the relevant acquisition.

Tax Filings

Annual tax returns must be made on an annual basis, while various other taxes are subject to a variety of deadlines.

3.4 Management Structures

Share corporations and LLCs, in general, have three bodies, namely:

- the shareholders' meeting/quota holders' meeting;
- the board of directors/management; and
- the auditor (subject to potential opting-out).

The shareholders' meeting is the supreme authority of a share corporation, resolving the fundamental organisation of the company, electing the board of directors and taking a (limited) number of key decisions.

The board of directors is the executive body responsible for all matters not reserved for the general meeting, and shall manage the business of the company to the extent it has not delegated such management to individual members or the executive management.

The auditor is a controlling body, with the scope of its tasks depending on whether a limited or ordinary audit is to be conducted.

Despite corporate law thus generally providing for a one-tier model, in practice, the day-to-day management (except for certain reserved matters) is, in many cases, delegated to the executive management, effectively leading to a two-tier structure. Certain companies, including banks and insurance companies, are even legally required to establish such two-tier structure The following are non-transferable, inalienable duties that may not be delegated:

- the overall management of the company and the issuing of all necessary directives;
- determination of the company's organisation;
- the organisation of the accounting, financial control and financial planning systems as required for the management of the company;
- the appointment and dismissal of persons entrusted with managing and representing the company;
- overall supervision of the persons entrusted with managing the company, in particular with regard to compliance with the law, articles of association, operational regulations and directives;
- compilation of the annual report, preparation for the general meeting and implementation of its resolutions;
- filing an application for a debt restructuring moratorium and notification of the court in the event that the company is overindebted; and
- in the case of companies whose shares are listed on a stock exchange, the preparation of the remuneration report.

3.5 Directors', Officers' and Shareholders' Liability

In general, members of the board of directors and the executive management are personally responsible to the company, its shareholders and creditors for damages caused intentionally or negligently by default of their duties. The liability is, however, excluded if a task was properly delegated and if due care was given in selecting, instructing and supervising the person(s) put in charge of the relevant task. Under the business judgement rule, a business decision taken in a proper, unbiased and reasonably informed manner does not lead to liability, even if, in retrospect, it becomes clear that such decision was materially wrong and to the detriment of the company.

Liability actions can be brought by the company, its shareholders (either directly if they suffered direct damage or on behalf of the company in case of indirect damages such as by a diminished share value) and, in the event of its bankruptcy only, the company's creditors. However, formal actions against board members are not common in practice.

Once shareholders have fully paid in their shares, they are not personally liable for the company's obligations. Under the "piercing of the corporate veil" concept, shareholders can, in exceptional cases, be held liable if the legal separation between the shareholder and the company has been disregarded and it would be abusive to rely on the legal independence of the company.

4. Employment Law

4.1 Nature of Applicable Regulations

Nature and Hierarchy of the Legal Rules Governing Employment Relationships

There are various legal sources which may be of relevance when it comes to determining the mutual rights and obligations in connection with a particular employment relationship. These are typically the following (listed in hierarchical order):

- mandatory statutory law (including pertinent case law);
- mandatory standard employment contracts, ie, a special kind of legislative decree (as the case may be);
- collective bargaining agreements (as the case may be);
- operating regulations (as the case may be);
- employment contract;
- regulations of the employer (if any);
- non-mandatory standard employment contracts (as the case may be);
- non-mandatory statutory law (including pertinent case law);
- instructions of the employer (if any); and
- judge-made law based on the hypothetical will of reasonable contracting parties (in the absence of any other applicable legal source).

4.2 Characteristics of Employment Contracts

Principle of Freedom of Form

Principle

Swiss employment law is governed by the principle of freedom of form, meaning that there are, as a matter of principle, no formal requirements for the conclusion of an employment contract. Therefore, the conclusion of an employment contract generally only requires explicitly or

impliedly communicated corresponding declarations of intent pursuant to which:

- the employee undertakes to work in the service of the employer for a limited or unlimited period; and
- the employer undertakes to pay a remuneration to the employee.

For the purpose of proof alone, however, it is always advisable to conclude an employment contract in writing.

Exceptions

There are also exceptions to the before-mentioned principle of freedom of form. Firstly, there are specific employment contracts whose conclusion requires the observation of the written form (eg, apprenticeship contracts). Secondly, there are a number of specific contractual provisions in any employment contract that may only be bindingly agreed upon in writing (eg, post-contractual non-compete restrictions).

Duration of Employment Contracts

Permanent versus fixed-term employment contracts

Swiss employment law provides for two basic types of employment contracts, ie, permanent and fixed-term employment contracts:

- permanent employment contracts are entered into for an indefinite period, and their termination requires a notice of termination (which may, in the sense of temporal protection against terminations, not be given at an inopportune juncture); and
- fixed-term employment contracts simply cease at the end of their fixed term and do not, at least as a matter of principle, provide for a premature ordinary termination option (although this is a possibility the parties may agree on).

Prohibition of "illegal chain employment contracts"

In order to guarantee a minimum of temporal protection against terminations for the benefit of the employee, case law has developed the rule that it is not possible to agree on multiple consecutive fixed-term employment contracts without an objective reason for preferring this to a permanent employment contract. In the absence of such an objective reason, the seemingly fixed-term employment contracts are, therefore, simply reinterpreted into one permanent employment contract.

Maximum Duration of Employment Contracts

After ten years, any fixed-term employment contract concluded for a longer duration (which is extremely unusual) may be terminated by either party by giving six months' notice expiring at the end of a month.

4.3 Working Time

No Minimum Working Time for Salaried Employees

Swiss law does not provide for minimum working times. As a matter of principle, it is up to the parties to agree on a salaried employee's workload.

Maximum Working Time for Some Salaried Employees

Maximum weekly and daily working time for a large group of salaried employees

At least for a large group of employees employed in Switzerland, the Federal Act on Work in Industry, Trade and Commerce (the "Labour Act") provides for weekly and daily maximum working times. These maximum working times pursuant to the Labour Act particularly, but not exhaus-

tively, apply to most so-called "blue-collar workers" but explicitly not to employees holding a higher executive position, employees performing a scientific activity and employees performing an autonomous artistic activity (to name a few of the exceptions).

Maximum weekly working time for salaried employees who are subject to the Labour Act

With regard to employees who are subject to the Labour Act, the maximum weekly working time is generally either 45 hours (roughly simplified: for employees performing predominantly intellectual work in offices or office-like jobs) or 50 hours (roughly simplified: for employees with a predominantly manual field of activity). These limits may still be exceeded in exceptional cases, however.

Maximum daily working time for salaried employees who are subject to the Labour Act

With regard to employees who are subject to the Labour Act, there is also a general maximum daily working time of 12.5 or 13 hours (depending on the calculation method) to be observed. This follows (indirectly) from the Labour Act's various provisions regarding minimum rest periods (such as mandatory minimum breaks and the general prohibition of work during the night and on Sundays/public holidays).

Overtime and Extra Hours

Distinction between overtime and extra hours

There are (respectively, may be) two main categories of hours worked in excess of the applicable usual weekly working time that need to be distinguished:

- "overtime" means the hours that an employee works in excess of the (usual) weekly working time that has been contractually agreed, is customary or has been defined in an applicable collective bargaining agreement or standard employment contract; and
- "extra hours" means the hours that an employee works in excess of the applicable maximum weekly working time (if any).

In the context of variable working time systems (eg, flexitime systems), there may be an additional important category of hours worked in excess of the applicable usual weekly working time (ie, hours worked based on the employee's "time sovereignty" which are to be distinguished from overtime).

Employee's duty to perform overtime and extra hours

While the employee is obliged to perform overtime if such overtime is required and to the extent they are able and may reasonably be expected to do so, the performance of extra hours (additionally) requires the existence of exceptional circumstances.

Compensation for overtime and extra hours

Pursuant to statutory law, overtime and extra hours are principally compensated by corresponding time off (only if the employee consents) or by an additional salary payment including a 25% surcharge (if the employee does not consent to compensation by time off).

However, this statutory compensation rule is only mandatory with regard to extra hours (for some employees, only from the 60th extra hour per calendar year). With regard to mere overtime, any employee's compensation claim (ie, both a compensation in cash or in kind) may be excluded by a parties' agreement observing the written form or by a respective provision in a collective bargaining agreement or standard employment contract.

4.4 Termination of Employment Contracts

Freedom of Termination

Principle

Ordinary terminations of employment (ie, terminations observing the applicable notice period) do not require a particular lawful reason, so Switzerland may be described as an "employment at will" jurisdiction. If the other party so requests, the party giving notice must state its respective reasons for termination in writing.

Limitations to the principle

However, there are important limitations to the before-mentioned principle of freedom of termination, as set out below.

- Terminations must principally observe the applicable notice period (during which the employer remains obliged to pay the employee's compensation).
- Terminations may never be issued in bad faith (so-called abusive terminations), whereas such bad faith is specified in a non-exhaustive legislative enumeration of circumstances (eg, bad faith is assumed if a termination is the result of the other party asserting claims under the employment relationship in good faith) – while even an abusive termination is valid, it entitles the terminated party to a penalty payment of up to six monthly salaries (provided that said party submits a written objection against the termination before the expiry of the notice period and brings the claim before the competent court within 180 days of the end of the employment relationship).
- Terminations with immediate effect (ie, without observing the applicable notice period or an agreed fixed term) require the existence of good cause. This is only very exceptionally assumed if the terminating party may not reasonably be expected to continue the employment until the expiry of the applicable notice period or the agreed fixed term and acts within just a few days of becoming aware of the respective good cause – while even respective terminations without good cause result in an immediate termination of the employment, the (non-)existence of good cause determines the further legal consequences of a termination with immediate effect, such as an additional penalty payment of up to six monthly salaries (in the case of an employer's termination without good cause).

While statutory law does not provide for severance payments, this may, in particular, be provided for in employment contracts or collective bargaining agreements (subject to the respective prohibition for members of the board of directors, the executive board and the advisory board, and persons close to them, of Swiss stock corporations whose shares are listed on a stock exchange).

Termination Agreements

As a matter of principle, the parties may agree on a mutual termination of their employment relationship in a termination agreement. This, however, requires that such a termination agreement is not concluded to circumvent statutory provisions protecting the employee's interests (such as mandatory provisions in connection with incapacity for work due to illness or accident) but rather constitutes an actual "settlement". It is against this background that respective termination agreements usually provide for an additional "voluntary" severance payment that shall compensate the employee for a fixation of an exact termination date (respectively, the exclusion of any statutory prolongation of the employment in connection with an employee's incapacity for work) and/or which shall compensate the

employee for a waiver of his or her potential claim to an additional penalty payment in view of an abusive termination. Non-compliance with the "actual settlement" requirement leads to the entire termination agreement being declared null and void.

Collective Redundancies

Procedural rules to be followed

The termination of a certain minimum number of employees (in any case at the very least ten employees) within 30 days and for reasons not pertaining personally to the affected employees (ie, collective redundancies) is subject to specific procedural requirements. Most importantly:

- an employer may not decide to carry out collective redundancies before having informed the works council or (in the absence of such a works council) the employees in writing (including a copy sent to the cantonal employment office) and having consulted with them;
- in connection with such consultation, the employer must at least provide the works council or the employees the opportunity to formulate (non-binding) proposals on how to avoid redundancies, limit their number and/or mitigate their consequences within a set deadline of (in standard cases) approximately two weeks (otherwise, any respective termination would qualify as abusive and entitle each affected employee to a penalty claim of up to two monthly salaries);
- the employer must notify the cantonal employment office about the results of the consultation and provide it with further appropriate information in writing (including a copy sent to the works council or the employees); and
- no individual employment relationship eventually terminated in the course of collective redundancies may end until at least 30 days after such notification of the cantonal employment office.

Employer's duty to issue a social plan

Only employers normally employing at least 250 employees and intending to make at least 30 employees redundant within 30 days for reasons not pertaining personally to the affected employees are obliged to negotiate a social plan (ie, an agreement setting out measures to avoid redundancies, to reduce their number and to mitigate their consequences) with the works council or (in the absence of such a works council) the employees. If the employer fails to reach a respective agreement with the works council or the employees, the social plan will be issued by an arbitral tribunal.

4.5 Employee Representations

Optional Constitution of a Works Council

According to the Federal Participation Act, employees of a Swiss employer with a headcount of at least 50 are entitled (but not obliged) to constitute a works council. At the request of 20% of the employees (or at the request of 100 employees of an employer with a headcount of more than 500), an anonymous vote must be held to determine whether the majority of the employees casting a vote are in favour of the suggested constitution of a works council.

Participation Rights

Also, according to the Federal Participation Act, the management must provide the works council with all the information necessary to carry out its tasks properly (at least once a year). In addition, the works council has special participation rights (such as specific information rights, consultation rights or even a right of co-decision) in connection with questions relating to occupational safety and employee protection, transfers

of undertakings, collective redundancies and selected topics in connection with occupational pension funds. In the absence of a works council, the employees may exercise their respective rights individually.

Far-Reaching Consequences of a Violation of Participation Rights

The potential consequences of a violation of the before-mentioned participation rights are not uniform but may, depending on the pertinent subject, be quite far-reaching (eg, pursuant to case law, the termination of an affiliation contract with an occupational pension fund without the necessary consent of the works council/employees must be considered null and void).

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Taxes Applicable to Employees

Income tax

Income tax is levied at federal, cantonal and municipal levels on:

- the worldwide income from all sources in case of a tax resident employee (so-called "unlimited taxation"); or
- income earned in Switzerland in case of a non-tax resident employee ("limited taxation").

Individuals are considered tax resident if they are:

- Swiss resident (ie, the centre of vital interests is in Switzerland);
- involved in a gainful occupation and staying at least 30 consecutive days in Switzerland; or
- staying at least 90 consecutive days in Switzerland (irrespective of any gainful occupation).

Exempt from unlimited taxation is income from enterprises and permanent establishments outside of Switzerland. Further exemptions from income tax may apply, eg, with regard to certain types of income (such as income from inheritance, gifts and matrimonial property rights, which may however be subject to gift or inheritance taxes), capital gains from disposal of privately held movable assets (eg, shares; such movable assets are in principle exempt unless the taxpayer is deemed a professional dealer) and gains from immovable assets (ie, real estate) located in Switzerland.

Swiss income tax rates are progressive, with the marginal income tax rates varying between approximately 22% and 41%. Reduced taxation applies for certain non-occupational income (such as dividend income in case of qualified participation of at least 10% of the nominal share capital). The applicable tax rates are determined based on the worldwide income, irrespective of whether unlimited or limited taxation applies.

Swiss domestic tax law and the above principles on Swiss income tax may be overruled if, in an international context, a double taxation treaty (DTT) applies. DTTs have been concluded by Switzerland with over 100 countries.

Wealth tax

Levied on a cantonal and municipal level only, the distinction between unlimited and limited taxation also applies.

In case of unlimited taxation, wealth tax will be levied on the worldwide wealth, excluding assets attributable to business operations, permanent

establishments or real estate outside of Switzerland (these assets are, however, considered for determining the applicable tax rate). Wealth tax rates vary significantly depending on the canton and municipality of residence, with top marginal wealth tax rates varying between approximately 0.1% and 1.0% above a certain threshold, which is usually tax-free.

Social security contributions

Levied on the gross income, the "state pension" covers old-age and survivors' insurance, disability insurance, and loss of earnings compensation in case of (military or similar) service and maternity. Social security contributions are split 50:50 between employee and employer, with the employee's portion amounting to 5.3% of the gross salary and being deducted and directly paid by the employer.

Occupational pension contributions

Contributions to the occupational pension scheme(s), to be established or acceded to by the employer for its employees, are determined by the specific pension scheme based on individual factors (such as age and insured salary) and are usually split 50:50 between employee and employer (the employee's portion may in any case not exceed 50% of the total contributions).

Employees earning above a certain annual threshold (from 2023: CHF22,050) are mandatorily required to join the employer's pension scheme. Mandatory pension schemes are limited to a maximum annual salary (from 2023: CHF88,200), above which the employer may establish or accede to a voluntary pension scheme.

Unemployment insurance contributions

Providing certain compensation for a limited period in case of unemployment, weather-induced loss of working hours, short-time work, and non-payment in case of the employer's insolvency, the contributions amount to 2.2% of the gross salary not exceeding CHF148,200, and 1% of the gross salary exceeding the said amount, and are split 50:50 between employer and employee.

Non-occupational accident insurance contributions

Employees working at least eight hours per week are mandatorily insured against non-occupational accidents. The contributions depend on the individual insurance contract and are usually borne entirely by the employee, and deducted and directly paid by the employer.

Daily sickness benefits insurance contributions

For a limited period, the employer is obligated to continue paying the salary if an employee is prevented from working due to illness. The employer may take out insurance to cover this risk and agree with the employee to bear up to 50% of the contributions, subject to the individual insurance contract.

Social health insurance premiums

Though mandatory for all Swiss residents, social health insurance is a private matter of each employee, not related to the employment relationship. The employer is not obligated to contribute, nor is it customary that the employer contributes, to its employees' social health insurance premiums.

Taxes Applicable to Employer

With regard to general taxation, please see **5.2 Taxes Applicable to Businesses**. In addition, from the salary of employees who are:

- non-tax residents (in Switzerland); or
- neither Swiss citizens nor holders of a permanent residency permit nor married to a Swiss citizen,

a wage source tax in the amount of the income tax owed is levied and withheld by the employer.

Social security contributions

The employer's portion of 5.3% is to be paid directly by the employer in addition to the gross salary (from which the employee's portion of an additional 5.3% is deducted and directly paid by the employer).

Occupational pension contributions

See above, as for employees; usually split 50:50, at least 50% are to be borne by the employer.

Unemployment insurance contributions

See above, as for employees; usually split 50:50, at least 50% are to be borne by the employer.

Occupational and non-occupational accident insurance contributions

Occupational accident insurance is mandatory for all employees working in Switzerland and must be borne by the employer. Contributions depend on the individual insurance contract. With regard to non-occupational accident insurance, see above, as for employees.

Daily sickness benefits insurance contributions

See above, as for employees; usually split 50:50, at least 50% are to be borne by the employer.

Family allowance contributions

Family allowances (child and education allowances as well as birth and adoption allowances) are paid by the employer to entitled employees, for which the employer is reimbursed by the competent compensation office. Family allowance contributions are mainly borne by the employer based on a percentage of the salary and depend on the canton and the individual insurance contract (usually between 0.7% and 3.5% of the annual gross salary).

5.2 Taxes Applicable to Businesses

Corporate Income Tax

As for individuals, corporate income tax is levied on federal, cantonal and municipal levels:

- on the worldwide net income from all sources in Switzerland in case of a tax resident legal entity, including companies, co-operatives, associations and foundations (so-called "unlimited taxation"); or
- on net income earned in Switzerland in case of a non-tax resident legal entity ("limited taxation").

A legal entity is considered a tax resident if (i) its statutory seat or (ii) its place of effective management is located in Switzerland.

Exempt from unlimited (corporate) taxation is income from enterprises and permanent establishments or real estate outside of Switzerland. Effective corporate income tax rates depend on the canton and the municipality and vary from approximately 12% to 22%.

Tax losses may be carried forward and offset against income for the following seven years.

Dividends and capital gains are subject to a participation relief in case of participation of at least

10% of the nominal share capital or a fair market value of the participation of at least CHF1 million. In the case of such qualified participations, the corporate income tax will be reduced by the ratio between the net income from the participation and the aggregate taxable income of the legal entity concerned.

Further deductions may be available, such as IP Box, R&D Super Deduction or Notional Interest Deduction.

Capital Tax

Tax resident and non-tax resident legal entities in Switzerland are subject to an annual capital tax on the cantonal and municipal levels. Levied on the tax-adjusted net equity, the applicable tax rates range between approximately 0.001% and 0.53%. The capital tax is creditable to the corporate income tax in some cantons.

Stamp Duty

A one-time capital duty of 1% is levied on any issuance of new shares by a tax resident company exceeding the amount of CHF1 million (nominal value and share premium, any issuance up to such amount being tax-free) and on contributions made to such company. In both cases, certain reliefs are available for, inter alia, recapitalisation, restructuring and migration.

A security transfer tax of 0.15% for Swiss securities and 0.3% for foreign securities applies to any transfer of taxable securities:

- which are transferred against consideration;
- where at least one of the parties involved in the transfer qualifies as a Swiss securities dealer; and
- where none of the available exemptions applies.

Stamp duty is further levied in certain special legal cases (eg, on insurance premiums).

Value Added Tax (VAT)

VAT is levied at a federal level on taxable supplies and services made in Switzerland as well as on the import of goods. Taxable services from abroad are subject to the reverse charge mechanism.

The standard tax rate is 8.1%. A special tax rate of 3.8% applies to accommodation services (eg, hotels), and a reduced tax rate of 2.6% applies to the charge (and import) of certain elementary supplies such as food, water and medication.

Individuals and legal entities providing taxable supplies and services are subject to VAT if such supplies and services exceed CHF100,000 per annum (in certain special cases such as sports associations, the threshold amount is CHF150,000).

Withholding Tax (WHT)

Dividends in cash or in kind from a tax resident company are subject to WHT at a rate of 35%, to be withheld by the company and paid to the Swiss Federal Tax Authorities. The WHT is refundable or creditable in full to any shareholder having recognised the distribution in the income statement or reported it in the income tax return or based on a DTT or, under certain circumstances, the agreement with the EU regarding international automatic exchange of information. A notification procedure is available (instead of paying the tax and claiming the refund) under certain conditions.

Interest payments of tax resident legal entities are subject to WHT if:

- made for customer deposits with Swiss banks; or
- based on a collective debt fundraising (ie, debt raised from more than ten creditors at identical conditions or 20 creditors at deviating conditions, and the aggregate debt concerned amounts to at least CHF500,000).

Royalties paid by tax resident legal entities are not subject to WHT as long as they meet at arm's length terms.

OECD/G20 Minimum Tax Rate

The second pillar of the Organisation for Economic Co-operation and Development's (OECD) Two Pillar solution has been implemented in Switzerland following approval of a constitutional amendment by a popular vote on 18 June 2023. On 22 December 2023, the Swiss Federal Council enacted a temporary ordinance with effect on 1 January 2024, implementing a minimum tax rate (Qualified Domestic Minimum Top-up Tax, QDMTT) of 15% for large multinational companies with an annual turnover of at least EUR750 million by means of a supplementary tax. The Federal Council must submit a draft law to Parliament to replace the ordinance within six years of the ordinance coming into force. The Federal Council has further decided to initially refrain from applying the international supplementary tax rules Income Inclusion Rule (IIR) and Undertaxed Payments Rule (UTPR).

5.3 Available Tax Credits/Incentives

Further tax credits and incentives – such as IP Box, R&D Super Deduction or Notional Interest Deduction – may be available; however, this depends on the cantonal implementation (if any) and is therefore subject to the tax domicile.

5.4 Tax Consolidation

Tax consolidation is available for VAT purposes. Legal entities, including permanent establishments, under common control, may form a VAT group, by which intra-group supplies are excluded from VAT.

5.5 Thin Capitalisation Rules and Other Limitations

The minimum equity of a tax resident company is calculated on the asset base, ie, the maximum indebtedness permissible for tax purposes for each category of assets, such permissible maximum indebtedness ranging between 0% and 100%. A company is considered thinly capitalised if the aggregate debt owed to related parties exceeds the calculated permissible maximum indebtedness.

Such a qualification has the effect that:

- related party debt exceeding the calculated permissible maximum indebtedness will be deemed hidden equity for capital tax purposes (ie, increasing the basis of the capital tax); and
- interest payments on such excess related party debt will be deemed a (hidden) dividend, resulting in respective taxes being applicable, in particular a 35% WHT.

5.6 Transfer Pricing

As a principle, Switzerland has no statutory transfer pricing rules other than the requirement that intercompany charges are on arm's length terms. Therefore, Swiss tax authorities accept, in principle, the transfer pricing methods described by the OECD guidelines.

Special rules apply with regard to interest rates on loans granted from or to shareholders and other related parties. The Swiss Federal Tax

Authorities publish, on an annual basis, safe-haven interest rates applicable for the following year. Higher or lower interest rates may be applied if it can be proved that they are on arm's length terms.

5.7 Anti-evasion Rules

Swiss law does not provide for specific anti-evasion rules. Based on Swiss law and decisions by the Swiss Federal Supreme Court, the following two rules have been developed.

- Legal entities are taxable at the registered seat or the place of effective management.
- Arrangements may be disregarded if:
  (a) the taxpayer's legal form appears unusual or unsuitable for its economic goal;
  (b) the legal form appears to have been chosen arbitrarily and only to achieve tax savings; and
  (c) the legal form leads to tax savings.

6. Competition Law

6.1 Merger Control Notification

Mergers and acquisitions must be notified if certain turnover thresholds are reached. Planned concentrations of undertakings such as mergers, acquisitions of sole or joint control over a previously independent undertaking as well as the setting up of full-function joint ventures (Concentrations) must be notified to the Competition Commission (COMCO) before their implementation if the following turnover thresholds are reached in the financial year preceding the Concentration:

- the undertakings concerned together reported a turnover of at least CHF2 billion, or a turnover in Switzerland of at least CHF500 million; and
- at least two of the undertakings concerned each reported a turnover in Switzerland of at least CHF100 million.

Regardless of whether the turnover thresholds above are reached, a Concentration must be notified in any case if one of the undertakings concerned has been held (in a binding decision) to be dominant in a market in Switzerland and the Concentration concerns either the same market or an adjacent, upstream or downstream market.

6.2 Merger Control Procedure

The merger control procedure can include two phases: COMCO has one month for a preliminary assessment of a notified transaction (Phase I). Then, the Concentration may be implemented, unless COMCO opens a Phase II investigation. The Phase II investigation must be completed within an additional four months. Before Phase I and, if relevant, Phase II is completed, Concentrations must not be implemented.

COMCO assesses whether the notified Concentration leads to the creation or strengthening of a dominant market position likely to eliminate effective competition. The threshold for intervention seems comparatively rather high. COMCO also can clear Concentrations under certain conditions and obligations only.

6.3 Cartels

Agreements that significantly restrict competition in a market for specific goods or services and are not justified on the grounds of economic efficiency, and all agreements that eliminate effective competition, are unlawful.

Agreements and concerted practices between competitors (Horizontal Agreements) on prices or price elements (such as rebates), quantities

or the allocation of territories or customers are presumed to eliminate effective competition (so-called hardcore restrictions). Such hardcore restrictions can hardly ever be justified on economic efficiency grounds.

Agreements between undertakings at different levels of the production and distribution chain (Vertical Agreements) regarding fixed or minimum prices are presumed to eliminate effective competition and thus qualify as hardcore restrictions, irrespective of whether the agreement has actual effects on the relevant market. The same is true for agreements on absolute territorial protection. Absolute territorial protection clauses prohibit passive sales, ie, prohibit the fulfilment of unsolicited customer orders.

6.4 Abuse of Dominant Position

Dominant undertakings and undertakings with relative market power behave unlawfully if, by abusing their position in the market, they hinder other undertakings from starting or continuing to compete (eg, by pricing below cost) or disadvantage trading partners (eg, by imposing excessive prices or unfair trading terms).

Undertakings are considered dominant in a specific market if they are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market. A dominant position is generally presumed for a company with a market share of 50% or more. However, under certain circumstances, a lower market share of approximately 40% is sufficient to qualify as a dominant market position.

An undertaking has relative market power if other undertakings are dependent on it for the supply of or the demand for goods or services in such a way that there are no adequate and reasonable opportunities for switching to other undertakings.

The Swiss Cartel Act lists certain behaviours of dominant undertakings and undertakings with relative market power which are considered unlawful (non-exclusive):

- any refusal to deal (eg, refusal to supply or to purchase goods);
- any discrimination between trading partners in relation to prices or other conditions of trade;
- any imposition of unfair prices or other unfair conditions of trade;
- any undercutting of prices or other conditions directed against a specific competitor;
- any limitation of production, supply or technical development;
- any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services; and
- the restriction of the opportunity for buyers to purchase goods or services offered both in Switzerland and abroad at the market prices and conditions customary in the industry in the foreign country concerned.

The abuse of a dominant market position by a dominant company (but not the abuse of relative market power) is subject to a fine of up to 10% of the turnover of such company in Switzerland in the preceding three financial years.

7. Intellectual Property

7.1 Patents

Definition

An invention or process can be patented if it is:

- new and does not form part of the state of the art, ie, all knowledge that has been made publicly available anywhere in the world prior to the patent application;
- inventive, which means that it must not be obvious to a person skilled in the art; and
- industrially applicable and practicable, and it is possible to replicate its implementation.

Neither the novelty nor the inventive aspect are examined prior to the grant of a Swiss patent but can be disputed by third parties in court proceedings challenging the patent.

The following cannot be patented:

- abstract ideas without specific technical solutions, discoveries of natural processes or phenomena, scientific theories and mathematical methods;
- game rules and teaching methods;
- diagnostic, therapeutic and surgical procedures used on humans or animals;
- plant sorts, animal breeds, and other biological procedures for breeding plants or animals (however, biotechnological inventions – such as the extraction of human insulin from yeast cells – can be patented); and
- inventions whose use would be contrary to public policy, explicitly forbidden or immoral.

Application

Swiss patent applications must be filed with the Swiss Federal Institute of Intellectual Property.

The following need to be submitted over the course of the filing process:

- information on the applicant;
- description of the invention;
- at least one patent claim to define the invention;
- technical drawings of reproducible quality;
- declaration regarding international priority rights claimed (if any); and
- names of the individual inventors.

Enforcement and Remedies

Any valid patent can be challenged before the Swiss Federal Patent Court. Patents (or parts thereof) can be cancelled if:

- the invention was not new or innovative at the time of filing; or
- the invention is not described sufficiently clearly and precisely for it to be carried out by a person skilled in the art. This is referred to as insufficient disclosure. The plaintiff can also argue that important elements or steps relating to the invention are not mentioned or obvious in the patent specification.

Patent infringements can be prosecuted through both civil actions and criminal proceedings.

Length of Protection

Patents are protected for 20 years from the date of filing. This period is generally not extendable. However, for certain products (eg, medicinal products) a supplementary protection certificate may be requested that extends patent protection for up to five years.

7.2 Trade Marks

Definition

A trade mark is a protected sign that distinguishes a company's products or services from those of other companies.

The following categories of trade marks are available:

- individual trade marks, being the most common category, typically used by companies

to identify and market their products and services;
- collective trade marks, used for the identification and marketing of products and services by associations and their members;
- guarantee trade marks, guaranteeing that goods and services possess specific characteristics (eg, regarding the quality or geographical origin); and
- geographical trade marks, requiring the existence of a prior registration, a foreign (controlled) designation of origin recognised by Switzerland, a geographical indication, the existence of a Federal Council ordinance or an equivalent foreign regulation.

The following types of trade marks are available:

- word marks;
- figurative marks (optionally with a colour claim); and
- combined word and figurative marks (optionally with a colour claim).

The trade mark owner has the exclusive but transferable and licensable right to use the trade mark for goods or services for which it is registered and can prohibit third parties from using it.

Application
Swiss trade mark applications must be filed with the Swiss Federal Institute of Intellectual Property.

Enforcement and Remedies
Any trade mark can be challenged by means of an opposition if it could be confused with one or more other trade marks. The objection must be filed with the Swiss Federal Institute of Intellectual Property within three months upon registration of the trade mark. Trade marks can be challenged at any time after the expiration of the objection period before ordinary civil courts.

Trade mark infringements can be prosecuted through both civil actions and criminal proceedings.

The cancellation of a trade mark can be requested after a non-interrupted period of non-use of five years; it should be noted that the use of a trade mark either by the trade mark owner or by a third party with the consent of the trade mark owner is sufficient to prevent successful cancellation requests.

Length of Protection
Trade marks are protected for an initial period of ten years from the date of filing and can be renewed for an unlimited number of additional ten-year periods.

7.3 Industrial Design
Definition
The design of products or parts of products is characterised in particular by the arrangement of lines, surfaces, contours or colours or by the materials used.

Designs can be protected if they are:

- new (ie, they have not been made publicly available prior to the date of application or priority); and
- sufficiently distinctive from existing designs in key features,

and are not:

- otherwise unlawful;
- contrary to public policy, explicitly forbidden or immoral; or

- only comprised of features dictated solely by the technical function of the product.

The owner of a design has the exclusive right to its use and can prevent third parties from using it for commercial purposes. Protection covers the external appearance and visual impression of a product. The production, utility, intended use and technical effects of a design are not protected.

Animated creations are not covered by design protection in Switzerland.

Application

Swiss design applications are to be filed with the Swiss Federal Institute of Intellectual Property. Publication can be deferred for up to 30 months.

Enforcement and Remedies

Design infringements can be prosecuted through both civil actions and criminal proceedings.

Length of Protection

Designs are protected for an initial period of five years from the date of filing and can be renewed for additional five years for a duration of up to 25 years.

7.4 Copyright

Definition

Intellectual creations (including visual and audio-visual works, music, works of architecture, computer software and scientific works) with an individual character are copyright-protected works. Software is an explicitly recognised work category. Further, photographs are protected even if they do not have an individual character.

Copyright does not protect, for example, ideas, achievements, products of nature or coincidence, concepts or instructions, laws and regulations. Patent specifications and published patent applications are not protected.

The copyright owner has the exclusive right to determine how and when the copyright-protected work is used. This includes:

- the right to reproduce;
- the right to distribute;
- the right to make a work available to the public;
- the right to perform and present; and
- the right to adapt.

Protection

Protection arises automatically upon the creation of the work, with no registration required. Under Swiss law, it is not necessary to add "©" or "Copyright" for protection to apply.

As there is no register for copyrights, in case of a dispute the copyright owner needs to demonstrate authorship or having been assigned (by operation of law or contractually) ownership. Aside from other means of proof (witnesses, drafts, etc), the Swiss Copyright Act provides for a presumption of authorship, meaning that, unless proven otherwise, the author is deemed to be the person whose name or pseudonym appears on the copies of the work published.

Enforcement and Remedies

Copyright infringements can be prosecuted through both civil actions and criminal proceedings. Remuneration claims for certain types of works are only enforceable by societies for the collective management of copyrights.

Length of Protection

Protection lasts for the life of the author, plus:

- 50 years for computer software and photographs; and
- 70 years for all other copyrights.

7.5 Others

Switzerland does not have an act dealing specifically with trade secrets. Instead, trade secrets are protected under various provisions as set out below.

- Criminal law sanctions persons legally committed to keeping a secret from exploiting or revealing it. It further prohibits industrial espionage. Furthermore, a number of secrecy obligations are enforced with criminal sanctions in various industrial sectors and professions, such as the secrecy obligations applicable to lawyers, physicians, banking, etc.
- Under Swiss competition law, unfair business practices regarding the unlawful procurement, misappropriation or exploitation of information are prohibited. A violation of these rules may lead to civil liability and criminal sanctions.
- Corporate law prohibits the bodies and top management of companies from disclosing or otherwise utilising secret information other than for the scope of their mandates.
- Employment law prohibits an employee from exploiting confidential information acquired in the course of work.
- Agency and procurement law forbids an agent from making use of the principal's trade secrets it has been entrusted with.

Furthermore, Switzerland is a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

8. Data Protection

8.1 Applicable Regulations

Data protection in Switzerland is mainly regulated by the Federal Act on Data Protection (FADP) and its ordinances, particularly the Federal Ordinance on Protection Act. However, sector-specific or overarching data protection legislation may provide for a broader scope of application. The new FADP that entered into force on 1 September 2023 aligned Swiss data protection to a significant extent to the European legislation and has, amongst others, implemented:

- the principle of data protection by design and by default;
- the obligation to perform an impact assessment under certain circumstances; and
- the obligation to notify the Federal Data Protection and Information Commissioner (FDPIC) or data subjects of data breaches unless an exception applies.

Given that Switzerland is not a member state of the EU, the EU General Data Protection Regulation only applies under certain circumstances, eg, if a Swiss-based company offers goods or services to individuals in the EU or monitors the behaviour of such individuals.

8.2 Geographical Scope

The FADP is applicable to the processing of personal data that has an effect in Switzerland, even if they occurred abroad. Therefore, if personal data concerning natural persons in Switzerland is processed abroad, the controller or processor abroad must comply with applicable Swiss law. In addition, private controllers domiciled or resident abroad must appoint a representative in Switzerland if they process personal data of persons in Switzerland.

The FADP establishes certain principles, which must be observed by controllers and – for most principles – also processors.

- Lawfulness – personal data must be processed lawfully, meaning that processing must not violate another norm of Swiss law directly or indirectly aiming at protecting the personality.
- Good faith – data shall be processed in good faith, meaning that the processing shall be evident to the data subject.
- Transparency and purpose limitation – the collection of personal data and its usage must be apparent to the data subject, and use shall be limited to the specified purpose.
- Proportionality – processing must be proportionate to the purpose (data minimisation) and must be "destroyed or anonymised" as soon as it is no longer needed with regard to the purpose of the processing.
- Accuracy – reasonable measures are to be taken to ensure that the personal data is up-to-date, and that it is possible to correct incorrect data.
- Privacy by design and security – controllers must set up technical and organisational measures in order to meet the data protection requirements (privacy by design) and, in particular, to ensure a level of data security appropriate to the risks (data security).
- Privacy by default – unless the data subject directs otherwise, the controller is required to limit the processing to the required minimum through pre-defined settings.

The transfer of personal data to countries that do not provide a level of data protection considered adequate by Swiss law is not permitted unless the protection of the personal data is ensured by other measures (eg, by using the standard contractual clauses of the EU with certain Swiss-specific amendments). In certain cases, the transfer mechanism requires prior approval by or notification to the Swiss Federal Data Protection and Information Commissioner (FDPIC), the Swiss data protection authority.

8.3 Role and Authority of the Data Protection Agency

The FDPIC is an independent body tasked with supervising private persons and federal bodies with respect to data protection compliance. To this end, the FDPIC has published several non-binding guidelines.

The FDPIC may investigate cases either on its own initiative or at the request of a third party. If such an investigation reveals that data protection regulations are being breached, the FDPIC may issue binding orders (eg, that the processing is fully or partially adjusted, suspended or terminated). The individual or entity subject to such order (but not the data subject) may initiate proceedings against such order before the competent court. The FDPIC may also inform the public of its findings and its decisions in cases of general interest, which may lead to negative publicity. Moreover, the FDPIC is subject to the Freedom of Information Act and may be required, upon request, to release information to the public or the media.

The FDPIC does not have the authority to issue any fines. However, law enforcement agencies may issue fines of up to CHF250,000 for certain data protection breaches. These fines may be imposed on the individuals responsible for a breach, including, if applicable, on directors and officers and employees with independent decision-making power, provided these breaches have been committed wilfully (see Article 12, Criminal Code) and on condition that a subject makes a complaint.

In addition, data subjects may directly take legal action against the violation of their rights under the FADP and related Swiss data protection legislation.

9. Looking Forward

9.1 Upcoming Legal Reforms

Revised Corporate Law

The new Swiss Corporate Law entered into force on 1 January 2023, aiming to modernise Swiss corporate law. The main changes are:

- added flexibility of the structuring of the share capital, inter alia with the introduction of the so-called "capital band" (a range within which the company's board may increase or decrease the share capital without further approval by the shareholders' meeting), allowing a company to have its share capital in its functional currency and reducing the minimum nominal value from CHF0.01 to any amount higher than zero;
- added flexibility for dividends, in particular by enabling so-called "interim dividends", ie, dividends from the profits of the current year;
- expanding the rights of minority shareholders;
- enabling virtual shareholders' meetings and written or electronic shareholders' resolutions; and
- restructuring the rules on insolvency and overindebtedness.

Companies have been granted a two-year grace period until 31 December 2024 to amend their articles of association in conformity with the new Swiss Corporate Law.

TAIWAN

Law and Practice

Contributed by:
Yulan Kuo, Brian Hsieh, Jane Wang, Charles Chen and Hsin-Yeh Chiang
Formosa Transnational Attorneys at Law

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Formosa Transnational Attorneys at Law

Formosa Transnational Attorneys at Law was founded in October 1974 by four young lawyers, of whom three had just retired from the Bench, with the vision of providing quality legal services to Taiwan's newly developed economy. For five decades, Formosa Transnational has represented not only Taiwan's leading companies, but also major international clients who rely on its lawyers' ability to provide clear, practical and thorough advice in Chinese, Japanese and English. Its ethos of specialisation, teamwork and service has allowed it to grow with Taiwan. It began by working with the traditional industries and manufacturing that dominated Taiwan's economy in the 1970s. Since then, internet, high-tech and semiconductor companies have relied on its expertise. Today, it is deeply engaged with clients in newly emergent industries such as biotechnology, green energy and AI. To meet the evolving needs of its dynamic clients, it has assembled a team of competent and experienced lawyers and experts to deliver world-class dispute resolution and transactional services.

Authors

Yulan Kuo is a senior partner at Formosa Transnational who has been practising for 30 years. He founded the technology and law department of the firm. His team serves technology industries and now virtually all fields of industry. Under his leadership, his team handled the first patent litigation case adjudicated by Taiwan's IP Court. More recently, he served as lead counsel for a semiconductor company involved in a complex case that included disputes in Taiwan and in the USA. His strategic leadership enabled his client to prevail in both jurisdictions. Yulan is a member of AIPPI, APAA, AIPLA, INTA and ACS.

Brian Hsieh is a partner at Formosa Transnational. He focuses his practice on the areas of intellectual property, administrative law, competition law and data protection. He has counselled on and handled a wide range of regulatory and administrative law matters for many global companies in the technology, e-commerce and online platform industries. Brian has taught constitutional/administrative law at academic institutions for many years. He currently chairs the Taipei Bar Association Academic Exchange Committee as well as the Taiwan Criminal Defense Attorney Association's Education and Training Committee.

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Formosa Transnational Attorneys at Law

Jane Wang is a partner at Formosa Transnational whose practice includes IP litigation, data protection, employment, franchising and emerging technologies. She represents clients in cross-jurisdictional projects, including legal compliance and export control. She advises clients from start-ups to multinational enterprises, and clients with entities registered in low-tax countries. Jane co-chairs the IP practice group of a top-tier global law firm network with 21,000 lawyers from 90 jurisdictions. Jane is a member of the Innovative Technology Committee of the Taipei Bar Association, a charter member of the Taiwan Competition Law Institute, and a member of INTA, APAA, AIPPI and LESI.

Hsin-Yeh Chiang is a senior associate at Formosa Transnational. Her practice is focused on intellectual property, labour law, privacy rights and data protection laws, corporate governance and commercial affairs. She has extensive experience representing multinational clients, including corporations and non-profit organisations in the pharma, technology and e-commerce industries. She is also a certified TPIPAS Internal Management Training Specialist for Personal Data and served as an individual member representative at the Taiwan Bar Association.

Charles Chen is an associate partner at Formosa Transnational, where he has been a member of the firm's technology law division since 2002. His practice focuses on intellectual property, corporate commercial matters, franchising, licensing, competition/antitrust matters, legal compliance and emerging technologies. Charles assists well-known global companies with IP litigation and prosecution in Taiwan and provides advice and service with respect to all aspects of business, such as incorporation plans, employment arrangements and legal compliance issues.

Contributed by: Yulan Kuo, Brian Hsieh, Jane Wang, Charles Chen and Hsin-Yeh Chiang,
Formosa Transnational Attorneys at Law

Formosa Transnational Attorneys at Law

136, 13th Floor
Jen-Ai Road
Section 3
Taipei 106
Taiwan

Tel: +886 2 2755 7366
Fax: +886 2 2708 8435
Email: ftlaw@taiwanlaw.com
Web: www.taiwanlaw.com

萬國法律事務所
Formosa Transnational
Attorneys at Law

1. Legal System

1.1 Legal System and Judicial Order

Taiwan is a civil law country. Legal matters are governed by statutory laws and regulations. Different administrative authorities are in charge of different sectors of laws and regulations. The civil courts, criminal courts and administrative courts handle civil litigation, criminal litigation and administrative litigation in accordance with their jurisdiction and the nature of the cases. A specialised Intellectual Property and Commercial Court adjudicates intellectual property-related litigation and complex commercial cases. Typically, a legal dispute is heard first by a district court. Appeals can be made to the high courts and the Supreme Court.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Foreign investments in Taiwan require approval, although Taiwan in general imposes no restrictions on foreigners entering the Taiwan market. A foreign investor, including investors from Mainland China, Hong Kong and Macau, needs to acquire advance approval for the foreign investment from the Investment Commission of the Ministry of Economic Affairs (MOEAIC). For example, if a foreign investor would like to acquire shares in a Taiwanese company or to establish an entity in Taiwan, approval is required beforehand. Due to political and national security concerns, reviews of investment from Mainland China are stricter than those from other countries.

Taiwan allows foreigners to invest in all sectors except for specific industries in which foreign investments are prohibited due to national security concerns, environmental protection or other stipulated policy reasons. The prohibited sectors include water and gas supply and basic metal manufacturing, among others. There are also limits on foreign shareholders and control over the board of domestic companies in certain industries. These restrictions are set out in the Negative List for Investment by Overseas Chinese and Foreign Nationals. This list is updated from time to time. It is always prudent for a foreign investor to conduct compliance checks when planning its investments in Taiwan.

2.2 Procedure and Sanctions in the Event of Non-compliance

To obtain foreign investment approval, the foreign investor is required to submit an application to the MOEAIC. The applicant needs to illustrate its investment plan, for example, whether the transaction is an incorporation, capital increase, or cross-border merger or acquisition, among others. The MOEAIC will review the application and may ask for supporting documents where it deems necessary. After foreign investment approval is granted, the applicant has to carry out the investment accordingly within the period indicated, including remitting the funds into Taiwan.

Investing without advance foreign investment approval may result in sanctions such as fines, revocation of investment approval or confiscation of invested capital, or may even trigger criminal sanctions if it involves national security issues. Compliance review and professional advice before making such investments is almost always recommended.

2.3 Commitments Required From Foreign Investors

There are usually no specific conditional commitments required by the authority concerning a foreign investment application. However, as foreign investment requires prior approval, the MOEAIC may raise its concerns regarding the proposed investment plan while reviewing the application. For example, the applicant may need to explain the source of funds and the ultimate beneficiaries, and so on. The applicant can liaise with the MOEAIC officer in order to find an acceptable resolution and revise the investment plan accordingly. Once the revised investment plan is approved, the investor needs to follow the plan made, or file for another revision with the MOEAIC.

2.4 Right to Appeal

The authority's rejection of an investment approval may be appealed to the Petitions and Appeals Committee of the Executive Yuan. If the Committee dismisses the investor's appeal, the investor may bring the matter before the Administrative High Court and the Administrative Supreme Court, requesting proper remedies from the judicial branch. While an investor is always entitled to seek judicial review of the authority's refusal to grant an approval, in practice, very few choose to challenge the authorities, due to concerns about the time and effort required for appeals.

The closing of a foreign investment is usually time-sensitive. The applicants usually will not appeal; rather, an applicant will adopt a co-operative approach to communicating and negotiating with the authority before a decision is made, to the extent that a plan acceptable to the authority can be concluded. If the authority ends up not authorising an investment, the plan will usually be abandoned and the investment team, including its legal counsel, will make efforts to tailor a new plan and file another application.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

There are four types of companies under Taiwan's Company Act:

- unlimited company;
- unlimited company with limited liability shareholders;
- limited company; and
- company limited by shares.

Unlimited companies and unlimited companies with limited liability shareholders are rarely used

in practice; companies limited by shares and limited companies are the most common forms of business for foreign investors in Taiwan.

There are no minimum capital requirements set by the Company Act, but in practice the capital must be sufficient to cover the company's costs and expenses. The share structure of a company can be customised in many ways depending on the plans and needs of the company. A limited company places restrictions on share transfers. For this reason, it is easier for the shareholders to control a limited company or a close company limited by shares. If the company plans to go public, then it needs to become a general company limited by shares at the time it goes public. Foreign investors usually decide on a preferred business vehicle in Taiwan based on their funding, business and strategic needs.

3.2 Incorporation Process

Taking a limited company as an example, if a foreign company wants to establish a limited company subsidiary in Taiwan, the main steps would be:

- to request a company name search and reservation;
- to request approval for foreign investment;
- to open the preparatory bank account and inject the capital;
- to request a business registration;
- to register for tax; and
- to transfer the capital from the preparatory bank account to the official bank account.

It usually takes approximately eight to 12 weeks in practice to successfully set up a limited company subsidiary.

3.3 Ongoing Reporting and Disclosure Obligations

Companies registered in Taiwan are required to make annual reports of major equity holders (defined as persons holding 10% or more of the company's outstanding equity), directors and officers. In addition, there is an ongoing reporting requirement with respect to basic company information. Any change in relation to the company's registered information must be filed with the relevant authority within 15 days. Such changes include, for example, changes to:

- legal representatives, directors or supervisors;
- capital; or
- articles of incorporation, company address or company name.

Public companies are subject to more stringent reporting obligations. As of 10 May 2024, any individual or group that acquires more than 5% of a public company's total issued shares must report the acquisition to the competent authority and make a public announcement.

3.4 Management Structures

The basic management of a corporation in Taiwan is a two-tier structure: the shareholders, and the board of directors. Shareholders, by shareholders' meeting, elect director(s) of the board and supervisor(s). The board of directors holds discretionary powers from the delegation of shareholders and performs the functions of management in the company's daily operation. Shareholders retain the power to remove any director who abuses the delegated discretionary power. Supervisor(s) monitor directors and also audit the managerial execution of business activities.

3.5 Directors', Officers' and Shareholders' Liability

Directors and officers have fiduciary duties to the company and its shareholders, and they may be held liable for damages caused by their negligence, breach of duty or illegal acts. In addition, directors and officers may face criminal charges or administrative sanctions for violating certain laws or regulations related to corporate governance, financial reporting, insider trading or market manipulation.

The amendments to the Company Act in 2013 and 2018 incorporated the principle of piercing the corporate veil. If a shareholder abuses the company's status as a juristic person resulting in the company having certain debts that it cannot settle, the shareholder will be held personally liable for such debt to the extent necessary if the abuse is of a severe nature.

4. Employment Law

4.1 Nature of Applicable Regulations

The employment relationship in Taiwan is mostly governed by laws and regulations and agreements, including collective bargaining agreements and individual employment agreements. Although the employer and the employee are free to enter into employment agreements with the terms and conditions they want, the labour laws and regulations serve as a floor for the employment relationship. Labour laws and regulations should prevail if there is a contradiction between them and the employment agreements.

4.2 Characteristics of Employment Contracts

The Labour Standards Act (LSA) sets up the basic terms and conditions and the minimum standards for the employment relationship. Employment contracts can be made verbally or in writing. An employment contract may specify the workplace, working time for each working day, rest periods, holidays, leave and shift changes, wage payment, termination and retirement, severance pay, pension, allowance, bonuses, expenses, health and safety, labour education and training, welfare, compensation and remedy for an occupational accident, work discipline, awards, rights and obligations. If an employment contract is made without stipulating these details, the terms and conditions set forth in the LSA govern.

The term of an employment contract should be indefinite, with four exceptions which make a definite term of less than a year permissible:

- temporary work;
- short-term work;
- seasonal work; and
- specific work of a non-continuous nature.

Though a probationary period is common in practice, it is not foreseen in the LSA. Therefore, an employee in the probationary period shall be entitled to the same rights and benefits as stipulated in the LSA with an additional clause that puts work performance in a probationary period satisfactory to the employer as a condition to continue the employment relationship.

4.3 Working Time

The regular working time of salaried employees may not exceed eight hours a day or 40 hours a week. With the consent of a labour union (or labour-management conference as an alternative), an employer engaged in certain types of business as designated by the competent authority may change the working time from eight hours a day to ten hours a day.

An employee shall have regular days off every seven days. One day is a regular day of leave and the other one is a rest day. If an employer changes the working time, an employee shall at least have a minimum of one regular leave day every seven days. An employer shall never request employees to work on their regular leave days unless a natural disaster, accident or unexpected event requires a continuation of work.

An employer has an obligation to keep employee attendance records for five years. The attendance record shall register the attendance of employees on a daily basis to the minute.

4.4 Termination of Employment Contracts

Termination

Taiwan is not an employment at will jurisdiction. Except for a mutually agreed termination, any termination by employers requires a cause stipulated in the LSA.

An employer may unilaterally terminate the employment with advance notice and severance pay to the employee under Article 11 of the LSA. For example, this might occur if the business suffers huge losses or is suspended, for which the cause is not attributable to the employee. If the employee is at fault, an employer may terminate their employment under Article 12 of the LSA without advance notice or severance pay. The most common cause thereunder is a material breach of the employment contract or of the work rules.

An employee may terminate the employment without advance notice if an employer makes a false representation regarding the working conditions, materially breaches the employment contract or seriously violates labour laws, and other causes stipulated under Article 14 of the LSA.

Among the above, the advance notice should be given:

- at least ten days in advance when the employee has worked for three months or more but less than one year;
- at least 20 days in advance when the employee has worked for one year or more but less than three years; or
- at least 30 days in advance when the employee has worked for three years or more.

Mutual termination usually, in practice, will come with a mutually agreed payment; such amount is no less than the severance pay required by law.

Collective Redundancies

The Act for Worker Protection of Mass Redundancy lays out the definition, process and obligations with which the employer must comply regarding mass redundancy. Generally, the total number of employees, time limitations, and the number of employees who are being terminated are the three main factors that trigger the regulatory scheme of a mass redundancy. For example, in a company or factory where the total number of employees is less than 30, if such company or factory decides to terminate more than ten employees within 60 days, the company or factory must adhere to the process and report to the competent authority.

The Act requires employers to notify the union, employee representatives and the employees being terminated at least 60 days prior to the termination with a redundancy plan detailing:

- the cause;
- the department to be affected;

- the scheduled effective date;
- the number of employees to be terminated;
- the criteria for selecting the subjects of such mass redundancy;
- the method for calculating the severance pay; and
- the job transition assistance project.

Both employer and employees shall commence a negotiation within ten days of receipt of the redundancy plan. During the negotiation, the employer shall not for any reason terminate or transfer the employees to be terminated.

4.5 Employee Representations

According to the LSA, an employer shall hold a labour-management conference on a regular basis. The details and process of the labour-management conference, including the eligibility of the employee representatives, is further stipulated in the Regulations for Implementing Labour-Management Meeting, which apply to an employer with 30 employees or more. Others may hold the labour-management conference according to their own arrangements.

Further, under the Regulations for Implementing Labour-Management Meeting, the labour-management conference should be held every three months with the attendance of both the management representatives and the employee representatives. The management representatives shall be designated by the employer from persons who are familiar with the business's operations or labour affairs. The employee representatives shall be elected either through the general meeting of the union members or by all employees.

The role of the employee representatives is to attend the labour-management conference and negotiate with the management representative on behalf of all employees regarding working conditions. Among other things, changes to the working hours, including the sum of the additional permissible hours for overtime work and adjustment to the regular working hours, are required by law to be negotiated and determined through the labour-management conference.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

In Taiwan, an employee is entitled to statutory benefits which include:

- labour insurance;
- national health insurance (NHI);
- labour pension; and
- supplementary NHI.

The government, employer and employee are required to contribute to the benefits and thus are each allocated a specific allotment rate. To calculate the premiums, one should look to the Table of Grades published by each competent authority to find out the grade for an employee's monthly wage as the ceiling for each insurance varies.

An employer should be responsible for 70% of the labour insurance premium, 60% of the NHI premium, and 6% of the insured's monthly wage for labour pension. Once the sum of bonuses or rewards given to an employee is greater than four times the employee's monthly wage, the employer is required to deduct the supplementary NHI premium from such bonuses or rewards in advance on behalf of the employee.

An employee should pay their own income tax (current progressive tax rates 5% to 40%), and

be liable for 20% of the labour insurance premium and 30% of the NHI premium. It is optional for an employee to deduct 6% of the monthly wage to put it into their labour pension. Once the sum of bonuses or rewards exceeds four times the monthly wage, an employee should be fully liable for the supplementary NHI premium.

5.2 Taxes Applicable to Businesses

A company is obligated to pay:

- value added business tax (VAT, current rate 5%) for any sale of goods or services within the territory of Taiwan and import of goods except for goods in the bonded zone, payable every two months;
- profit-seeking enterprise income tax (current rate 20%) except for very small-scale businesses, payable every May;
- additional profit-seeking enterprise income tax (current rate 5%) applied to undistributed surplus earnings, payable every May; and
- withholding tax on dividends/interest to a non-resident of Taiwan (current rate 21%).

As Taiwan is not an OECD member and does not take part in the Agreement to Address the Tax Challenges Arising from the Digitalisation of the Economy, Taiwan has not implemented Pillar Two of the OECD Two Pillar Solution. Consequently, Taiwan has not introduced a domestic top-up tax that would likely be granted Safe Harbour status by the OECD.

5.3 Available Tax Credits/Incentives

Tax credits are available for both value added business tax and profit-seeking enterprise income tax for various purposes.

The laws and regulations provide tax credits to certain goods and services that are not provided within the territory of Taiwan, for example, exported goods, services relating to export or services provided in Taiwan but used in a foreign country, goods sold to outbound or transit passengers by duty-free shops, goods or services sold to a bonded zone business entity, and international transportation. Tax incentives are also offered to foreign enterprises, institutions, organisations or associations having no fixed place of business within the territory of Taiwan so that such foreign taxpayers may request a refund for the tax payable for the goods and services purchased for participating in exhibitions or temporary commercial activities within one year, provided that the foreign taxpayer comes from a country which offers the same tax incentives as Taiwan.

As to income tax, there are various tax credits available. The main tax credits apply to the following regimes and businesses:

- an enterprise that engages in the business of recycling and reuse;
- expenses for sponsoring government-initiated international promotion campaigns, attending international tourism organisations and travel fairs, and sponsoring government efforts to promote business and conference tourism;
- a business that engages in the research, development and manufacture of new drugs, new dosage forms, high-risk medical devices, regenerative medicine, precision medicine, digital medicine, innovative technology platforms dedicated to the biotech and pharmaceutical industry, and other strategic biotech and pharmaceutical products;
- a private institution participating in a major infrastructure project and limited transportation infrastructure projects;
- a company or limited partnership that aims to promote industrial innovation and that has not violated any environmental protection, labour

health and safety, or food safety and sanitation laws in the past three years; and
- small and medium-sized enterprises that seek to promote innovation and research.

5.4 Tax Consolidation

Taiwan allows a parent company and its subsidiary to file a consolidated income tax in the following circumstances.

- When the parent company is a financial holding company and it holds 90% or more of the outstanding issued shares of a domestic subsidiary, such parent company may, for a tax year in which such shareholding in the subsidiary has existed for the entire 12 months of that tax year, elect to be the taxpayer itself, and jointly declare and report profit-seeking enterprise business income tax.
- If as a result of carrying on a merger/consolidation, division or acquisition, the shares or contributed capital of a subsidiary company held by the parent company reach 90% or more of the total number of issued shares or subscribed capital, the parent company may be elected as the taxpayer once the parent company holds the shares or contributed capital for the entire 12 months in a tax year.

5.5 Thin Capitalisation Rules and Other Limitations

To prevent thin capitalisation, the "Regulations Governing Assessment of Interest Expenditure on the Debts Owed by a Profit-seeking Enterprise to a Related Party in Accordance with the Condition that the Related Payments Shall Not be Considered as Expenses or Losses", which are regulations implemented by the Ministry of Finance, provide that a business should disclose the proportion of related party debt to equity and relevant information in a prescribed format, and prepare the required documents for examination and verification by the tax collection authorities.

Among others, the required documents should include:

- the explanation of the changes in circumstances of the company's paid-in capital, capital reserve, retained earnings (or accumulated losses), and other items under owner's equity;
- the nature of the liabilities, purposes of the liabilities and market situation at the time of the acquisition of the liabilities;
- the types of currency, amount, interest rate, period and financing condition of the liabilities, and the criteria for calculating the exchange rate;
- pledges and conditions offered by a profit-seeking enterprise;
- guarantors and guarantee conditions;
- the trends of loan interest rate and financing conditions under the same period and similar loans;
- the conversion conditions of the convertible corporate bonds; and
- other information regarding the related parties, liabilities and owner's equity that could impact the calculation of the excess interest expenditure.

The standard ratio of related party debt to equity is 3:1. If the proportion of related party debt to equity of a company exceeds the standard ratio, the excess interest expenditure on the debts owed directly or indirectly by a company to a related party shall not be considered as expenses or losses.

5.6 Transfer Pricing

If a company engages in transactions with other profit-making enterprises in Taiwan or abroad

in an attempt to circumvent or reduce its tax liabilities in Taiwan by engaging in non-arm's length transactions, the Regulations Governing Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's Length Transfer Pricing may apply and the tax authorities may investigate and make adjustments in accordance with the law.

If a profit-making business with a total annual revenue of no less than TWD300 million engages in transfer pricing, it should disclose the affiliated enterprise and related party transaction information and prepare a transfer pricing report when filing the annual income tax. The transfer pricing report should contain at least:

- a comprehensive business overview;
- a description of group organisation and management structure;
- summaries of controlled transactions;
- controlled transaction analysis;
- statements and consolidated reports of the affiliated enterprises; and
- other documents in relation to related parties or controlled transactions.

If a profit-seeking enterprise is a member of a multinational enterprise group, it should disclose relevant information about the ultimate parent entity and the constituent entity filing the master file on behalf of the ultimate parent entity, regardless of whether the group is required to submit the master file.

5.7 Anti-evasion Rules

Taiwan has various implementations of anti-tax avoidance rules. Among others, the main implementations include the Controlled Foreign Company (CFC) Rules for Enterprises effective from 1 January 2023, and the Place of Effective Management (PEM) Rules with an undetermined effective date.

CFC Rules for Enterprises

A CFC refers to a foreign company established in a low-tax jurisdiction and directly or indirectly controlled by enterprises or individuals in Taiwan. The Income Tax Act provides that if (i) a CFC does not engage in substantial operating activities, and (ii) its earnings are more than TWD7 million, it shall calculate CFC investment income and be subject to profit-seeking enterprise income tax. To avoid double taxation, the amount that has been recognised as CFC investment income shall not be included in taxable income. Further, the taxes paid on the dividends or earnings in accordance with tax laws of the source jurisdictions may, within five years, be applicable for a deduction or refund.

PEM Rules

To prevent a resident company of Taiwan from changing to a non-resident company by incorporating and registering in a low-tax jurisdiction for tax avoidance, the Income Tax Act provides that if a non-resident company fulfils all of the following requirements, it should be subject to the profit-seeking enterprise income tax:

- the decision maker who makes significant decisions is a resident individual or a profit-seeking enterprise in Taiwan, or the place where significant decisions are made is Taiwan;
- financial statements, records of accounting books, and minutes of meetings are prepared or stored in Taiwan; and
- major business activities are carried out in Taiwan.

6. Competition Law

6.1 Merger Control Notification

For any merger or acquisition, acquisition of shares, transfer of business or property, joint operation or entrusted operation, control over the business operation of other businesses or personnel appointment or removal, or the like, if it reaches the threshold of merger filing under the Fair Trade Act, it will trigger the merger reporting obligation. A business is required to notify the Fair Trade Commission if one of the following circumstances applies:

- as a result of the merger the enterprise(s) will have one third of the market share;
- one of the enterprises in the merger has one quarter of the market share; or
- sales for the preceding fiscal year of one of the enterprises in the merger exceed the threshold amount publicly announced by the competent authority, eg, if the business involved in the merger is a non-financial institution, the threshold amount for domestic sales would be TWD15 billion.

Article 12 of the Fair Trade Act sets forth certain exceptions where no filings are required, such as mergers that do not change the market structure or have no effect on competition in the market. For example, in a case where the participating company or a 100% subsidiary of the participating company already holds 50% or more of the voting shares or capital of the other business, the participating company and the other business are not required to report their merger in advance to the regulator.

6.2 Merger Control Procedure

Usually, when two companies decide to merge, they will sign an MOU or a contract whereby obtaining the approval of the Fair Trade Commission is a precondition or condition precedent to the closing. In the contract, the parties may also determine which party shall bear the obligation for filing and the associated fees and costs.

Upon receipt of a merger filing, the Fair Trade Commission will conduct a formal review. The Commission will request the parties to submit further documents if the submitted materials are not complete and additional documents are required. The Commission will then hold a substantive review meeting to determine whether the overall economic benefits of the merger outweigh the disadvantages of restricting competition and whether additional conditions or burdens are required. A decision to approve or not approve the merger should be made within 90 working days.

6.3 Cartels

Concerted actions (also known as “cartels”) are not allowed in Taiwan, except under the circumstance that the concerted action meets the requirements set forth in the Fair Trade Act and is beneficial to the overall economic and public interest and is approved by the Fair Trade Commission in advance.

A concerted action refers to the conduct of an enterprise that determines the price, quantity, technology, products, equipment, trading partners or trading area, or engaging in other mutually binding activities pertaining to goods or services jointly with a competing enterprise at the same stage of production and marketing by means of contract, agreement or other means of agreement, and is sufficient to affect the market function of production, trade in goods or supply and demand of services. This also includes the acts of trade associations or other business organisations that bind the business activities by the articles of incorporation or the resolutions of

the general meeting, the board of directors and the supervisory meeting.

Exceptions for permissible concerted actions include actions to set forth standards for specifications or models of goods or services for the purpose of reducing costs, improving quality or increasing efficiency, or to engage in joint research for the purpose of upgrading technology, improving quality, reducing costs or increasing efficiency, which can be conducted subject to an advance approval from the Fair Trade Commission.

6.4 Abuse of Dominant Position

Abuse of a dominant position is prohibited. The Fair Trade Act specifically deals with the issue of monopolistic enterprises, as well as governing other types of businesses that are involved in the abuse of a dominant position.

A business shall not engage in a deal that may impose improper restrictions on the trading counterpart's business activity. Such conduct includes tying, exclusive dealing arrangements, sales region or customer restrictions, use restrictions and other conduct that restrict the business activities of the counterparty to the transaction. In addition, the Fair Trade Commission has pointed out that it will consider the following factors in their totality to determine the dependent relationships and the abuse of the dominant position:

- the intention and purpose of the parties;
- the market position of the parties;
- the structure of the market;
- the characteristics of the goods; and
- the effect on competition in the market.

The Guideline published by the Fair Trade Commission expressly points out that abuse of a dominant position is an example of obviously unfair conduct prohibited by the Fair Trade Act.

7. Intellectual Property

7.1 Patents

There are three types of patents are available in Taiwan: invention (20 years), utility model (ten years) and design patents (15 years). Applicants from WTO member countries can claim priority based on a patent application filed within 12 months in any WTO member country. Taiwan is not a member of the Patent Cooperation Treaty (PCT). When doing international patent prosecution, Taiwan's patent applications are not included in the coverage of a PCT application.

Invention Patent

- An invention is eligible for patent protection if it is a technical creation that satisfies the requirements of novelty, inventive step and industrial utility.
- The term is 20 years from the filing date. Extensions are applicable for pharmaceutical, agrichemical or manufacturing processes, taking into account the time to obtain the regulatory approval.
- Invention patent applications are filed at Taiwan Intellectual Property Office (TIPO). An e-filing service is available. Applicants from WTO member countries can claim priority based on the patent application having been filed in the previous 12 months in any WTO member country. A PCT application is not acceptable by TIPO, but any applicant from a WTO member that files a patent application in Taiwan may claim priority based on its PCT application.
- A patent owner has an exclusive right to implement and exploit the patented invention. Monetary compensation will be granted

if infringement and the damage thereof are proved. For willful infringements, the patent owner is allowed to claim treble the amount of its established damages. Permanent injunctions prohibiting the defendant from manufacturing, selling, offering for sale, and other exploitation of the patented invention will be granted if the patent owner prevails in an infringement case.

Utility Model

- A utility model is a creation related to the shape or structure of an article or combination of articles. Manufacturing methods, processing methods, and chemical substances with concrete shape cannot be protected as a utility model.
- The term is ten years from the filing date.
- TIPO only conducts a formal review without substantive examination of utility model applications so that utility model patents generally can be granted within six months after filing. An applicant may file invention and utility model patent applications for the same creation on the same date to enjoy continuous protection until both the invention and the utility model are granted – at that time the applicant needs to abandon either the invention or utility model patent because double patenting is not allowed.
- Enforcement and remedies available to a utility patent owner are the same as those for invention patents.

Design

- A design patent protects a creation made in respect of the shape, pattern, colour, or any combination thereof, of an article as a whole or in part by visual appearance. Computer generated icons and graphic user interfaces applied to an article can also be the subject of a design patent.
- The term is 15 years from the filing date.
- The prosecution procedure is the same as for invention patent applications.
- Enforcement and remedies available to a design patent owner are the same as those for invention patents.

7.2 Trade Marks

Any mark that can be used to distinguish a company's goods and services from the goods and services of other companies is protectable. Words, designs, symbols, colours, three-dimensional shapes, motions, holograms, sounds, or any combination thereof, can be registered as a trade mark.

Trade mark applications can be filed with TIPO, which also accepts digital filings via its e-filing system. Taiwan is not a signatory to the Madrid Agreement; thus, an international registration is unable to be extended to Taiwan. Applicants from WTO member countries can claim priority based on a trade mark application filed in the previous six months in any WTO member country. Trade mark examination will take approximately six to eight months and it will take another one to two months to obtain the registration certificate. An opposition may be filed only within three months from the day following the date of publication of registration.

The registration term is ten years and can be repeatedly renewed for additional ten-year terms.

A trade mark owner may use various legal mechanisms to protect its rights and interests against infringement, such as civil action, criminal action and border enforcement.

7.3 Industrial Design

A design can be protected as a design patent. Please refer to **7.1 Patents** for information on design.

It is also possible to protect a design by trade mark or copyright. Please refer to **7.2 Trade Marks** and **7.4 Copyright**, respectively.

An allegation of unfair competition may also be a way to protect a design (trade dress).

7.4 Copyright

A creation that is within a literary, scientific, artistic or other intellectual domain can be protected under Taiwan's Copyright Act, including:

- oral and literary works;
- musical works;
- dramatic and choreographic works;
- artistic works;
- photographic works;
- pictorial and graphical works;
- audiovisual works;
- sound recordings;
- architectural works; and
- computer programs.

Copyright protection is granted immediately with the creation of a work. No registration is required.

Copyrights include moral rights and property rights:

- protection of an author's moral rights is perpetual; and
- property rights are for the lifetime of the author and for 50 years after their death. However, property rights in pseudonymous or anonymous works, works authored by a juristic person (eg, a company or foundation), photographic and audiovisual works, sound recordings and performances are for 50 years from the time of public release.

A copyright owner may use various legal mechanisms to protect its rights and interests against infringement, such as civil actions, criminal actions and border enforcement.

7.5 Others

Trade secrets are protected under the Criminal Code, the Trade Secret Act and the Taiwan National Security Act. A trade secret can be any method, technique, process, formula, programme design or other information that may be used in the course of production, sales or operations and must meet the following requirements:

- it is not known to persons generally involved in information of this type;
- it has economic value, actual or potential, due to its secret nature; and
- its owner has taken reasonable measures to maintain its secrecy.

Protections for plant varieties and seeds are also available under Taiwan law. Breeders of new plant varieties or seeds shall apply to the authority for plant variety rights before they can enjoy protection for their inventions.

8. Data Protection

8.1 Applicable Regulations

In Taiwan, the Personal Data Protection Act (PDPA) governs the use, collection and processing of personal information (PI). The collection of sensitive data, which includes a person's health records, genetic information, sexual history and criminal history, is subject to stricter restrictions as set forth in the PDPA.

The PDPA does not expressly cite any foreign legislation. However, the drafters of the PDPA did consider the provisions of EU Directive 95/46/EC (the Data Protection Directive, which was later replaced by the GDPR), the OECD Guidelines and APEC's (Asia-Pacific Economic Cooperation) privacy framework when drafting the PDPA.

A breach of the obligations imposed by the PDPA may result in civil and criminal liabilities, as well as administrative penalties and orders.

8.2 Geographical Scope

The PDPA applies to companies outside Taiwan if they collect, process or use the personal data of Taiwan's citizens. In other words, the data protection provisions under the PDPA apply to a foreign company targeting customers in Taiwan.

8.3 Role and Authority of the Data Protection Agency

Before 2023, there was no one single governmental agency in charge of enforcing data protection rules. Rather, an agency affiliated with the Executive Yuan co-ordinated policy and enforcement matters relating to the enforcement of the PDPA and other matters relating to the EU's GDPR.

On 31 May 2023, the PDPA was amended and a newly established regulatory agency, the Personal Data Protection Commission, now acts as an independent data protection authority in charge of enforcing the PDPA, as well as supervision of the PDPA's enforcement.

9. Looking Forward

9.1 Upcoming Legal Reforms

Several major legislative reforms occurred during the past five years, including but not limited to:

- the Trade Secret Act (15 January 2020);
- the Company Act (29 December 2021);
- the Patent Act (4 May 2022);
- the Copyright Act (15 June 2022);
- the Intellectual Property Case Adjudication Act (15 February 2023);
- the Trademark Act (24 May 2023);
- the Personal Data Protection Act (31 May 2023);
- the Electronic Signatures Act (15 May 2024);
- the Gender Equality in Employment Act (16 August 2023); and
- the Minimum Wage Act (27 December 2023).

A prudential investor interested in entering markets in Taiwan should pay considerable attention to regulators' implementation schemes and court cases addressing these new pieces of legislation, as well as keeping updated of any further developments.

TURKS & CAICOS

Law and Practice

Contributed by:
Devon McLean and Brook Capron
Stanbrook Prudhoe

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Stanbrook Prudhoe is a firm with deep experience of working across the Caribbean region and the common law Central and South America. Based out of the Turks and Caicos Islands (TCI), the two founding partners (Sophie Stanbrook and Tim Prudhoe) are both London-trained. The real estate, development and commercial teams are headed by Sophie Stanbrook and the disputes practice by Tim Prudhoe. The firm continues to appear in all the major litigation in the TCI, including public law and constitutional challenges relating to same-sex marriage rights, immigration and habeas corpus. It also handles "big ticket" disputes work across a wide range of jurisdictions. In 2023, the firm opened an office in Georgetown, Guyana, reflecting strong growth in client demand there.

Authors

Devon McLean advocates for clients at all levels of courts and tribunals, as well as managing risk for clients through contract negotiations. She leads representations for landowners defending against encroachments, easements and acquisitions, and for banks, private asset managers and others in enforcing their financial agreements and in the collection of secured and unsecured debts. In addition to litigating employment matters, she prepares employment contracts and manuals, guides clients through disciplinary action, and prepares complex separation agreements with high-level employees – always with a focus on risk management.

Brook Capron specialises in legal work around residential and commercial lending by local banking institutions and private lenders. He also navigates the full spectrum of real estate development work and high net worth private client real estate investment.

Stanbrook Prudhoe

Third Floor Graceway House
Graceway Plaza
Providenciales
Turks and Caicos Islands TKCA 1ZZ

Tel: +1-649-946-4300
Email: contact@spcaribbean.com
Web: www.spcaribbean.com

Stanbrook Prudhoe

1. Legal System

1.1 Legal System and Judicial Order

The foundation of law in the Turks and Caicos Islands (TCI) is its written Constitution, and the islands have a common law legal system. As a British Overseas Territory, the majority of its legal influence is the laws of England and Wales. It remains subject to the UK's international obligations (such as United Nations conventions – for example, on asylum and refugee issues).

The TCI has its own Magistrate's Courts, Supreme Court, and Court of Appeal. The two lower courts sit primarily in two of the islands (Providenciales and Grand Turk) and the Court of Appeal in Providenciales when not sitting remotely. The final appellate court remains the Judicial Committee of the Privy Council in London, England. Claims in respect of rights and freedoms as guaranteed under Part 1 of the Constitution have a right of appeal, subject only to not being frivolous.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

There is generally no restriction on foreign investment. Foreign investments in private enterprises in the TCI are not treated any differently from domestic investments. However, local business licensing laws will apply in relation to certain types of businesses. Certain categories of business are protected and require local (Turks and Caicos Islander) ownership of at least 50% of the equity of the relevant entity.

Investments in the financial services sector such as banking, insurance or investment management are subject to regulation by the Financial Services Commission (FSC), and the approval typically includes meeting capital adequacy requirements, demonstrating compliance with anti-money laundering regulations and obtaining necessary licences or permits.

Large-scale development projects such hotels/resorts and marinas require approval from government departments such as the Department of Planning, Environmental Health Department, Business Licence Department and/or Department of Environment and Coastal Resources, as applicable. Each relevant department will have its own set of criteria (some of which will be detailed in the respective ordinance, such as the Physical Planning Ordinance) depending on the specifics of the project. The criteria for approval may involve conducting environmental impact assessments, following sustainable development principles, adhering to building codes and standards, consulting with local communities, or demonstrating the economic benefit the investment will bring to the TCI, such as job creation, employment of locals, technology transfer or contribution to local infrastructure development.

Invest TCI is a statutory body that is specifically commissioned and mandated to promote and facilitate foreign investment in the TCI. Although its involvement is not required for private self-funded investments, it is to Invest TCI that applications for development agreements are made where government incentives and concessions are being requested for a project. It provides pivotal support in navigating government interactions and streamlining the investment process by working across government agencies.

2.2 Procedure and Sanctions in the Event of Non-compliance

There is no general foreign investor approval process as there is no general restriction on foreign investments.

Where a development agreement is sought, an application is made to Invest TCI in the form of a Business Proposal, and all of the proposed parties to the development agreement will need to provide due diligence materials to Invest TCI for vetting.

2.3 Commitments Required From Foreign Investors

Where the TCI government enters a Development Agreement granting concessions/incentives to a project, the government will typically require certain commitments such as employment of a number of locals in key positions of that establishment, the development and/or maintenance of specific community infrastructure projects such as creation and or upkeep of a park, maintenance of a government school, etc.

2.4 Right to Appeal

If a government department does not authorise an investment, there is usually an appeal procedure to follow, which would be outlined in the relevant ordinance. The timing of an appeal will vary across each government department/agency and by the nature of the decision. If the outcome of the appeal is not satisfactory to the investor, there can sometimes be scope to apply for a judicial review of the denial, an area of legal work that requires specialist skills.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The most common types of corporate vehicles available in the TCI are:

1. Domestic Company

A company is considered to be a domestic company if it is formed and conducts business in the TCI. The liability of such companies can be limited or unlimited; they can be authorised to issue shares or be limited by guarantee. There is no minimum or maximum share capital requirement, and the share capital may be unlimited. In practice, we most frequently see a share capital of USD5,000. A domestic company requires a minimum of one shareholder and one director (who can be the same person). This type of company is best suited for any venture that is for profit.

2. Foreign Company

If a foreign company (being a body corporate that has been incorporated outside of the TCI), wishes to carry on business in the TCI, it may do so without incorporating a TCI entity. To do so, the foreign company can apply to the Registrar of Companies to be registered in the Register of Foreign Companies.

3. Limited Partnership

This vehicle does not have the usual shareholder and director requirements but has at least one general partner (who is involved in the day-to-day running of the business and has unlimited liability) and at least one limited partner (who is not involved in the day-to-day and whose liability is limited to their investment). This structure is best suited for various investors pooling their resources to purchase a large investment.

4. Non-profit Corporation

The liability is always limited; it can be authorised to issue shares or be limited by guarantee. As for domestic companies, there is no minimum share capital, a minimum shareholder requirement of one person and a minimum director requirement of two. This structure is best suited for any matters of a non-profit nature such as religious and charity organisations.

5. Protected Cell Company

This is a corporate structure in which one entity consists of a core and of separate and distinct cells, each with assets and liabilities that are separated and protected from those of the others. This type of structure is used by insurance companies to underwrite insurance risks.

3.2 Incorporation Process

The main steps of incorporation of a company in the TCI are as follows:

1. Name reservation: Complete a name reservation form at the FSC providing three potential names in order of priority. Once a name has been cleared, it can be reserved for three months.

2. Preparation of articles of incorporation: These can be basic or detailed, and require share capital to be detailed and are required to state whether the company will be limited or unlimited by shares or guarantee.

3. Compliance measures must be met ahead of incorporation, which requires completion and submission of due diligence forms for all directors and shareholders, including corporate owner(s) or in a trust structure.

Provided the above steps have been completed and all supporting documents have been provided, incorporation can take place generally within three days of submission to the Companies Registry.

3.3 Ongoing Reporting and Disclosure Obligations

All private companies in the TCI are subject to reporting and disclosure obligations. A notice of any change of name, shareholders, directors or articles of incorporation must be filed at Companies Registry, and failure to do so in accordance with the timeframe specified by the ordinance may result in the FSC imposing a penalty. Beneficial ownership details are also required to be filed. There are no annual returns and no requirements to file financial statements.

Non-profits share the same requirements as private companies with the exception of being required to file financial details annually.

Although a register of limited partners and their contribution percentages must be kept on the company's books, those details are not required to be filed at the Companies Registry. However, details of all beneficial owners are so required.

3.4 Management Structures

The most common legal entities in the TCI are as follows, each of which follows a one-tier framework:

1. Private companies limited by shares: This is the most prevalent structure in the TCI. The management is handled by a board of directors, which is responsible for both the strategic direction and operational management of the company. Directors are appointed by the shareholders, who are the ultimate owners of the company. Shareholders can also serve as directors, should they choose. Although no longer mandatory under TCI company law, it is advisable to

appoint a company secretary to maintain good corporate governance.

2. Partnerships: Partnerships, including limited partnerships, follow a partner-managed structure. General partners manage the partnership and are responsible for its operations and decisions. In a limited partnership, limited partners contribute capital but do not participate in management, limiting their liability to the extent of their investment.

3. Non-profit organisations: Although these have a one-tier structure, they can also have advisory boards. Nonetheless, the most common framework is to have a board of directors that oversees the organisation's activities, ensuring it meets mission and regulatory requirements. Directors are usually volunteers and are responsible for strategic planning and oversight.

3.5 Directors', Officers' and Shareholders' Liability

The liability of directors and officers of a TCI company is governed by rules and principles derived from common law and the Companies Ordinance. They impose a fiduciary duty on each director to act honestly, in good faith and in what the director believes to be in the best interest of the company. Directors also have an obligation to exercise a reasonable degree of care, skill and diligence, a standard that is measured against what a reasonably diligent person with the same knowledge and experience would exercise – acting with a level of competence expected of someone in their position.

The concept of "piercing the corporate veil" exists in the TCI as in other common law jurisdictions. This principle allows the court to disregard the separate legal personality of the company and hold the shareholders or directors personally liable for the company's obligations in certain circumstances. However, this is an exceptional measure for instances such as fraud or misconduct where the company is used as a vehicle for fraudulent or wrongful activities or in cases where directors or shareholders have conducted business in an improper or dishonest manner. This legal framework aims to ensure that directors and officers act responsibly and in the best interests of the company while providing mechanisms to deter and address serious misconduct.

4. Employment Law

4.1 Nature of Applicable Regulations

In the TCI, the employer/employee relationship is primarily governed by the Employment Ordinance.

Although contracts may modify or amend the requirements set out by ordinance, they generally cannot do so to the detriment of an employee. Employment agreements must generally be in writing and set out certain specified information as required by the ordinance. However, in the absence of a written contract, a verbal contract may be found and upheld.

The enforcement of the Employment Ordinance is in the hands of the Labour Department with respect to employer compliance with the ordinance and the issuance of fines and other sanctions for non-compliance. The Labour Department has broad powers to facilitate compliance, including, for example, to request documents from employers, which requests employers cannot refuse.

The Labour Department is also employees' first stop for recourse in the event they have a grievance with their employer that cannot be resolved

within the organisation. If a dispute is lodged with the Labour Department and not resolved, an employee can choose to file a claim with the Labour Tribunal, which operates similarly to a court but is not bound by the rules of the TCI courts.

Appeals from the Labour Tribunal go to the Turks and Caicos Islands Court of Appeal and, ultimately, though rarely, to the Privy Council in England. The interpretation of the Employment Ordinance is governed primarily by case law from the Court of Appeal, although the Labour Tribunal may use its own historical precedents to assist in the interpretation of the ordinance. The Tribunal may also consider cases from the UK and other jurisdictions to be persuasive, although not binding.

4.2 Characteristics of Employment Contracts

The Employment Ordinance requires employers to provide employees with written employment contracts within seven days of their start date, and for parties to sign the contract within 14 days thereafter.

However, the absence of a written contract does not invalidate the employment, and a verbal contract will instead be found to be in place.

The issue with verbal contracts is that it is much less clear where the contract deviates from the Employment Ordinance to an employer's benefit. For that reason, unless the parties agree on a specific term, or there is evidence that they operated on the basis of that term, the Labour Tribunal will likely apply the employee-friendly default terms and obligations specified in the ordinance.

For example, an employment contract will be found to be permanent in duration unless it is specifically agreed, usually in writing, to be for a fixed term.

For contracts in writing, the Employment Ordinance requires they contain at least: identification of the parties; the date employment began; the date on which the employee's period of continuous employment began, taking into account employment with a previous employer which counts towards that period; details of remuneration and frequency of pay; hours of work; entitlement to holidays and sick days, and pay related to same; whether the employee is entitled to a pension; agreed notice periods; job duties; disciplinary and grievance procedures; and the date the contract expires (if for a fixed term).

4.3 Working Time

For hourly employees, overtime must be paid once an employee reaches 44 hours per week. That number can be reduced, but not increased, by contract.

For salaried employees, they can either be subject to the maximum 44 hours per week as are hourly employees, or by contract it can be specified that they are not subject to regular working hours and are instead paid on the basis of the work they perform. In that case, the salaried employee will be exempt from overtime restrictions.

4.4 Termination of Employment Contracts

The TCI does not permit "at will" termination. That means, in order to terminate an employee's employment, the employer must have a "valid" reason for termination. A valid reason, if properly documented, may include: performance issues for which the employee has been given three

months to correct; misconduct which is repeated within six months; serious misconduct which might warrant immediate dismissal, for example, violence in the workplace; or redundancy, such as when all or part of a business is shut down.

Even the failure to renew a fixed-term contract may constitute dismissal, unless the employee is a work permit holder and specific waivers are given.

There are statutory minimum notice periods for terminating an employee's contract even with a "valid" reason, and which are based on the length of the employee's service. Those periods can be expanded, but not reduced, by contract.

If an employer terminates an employee for any invalid reason, called "unfair dismissal", the employer will still be liable to the employee for the notice period or pay in lieu of notice, as well as being liable upon claim by the employee to the Labour Tribunal for payment of a basic award and a compensatory award. The basic award is a statutory calculation, similar to notice pay but paid in addition to notice pay, which is an award based on the employee's length of service. The compensatory award is intended to compensate employees for losses they sustained as a result of their termination (and punish employers for wrongdoing). The compensatory award is paid at the discretion of the Labour Tribunal and is usually capped at USD35,000. That cap is waived in circumstances of discrimination.

As mentioned above, a redundancy may be a reason for a "valid" termination of employment. However, when terminating for reason of redundancy, employers should be aware that there are additional payment obligations. In addition to notice pay, employees with over two years of service with a particular employer and who are made redundant will be owed a statutorily calculated amount of severance pay based on their years of service.

Although the Employment Ordinance contains provisions relating to collective bargaining and unions, and protection for employees related to same, there are in reality no unions in the jurisdiction.

4.5 Employee Representations

When disciplining employees, management has an obligation to ensure employees understand what they are being disciplined for and to provide copies of any written disciplinary warnings or other actions. Employees also have the right to appeal any disciplinary action against them internally within the organisation. In practice, that is only useful when the employer is a large organisation to which the matter can be escalated to a higher level of management. For small organisations, the opportunity to appeal is rarely exercised or given (although it legally must be).

If an employer intends to make an employee (or employees) redundant, they have an obligation to first speak with the employee to determine whether alternatives to redundancy can be found, including alternative positions within the same organisation. In circumstances of redundancy, the employer has an obligation prior to making the employee redundant to inform the trade union or the employee's representative as soon as possible. However, as mentioned above, there are no unions in the TCI and therefore no employee representatives at most organisations. It is the employees themselves who will be notified and consulted with respect to redundancy.

In bringing a claim to the Labour Tribunal, an employee may choose to be represented by an attorney or otherwise, but there is no obligation

for either employees or employers to have any such representation.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

The TCI does not have an income tax regime for individuals or corporations. However, corporations may be subject to other fees and taxes as addressed below.

Employees are subject to mandatory deductions for payment of National Insurance Board (social security, pensions, etc) and National Health Insurance Board (socialised medicine). The NIB contributions to be paid by each of the employer and the employee were recently increased effective 1 April 2024 and currently sit at 6.5% employer contribution and 5.5% employee contribution. The NHIP (National Health Insurance Plan) contributions are 6%, split evenly between employees and employers, with a cap on contributions where an employee makes in excess of USD7,800 per month.

5.2 Taxes Applicable to Businesses

Currently, there are no corporate, income or capital gains tax in the TCI. However, there are other local taxes and fees that businesses must pay, which include:

1. Business licence fees: All businesses are required to obtain a business licence and pay an annual fee. The fee varies depending on the type and size of the business.
2. Business/company registration fees: All businesses, whether sole trader or body corporate, are subject to annual registration fees.
3. Work permit fees: Companies employing expatriates must pay for work permits, the cost of which varies by job type and length of employment.
4. Customs duties: Import duties are levied on goods brought into the TCI. These vary generally from 5% to 45% depending on the type of goods imported. All goods are currently subject to a mandatory processing fee of 7.5%.
5. Stamp duty: Land transfers are subject to stamp duty, which ranges from 6.5% to 10% depending on the value and location of the property.
6. Accommodation tax: A tax of 12% is applied to the gross revenue of accommodations such as hotels, villas, guesthouses and any other transient guest lodgings. This tax is typically passed on to guests.
7. Service charge: Many restaurants charge a 10% service charge. If this is charged, restaurants have a statutory requirement to distribute it (in full) among its staff.

At present, the TCI has not implemented Pillar Two of the Organisation for Economic Co-operation and Development framework, which focuses on establishing a global minimum corporate tax rate of 15%. Although this structure continues to be adopted by many countries around the world, its implementation requires legislative changes that the TCI has not yet made.

5.3 Available Tax Credits/Incentives

Tax credits and tax incentives are not offered in the TCI.

5.4 Tax Consolidation

Tax consolidation is not available in the TCI.

5.5 Thin Capitalisation Rules and Other Limitations
Thin capitalisation rules do not apply in the TCI.

5.6 Transfer Pricing
Transfer pricing rules do not apply in the TCI.

5.7 Anti-evasion Rules
There are no anti-evasion rules in the TCI.

6. Competition Law

6.1 Merger Control Notification
There are no merger controls in place in the TCI.

6.2 Merger Control Procedure
As there are no merger controls in the TCI, there are no protocols relating to same.

6.3 Cartels
There are no rules governing anti-competitive agreements and practices in the TCI.

6.4 Abuse of Dominant Position
There are no rules governing unilateral conduct and economic dependency in the TCI.

7. Intellectual Property

7.1 Patents
A patent is a form of intellectual property that grants an inventor or their assignee exclusive rights to make, use, sell and distribute an invention for a limited period. Patents in the TCI are governed by the Patents Ordinance, which requires a patent to be granted in the UK and registered in the TCI within five years from the date of grant of the patent.

To register a patent in the TCI, one must complete and submit the prescribed application form (as set out in the ordinance) to the Registrar of Patents for registration. It must be accompanied by payment of the prescribed fee and a copy of the specification, together with the drawings (if any) relating to the patent and a certificate of the UK Comptroller-General of Patents, Designs and Trade Marks, giving full particulars of the grant of the patent or of its taking effect in the UK. Upon receipt of an application that has been complied with to the satisfaction of the Registrar, the Registrar will advertise the application in the Gazette for two months and, provided that there is no opposition from the public, issue a certificate of registration of the patent. UK patents are typically granted for a period of five years, are renewable for five-year periods and have a lifespan of 20 years. A patent that is registered in the TCI shall continue in force as long as it remains in force in the UK.

No action for infringement of a patent in the TCI can be entered into prior to the date of issuance of a certificate of registration. Remedies are based on UK remedies for infringement, which include injunctions, damages (or an account of profits), and delivery up or destruction of the infringing products.

7.2 Trade Marks
The Trade Marks Ordinance in the TCI defines a trade mark as “any sign capable of being represented graphically which is capable of distinguishing the goods or services of one undertaking from those of other undertakings and it may, in particular, consist of words (including personal names), designs, numerals, letters or the shape of goods or their packaging”. Trade marks are registered for a period of ten years from the date of registration and are renewable for further peri-

ods of ten years subject to payment of the prescribed renewal fee.

For a trade mark to be protected it must be registered at the Companies Registry. To register a trade mark, an application for registration must be filed with the Registrar, who will examine whether it satisfies the requirements of the ordinance and regulations. Once accepted, the Registrar will cause the application to be published in the Gazette in the prescribed manner, and the public is given a period of one month from the date of publication of the application to provide a notice of opposition. If the Registrar does not receive notice of any matters that may require the application to be withdrawn, the Registrar will proceed to register the trade mark, after payment of the prescribed fee. Infringement proceedings may be brought by the proprietor of the trade mark, who may seek remedies such as damages, injunctions, accounts of profit, order for delivery up of infringing goods, or otherwise that may be available to him in respect of a breach by a third party using the trade mark without consent.

7.3 Industrial Design

The TCI does not have industrial design legislation.

7.4 Copyright

Copyright is a legal concept that grants the creator of an original work exclusive rights to its use and distribution, usually for a limited time, with the aim of enabling the creator to receive compensation for their intellectual investment. This protection covers various types of works, including literary, dramatic, musical and artistic creations, as well as films, sound recordings and broadcasts. The UK's Copyright Act 1911 applies to the TCI. Copyright protection is automatic, does not require registration and lasts for 50 years after the death of the creator. Enforcement of and available remedies for copyright are similar to that for patents and trade marks.

7.5 Others

There are no laws protecting IP rights such as software, databases and trade secrets in the TCI.

8. Data Protection

8.1 Applicable Regulations

There are currently no applicable regulations on data protection.

8.2 Geographical Scope

As there are no data protection ordinances or regulations in the TCI, common law rules will apply.

8.3 Role and Authority of the Data Protection Agency

As the TCI has no data protection rules, there is no body or organisation that oversees data protection.

9. Looking Forward

9.1 Upcoming Legal Reforms

Corporate

The Beneficial Ownership Information Register (BO Register) was introduced in the TCI as part of a broader effort to enhance financial transparency and comply with international standards. The implementation of the registry aligns with the global push to combat financial crimes such as money laundering and tax evasion. Specifically, the BO Register was established through the incorporation of specific provisions into the Companies Ordinance 2017, such provisions

taking effect on 26 June 2017. This legislation requires all legal entities incorporated in the TCI to maintain and disclose accurate information about their beneficial owners, such information to be uploaded to the database of the BO Register and kept outside the public domain – the only disclosure requirement being to persons or authorities such as the Royal Turks and Caicos Islands Police Force or other regulatory authorities.

Prior to the enactment of this legislation, there were discussions about the implementation of a public beneficial ownership registry. This proposal was met with major resistance from regional leaders of offshore financial centres such as the BVI and the Cayman Islands, citing various concerns primarily in relation to privacy issues, potential economic impact, competitive disadvantage, legal and constitutional issues, international standards and pressure, and arguing that the push for public beneficial ownership registries should be part of a global standard rather than being implemented unilaterally or in a piecemeal fashion. They contended that a co-ordinated international approach would ensure a level playing field and more effectively combat financial crimes. As a compromise, the result was a beneficial ownership database that is accessible to law enforcement and regulatory authorities (upon request) and not the general public. This met international requirements without the need for public disclosure.

In recent times, there have since been re-emerging discussions in the company managers space relating to the implementation of a public beneficial ownership registry (by the global powers that be) in the year 2025. However, nothing tangible has surfaced to date and the industry continues to await the next wave of proposed changes.

Employment

Although there are no planned legislative revisions to the Employment Ordinance, the interpretation of that ordinance is constantly being verified and modernised though decisions of the Labour Tribunal and by appeals to the TCI Court of Appeal. For example, a December 2023 Court of Appeal decision confirmed that in circumstances of wrongful termination the employee's awards of compensation are to be calculated on the basis of the hours actually worked during the employee's employment, to avoid employees being awarded a windfall by reason of their termination. Before that decision, the Labour Tribunal was awarding damages based on the maximum contractual hours.

That decision also changed the procedure by which the Labour Tribunal hears employment disputes. It required the Labour Tribunal to be more open in its process, requiring that parties have an opportunity to know and respond to the case against them by the other side.

Trends and Developments

Contributed by:
Devon McLean and Brook Capron
Stanbrook Prudhoe

Stanbrook Prudhoe is a firm with deep experience of working across the Caribbean region and the common law Central and South America. Based out of the Turks and Caicos Islands (TCI), the two founding partners (Sophie Stanbrook and Tim Prudhoe) are both London-trained. The real estate, development and commercial teams are headed by Sophie Stanbrook and the disputes practice by Tim Prudhoe. The firm continues to appear in all the major litigation in the TCI, including public law and constitutional challenges relating to same-sex marriage rights, immigration and habeas corpus. It also handles "big ticket" disputes work across a wide range of jurisdictions. In 2023, the firm opened an office in Georgetown, Guyana, reflecting strong growth in client demand there.

Authors

Devon McLean advocates for clients at all levels of courts and tribunals, as well as managing risk for clients through contract negotiations. She leads representations for landowners defending against encroachments, easements and acquisitions, and for banks, private asset managers and others in enforcing their financial agreements and in the collection of secured and unsecured debts. In addition to litigating employment matters, she prepares employment contracts and manuals, guides clients through disciplinary action, and prepares complex separation agreements with high-level employees – always with a focus on risk management.

Brook Capron specialises in legal work around residential and commercial lending by local banking institutions and private lenders. He also navigates the full spectrum of real estate development work and high net worth private client real estate investment.

Stanbrook Prudhoe

Third Floor Graceway House
Graceway Plaza
Providenciales
Turks and Caicos Islands TKCA 1ZZ

Tel: +1-649-946-4300
Email: contact@spcaribbean.com
Web: www.spcaribbean.com

The Conveyancing Landscape

A recent trend in the Turks and Caicos Islands (TCI) is the use of zero setback requirements. Traditionally, and in accordance with the Physical Planning Ordinance (as revised on 31 March 2021), there are prescribed setback requirements that are outlined in the Development Manual (schedule), which vary based on the nature and location of the proposed development. They are determined largely by factors such as whether the development is a condominium scheme, hotel, residential (villas or mixed condominium and villa development) or commercial development, and considerations such as proximity to a public road, coastline, iron shore or canal.

The Department of Planning in the TCI has recently provided approvals for projects with relaxed setback restrictions. Decisions to do so are made on a case-by-case basis at the discretion of the Physical Planning Board on the advice of the Director of Planning, after taking into account considerations specific to the property.

The TCI has also seen zero setback requirements for adjoining properties. The TCI, however, has no equivalent legislation to the English Party Wall Act 1996 and as such, provisions dealing with party wall issues are set out in the contractual documentation. The benefits are:

- it enables higher-density development without the need for a strata structure; and
- it allows buyers to finance their purchase/construction as they can secure the borrowing on the underlying land parcel, unlike a strata purchase where the legal title to the property does not pass until the property is fully constructed, meaning that there is no ability for a lender to take security.

Investment Policy

In December 2023, Invest TCI launched the Turks and Caicos National Investment Policy 2023. The revised investment policy includes enhanced incentives for Turks and Caicos Islander-owned investment projects and thresholds for incentivising foreign investment (ie, minimum investment amounts to qualify for concessions), and introduces sustainable development goals.

Economic Substance

In response to pressure from international organisations such as the Organisation for Economic Co-operation and Development and the European Union, the TCI has embraced economic substance requirements as part of its commitment to international tax transparency and regulatory compliance. This was formalised through the enactment of the Companies and Limited Partnerships (Economic Substance) Ordinance, which sets out the criteria and obligations for entities operating in the TCI.

Although all companies are required to file annual returns and reports to the local authorities (namely, the Exchange of Information Office), the content of which determines whether a company's activities fall within scope of the requirements, TCI legislation also specifies which business activities are subject to economic substance requirements. These include banking, insurance, fund management, headquarters operations, shipping, holding companies, intellectual property, and distribution and service centres.

Companies that are caught by economic substance are required to furnish additional documents such as evidence of their core income-generating activities, physical presence, management and local expenditure.

The TCI imposes penalties for entities that are caught by the legislation but fail to meet economic substance requirements. These can range from fines and sanctions to the potential deregistration of non-compliant companies.

In essence, economic substance has become a cornerstone in the evolving landscape of global tax regulation, with its requirements representing a significant step towards greater financial transparency. By ensuring that entities have a genuine economic presence and conduct meaningful business activities within their jurisdictions, territories like the TCI align with global efforts to combat tax avoidance, promote fair competition and enhance the credibility of offshore financial centres in the region.

Major Cases and Constitutional Challenges

Having experienced the suspension of parts of its Constitution from August 2009 to 2012 as a result of corruption of its government and legislature, including allegedly by then prime minister Michael Misick, the TCI remains mired in ongoing legal proceedings known locally as "SIPT" (Special Investigation and Prosecution Team). The SIPT proceedings began in 2015 and continue in various forms. The first convictions in the SIPT proceedings came in 2023, in which the ex-deputy premier and former Speaker of the House were convicted of bribery and money laundering, respectively, and both were sentenced to prison terms. Those convictions are currently under appeal, and the SIPT saga continues. The allegations which led to the suspension of the Constitution, and that recommendation for suspension, are set out in the Sir Robin Auld Commission of Inquiry Report 2008-2009.

Marriage remains only as between opposite sexes in the TCI. A legal challenge relating to that (recognition of legal rights for same-sex couples married outside of the TCI) resulted in a 2024 decision that the couple in that case had been treated unconstitutionally, but did not go so far as to require the government to recognise same-sex marriages performed elsewhere. That decision is under appeal from both the couple and the government.

Since 2019, the TCI has had to sharply increase its knowledge of refugee and asylum issues, including its interview protocol and assessment of asylum applications. In October 2019, more than 20 Sri Lankan men entering the TCI illegally from nearby Haiti were detained following the seizure of the boat on which they arrived. A criminal investigation ensued, resulting first in imprisonment in TCI of the smuggler and then his extradition to the United States for related charges. The smuggled individuals were then interviewed on behalf of the TCI government by representatives of the United Nations High Commissioner for Refugees. Of those who received refugee status designation who remained in

the TCI, all claimed asylum, which was granted in 2023. Those individuals also won claims in damages against the TCI government for false imprisonment and related constitutional claims on issues relating to translation costs. There is public concern that these recent grants of asylum may open the floodgates for other asylum applications in a jurisdiction with little resources to handle such an influx.

In circumstances that the Royal Turks and Caicos Islands Police Force has called a "steady proliferation of illegal firearms and firearm-related crimes" in the TCI, the TCI strengthened its firearms laws in 2022 with the introduction of a 12-year mandatory minimum sentence for possession of a firearm or ammunition (up from seven years). At least four criminal cases against Americans who say they inadvertently brought guns and/or ammunition into the TCI have made their way through the courts, making international headlines. The US government put out a warning to travellers in September 2023 noting that firearms and ammunition are illegal in the TCI, and that the US government would not be able to secure any US citizen's release from custody if charged with related offences. The TCI government has reminded travellers that there is no constitutional right to carry firearms or possess ammunition in the TCI. None of the Americans charged and sentenced thus far were subject to the mandatory minimum, as all were found to have exceptional circumstances which fall under the "exemptions" to that provision. On 14 June 2024, the TCI government passed the Firearms (Amendment) Ordinance 2024, which removed the requirement for a custodial sentence where exceptional circumstances are found, although the 12-year mandatory minimum otherwise remains in place.

Law and Tech

When the rest of the world shut down for COVID-19, so too did the TCI. However, it has adapted and even managed to hold virtual jury trials for criminal matters. Practice Directions were introduced that allowed for the filing of certain documents via email. In 2023, the judiciary introduced "E-JUDICIARY", a paperless court with digitised access for all users including attorneys and members of the public. In April 2024, the Supreme Court announced that its grace period for accepting paper filings for certain actions was coming to an end, signalling the permanent and final transition to a paperless court. That "E-JUDICIARY" programme is currently in its pilot phase for the Court of Appeal.

In her "2022 Legal Year Opening Speech", Chief Justice Mabel Maame Agyemang referred to "technology that permits virtual proceedings has become sine qua non in judicial work", leaving hope that the technological advancements in the practice of law forced upon the TCI by the COVID-19 pandemic and cessation of in-person proceedings will remain and progress further.

The adoption of technology in the exercise of the law was bolstered by a 2023 Supreme Court decision which was the first written decision in the TCI explicitly allowing service of court documents by way of social media (LinkedIn).

In 2000, the TCI adopted the UK rules of civil procedure that were in place in the UK in 1999 (although soon after replaced in the UK), and they have been in use in the TCI since. There have been comments from the judiciary that the TCI will in the near future be adopting the rules of the Eastern Caribbean, which would mark a sharp departure from the more lenient 2000 rules, and usher in an era of unforgiving deadlines and consequences in litigation – perhaps

intentionally, as the Chief Justice has made it one of her missions to clear the backlog of litigation. Parties, and their attorneys, will need to be increasingly on top of deadlines or risk having their cases dismissed.

Access to Justice

Access to justice has been a recent focus for both the judiciary and the legal profession, with a number of legislative changes and more informal initiatives.

At her legal year opening address in January 2024, the Chief Justice put out a call to action for the TCI government, calling for "compliance with the constitutional provision which assures the Judiciary of adequate funding – a matter that is inextricably bound with the attainment of judicial independence", and stating that while "we understand the need for value for money and recognise that our budgetary needs must be scrutinised as much as possible, we implore the Legislature and Cabinet to not deny us funds we require to operate effectively and to expand access to justice".

Limited Legal Aid funding has been available for criminal cases since 1999. In 2021, access to that funding was expanded, but remains limited primarily to those who are indigent. The Legal Aid (Early Criminal and Civil Assistance) Rules 2021 introduced the concept of duty counsel to assist individuals prior to their being charged criminally, and recognised the need for funding for indigent persons in prosecuting and defending claims before the court, or to seek declarations pertinent to the protection of constitutional rights, including public law cases that will both benefit the public and improve local jurisprudence. A Legal Aid Roster was also implemented, from which the Registrar may assign attorneys to matters in need of representation via Legal Aid.

Also in 2021, the TCI Bar Council's Pro Bono Committee took up the cause of increasing access to justice and formulated a "Pro Bono Strategy" for implementation in 2022, its most prominent feature being free preliminary advice via virtual sessions staffed by volunteers from the Bar which continue today.

Conditional fee arrangements, which were previously prohibited in the TCI, were given judicial approval in 2021, expanding the types of fee arrangements attorneys may enter into. Proceedings are underway to expand that approval to include damages-based agreements, which are currently prohibited in the TCI.

In 2023, the TCI judiciary opened a satellite courthouse in the less populated island of North Caicos, serving North and Middle Caicos, and it has announced a courthouse in South Caicos in order to increase access to justice on those islands.

The TCI's first full-time coroner was appointed in 2023, along with the establishment of a Coroner's Court in 2024, both with the goal of clearing the backlog of unexplained deaths. This is particularly important for foreigners who die in the TCI, as the lack of a full-time coroner could mean a delay of weeks in transporting a loved one's body back to their country of origin.

In 2022, the Restorative Justice Rules were introduced in the TCI to promote victim-offender reconciliation, which may include reparation for offences, and in acknowledgement of the gaps in the intersection of mental health treatment and criminal law which must be addressed. That launch coincided with the 2022 inception of the

Victims and Witness Support Unit, in support of persons impacted by crimes.

As a part of its focus on reconciliation, and in support of its Court Connected Mediation programme, whereby litigants or presiding judges can refer matters to mediation, in 2021 the TCI judiciary began training mediators to add to its Roster, in partnership with the Department of Behavioural Sciences at the Faculty of Social Sciences, University of the West Indies St Augustine, Trinidad. In 2022, it opened its Mediation Centre and expanded the training to family mediators.

UK

Law and Practice

Contributed by:
James Ross, Paolo Palmigiano, Rachael Roberts, Helen Farr, Jack Cunningham, Hope Oraka, Celine Enos and Richard Miles
Taylor Wessing LLP

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Taylor Wessing LLP is a leading international law firm that serves the world's most innovative people and businesses. Specialising in technology, media and communications, life sciences, private wealth, real estate and energy, the firm acts for 32 of the world's top 50 brands; some of the world's most exciting start-ups; and some of the world's wealthiest families. It is deeply embedded within its sectors and works closely with its clients to crack complex problems, allowing ideas and aspirations to thrive. Taylor Wessing has over 400 partners and more than 1,200 lawyers spanning 28 offices in 17 jurisdictions globally, including the UK, Germany, the CEE and the Middle East. It is committed to being a responsible business and to accountability for its actions.

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Authors

James Ross is a partner in the tax team at Taylor Wessing, advising on a broad range of advisory and transactional tax matters. These include: the structuring and negotiation of M&A transactions; advising US-based clients on the structuring of acquisitions and inward investments in the UK and Europe; corporate restructuring matters, including financing and intellectual property holding structures; and assisting clients in relation to tax authority enquiries and audits. James has a particular focus on cross-border work. He works with a wide range of clients, from large multinationals and private equity funds to privately-held companies, family offices and private clients.

Paolo Palmigiano heads up Taylor Wessing's UK competition, trade and foreign investment practice, and is a member of its European competition law team operating from the Brussels office. Qualified in England & Wales and Italy, Paolo has over two decades of experience advising on EU and UK competition law, both in private practice and in-house, in regulated sectors such as telecommunications and media, financial services and payment systems, as well as in the tech and life sciences sectors. Paolo's extensive experience extends to all areas of competition law, including cartels, abuse of dominance, investigations, mergers, state aid and follow-on damages claims.

Rachael Roberts is an associate in the corporate technology and life sciences group in Taylor Wessing's London office. She specialises in advising companies and investors within the technology and life science sectors on venture capital investments, M&A transactions and general corporate matters.

Contributed by: James Ross, Paolo Palmigiano, Rachael Roberts, Helen Farr, Jack Cunningham, Hope Oraka, Celine Enos and Richard Miles, **Taylor Wessing LLP**

Helen Farr covers the full spectrum of employment law and human resources strategy at Taylor Wessing, with extensive experience in complex advisory and litigation projects. Helen has particular expertise in working with clients in the financial, tech and professional services sectors. She has guided many banks and solo regulated firms through the complex employment issues related to the introduction of the senior managers and certification regime and on crossover employment and regulatory issues. Helen's focus is on strategic matters, such as workplace discrimination of a sensitive nature, equal pay, team moves, boardroom disputes and employment cases involving financial services regulatory issues.

Jack Cunningham is currently a trainee in the employment, pensions and mobility group. He will be qualifying into the corporate technology and life sciences group in September 2024 at Taylor Wessing's London office, specialising in advising companies and investors in the technology and life science sectors on venture capital investments, M&A, and general corporate matters.

Hope Oraka is currently a second-seat trainee within Taylor Wessing's employment, pensions, and mobility team, advising on UK employment law across a range of advisory matters, disputes, and transactional deals. Prior to this, Hope completed her first seat in the private equity team, advising private equity houses, their portfolio companies and management teams on UK and cross-border restructuring and M&A transactions.

Celine Enos is currently a trainee within Taylor Wessing's employment, pensions, and mobility group, advising on complex benefits issues and individual employment disputes that feature an international element. Before this, she completed a six-month seat in the contentious private-client group focused on resolving disputes related to contentious trusts, as well as contentious family and probate matters.

Richard Miles Rich is currently a trainee in the tax and incentives group. He will be qualifying into the disputes and investigations group in September 2024 at Taylor Wessing's London office, specialising in both investor-state and international commercial arbitration and life science litigation.

Contributed by: James Ross, Paolo Palmigiano, Rachael Roberts, Helen Farr, Jack Cunningham, Hope Oraka, Celine Enos and Richard Miles, **Taylor Wessing LLP**

Taylor Wessing LLP

5 New Street Square
London
EC4A 3TW

Tel: +44 20 7300 7000
Fax: +44 20 7300 7100
Email: london@taylorwessing.com
Web: www.taylorwessing.com

1. Legal System

1.1 Legal System and Judicial Order

The UK is a common-law jurisdiction, primarily built on case law, where the outcomes of previous legal cases set precedents for future cases. The UK courts are arranged in a hierarchy. At the base are Magistrates' Courts and County Courts, dealing with minor criminal offences and civil matters, respectively. Above these are the Crown Court and High Court, which handle more serious criminal cases and significant civil disputes.

The Court of Appeal sits above these courts, and reviews cases from them to ensure the correct application of law. The Supreme Court is the highest court in the UK; it provides final judgments on points of national importance and clarifies laws that affect everyone.

There are also tribunals that specialise in particular areas, such as employment or immigration. These tribunals make decisions within their specific field, but can be appealed to the higher courts.

While judges create common law, statues passed by the UK Parliament take precedence over all case law. This combination of statute law and common law ensures both a democratic input from Parliament and a detailed interpretation by judges based on precedent.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

While the UK does not have a specific foreign investment regime, in 2022 it introduced the National Security and Investments Act 2021 which applies to investors of any country, including UK investors. There is a requirement for a mandatory notification if the target is active in one of 17 key sectors of the economy (and within the definition of those sectors in the Act, clearance must be obtained prior to closing (with substantial fines for non-compliance)).

The 17 sectors are as follows:

- advanced materials;
- advanced robotics;
- artificial intelligence;
- civil nuclear;
- communications;
- computing hardware;

- critical suppliers to government;
- cryptographic authentication;
- data infrastructure;
- defence;
- energy;
- military and dual use;
- quantum technologies;
- satellite and space technologies;
- suppliers to the emergency services;
- synthetic biology; and
- transport.

Notifiable transactions are those where there is an increase in shareholding and voting rights from:

- 25% or less to more than 25%;
- 50% or less to more than 50%;
- less than 75% to 75% or more; or
- the acquisition of voting rights that enables or prevents the passing of any class of resolution governing the affairs of the entity being acquired.

The Act also introduces a voluntary filing if the target is outside the definitions of the 17 key sectors, or is active in any sector but there are national security issues. Since filing is voluntary, there is no obligation to wait for approval before completing. However non-notified transactions that raise national security concerns might be called in for review by the government. Asset deals and IP licensing transactions can be subject to call-in if they raise national security issues and it is possible to notify voluntarily.

The Act has extraterritorial application (therefore, for example, it will apply to acquisitions in the US, Canada, EU, China or any other jurisdictions of non-UK entities that conduct activities in the UK or supply goods and services in the UK, even if they do not have a direct presence there).

2.2 Procedure and Sanctions in the Event of Non-compliance

Notifications are made to a dedicated government unit, the Investment Security Unit (ISU), through a digital portal. The form to complete is not overly complex and, within a couple of days, the ISU will confirm whether the filing is accepted or if more information is needed. Once the Secretary of State accepts a notification (when it contains all the required information), a review period of 30 working days will start. This could end with a clearance or a call-in for an assessment period of a further 30 working days, at the end of which there can be clearance, clearance with conditions, prohibition, or an extension of 45 working days for further review. With possible suspensions during the assessment period, full national security scrutiny can be estimated to be up to 21 weeks.

Closing a transaction that is subject to mandatory notification without notifying and obtaining clearance carries a heavy fine of up to 5% of the total global turnover of the acquirer, or GBP10 million (whichever is greater), and imprisonment of up to five years, and the transaction becomes void.

2.3 Commitments Required From Foreign Investors

The process is not public unless the deal is blocked, or conditions are imposed and a decision issued. The government has accepted commitments in several cases, such as requiring certain capabilities remain in the UK, Chinese walls for sensitive information, and restricted access to sensitive areas, etc.

2.4 Right to Appeal

If a company wishes to challenge certain decisions of the Secretary of State – for example, to

approve, block or unwind a transaction – it can apply for a judicial review of the decision.

Judicial review is the mechanism by which the courts review the lawfulness of a decision taken by a public body. An application for judicial review can be brought on the grounds of illegality, procedural unfairness, unreasonableness/irrationality, or for a breach of a right protected by the European Convention of Human Rights.

An application for judicial review must be made "promptly and in any event within three months" of the decision under challenge. However, the NSIA modifies this and an application must be made within 28 days of any decision (extendable in exceptional circumstances).

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The three most common types of corporate vehicles in England are:

- a private company limited by shares;
- a public limited company; and
- a limited liability partnership.

There are also other corporate vehicles such as companies limited by guarantee, unincorporated associations and charitable incorporated organisations, but these are seen less frequently.

Private Limited Companies (Ltd)

A private limited company in England is typically governed by one or more directors and operates in accordance with its Articles of Association, as prescribed by the Companies Act 2006. The liability of shareholders is limited, meaning that their financial responsibility for company debts does not exceed the unpaid amount on their shares. A private limited company does not have a minimum share capital requirement, though it must always have at least one share in issue and there must always be at least one shareholder. These companies are best suited to small and medium-sized enterprises, and are particularly appropriate for family businesses, startups, or ventures seeking to keep their affairs private from public scrutiny.

Public Limited Companies (PLC)

A public limited company or PLC in England is also governed by the Companies Act 2006 but is subject to an additional regulatory framework which includes the UK Corporate Governance Code, the Listing Rules and the Market Abuse Regulations. The majority of PLCs are listed on a stock exchange, typically the London Stock Exchange or the Alternative Investment Market. A PLC must appoint at least two directors and a qualified company secretary. It is managed by a board of directors and is subject to more stringent regulations than a private limited company. A PLC must have a minimum of two shareholders, and shareholders' liability is limited to the amount that remains unpaid on the shares they hold. The minimum share capital threshold for a PLC is GBP50,000, with at least 25% of that amount being paid up upon incorporation. This type of entity is suitable for larger ventures looking to attract investment from public markets – being able to raise capital through equity offerings and sell shares to the public offers substantial opportunities for growth and expansion, making it an attractive option for businesses with ambitious scaling plans. Often, companies will start out as private companies limited by shares and eventually become public limited companies, most commonly as a result of either an initial public offering or by being acquired by a public company.

Limited Liability Partnerships (LLP)

An LLP is a type of corporate vehicle that merges the flexibility of a partnership with the benefits of limited liability for its members. The governance structure of an LLP is administered directly by its partners, usually pursuant to an LLP agreement, which sets out each partner's responsibilities, obligations, and share of profits. Unlike traditional companies, LLPs are not required to hold annual general meetings or file their accounts. Members of an LLP enjoy limited liability protection – their personal exposure for the debts incurred by the LLP does not extend beyond their individual investments into the partnership unless they engage in wrongdoing or personal negligence. There are no statutory rules regarding minimum capital contributions in an LLP, but an LLP must always have at least two members. In England, LLPs are particularly favoured by professional services firms, including law practices and accountancies.

3.2 Incorporation Process

The steps and timing for incorporation of entities in the UK depend on the type of entity that has been chosen. All private limited companies, PLCs and LLPs must be registered at Companies House, England's registrar of Companies that operates under the Companies Act 2006. Online registration with Companies House is typically processed within 24 hours, while postal applications may take 8-10 days. The information required for each is as follows.

Limited Companies (Ltd)

- Name – an appropriate company name that conforms with Companies House regulations must be chosen.
- Documentation – the necessary documents including the Memorandum of Association and Articles of Association must be prepared.
- Forms – Form IN01, with details such as registered office, director(s), secretary (if any), shareholder(s), and share capital must be completed.
- Registration – once the application has been processed by Companies House, a Certificate of Incorporation will be received confirming the legal existence of the private limited company.

Public Limited Company (PLC)

- Name – an appropriate company name that conforms with Companies House regulations must be chosen.
- Documentation – the necessary documents including the Memorandum of Association and Articles of Association must be prepared.
- Forms – Form IN01, with details such as registered office, directors (at least two), secretary, shareholder(s), and share capital must be completed.
- Minimum share capital – it must be ensured that there is a minimum allotted share capital of GBP50,000 with at least 25% paid upon incorporation.
- Registration – once the application has been processed by Companies House, a Certificate of Incorporation will be received confirming the legal existence of the PLC.
- Trading certificate – before starting business or borrowing money, a trading certificate must be obtained from Companies House by demonstrating that the PLC has met the minimum share capital requirements. This can take several weeks after registration.
- Prospectus publication – if shares are being offered to the public, a prospectus that complies with the Prospectus Rules must be published. The prospectus should provide detailed information about the company and its securities offering. This can be time-consuming, as it involves careful preparation and

review by legal advisors and financial regulators.
- Listing – if the PLC is to be listed on a stock exchange, various requirements will need to be met, and there are ongoing rules and obligations. Timing for this step can vary depending on market conditions and the PLC's readiness to list.

Limited Liability Partnerships (LLP)
- Name – an appropriate company name that conforms with Companies House regulations must be chosen.
- Designated members – at least two members must be chosen to be designated members, who are responsible for statutory compliance duties.
- Documentation – an LLP agreement is optional but recommended.
- Forms – Form LL IN01 with details such as the registered office and information about its members.
- Registration – once the application has been processed by Companies House, a Certificate of Incorporation will be issued confirming the legal existence of the LLP.

3.3 Ongoing Reporting and Disclosure Obligations

Companies in England are subject to various ongoing reporting and disclosure obligations which aim to ensure transparency and accountability.

Private limited companies, PLCs and LLPS are required to inform Companies House about any changes in directors or secretaries, amendments to articles, changes in beneficial ownership and certain resolutions of the shareholders. These filings must be made with Companies House within certain deadlines, often 14-30 days from the relevant event or change. Private limited companies and PLCs also need to file annual financial statements and annual confirmation statements. Financial statements should reflect an accurate financial position of the company and be filed within nine months of the end of their accounting reference period for small companies, or within 12 months for other private companies. Confirmation statements must be filed on a yearly basis to confirm that all information about the business held by Companies House is current and correct, including details on management, share capital, shareholders, and the PSC register.

For PLCs, there are a number of further reporting and disclosure requirements that are set out by the market regulators.

If companies fail to comply with their ongoing reporting and disclosure obligations, various penalties and consequences may apply.

3.4 Management Structures

In the UK, entities are typically organised under a one-tier system, meaning that there is a single board of directors responsible for both the strategic direction as well as the day-to-day management of the Company. The board of directors is usually made up of both executive and non-executive directors – executive directors are responsible for the daily operations of the company and the non-executive directors bring an independent perspective and oversee the performance of the executive directors. A one-tier system is designed to streamline decision-making processes by combining oversight with active management within a single body.

3.5 Directors', Officers' and Shareholders' Liability

Directors and officers of both public and private companies have fiduciary duties towards the

company which include, among others, acting within their powers, promoting the success of the company for its members' benefit, exercising independent judgment and reasonable care, skill and diligence and avoiding conflicts of interest. The main rules that govern the liabilities of directors in the UK are set out in the Companies Act 2006. If directors breach their fiduciary duties, they could face civil proceedings. In some cases, criminal liability may arise under the aforementioned Act, for example for fraud or wrongful trading. There are certain other rules and regulations that may govern a company, depending on whether it is public or listed on a stock exchange, for example, the Market Abuse Regulations or the Listing Rules, although the key rules are those set out under the Companies Act 2006.

The principle known as "piercing (or lifting) the corporate veil" exists in English law, and refers to a situation where a court sets aside the separate legal personality of a company. Typically, a company is seen as a distinct entity from its shareholders, although the court may decide to pierce this "veil". This principle is applied very narrowly by courts only in exceptional circumstances where the company has been used as a vehicle for fraud or improper conduct, or where the individuals behind a company have abused the corporate structure to shield themselves from liability or to perpetrate wrongdoing. Piercing the corporate veil is an exceptional remedy applied by the courts and is not used often – case law provides that it can only be justified when the more conventional remedies are all seen to be inadequate.

4. Employment Law

4.1 Nature of Applicable Regulations

The legal rules governing the employment relationship are multifaceted, and can be categorised as follows.

Statutory Law

This comprises legislation enacted by Parliament which sets out various rights and obligations for employers and employees. Key statutes include the Employment Rights Act 1996, the Equality Act 2010, and the Health and Safety at Work etc. Act 1974, among others. The following laws, depending on the stage of employment in question, are of particular note:

- Recruitment:
  - (a) Equality Act 2010;
  - (b) Rehabilitation of Offenders 1974; and
  - (c) Data Protection Act 1998.
- Pre-employment checks:
  - (a) Safeguarding Vulnerable Groups Act 2006; and
  - (b) Immigration, Asylum and Nationality Act 2006.
- Employment offer:
  - (a) Employment Rights Act 1996;
  - (b) the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002; and
  - (c) the Part Time Workers (Protection from Less Favourable Treatment) Regulations 2000.
- Training and development:
  - (a) Equality Act 2010;
  - (b) Employment Rights Act 1996;
  - (c) Education and Skill Act 2008; and
  - (d) the Employees Study and Training Regulations 2010.
- Change in personal circumstances:
  - (a) Employment Rights Act 1996;

(b) the Flexible Working Regulations 2014; and
(c) Employment Act 2002.
- Performance management:
(a) Equality Act 2010; and
(b) Employment Rights Act 1996.
- Industrial action:
(a) Trade Union and Labour Relations (Consolidation) Act 1992;
(b) Strikes (Minimum Service Levels) Act 2023; and
(c) the Conduct of Employment Agencies and Employment Business (Amendment) Regulations 2022.
- Mergers and acquisitions:
(a) the Transfer of Undertakings (Protection of Employment) Regulations 2006.
- End of employment:
(a) Employment Rights Act 1996;
(b) Equality Act 2010;
(c) Trade Union and Labour Relations (Consolidation) Act 1992; and
(d) the Collective Redundancies and the Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999.

Other Sources of Law and Regulation

In addition to the above-mentioned statutes, the following are also important sources of legal rules that govern employment relatoionships:

- *Case law (common law)* – The UK uses a common law system whereby judges make decisions interpreting statutes and cases establishing legal principles. Case law establishes precedent which is then followed by other tribunals deciding employment disputes.
- *Collective bargaining agreements* – These are agreements made between employers (or employers' organisations) and trade unions representing workers. They govern key employment terms including pay, working hours, holidays, and other working conditions.
- *Employment contracts* – Individual contracts between an employer and employee establish the contractual terms that apply to the employment relationship such as duties, remuneration, benefits, and termination procedures.
- *Regulatory materials* – Guidance from regulatory bodies, such as the Health & Safety Executive or Information Commissioner's Office, also plays a significant role in shaping workplace practices.

4.2 Characteristics of Employment Contracts

An employment contract between an employee and employer is a legally binding agreement. An employee has the right to a "written statement of employment particulars" in accordance with Section 1 of the Employment Rights Act 1996. A Section 1 statement sets out the main terms of employment, and there is a list of mandatory terms that must be given to every employee.

An employer will be treated as having met its obligations to provide a Section 1 statement where it gives an employee a written contract containing information satisfying the employer's Section 1 obligations and the document is provided no later than the beginning of employment.

The characteristics of a typical employment contract include:

- a job title and description;
- commencement date of the employment and duration – specifying when employment begins, its duration and if it is intended to be for a fixed term;

- location of work;
- salary and benefits – details of pay, payment frequency and benefits;
- hours of work;
- probationary period – the length and terms of any probation;
- notice period;
- holiday pay – paid holiday entitlement and procedures;
- sick leave and pay – sick-leave policies and statutory sick pay;
- notice period – the notice period required for termination by either party;
- training – any training entitlement which the employer requires the worker to complete;
- disciplinary and grievance procedure – processes for handling disciplinary actions and grievances;
- variation of terms – this explains how changes to the employment contract are made; typically requiring mutual agreement in writing; and
- non-compete or restrictive covenants – this sets out any post-employment restrictions.

4.3 Working Time

In the UK, the regulation of working hours for workers (which includes employees) is governed by the Working Time Regulations 1998 (as amended). Key aspects of these regulations include the following.

- *Maximum weekly working time* – Workers are protected by a 48-hour maximum working week, calculated over a reference period, typically 17 weeks. Some sectors are exempt from this, as are senior workers who can determine their own working time. Workers can opt out of the maximum working week by signing a written statement, but they cannot be forced to do so. They may opt back into the regime at any time by giving notice to their employer.
- *Night work limits* – For night workers, there are special limits on working hours. Typically, night work should not exceed an average of eight hours in any 24-hour period.
- *Rest periods and breaks* – Workers have the right to rest breaks during work (a minimum of 20 minutes if the working day is longer than six hours) and daily and weekly rest periods (11 consecutive hours' rest in any 24-hour period and an uninterrupted 24 hours without any work each week or 48 hours each fortnight).
- *Overtime regulation* – Employers should decide whether overtime is voluntary or compulsory for a particular job and draft the employee's employment contract accordingly. There are no statutory provisions which require an employer to pay a particular overtime wage, but average pay over the total hours they have worked must not fall below the national minimum wage. Working time may have an impact on employees' holiday pay. Employers must also ensure that total working time, including overtime, does not exceed the maximum weekly limit unless an opt-out agreement is in place.
- *Record keeping* – Employers must keep adequate records to show compliance with working time limits and health assessments for night workers.

4.4 Termination of Employment Contracts

The following conditions apply for termination of employment.

- There is no concept of "at will" employment in the UK, and employees have the right to be given notice when their employment terminates.

- As a requirement by law, employees must give their employer at least one week's notice that they are leaving if they have been employed for one month or more. An employee who has been continuously employed for more than one month, but less than two years, is entitled to receive one week's notice from their employer. Thereafter, they are entitled to receive an additional week's notice for each complete year of service, up to a maximum of 12 weeks.
- If an employer wants to, it can extend the notice period beyond the statutory notice period by including longer notice periods in the employment contract.
- An employee can be dismissed without any notice period if they have committed a serious breach of the employment contract that would justify this (for example, gross misconduct).
- All employees with more than two years' service may only be dismissed for one of the five legally fair reasons and be subject to a fair procedure. If the employer does not follow this procedure, the employee may have an entitlement to an unfair dismissal claim and can claim compensation as a result.
- There are circumstances where employees with less than two years' service can claim automatic unfair dismissal. These include if the dismissal is for a reason like pregnancy or other discriminatory reason.

In the case of redundancies, the following process must be followed.

- If an employer proposes to make redundant 20 or more employees within a period of 90 days or less at one establishment (ie, the employees' local workplace rather than the organisation as a whole), then it must consult collectively with elected employee representatives, as well as notify the Secretary of State. Consultation should start in good time before any redundancies are confirmed.
- Any dismissals should not take effect until at least:
  (a) 30 days after an employer's consultation obligations have been triggered, where between 20 and 99 redundancies are proposed; or
  (b) 45 days after an employer's consultation obligations have been triggered, where 100 or more redundancies are proposed.
- If an employee is made redundant and they have more than two years' service, they will qualify for a statutory redundancy payment.

4.5 Employee Representations

The following rules apply for collective consultation.

- An employer must collectively consult employees if they propose to make redundant 20 or more employees at one establishment and within a period of 90 days or less.
- Employers must consult with a trade union or employee representative about the redundancy process.
- Failure to comply with the legal requirement for collective consultation can result in claims to the employment tribunal and an award of up to 90 days' full pay for each affected employee.

The following rules apply with respect to grievances and disciplinary hearings.

- Employees and workers have a legal right to be accompanied, by a trade union representative or another employee, to grievance meetings or disciplinary hearings that can result in a disciplinary action against them.

- If an employee seeks the right to be accompanied, they must make a reasonable request.
- During a hearing, a representative may set out the employee's case, respond for the employee to any comments, talk to the employee during the hearing or take notes.
- Denying an employee the right to be accompanied by an employer could amount to a breach of an implied duty of trust and confidence and render the process unfair.

Rules apply with respect to TUPE (Transfer of Undertakings (Protection of Employment)) as follows.

- Prior to a TUPE transfer, both the outgoing and incoming employers must inform and consult with staff representatives to set out any proposed changes and why the transfer is taking place.
- An employer will consult with an employee regarding any changes relating to work practices that will take place as part of the transfer.

Applicable ICE Regulations (Information and Consultation of Employees) are as follows.

- Where an employer has 50 or more employees in the organisation, the employees have the right to request a formal agreement to be informed and consulted on the operation of the business.
- An elected employee representative may assist in conducting negotiations and requesting information from the employer.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Employees are subject to income tax on earnings from their employment, which is charged at progressive rates of 20%, 40% and 45%. UK-resident individuals are generally taxable on their worldwide income; non-UK residents are taxed only on earnings in respect of duties performed in the UK, subject to any relief available under double tax treaties. Individuals who become UK residents after at least three years of non-residence may be entitled to claim "overseas workday relief", whereby earnings from duties performed outside the UK will be taxable only if and when remitted to the UK (the so-called "remittance basis of taxation"). Overseas workday relief is available for up to three tax years; thereafter, individuals who are resident but not domiciled in the UK may be able to claim the remittance basis of taxation in respect of earnings from an employment carried on wholly outside the UK. At the time of this publication (July 2024), there is a strong possibility that the remittance basis will be replaced with a new regime for temporary residents, the scope of which has yet to be confirmed.

Employers with a presence in the UK are generally required to withhold tax from payments to employees, and to account for it to HM Revenue & Customs through the Pay As You Earn (PAYE) system.

Special rules apply to tax benefits in kind and earnings from employment-related securities (including share options).

National insurance contributions (ie, social security contributions) are charged on employees who are present in the UK. These are cur-

rently charged at a rate of 8% up to the "upper earnings limit" (currently GBP967 per week) and 2% above that threshold. The employer is liable for secondary contributions at a rate of 13.8%. Employer contributions apply to benefits in kind, and both employer and employee contributions may apply to benefits from employment-related securities that are readily convertible assets. The employer is required to account for national insurance contributions through the PAYE system.

5.2 Taxes Applicable to Businesses

A company that is resident in the UK is chargeable to corporation tax on its worldwide profits. A non-resident company is chargeable to corporation tax on profits of a trade carried on in the UK through a permanent establishment in the UK, as well as from profits of a UK property business and any profits from a trade of dealing in or developing UK land. A residual charge to income tax applies to the profits of a trade carried on in the UK other than through a permanent establishment – in practice, this only applies to companies that are not resident in territories with which the UK has a tax treaty.

The UK has implemented the Pillar 2 Income Inclusion Rule for accounting periods commencing on or after 31 December 2023, known as multinational top-up tax. It has also introduced a qualifying domestic top-up tax from the same date. It is expected to legislate to introduce the undertaxed profits rule with effect from 31 December 2024.

The UK imposes withholding tax on UK-source interest, royalties and certain other payments of a recurrent nature ("annual payments") at a rate of 20%. There is no withholding tax on dividends, except dividends paid by companies within the real estate investment-trust regime. Withholding tax liabilities may be reduced or eliminated under the UK's double tax treaties, and certain additional reliefs apply under domestic law with respect to withholding tax on interest.

Companies with a UK establishment are obliged to register for VAT and to charge VAT on taxable supplies of goods and services if the value of its taxable supplies exceeds the VAT registration threshold (currently GBP90,000). Non-established persons are liable to register if they make any taxable supplies in the UK.

5.3 Available Tax Credits/Incentives

The UK offers an "above the line" credit for expenditure on research and development, which was subject to significant reform with effect from 1 April 2024. The amount of the credit is 20% of the qualifying expenditure, which is itself subject to corporation tax in the hands of the recipient, subject to a cap in many cases at three times the amount of the company's PAYE and NIC liabilities for the accounting period plus GBP20,000.

The former super-deduction regime for small and medium-sized enterprises (SMEs) has been retained for loss-making, R&D intensive SMEs. This provides an enhanced 186% deduction for qualifying R&D expenditure, which may be surrendered in exchange for a repayable tax credit amounting to 14.5% of the surrenderable loss.

A number of similar reliefs are available for companies in the creative sector.

An elective patent box regime applies for profits from qualifying patents, resulting in an effective tax rate of 10% on qualifying profits.

5.4 Tax Consolidation

The UK does not have a consolidation regime for corporation tax purposes. However, the group relief rules enable companies that are members of the same group to make and surrender losses to one another. Broadly, companies are members of the same group for this purpose if one is a 75% subsidiary of the other, or both are 75% subsidiaries of a third company (which need not be a UK company). Both current and carried-forward losses arising on or after 1 April 2017 may be subject to group relief surrenders.

The transfer of capital assets (including intangible fixed assets and loan relationships) between group companies will generally be viewed for tax purposes as taking place on a no-gain/no-loss basis, although the gain that would otherwise have been taxable on the intra-group transfer may be brought back into charge by way of a "degrouping charge" if the transferee company leaves the group within the next six years. A company that disposes of an asset outside the group may elect for the gain to be reallocated to another group company (such as a company which has losses that can be used to offset the gain).

For VAT purposes, companies may elect to register as a group where one controls the other or the two companies are under common control (including control by an individual or partnership). The effect of group registration is that all supplies to third parties are treated for VAT purposes by the representative member of the group, all supplies between group members are disregarded, and all group members are jointly and severally liable for the group's VAT liabilities.

5.5 Thin Capitalisation Rules and Other Limitations

The UK polices thin capitalisation through transfer-pricing legislation. Interest expense in excess of an arm's length amount may be disallowed for tax purposes. The transfer pricing legislation provides that it should be read in line with the 2022 OECD Transfer Pricing Guidelines, which include the guidance on financial transactions approved in 2020. The capacity of companies within a group to bear interest expense is generally tested on a company-by-company basis, but, to the extent that a debtor company is unable to do so, other group companies can be treated as guarantors and, as such, may take interest deductions for such interest expense. HMRC will consider entering advance thin-capitalisation agreements to provide certainty as to a company's interest deductibility position – these have statutory force as advance pricing agreements.

In addition, the UK has introduced a corporate-interest restriction limiting interest deductions for UK group companies to the lower of 30% of tax EBITDA and the worldwide group's interest expense, subject to a GBP2 million de minimis. Where the worldwide group has an interest – ie, an EBITDA ratio that is higher than 30% – the UK companies may make a "group ratio election", allowing it to claim interest deductions up to an equivalent ratio. Disallowed deductions may be carried forward indefinitely and utilised in future periods; unused allowances with respect to the interest:EBITDA ratio may be carried forward for up to five years, and unused allowances with respect to the worldwide interest expense may be carried forward for one year.

5.6 Transfer Pricing

The UK has transfer pricing rules which align with – and are to be interpreted in accordance

with – the OECD transfer-pricing guidelines. These apply to domestic UK-to-UK arrangements, as well as cross-border provisions, but the government has recently consulted on introducing an exemption for transactions between UK companies where no UK tax is at stake.

An exemption applies where the UK company is dormant. In addition, small and medium-sized enterprises are exempt from transfer-pricing rules with respect to transactions with residents of the UK and of territories with which the UK has a full tax treaty. HMRC may, however, issue a transfer pricing notice to "turn on" the transfer pricing rules to a medium-sized enterprise in any circumstances, or to a small enterprise where a transaction results in profits benefiting from the patent box regime.

5.7 Anti-evasion Rules

The UK has numerous anti-avoidance rules, many of which operate to disregard or re-characterise arrangements whose main purpose, or one of whose main purposes, is the obtaining of a tax advantage. Since 2013, the UK has also had a general anti-abuse rule, which can counteract arrangements giving rise to a tax advantage where they are "abusive" – defined as arrangements which cannot reasonably be regarded as a reasonable course of action in relation to the relevant legislative provisions. The courts have also established that legislation must be read purposively and applied to the facts as viewed realistically – principles which have frequently been applied to counteract perceived avoidance.

6. Competition Law

6.1 Merger Control Notification

The UK's merger-control regime is overseen by the Competition and Markets Authority (CMA), which will have jurisdiction to review a transaction where a relevant merger situation has been created. This will be the case where two or more enterprises cease to be distinct and either:

- the target has turnover in the UK of in excess of GBP70 million (the "turnover test"); or
- as a result of the transaction, the parties have a combined share in excess of 25% of the supply of any goods and services in the UK or a substantial part of it (the "share of supply test").

The UK has a voluntary notification system, so even where either of the thresholds is met, the parties are not required to seek clearance before completion of the transaction.

The rules are triggered when enterprises cease to be distinct – ie, brought under common ownership or control. This covers any joint venture or acquisition of shares that give total or partial control over any other entity.

6.2 Merger Control Procedure

The parties will need to determine whether to notify to the CMA for clearance. If they choose to do so, the following steps must take place.

- The CMA must be informed of the transaction pre-notification discussions entered into, which can last up to three months (longer in complex cases).
- The CMA must be provided with the merger notification and any additional queries from the CMA must be responded to.

- When the CMA is satisfied that the notification is complete, the parties must make the transaction public and the CMA will start the formal Phase 1 process.
- Phase 1 will take up to 40 working days, and the CMA will consider whether the transaction may lead to a "substantial lessening of competition" (SLC).
- If there are no competition concerns, the CMA will proceed to clearance and issue a decision, which will be publicly announced.
- If it is determined that there is the risk of an SLC, the CMA has a duty to refer to a more in-depth Phase 2 review.
- It is open to the parties to offer remedies to address competition concerns, in the form of binding undertakings in lieu of reference (UIL).
- Generally, the CMA will accept UILs where the problem is easily severable, for example structural remedies (ie, divestment of all or part of the business). Behavioural remedies may also be considered, but this is uncommon.
- If UILs are offered, the CMA will begin the process of a detailed consideration of whether they are suitable. The timeframe for final determination is 50 working days from when the SLC decision was announced to the parties, with the possibility of a 40 working-day extension.
- If the CMA refers to Phase 2, this is a more in-depth and detailed examination of the possible SLC that was identified in Phase 1. The entire process is complex and time-consuming, and the CMA has up to 24 weeks from reference (extendable by up to eight weeks) to make a final decision.

If the parties choose not to notify for clearance, the CMA has up to four months from the later of completion of a non-notified merger or from when the transaction became public to investigate. While considering whether to investigate an anticipated completed transaction, the CMA may make an initial enforcement order to prevent pre-emptive integration of the businesses or require the reversal of any action. This means that the parties are unable to begin to integrate the businesses until the CMA's investigation is complete (and clearance obtained) or the CMA confirms that it does not have jurisdiction.

If the CMA decides to consider a non-notified transaction, it will send the acquiring party an Enquiry Letter requiring it to respond with details of whether one or both of the jurisdictional thresholds are met and, if so, further substantial details relating to the transaction. If the thresholds are met, the CMA may decide to open a merger investigation, and begin the process as set out above.

6.3 Cartels

Chapter 1 of the Competition Act 1998 prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices that may affect trade within the UK and have as their object or effect the prevention, restriction, or distortion of competition. All agreements that infringe Chapter 1 are void.

A non-exhaustive list of prohibited behaviour, as set out in s2(2) of the Act, comprises the following:

- directly or indirectly fixing purchase or selling prices or any other trading conditions;
- limiting or controlling production, markets, technical development, or investment;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions with other trading parties, placing them at a competitive disadvantage; and

- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Certain agreements may be exempt from the prohibition if they contribute to improving production or distribution, or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits. However, these agreements must not:

- impose restrictions which are not indispensable to the attainment of these objectives; or
- afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

If an agreement is investigated, the CMA can impose fines on undertakings that violate the prohibition of up to a maximum of 10% of their worldwide turnover.

6.4 Abuse of Dominant Position

Chapter 2 of the Competition Act 1998 prohibits any conduct by one or more undertakings that amounts to the abuse of a dominant position in a market within the UK or a part of it is prohibited if it may affect trade within the UK.

An undertaking is considered dominant if it can act independently of competitive pressures, such as setting prices, controlling supply, or hindering competitors' ability to operate in the market. There is a rebuttable presumption of dominance if an undertaking has more than a 50% share of the relevant market and CMA guidance confirms that less than a 40% share is unlikely to create dominance.

Examples of abuse are set out in Section 18(2) of the Act and include the following:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets, or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

If it can be shown that the behaviour is objectively justified, it will not be abusive even if competition is restricted. It is for the dominant undertaking to prove the justification.

If conduct is investigated, the CMA can impose fines on dominant undertakings of up to a maximum of 10% of their worldwide turnover.

7. Intellectual Property

7.1 Patents

Patents are exclusivity rights that protect products and processes of a technical nature. The subject matter of protection must be novel, inventive and satisfy several other statutory requirements for the patent to be valid. Patents last 20 years, but protection may be extended in the case of a medicinal product by up to a further five years by a supplementary protection certificate. Patents are normally registered in national patent offices once granted, but the new Unitary Patent (which has pan-European

protection for 18 countries rather than a single country) is registered at the European Patent Office. Depending on the nature of the patent, it may be enforced in infringement proceedings in the national courts or the Unified Patent Court. Remedies for infringement typically include damages and injunction.

7.2 Trade Marks

Broadly, a trademark is any sign capable of distinguishing the goods and services of one undertaking from those of others. A trademark can consist of, for example, words (including personal, business and brand names), logos, patterns, letters, numerals, colours, sounds, motions, holograms, videos, and the shape of goods or their packaging. Provided they are not cancelled, trademark registrations subsist for ten years from the date of registration, and can be renewed (potentially indefinitely) for successive periods of ten years on payment of a fee. No proof of use is required for renewal. Trademark protection can be obtained by filing an application with (a) the UK IP Office, or (b) WIPO for an international mark designating the UK. The latter can be cheaper and administratively easier if applications for the same mark are being filed in numerous jurisdictions. Trademarks must be registered for specific goods and/or services.

Protection for one good/service will not necessarily mean that the owner can prevent third-party use of the same mark for other goods/services. Unlike some other jurisdictions, a trademark does not need to have been used for an application to be filed. However, once registered, if a mark is not put to genuine use for a continuous period of five years in the UK, it can be revoked on application of a third party (subject to various conditions).

Once filed, applications are examined to determine whether they meet the definition of a registrable trademark. Following successful examination, applications are published to allow oppositions to be filed by any third parties who consider they have a conflicting prior right. The UK IP Office will not raise an objection on these grounds of its own volition. Assuming any objections and oppositions are successfully resolved, an application will be registered (usually within about five months). Now that the UK is no longer part of the EU, EU trademarks (EUTMs) no longer cover the UK. However, the UK legislated to fill the gap by creating a new UK mark (called a comparable trade mark) for all EUTMs in existence as at 31 December 2020.

The UK law of passing off also protects the goodwill generated through the use of a trademark (whether that mark is registered or not). It can also be used to prevent false endorsements and some misleading claims of equivalence.

Trademark and passing-off rights are enforced through the UK courts. Remedies for infringement include compensation, an injunction to restrain the infringement, delivery up/destruction of infringing materials, publication of the judgement and legal costs. Interim injunctions can also be obtained.

Brand owners are strongly advised to (a) conduct clearance searches before launching new brands in the UK to check that they will not be infringing anyone else's rights, and (b) file trademark applications before announcing/launching new brands. This could save the considerable costs and embarrassment of having to re-brand.

7.3 Industrial Design

There are two main types of design protection available in the UK, a registered design and an

unregistered design. Both protect the appearance of a product or its packaging, resulting from their features (including features resulting from the lines, contours, colours, shape, texture and/or materials of the product/packaging). Surface decoration is also protected.

To be protected, a design must be new and have individual character, and not be dictated by the technical function of the product.

A design registration lasts for a maximum of 25 years and must be renewed every five years (on payment of a fee). Unregistered design protection subsists for three years from first disclosure. Registered protection is much stronger (in particular, unregistered designs are only infringed when copied). If registration is required, an application must be filed within 12 months of first disclosure of the design, otherwise the design will be deemed not new.

Registered protection can be obtained by filing an application with (a) the UK IP Office or (b) WIPO for an international design designating the UK. The latter can be cheaper and administratively easier if applications for the same design(s) are being filed in numerous jurisdictions. There is very little examination of design applications, and no opposition procedure. Multiple designs can be filed in the same application to save costs.

Since the UK is no longer part of the EU, pan-EU Registered and Unregistered Community Designs no longer cover the UK. However, any such designs in existence on 31 December 2020 continue to be protected in the UK for the life of the right.

Designs are enforced through the courts in the UK. Remedies for infringement include compensation, an injunction to restrain the infringement, delivery up/destruction of infringing materials, publication of the judgement and legal costs. Interim injunctions can also be obtained.

The UK also protects another form of unregistered design (called a "design right"). It is similar in scope to the unregistered design, although there are key differences – for example, a design right does not protect surface decoration.

7.4 Copyright

Copyright protects original literary, dramatic, musical and artistic works, as well as other subject matter (such as sound recordings, films and broadcasts). It therefore protects original drawings, graphics, software code, literature, and databases. Copyright generally lasts for the life of the author plus 70 years. Different rules apply to computer-generated works, films, sound recordings, broadcasts and non-UK works/authors. It is not possible to register copyright in the UK. Protection arises automatically once a work is recorded, in writing or otherwise (irrespective of whether it is recorded by or with the permission of the author).

The general rule is that the author of a literary, dramatic, musical or artistic work is automatically the first owner of copyright in it. However, where such a work is made by an employee in the course of their employment, their employer is the first owner of copyright. Ensuring that any works created by independent contractors, outside consultants and design agencies are automatically transferred to a business is key.

Copyright is enforced through the UK courts. Remedies for infringement include compensation, an injunction to restrain the infringement, delivery up/destruction of infringing materials,

publication of the judgement and legal costs. Interim injunctions can also be obtained.

Copyright can be infringed in a number of ways, including by copying the whole or a substantial part of a work in which copyright subsists (with a substantial part being assessed qualitatively rather than quantitatively). Using even very small parts of a work can constitute infringement, but there are some "permitted uses".

7.5 Others

Copyright can subsist in original software text/code. Databases are protected under the law of copyright if they are original – ie, if, by means of the selection or arrangement of the contents of the database, the database constitutes "the author's own intellectual creation".

A separate right, called the database right, also protects databases for which there has been a "substantial investment" in "obtaining, verifying or presenting the contents of the database". Unlike copyright, there is no requirement for originality/creativity. "Investment" can mean "any investment whether in financial, human or technical resources." Like copyright, the database right is an automatic right that exist as soon as the database is fixed in recorded form.

Trade secrets protect certain commercially sensitive and confidential information, such as industrial processes and recipes, against disclosure to or use by third parties without consent. These may be enforced against breach resulting in damages and injunction.

8. Data Protection

8.1 Applicable Regulations

The UK General Data Protection Regulation (UK GDPR) is the main legislation governing the processing of personal data. It is retained in EU law and largely mirrors the EU General Data Protection Regulation 2016. It introduces a range of obligations on those processing personal data and confers rights on individuals in relation to their personal data. The Data Protection Act 2018 (DPA) supplements the UK GDPR (including where the UK was given discretion as to its implementation). It also implements the EU Law Enforcement Directive and covers the processing of personal data by the UK intelligence services. The Privacy and Electronic Communications Regulations 2003 as amended (PECR), based on the EU's ePrivacy Directive, set out additional rules governing privacy of communications. In particular, they cover direct marketing and the use of cookies and similar technologies.

The Network and Information Systems Regulations 2018 (NIS Regulations) implement the EU's Network and Information Security Directive 2016. They cover the security of IT systems and impose various cyber security and incident reporting obligations on relevant digital service providers and operators of essential services in designated sectors.

The Product Security and Telecommunications Infrastructure Act 2022 deals with security of consumer connected products. Together with related secondary legislation, it imposes security requirements throughout the supply chain.

A variety of other sector-specific cyber security laws may also be relevant.

8.2 Geographical Scope

Most of these laws have extra territorial effect and will apply to businesses operating in the UK, targeting or supplying to the UK, or processing the personal data of UK individuals, regardless of the organisation's location. The UK GDPR, for example, applies to any organisation processing the personal data of UK individuals where the processing relates to offering them goods or services, or to monitoring their behaviour. It applies to the processing of personal data by a controller or processor in the context of an establishment located in the UK, regardless of where the processing takes place. Note that there are strict rules around the export of personal data from the UK.

8.3 Role and Authority of the Data Protection Agency

The Information Commissioner's Office (ICO) is the agency in charge of enforcing data protection and cyber security rules, and also produces guidance and codes of practice (notably the Children's Code which overs processing of children's personal data by online services). The ICO has various powers. Under the UK GDPR, for example, the ICO has a range of enforcement powers, including the imposition of fines of up to the higher of GBP17.5 million or 4% of annual global turnover for non-compliance. Data controllers are required to pay annual fees to the ICO of between GBP40 and GBP2,900 depending on their size and subject to minor exceptions.

9. Looking Forward

9.1 Upcoming Legal Reforms

The UK is planning to review its design laws in 2024/25.

The Data Protection and Digital Information Bill was entering the final stages of the legislative process when the general election was called. It was intended to reform the UK's data protection framework, but its future is currently uncertain. There is also talk of reforming the NIS Regulations and PECR, but legislation has not been published.

Trends and Developments

Contributed by:
James Ross, Charlie Pring, Shireen Shaikh and Richard Miles
Taylor Wessing LLP

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Authors

James Ross is a partner in the tax team at Taylor Wessing, advising on a broad range of advisory and transactional tax matters. These include: the structuring and negotiation of M&A transactions; advising US-based clients on the structuring of acquisitions and inward investments in the UK and Europe; corporate restructuring matters, including financing and intellectual property holding structures; and assisting clients in relation to tax authority enquiries and audits. James has a particular focus on cross-border work. He works with a wide range of clients, from large multinationals and private equity funds to privately-held companies, family offices and private clients.

Charlie Pring is a senior counsel in the employment, pensions and mobility group at Taylor Wessing specialising in immigration work for businesses, entrepreneurs and private clients and their families, and assists international and UK businesses. Charlie advises on all work and business-related visas, including sponsor licence applications and employer compliance issues. He is a specialist in advising on specific visas for individual entrepreneurs and private clients investing into the UK and has expertise in handling the increasing overlap between employment and immigration work, the impact of M&A transactions and business transfers on migrant staff and advising on preventing illegal working.

Contributed by: James Ross, Charlie Pring, Shireen Shaikh and Richard Miles, **Taylor Wessing LLP**

Shireen Shaikh is a senior counsel (knowledge) in the employment, pensions and mobility group at Taylor Wessing, facilitating knowledge-sharing and best practice within the team, and providing training to lawyers and clients. Shireen frequently produces articles and commentary on legal developments in employment law and previously worked at Thomson Reuters as a senior editor, writing updates and materials on employment law, as well as contributing to podcasts and blogs. She has over 10 years' experience in private practice as an employment lawyer, advising on a wide range of issues, including discrimination, restrictive covenants, TUPE and data protection.

Richard Miles Rich is currently a trainee in the tax and incentives group. He will be qualifying into the disputes and investigations group in September 2024 at Taylor Wessing's London office, specialising in both investor-state and international commercial arbitration and life science litigation.

Taylor Wessing LLP

5 New Street Square
London
EC4A 3TW
UK

Tel: +44 20 7300 7000
Fax: +44 20 7300 7100
Email: london@taylorwessing.com
Web: www.taylorwessing.com

As this article goes to press, the United Kingdom is in the midst of a general election campaign, with voting taking place on 4 July 2024 – so all comments on future trends are necessarily caveated by the fact that we don't know the political complexion of the next government. That said, there are a number of common themes in the policy platforms of the main political parties, so the next few years are unlikely to see a radical change of policy direction, save, perhaps, in relation to employment law. While, in some respects, businesses are likely to see additional regulatory burdens, this should be balanced by an awareness that the UK needs to remain an attractive destination for investment – which is arguably an even stronger imperative post-Brexit.

Brexit

Brexit has, of course, been the most significant change to the UK business environment in recent years. While the UK has now decoupled from the EU regulatory regime, in many respects it has not diverged from it. While neither main party is proposing to rejoin any aspects of the EU legal order (such as the single market or customs union), neither party seems to be proposing to take a radically different regulatory approach in most policy areas where the UK was formerly subject to EU law. It is, however, possible that the UK might seek to align itself more closely with the EU – particularly if there is a Labour government – in order to remove some of the frictions to international trade that have arisen since Brexit.

Whilst not explicitly diverging from EU law, the government has legislated to end the supremacy of EU law that was assimilated into UK law on Brexit. In future, subject to certain exceptions, domestic law will take precedence over assimilated EU law. This had some unanticipated consequences. One example was a stamp duty charge applicable to UK companies raising capital on foreign stock exchanges, which had previously been found by the European Court of Justice to contravene EU law. Although no longer enforced, this charge remained on the statute book, meaning that the Government was required to introduce legislation at relatively short notice to ensure that the charge was not resurrected when the supremacy of EU law was brought to an end. There may be other such anomalies that simply haven't been spotted or resolved yet – these will only become apparent over time as cases work their way through the judicial system.

Immigration

One important area in which the UK has diverged from EU law is in in relation to immigration. When the UK left the EU, it ended the automatic right of European citizens to live and work in the UK (except for Irish citizens, who continue to have the unrestricted right to live, work and study in the UK without needing any immigration permission). While European citizens and their family members who were lawfully in the UK before the end of the Brexit transition period on 31 December 2020 were able to apply for the right to remain in the UK, other European citizens are now generally subject to the same immigration rules as the rest of the world. The current government is committed to reducing levels of migration to the UK, and consequently introduced reforms in 2024 which have significantly increased the minimum salary thresholds that apply for employers seeking to sponsor work visas for foreign workers. While overall levels of migration to the UK have increased since Brexit, all main political parties are committed to such a reduction with varying levels of enthusiasm – so further changes to the immigration system over the next few years are highly likely.

Businesses seeking to launch or grow in the UK that will rely on non-British and non-Irish workers are advised to take early immigration advice to devise a strategy. For example, if a business needs to become a sponsor (which is often an essential recruitment tool), this may impact on the structure and planning of its UK operation. It can take longer than expected to arrange initial visas, particularly for a start-up company, but, unlike some countries, the UK does not currently have a national or regional cap on the number of work visas that can be issued. That means that an established UK employer can arrange sponsored work visas quickly without the uncertainty of having to qualify against a government-imposed visa cap or quota.

Employment Law

Following Brexit, there was speculation that UK employment law would undergo a "bonfire of rights" by the Conservative Government, but this has not come to pass. Since the UK's departure from the EU, the Conservative government in fact passed a number of employee-friendly laws, including increasing protection from redundancy for pregnant employees or those taking family-related leave, strengthening the right to request flexible working and introducing carer's leave (unpaid). Legislation to reform holiday pay did not, as predicted, represent an erosion of EU-derived rights but largely codified such rights.

While the UK is no longer required to implement EU Directives, such as the Pay Transparency Directive and the Whistleblowing Directive, the UK already has some legislation in these areas. To the extent that there may be divergence, companies with international operations in the UK and the EU may find themselves wanting to adopt a harmonised approach across jurisdictions, deciding that, in some instances, it may make sense for UK operations to "level up", even if not legally required to do so.

While the Conservative government has passed legislation to curtail the right of public sector workers to strike and is not pro-trade union, the Labour party has made a commitment to reverse this legislation, to strengthen trade unions and to make it easier for workers to ballot for industrial action. Another key commitment would see the current two-year qualifying period for unfair dismissal abolished. While Labour has committed to make this a "day one" right, in reality, a reasonable probationary period will still be allowed, so this would be a qualified "day one right". Both the Conservative and Labour party are committed to supporting the growth of AI and tech, although Labour has indicated it will regulate more heavily to make such technologies safe and to prevent abuse in the workplace.

Tax

Recent years have seen a significant change in tax policy as the government has sought to raise revenues to meet the costs of the covid pandemic. The period from 2010 to 2019 saw steady reductions in the corporation tax rate to 19%, coupled with measures to broaden the tax base (such as a restriction in interest deductibility, in line with the recommendations coming out of the OECD BEPS project). This has now gone into reverse, with the main rate of corporation tax being increased to 25% from April 2023 – although this has been partially offset by the introduction of full expensing for capital expenditure. Similarly, the basic personal tax allowances are scheduled to be frozen from 2022 to 2028, after significant above-inflation increases in the preceding years.

The UK has been a committed participant in the OECD's base erosion and profit-shifting (BEPS)

project, which makes significant reforms to the international corporate tax system. Along with EU member states and several other developed economies, it has also adopted the "Pillar 2" reforms and introduced an income inclusion rule with effect from 31 December 2023, whereby multinational groups with annual turnover above EUR750 million are subject to a minimum effective corporate tax rate of 15% on profits in all the jurisdictions in which they operate. This operates as a "top-up" tax imposed on a "top-down" basis by the jurisdiction of the holding company. The UK has also introduced a domestic top-up tax to ensure that groups within scope of the income inclusion rule are subject to a 15% effective rate of tax on their UK profits.

Under the OECD model, a secondary "bottom-up" rule (the "undertaxed profits" rule) will be imposed by other group companies where the income inclusion rule is not imposed by the holding company jurisdiction. The undertaxed profits rule is set to be introduced from 31 December 2024. The UK has not yet legislated to introduce the undertaxed profits rule, but all main parties are committed to the OECD process, and legislation (a draft of which has already been published for consultation) is likely to be introduced after the general election, whatever the complexion of the new government.

In practice, it seems unlikely that very much additional tax will be paid by multinational groups under these provisions – there are relatively few multinational groups who will be paying effective rates of corporation tax of less than 15% in the UK or in many other jurisdictions – but the new rules are clearly a significant compliance obligation for larger groups. Indeed, broader tax compliance obligations for larger corporates are something of a running theme – as well as the OECD reforms (described above), the UK has also introduced country-by-country reporting, specific transfer-pricing documentation requirements and an obligation to disclose uncertain tax positions to HMRC.

Regardless of the outcome of the general election, it seems unlikely that there will be major changes in the rates or the scope of either personal or corporate income taxes, social security contributions, or VAT. However, the government's need for revenue has not abated, and it is therefore likely that it will be looking for revenue-raisers after the election, whatever its political complexion. This might include changes to reliefs, or to the rate or scope of capital gains tax.

One specific change that we are anticipating is a reform to the remittance basis of taxation, which has been mooted by both main parties in recent months. The remittance basis has been a feature of the income tax system for individuals since its introduction, and applies to individuals who are resident but not domiciled in the UK (that is, broadly, those individuals for whom the UK is not their permanent long-term home). Such individuals can elect for their foreign-source income and gains to be taxed on the remittance basis, meaning that it will not be taxed in the UK unless or until remitted to the UK. In recent years, the benefits of this regime have only been available for those who have been resident for less than 15 of the last 20 tax years, at which point such individuals are also brought into the inheritance tax net on their worldwide assets (rather than merely their UK-situs assets). It seems likely, however, that the existing regime will be replaced with a new regime for those coming to the UK, which may provide an exemption for foreign-source income or gains but for a rather shorter period. It may also result in the worldwide assets of such individuals being brought into the inheritance tax

charge sooner than is currently the case – which is significant, given the relatively high rate (40%) and comparatively low threshold for chargeability (GBP325,000 per person). Individuals looking to relocate to the UK should be alive to potential changes to this regime after the election.

USA - CALIFORNIA

Trends and Developments

Contributed by:
Hillary Bunsow and Aaron Hand
Bunsow De Mory LLP

Bunsow De Mory LLP is relied on by creators, inventors, research institutes, technology companies, and entertainment firms around the world to protect and enforce their intellectual property rights by prosecuting and defending copyright, patent, trade mark, and trade secret litigation. Bunsow De Mory's expertise in intellectual property litigation has led to a robust strategic counselling and enforcement practice. The firm designs, develops, and executes copyright, patent, and trade mark licensing and enforcement programmes worldwide. In every forum, Bunsow De Mory – a firm of 19 lawyers – takes on law firms 50 times its size and succeeds with a combination of legal, technical, and strategic expertise. Based in Silicon Valley, Bunsow De Mory is a majority women-owned law firm with a diverse team of lawyers. The strength of its practice lies in its courtroom experience coupled with the technology backgrounds of its lawyers, almost all of whom have degrees and work experience in science or engineering.

Authors

Hillary Bunsow is a senior associate at Bunsow De Mory and the firm's pro bono co-ordinator. Her practice focuses on commercial and intellectual property-related disputes and counselling. Hillary has a thriving copyright practice and has led enforcement campaigns for major entertainment companies and creators. She played a critical role in virtually every win the firm enjoyed in 2023, leading the charge on damages in two patent infringement cases and helping secure injunctions in trade secret matters. Hillary is a member of the Los Angeles Intellectual Property Law Association and serves on the organisation's Diversity Committee.

Aaron Hand is a partner at Bunsow De Mory. He is an experienced litigator in patent, trade secret, and intellectual property disputes involving a wide array of technologies, including consumer products, semiconductor, storage, wireless, and biologics. Aaron has uncovered evidence tampering in multiple proceedings, driving settlements and favourable outcomes, including a USD500 million arbitration award. He commits significant time to pro bono matters, and recently secured two litigation victories in voting rights cases.

Contributed by: Hillary Bunsow and Aaron Hand, **Bunsow De Mory LLP**

Bunsow De Mory

701 El Camino Real
Redwood City
CA 94063
USA

Tel: +1 650 351 7248
Fax: +1 415 426 4744
Email: contact@bdiplaw.com
Web: bdiplaw.com

Introduction

California is a hotspot for creation and innovation. As a result, copyright disputes regarding who owns, and who can use, creative works are common. In fact, more copyright lawsuits are filed in California than in any other state in the country. In the internet and social media era, many of these disputes arise from online activity. It is all too easy (and tempting) for an infringer to copy a photograph or other work for use in an article, advertisement, or social media post. Some mistakenly believe that "fair use" allows for wide-ranging copying and reuse of others' works. Recent legal cases serve as reminders that copyright law is alive and well, and that the exceptions to copyright law are narrower than many believe.

This article provides an overview for individuals and companies doing business in California that are concerned with protecting their copyrighted works, including what can be done to deter infringement and the avenues for recourse should infringement occur.

Copyright Law in the United States

The purpose of copyright law in the United States is to promote the arts by granting authors exclusive rights in their works for a limited time. Copyright laws apply nationwide and are enforced in federal courts.

Copyright protection is available for "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (17 U.S.C. § 102(a)). In practice, this means that written, drawn, or recorded work created by a human reflecting at least a minimal degree of creativity is subject to copyright protection.

Typically, the author of a work owns the copyright in that work. Ownership may also be transferred or assigned to another individual or entity. For example, employees that create a work within the scope of their employment may assign the copyright in their work to an employer; these are called "works made for hire". Or authors may assign their copyrights to other individuals or entities via assignment agreements.

In general, works receive copyright protection for the life of the author plus 70 years. Certain types of works, such as works made for hire or works created prior to 1978, may have different

copyright terms that are determined based on factors such as the date of first publication.

A copyright owner has the following exclusive rights:

- to reproduce the copyrighted work;
- to prepare derivative works based upon the copyrighted work;
- to distribute the copyrighted work to the public;
- to perform the copyrighted work publicly (in the case of sound recordings and audiovisual works); and
- to display the copyrighted work publicly (in the case of audiovisual works and pictorial, graphic, or sculptural works) (17 U.S.C. § 106).

A copyright owner's exclusive rights are subject to certain exceptions, such as fair use. Fair use means that certain uses of a copyrighted work – such as for criticism, comment, news reporting, teaching, scholarship, or research – might not be infringement. The purpose of the fair use doctrine – like the copyright system itself – is to promote creativity, innovation, and freedom of expression, reflecting an effort to balance a copyright owner's exclusive rights in a work with the public benefit of allowing some limited uses of the work.

While copyright in a work is established upon its creation, if a copyright owner wishes to enforce their exclusive rights, they must register the work with the Copyright Office. Only then can an owner of a registered copyright bring a lawsuit for copyright infringement in federal court against any individual or entity that violates these exclusive rights.

Best Practices for Protecting Copyrighted Works

There are several steps that copyright owners should take to protect their copyrighted work.

Registration and copyright notices

Copyright owners should register their work with the Copyright Office as soon as the work is fixed (ie, written, drawn, or recorded). Registration can be done online at the Copyright Office website.

Once registration is complete, the copyright owner should place a notice on copies of the work with the following:

- the symbol © (or the letter "p" in a circle for certain sound recordings) or the word "copyright" or abbreviation "copr.";
- the year the work was first published (ie, distributed to the public); and
- the name of the copyright owner.

Doing so gives notice to the public that the work is copyright protected and deters others from using the work without permission.

Licensing

Copyright owners who are willing to license others to use their work should make it simple to request a licence. If a copyright owner wishes to negotiate licences with users directly, they should make sure to include a copyright notice on copies of their work so that potential users can easily find contact information to request a licence. Alternatively, copyright owners can retain licensing agents to negotiate licences on their behalf for a fee.

Having a simple licensing process can be a deterrent to infringement. For example, if the licensing process is too difficult or users cannot

figure out how to request a licence, they may be more likely to use a work without permission.

Taking action against infringement

The first step a copyright owner should take upon discovering their work has potentially been infringed is to preserve evidence of the potential infringement. The evidence should include the date on which the evidence was preserved and the URL where the infringing content is hosted, if the infringing content is online. For example, if taking a screenshot of an infringing webpage, the screenshot should include the browser toolbar with the website URL and the date and time marker typically found on computer desktops.

Next, the copyright owner should consider whether the allegedly infringing use might be fair use. If the use is clearly fair use, then the copyright owner should not take any further action. However, if fair use does not apply – or if it is unclear whether fair use applies – then enforcement may make sense.

When considering whether to take enforcement actions against a potential infringer, a copyright owner should determine the goals to be achieved from enforcement. Then the copyright owner can develop an enforcement strategy that best supports these goals. For example, if the infringement is found online and the copyright owner wants the infringing content taken down, the best course of action may be to submit a DMCA Takedown Notice (ie, a request that the platform hosting the content remove it). A cease-and-desist letter is another (or alternative) option. If the copyright owner wants compensation for the infringement, the best course of action may be to send a cease-and-desist letter and then sue for copyright infringement if the infringer is unwilling to pay a reasonable licence fee for the unauthorised use.

Various enforcement strategies are discussed below. It is advisable to retain a copyright attorney to advise on, and execute, an enforcement strategy that best aligns with the copyright owner's goals.

Evaluating fair use

There is no bright-line rule as to what constitutes fair use. A copyright owner should consult with an attorney to determine whether an unauthorised use might be fair use.

Four factors must be considered to determine whether a use is fair use:

- the purpose and character of the use, such as whether the use is commercial or transformative (ie, adds something new);
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work (17 U.S.C. § 107).

Court opinions analysing and applying these factors can be a helpful guide. The following are some recent examples from jurisdictions relevant to California.

- In Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith, the Andy Warhol Foundation licensed a magazine to use a portrait of Prince that Andy Warhol created from a copyrighted photograph. The US Supreme Court held that the Foundation's use of the photograph was not fair use. Key factors influencing the court's decision included the commercial nature of the Foundation's use (ie, for commercial licensing) and that the purpose of the Warhol portrait and the original

photograph were substantially the same (ie, to illustrate stories about Prince) (598 U.S. 508 (2023)).
- In McGucken v Pub Ocean Ltd, Pub Ocean used copyrighted photographs to illustrate an online news article about a lake in Death Valley. The US Court of Appeals for the Ninth Circuit held that fair use did not apply. Key factors influencing the court's decision included that the use was commercial (ie, illustrating a for-profit article), the use was not transformative because the photographs merely illustrated the subject matter of the article, and Pub Ocean used the entire photographs without meaningful alteration (42 F.4th 1149 (9th Cir. 2022)).
- In In re DMCA Subpoena to Reddit, Inc, an anonymous Reddit user posted a Jehovah's Witnesses organisation's copyrighted materials on a discussion forum to start a discussion critical of the organisation. The US District Court for the Northern District of California held that fair use did apply. Key factors influencing the court's decision included that the copyrighted works were factual works with minimal creativity and the use was non-commercial and for purposes of criticism and commentary (441 F.Supp.3d 875 (N.D. Cal. 2020)).

DMCA Takedown Notices

In some instances, a copyright owner can submit a DMCA Takedown Notice to a platform that hosts infringing content requesting that the content be removed. Popular hosting platforms, such as YouTube, Instagram, TikTok, Facebook, and Reddit, allow copyright owners to submit DMCA Takedown Notices directly through their websites.

Upon receiving a DMCA takedown notice, the platform must remove the infringing content. The accused infringer will then have the opportunity to dispute the infringement claim by filing a "DMCA Counter Notice" with the platform. Within ten to 14 business days of receiving a DMCA Counter Notice, the platform must put the content back up unless the platform receives notice from the copyright owner that it has filed a copyright infringement lawsuit against the accused infringer.

Cease-and-desist letters

A copyright owner can send a cease-and-desist letter to an accused infringer demanding removal of infringing content and/or compensation for the infringement. The letter should identify the copyright owner, the registration number of the work infringed, evidence of the infringement, a demand for relief (ie, remove the infringement, pay a licence fee, etc), and a demand that the accused infringer preserve any evidence potentially relevant to the infringement allegations. A copyright owner should retain a copyright attorney to draft and send the letter, both to ensure the letter is complete, and because an accused infringer may be more responsive if they know counsel is involved.

Sending a cease-and-desist letter can be beneficial because it may motivate the infringer to provide the requested relief (ie, remove the infringement, pay a licence fee) without needing to resort to litigation. If litigation does become necessary, a copyright owner can use the letter to show that the infringer was put on notice of its infringement but continued to infringe, which may influence a court to award higher damages to the copyright owner for willful infringement (ie, the infringer knowingly infringed).

Infringement lawsuits

The owner of a registered copyright may file a copyright infringement lawsuit in federal district

court. If the copyright owner is a legal entity, like a corporation or an LLC, it must be represented by counsel in federal court. An individual copyright owner may file suit without a lawyer, but it is advisable to retain counsel to help navigate the complexities of the legal system.

California is divided into four regions, each of which is served by a federal judicial district: Northern District, Southern District, Central District, and Eastern District. A copyright owner can benefit from filing a lawsuit in California district court if the alleged infringer resides in or does business in California.

California courts are experienced with copyright because of their proximity to California's thriving entertainment and technology industries, where copyright disputes are commonplace. From 2009 to 2024, more copyright cases were filed in the US District Court for the Central District of California (which encompasses Los Angeles) than any other judicial district in the country. During that same period, the fourth-highest number of copyright cases were filed in California's Northern District (which encompasses Silicon Valley).

To file in a California district court, the copyright owner must show that the court has personal jurisdiction over the defendant and that venue is proper. If the defendant is an individual who lives in California, jurisdiction and venue will likely be satisfied in the court for the district where the defendant lives. If the defendant is an entity incorporated in California, jurisdiction and venue will likely be satisfied in any of the California district courts.

In addition, jurisdiction and venue may be satisfied where enough facts tie the case or the defendant to California and/or the district. The following are some recent copyright cases where personal jurisdiction and venue in a federal district court in California were satisfied.

- In Marshmello Creative, LLC et al v Thomas Hoefer, the defendant was employed by a company located in the district that provided him with the equipment to create the works at issue, and the defendant created some of those works in the district (No 2:23-cv-07345, 2024 WL 2106949 (C.D. Cal. Apr. 4, 2024)).
- In Scott v Domus Construction and Design, Inc, the defendant targeted its advertising at residents of the district (No 3:21-cv-00623, 2021 WL 5505888 (S.D. Cal. Nov. 24, 2021)).
- In Velaro, Inc v National Flood Services, LLC, the defendant was bound by a forum selection clause in a licence agreement providing that disputes arising from the agreement shall be exclusively heard in the courts of the district (No 20-5078, 2021 WL 8779924 (C.D. Cal. July 7, 2021)).
- In Loomis v Slendertone Distribution, Inc, 420 F.Supp.3d 1046 (S.D. Cal. Nov. 6, 2019), the defendant had an agent for service of process in California, was registered with the California Secretary of State, and targeted its advertising at California residents.

Infringement damage awards

A copyright owner that prevails on an infringement claim is entitled to recover either the copyright owner's actual damages from the infringement and any additional profits of the infringer not already counted as actual damages, or statutory damages in the amount of USD750 to USD30,000 per work infringed, or up to USD150,000 per work if the infringement was willful (17 U.S.C. § 504). Courts also have discretion to award costs and reasonable attorney's fees to a prevailing copyright owner (17 U.S.C. § 505).

The following are some recent California copyright cases with damages awards.

- In Mackie v West Valley Properties, Inc, the parties consented to entry of judgment and damages of USD15,001, including costs and attorneys' fees, for infringement of one photograph posted on the defendant's website (No 5:22-cv-02663 (N.D. Cal. Apr. 4, 2024)).
- In Watson Music Group, LLC v Unreale Promotions, Inc, the court entered a default judgment for USD6,194 consisting of damages, costs and attorney's fees for infringement of one song used in the defendant's social media content (No 8:23-cv-02091 (C.D. Cal. Mar. 4, 2024)).
- In Scott Hargis v Pacifica Senior Living Management LLC, a jury awarded USD6.3 million for willful infringement of 43 photographs used by the defendant to market senior living facilities online (No 2:22-cv-06989 (C.D. Cal. Dec. 18, 2023)).

Conclusion

While it is not possible to eliminate the risk of copyright infringement, authors and copyright owners (eg, employers whose personnel create works for hire) can take measures to decrease the risk that their works will be used without permission, and to seek recourse should infringement occur. Companies and individuals that own copyrights and do business in California should consult with an experienced copyright attorney to formulate a strategy that meets their goals for protecting and enforcing their copyrights.

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Trends and Developments

Contributed by:
Shawn Kachmar, Brian Sopp and Robert Hurst
HunterMaclean

HunterMaclean has offices in Savannah and St. Simons Island and represents a wide variety of local, regional, national, and international companies and individuals in their legal and business matters in Georgia. HunterMaclean is a business law firm that is committed to its clients and connected to the communities in which its clients do business. The firm has extensive experience representing clients in all areas of litigation as well as corporate, employment, tax, real estate, transportation law, maritime law, information technology, and business planning matters. Firm clients include Fortune 500 companies, banks and hospitals, professional service organisations, industrial development authorities, and non-profit corporations. With 60 attorneys, HunterMaclean's clients receive knowledgeable counsel on all the varied legal issues their industry may face from one comprehensive source.

Authors

Shawn Kachmar is the managing partner with HunterMaclean and practices in the areas of employment law, employee benefits, and business litigation. He has successfully represented public entities and private employers faced with claims under federal and state civil rights laws, as well as a wide variety of business disputes. Shawn also advises employers on employment agreements, executive compensation and ERISA matters, alternative dispute resolution, and restrictive covenants. He serves on the firm's management committee and is a frequent speaker at employment law and human resources seminars and has served as an arbitrator in employment disputes.

Brian Sopp is of counsel in HunterMaclean's Savannah office, where he focuses his practice on employment law. He is an experienced litigator who has successfully defended clients in state and federal courts, up to and including trial. Brian advises organisations regarding employment, benefits, and contract negotiations and disputes. His defence litigation background includes representing medical providers and institutions in medical malpractice, employment, and licensing matters in state and federal court and before state agencies. Brian has successfully represented insurers in federal court in ERISA benefits litigation.

Robert Hurst is an associate in the Savannah office, where he focuses his practice on business litigation and Georgia property tax issues and appeals. He works with businesses and individuals on a wide variety of general and commercial litigation matters, including product liability, real estate litigation, trust and estate litigation, fiduciary liability, real and personal property tax issues, and contract disputes.

HunterMaclean

200 E. Saint Julian Street
Savannah
GA 31401
USA

Tel: +1 912 236 0261
Fax: +7 912 236 4936
Email: bd@huntermaclean.com
Web: www.huntermaclean.com

Contributed by: Shawn Kachmar, Brian Sopp and Robert Hurst, **HunterMaclean**

Background and Business Environment

The State of Georgia is located in the Southeastern United States. It has a population of almost 11 million people (eighth largest in the United States) and is growing. Atlanta, a regional and national business hub, serves as the state capital, while the port city of Savannah is one of the busiest ports in the country.

Georgia has a business-friendly legal and regulatory environment. The state focuses on business development through investments in workforce training, infrastructure, real estate development, logistics, and a wide range of tax credits and exemptions. Growth sectors include agriculture, logistics and distribution, automotive, cybersecurity, aerospace, life sciences, and entertainment.

Given Georgia's business-friendly environment, in many contexts, federal law controls, in the absence of more stringent state regulations. The following are seven developments in federal and state law affecting business in Georgia. This list is not exhaustive. Companies looking to do business in Georgia should consult with experienced counsel to ensure compliance with applicable requirements.

Georgia Nonprofit Corporation Code – 2023 Updates and Revisions

The Georgia Nonprofit Corporation was completely recodified in 2023 by the enactment of Senate Bill 148. Extensive efforts were made by the Georgia Nonprofit Law Section Legislative Committee which provided the working draft on which the revised Code was based.

The Committee's stated goals were to clean up and clarify the act, modernise the act and make identified substantive changes. The following is an incomplete list of changes that will impact many non-profit organisations in Georgia.

General provisions

Penalty for Signing False Documents – O.C.G.A. § 14-3-129

New subsections (b) and (c) were added to penalise the signing of false documents consistent with the Model Nonprofit Corporation Act.

Definitions – O.C.G.A. § 14-3-140

New subsections (6) and (7) attempt to modernise the Code to reflect modern titles of chief executive officer and chief financial officer that have become the dominant nomenclature of these positions.

Meetings, action and notice

Meetings – O.C.G.A. § 14-3-820

The 2023 amendment added the second and third sentences in subsection (a); added present subsection (b); and redesignated former subsection (b) as present subsection (c).

- The second and third sentences in subsection (a) state, "[i]f the time and place of a directors' meeting is fixed by the bylaws or the board, the meeting shall be a regular meeting. All other directors' meetings shall be special meetings".
- Subsection (b) states that unless the articles of incorporation or by-laws provide otherwise, the chair of the board or the CEO, or at least 20% of the directors then in office, may call and deliver notice of a special meeting of the board.

Actions taken without meeting – O.C.G.A. § 14-3-821

The 2023 amendment primarily added subsection (b) stating that "a director's consent may be withdrawn by a revocation signed by the director

and delivered to the corporation prior to delivery to the corporation or unrevoked written consent signed by all the directors required for an action to be taken".

It also added subsection (f) which affirmatively allows a director's signature to be electronic when required unless otherwise stated in the articles or by-laws.

Notice – O.C.G.A. § 14-3-822

Notice is now required for any meeting where an amendment to the articles or by-laws or the removal of a director will be considered. The amendment also affirmatively allows for the by-laws to authorise oral notice of meetings of the board of directors.

Committees – O.C.G.A. § 14-3-825

Significant rewrites were made to this code section to make it conform to the Model Act and Business Code counterpart and to authorise the practice of some non-profit corporations of appointing former board members as voting members of director committees.

Directors and officers

Officers are as described in articles or by-laws or as appointed – O.C.G.A. § 14-3-840

This section now affirmatively allows a corporation to have an executive director unless the articles or by-laws state otherwise.

Duties and authority of officers – O.C.G.A. § 14-3-841

This section now affirmatively allows designation of duties and authority in the articles and by-laws by the directors.

Amendment of articles of incorporation and by-laws

Authority of corporation to amend – O.C.G.A. § 14-3-1001

This section added subsections (b) and (c), which state:

- except as provided in the articles of incorporation, a member of a corporation does not have a vested property right resulting from any provision in the articles, including provisions relating to management, control, purpose, or duration of the corporation; and
- subsection (b) of this Code section shall not apply to vested real property rights of members of a corporation, including a property owners' association, established pursuant to a recorded declaration of covenants or any other recorded agreement between the corporation and all its members.

Records and inspection

Members' right to copy and inspect records – O.C.G.A. § 14-3-160

This section added subsection (e) which allows a corporation to impose reasonable restrictions on the confidentiality, use, or distribution of the records that members are entitled to inspect and copy.

Family Care Act extension – O.C.G.A. § 34-1-10

In 2023, Georgia permanently extended its Family Care Act that was otherwise set to sunset later this year. O.C.G.A. § 34-1-10 has been in effect since 2017 and extends state requirements for certain employers to provide paid sick leave to employees to care for their immediate family members. Employers with 25 or more employees who already provide paid sick leave voluntarily are covered by the Act. Employees must work at least 30 hours per week to be eligible for this

paid leave and must be permitted to use up to five days of earned sick leave to care for immediate family members. Georgia's Family Care Act defines immediate family members as children, spouse, grandchildren, grandparents, parents or any dependent on the employee's most recent tax return. For the first time, these protections are permanent.

Smokefree Air Act – O.C.G.A. § 31-12A-2

In 2023, Georgia amended its Smokefree Air Act to include vaping and electronic cigarettes, resulting in the permanent ban of these devices and activities in enclosed places of employment. Prior to 2023, the Act limited its definition of "smoking" to incinerated tobacco products such as cigarettes, cigars, and pipe tobacco. The Act now states that "smoking" includes "use of an electronic smoking device which creates aerosol or vapor or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking".

Pregnant Workers Fairness Act and PUMP for Nursing Mothers Act

While Georgia has not yet passed clear protections for pregnant workers' rights, it has enacted protections for employees to express breast milk at work. Additionally, the Department of Public Health (DPH) advocates for Breastfeeding Friendly Workplaces and designates itself as a benchmark for compliance. Georgia DPH policy encourages and supports all practices in compliance with state and federal law. To that end, two recent federal laws went into effect that will impact many private employers and all public employers both in Georgia and nationwide.

O.C.G.A. § 34-1-6 does provide that any employer in Georgia with one or more employees shall provide reasonable unpaid break time each day to an employee to express breast milk for her infant child. The employer may make reasonable efforts to provide a room or other location, other than a restroom, where the employee may pump in privacy. This break time should, when possible, run concurrently with any break time already provided to an employee, but the employer is not required under state law to provide break time under this code section that would unduly disrupt the employer's operations.

The federal Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act was signed into law by President Biden on 29 December 2022, which went into effect in 2023 and extends federal protections to more nursing employees than were previously protected. Under the federal PUMP Act, eligible employees have the right to reasonable break time and a place, other than a bathroom, that is shielded from view and free from intrusion to express breast milk while at work and extends this right for up to one year after the birth of the child. Between the protections provided by the state law and its federal counterpart, most employers are covered by these regulations.

On 27 June 2023, the Pregnant Workers Fairness Act (PWFA) went into effect, providing critical protections for and expanding the rights of pregnant mothers. The Act applies to all public employers as well as to any private employers with more than 15 employees.

The PWFA gives workers an affirmative right to receive reasonable accommodations for pregnancy, childbirth, and related medical conditions, including lactation, unless providing such accommodations would create an undue hardship on the employer.

Examples of reasonable accommodations include light duty or help with manual labour

and lifting, temporary transfer to a safer or less physically demanding position, allowing pregnant workers to carry a water bottle, changing or adaptation of dress codes, modifying work schedules, providing a stool to sit on, and longer and/or more flexible breaks for water, food, rest, or lactation needs.

Each employee may require different accommodations, and employers should treat each case or request individually. Under the PWFA, an employer must have a good-faith conversation with a worker who is seeking reasonable accommodation about the worker's needs and what reasonable accommodations could help to meet those needs. Employers must respond to requests for reasonable accommodations interactively and promptly.

Undue hardship is determined by factors including, but not limited to, the cost to the employer and the relative financial resources of the employer. Generally speaking, the larger a company is, the higher the threshold is to show that an accommodation rises to undue hardship.

A pregnant or postpartum employee does not need to have a pregnancy-related disability in order to receive an accommodation under the PWFA. This is a distinct change from prior law. An employer cannot deny a pregnant worker employment opportunity, and a pregnant employee may not be forced to take leave when another reasonable accommodation could help to keep the worker on the job.

Finally, the law makes it illegal to discriminate or retaliate against a pregnant worker for requesting or actually utilising accommodations. Employers should be aware of their new obligations under the PWFA. The PWFA further authorises the US Equal Employment Opportunity Commission (EEOC) to make rules within two years of enactment of the PWFA; so, employers should check back to ensure they are fully compliant with the law as enacted.

Non-competition Agreements

On 23 April 2024, the Federal Trade Commission issued a Final Rule prohibiting for-profit employers from entering into new non-competition agreements with employees, including senior executives, and with independent contractors. Existing non-competition agreements with senior executives earning more than USD151,164 remain enforceable but employers must notify all other employees that existing non-competition agreements are unenforceable as of the effective date of the new rule, which is 120 days after publication in the Federal Register.

The Final Rule does not apply to sales of businesses. And while it generally does not apply to non-profit entities, the FTC noted that some "entities that claim tax-exempt nonprofit status may in fact fall under the Commission's jurisdiction". Holding tax-exempt status under the Internal Revenue Code is meaningful, but not dispositive. Physician-hospital organisations, independent physician/practice associations, and non-profits that pay unreasonable compensation to founders, board members, and other insiders were singled out as potentially being subject to the Final Rule.

The FTC's guidance also notes that while other clauses typically accompanying non-competition provisions, like non-solicitation and confidentiality provisions, are not categorically prohibited, they may violate the Final Rule if they are functionally overbroad or onerous.

Given clear state law that favours enforcement of non-competition agreements (see Georgia's

Restrictive Covenants Act, OCGA § 13-8-50 et seq.) the uncertainty created by the FTC rule is particularly concerning for Georgia employers.

Lawsuits challenging the new rule will likely delay or preclude its implementation. Nevertheless, companies should review the new rule, including its exceptions, and develop strategies to prepare for its implementation, including a thorough review of current contracts and the use and substance of restrictive covenant clauses moving forward.

Fair Labor Standards Act Update

On 23 April 2024, the US Department of Labor announced a Final Rule increasing the salary thresholds for the Executive, Administrative, and Professional exemptions from overtime pay requirements under the Fair Labor Standards Act (FLSA) and an increase in the salary threshold for highly compensated employees. Rules requiring that employees in these classifications be paid on a salary basis and meet certain job duty requirements remain unchanged. The salary threshold changes for the Executive, Administrative, and Professional exemptions will increase from USD35,568 to USD43,888 on 1 July 2024, and to USD58,656 on January 2025. The Highly Compensated exemption will increase from USD107,432 to USD132,964 on 1 July 2024, and USD151,164 on 1 January 2025.

Georgia does not have a state Wage and Hour law of general applicability, and therefore, Wage and Hour compliance in Georgia focuses on the requirements of the FLSA. The DOL's updated salary thresholds will likely affect the classification of a large number of employees in Georgia. As such, employers should review current employee classifications and develop strategies to prepare for the current 1 July 2024, implementation of the new Final Rule.

National Labor Relations Act

Georgia is one of the most pro-business jurisdictions in the United States. Georgia is a "right-to-work" state, which means that the right to work cannot be conditioned upon joining or not joining a union. However, like many right-to-work states, in recent years Georgia has seen an increase in union activity as well as an increase in investigations and complaints by the NRLB against non-unionised employers as the National Labor Relations Board (NLRB) becomes more aggressive.

One recent decision of the NLRB has increased the potential for private employers to be subject to unfair labour practices claims before the NLRB. Specifically, in Stericycle, Inc and Teamsters Local 628 (2 August 2023), the NLRB adopted a new standard for the lawfulness of work rules – they are presumptively unlawful if they have a reasonable tendency to chill employees from exercising their rights under the NLRA ("the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"). The employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule.

This is how the new standard will be applied: "Our standard requires the General Counsel to prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights. We clarify that the Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who

also contemplates engaging in protected concerted activity. Consistent with this perspective, the employer's intent in maintaining a rule is immaterial. Rather, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. If the General Counsel carries her burden, the rule is presumptively unlawful, but the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain."

Employers should review their policies and handbooks with this new standard in mind and with a particular focus on rules regarding confidentiality, communication, and social media.

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Trends and Developments

Contributed by:
Shiloh Theberge
Bernstein Shur

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Author

Shiloh Theberge is the chair of Bernstein Shur's labour and employment practice group and practices in numerous areas of labour and employment law, including employment discrimination and harassment, family and medical leave, disability accommodations under the Americans with Disabilities Act (ADA) and relevant state law, whistle-blower and retaliation claims, wrongful discharge, and wage and hour matters. Shiloh also defends institutions of higher education and other schools in employment and student Title IX cases.

Bernstein Shur

100 Middle Street
PO Box 9729
Portland
ME 04104-5029
USA

Tel: +1 207 774 1200
Fax: +1 207 774 1127
Email: cstevens@bernsteinshur.com
Web: www.bernsteinshur.com

Trends in Labour and Employment in Maine

The State of Maine continues to experience significant shifts in labour and employment practices as the trend towards employee-friendly workplace cultures, policies, and laws in the state, for the most part, moves forward. Given the diverse economy in the state, Maine's labour and employment landscape often undergoes shifts. Current shifts appear to be moving toward employee-friendly laws and appear to reflect the social beliefs of an increasingly diverse and younger workforce. These shifts also appear to be the result of the growth of technology companies and startups that are adding to traditional industries such as forestry, fishing, and tourism in the state. This article examines the key trends and legislative initiatives currently shaping labour and employment in the State of Maine.

Between recently passed laws in 2023 and pending legislation in 2024, Maine is experiencing a significant trend towards employee-friendly laws becoming effective in the state. Employers that do not recognise and comply with these new or expanding state laws may become subject to penalties and fines, which can be significant, as well as lawsuits. Employers that are either considering opening a location in Maine or employing individuals who will be working remotely in Maine, which is a trend that appears here to stay, also need to be aware of the myriad of effects of these new laws, including the potential for increased liability for employers in the state.

Stronger move towards unionised workforces

The changing workforce demographics in Maine have led to an uptick in employee unionisation in the state, particularly in industries such as healthcare, education, and retail sales. At least in part, this uptick appears to be the result of an overall increase in awareness and support for labour rights in the state, the liberal trend in the legislature, and an increase in social activism, particularly by younger workers coming to the state. Employees also increasingly appear eager to share the terms and conditions of employment with co-workers in order to collectively work together to improve those terms and conditions.

On their end, employers appear to be more inclined than in years past to voluntarily recognise unions supported by a majority of employees. Employers likely find voluntarily recognition simpler than engaging in an often costly and lengthy anti-union campaign against employees. An employer's choice to voluntarily recognise a union also can often result in a smoother and shorter process when the union and employer engage in bargaining over the initial union contract.

Potential ban on non-compete provisions

Employers breathed a sigh of relief on 29 March 2024, when Governor Janet Mills vetoed a bill entitled An Act to Prohibit Noncompete Clauses, a veto that was sustained by the Maine legislature on 2 April 2024. The proposed law would have led to a near statewide ban on non-compete provisions. In her veto letter, Governor Mills called non-compete provisions "a critical tool" in preventing employees from taking advantage of their former employers and highlighted a largely negative response from employers across the state. Governor Mills also stated that she found "no evidence" that the state's current statute restricting non-compete provisions was inadequate.

Despite this, employers in Maine are carefully monitoring the status of the final rule on non-competes issued by the Federal Trade Commission (FTC) on 23 April 2024. That rule, if it becomes effective, bans employers' use of all

non-compete provisions in agreements, with limited carveouts. The FTC rule is scheduled to go into effect 120 days after it is published in the Federal Register, or 4 September 2024. Importantly, the rule will supersede all state and local laws – including the current Maine statute on non-competes – unless they provide greater protection to employees.

However, there is hope on the horizon for employers using non-compete provisions. Specifically, the US Chamber of Commerce and other groups have already filed suit challenging the rule and requesting an injunction preventing enforcement of the rule while litigation is pending. While awaiting rulings from the courts in this litigation, employers are reviewing their existing agreements that include non-compete provisions, as well as other restrictive covenants such as non-solicit and non-disclosure provisions, to determine whether they will need to make significant changes if the rule stands.

Increase in salary threshold for exempt employees

The US Department of Labor (DOL) issued a long-awaited rule for the new salary levels for administrative, professional, executive, and highly compensated employee exemptions under the Fair Labor Standards Act (FLSA). The rule significantly raises the salary threshold for employees to be considered exempt from overtime pay to a level higher than originally forecasted. This will affect Maine employers because, while the annualised salary threshold under Maine law is currently USD42,450, which exceeds the federal threshold under the FLSA, that amount will fall below the new salary threshold of USD43,888 effective 1 July 2024, at which point Maine employers will have to use the new federal threshold rather than the state threshold. Employers expect the rule to be challenged in court and should carefully monitor this litigation. If the rule moves forward, employers will need to review their exempt employees and determine whether these salary increases are management or whether employees will need to be transitioned to non-exempt status.

Increase in statutory damages caps already above federal limits

The Maine Human Rights Act (MHRA) generally prohibits discrimination or harassment in employment because of race, colour, sex, sexual orientation, age, physical or mental disability, genetic predisposition, religion, ancestry, gender identity, and national origin, along with other protected characteristics. The statutory damages caps on compensatory and punitive damages under the MHRA have recently been higher than the caps under the corresponding federal laws. However, on 22 June 2023, the legislature passed An Act to Increase the Limits on Awards for Compensatory and Punitive Damages Under the Maine Human Rights Act.

This Act became effective on 19 September 2023, and significantly increased the statutory caps on awards under the MHRA to between USD100,000 and USD1 million depending on the size of the employer as follows:

- 15–100 employees – USD100,000 from USD50,000;
- 101–200 employees – USD300,000 from USD100,000;
- 201–500 employees – USD500,000 from USD300,000; and
- more than 500 employees – USD1 million from USD500,000.

This increase is expected to lead to larger jury verdicts and/or larger settlement demands from plaintiff's counsel and expose employers to

greater financial risk in discrimination cases. This new legislation also passed after recent caselaw in the US District Court for the District of Maine and the US Court of Appeals for the First Circuit where the courts held that "stacking" of damages under the MHRA and corresponding federal laws is allowed, so that plaintiffs may be able to recover damages under both state and federal law for the same claims.

Broadening of equal pay law to include race

On 22 June 2023, Governor Mills signed An Act to Amend the Maine Equal Pay Law by Prohibiting Pay Discrimination Based on Race. This Act expands the state's equal pay law to prevent pay discrimination based on race as well as sex. This Act also follows case law in the US District Court for the District of Maine and the US Court of Appeals for the First Circuit where the courts essentially held that employers are strictly liable under the law with only limited specific exceptions that will infrequently apply – specifically, established seniority systems or merit increase systems or difference in the shift or time of day worked are the only exceptions allowed for differential pay. This revision is expected to lead to a heavy influx of equal pay litigation in the state.

Expansive paid FMLA law enacted

On 11 July 2023, the Maine legislature joined other states when it passed An Act to Implement the Recommendations of the Commission to Develop a Paid Family and Medical Leave Benefits Program. The Act implements a paid family and medical leave benefits programme based on the recommendations of the Commission to Develop a Paid Family and Medical Leave Benefits Program established by a prior Maine Legislature. The programme is one of the most expansive paid leave programmes in the US and may be costly for employers to implement.

On 22 May 2024, the Maine Department of Labor (MDOL) released proposed rules for administration of the programme. Public comments on the proposed rules are due by 8 July 2024. In March 2024, Governor Mills appointed a 15-member board to monitor the programme's solvency and make recommendations on programme rules.

The programme will provide nearly all public and private sector employees up to 12 weeks of family leave and up to 12 weeks of medical leave to eligible covered individuals, with the maximum weekly benefit amount capped at 120% of the state average weekly wage and 90% of the individual's average weekly wage. The Act requires that payroll contributions by employers begin on 1 January 2025, with benefit claims to be processed beginning 1 January 2026. The proposed rules contain comprehensive requirements and factors that allow an employer to deny leave based on undue hardship to its operations.

The programme offers paid medical leave in the event of an employee's serious health condition, as well as paid family leave for employees caring for individuals with a medical condition, paid family leave for bonding with an employee's child after birth or adoption, and safe leave for employees who have experienced violence, sexual assault, assault, or stalking, among other things. A family member is defined broadly under the law to include an individual with whom an employee has a "significant personal bond that is or is like a family relationship, regardless of biological or legal relationship". Employers are hoping for additional clarification on this definition as well as other items through rule-making or guidance.

The programme allows employees to take intermittent leave in blocks of no less than eight hours. An employee's right to accrue vacation

time, sick time, bonuses, advancement, seniority, length of service credit, or other employment benefits, plans, or programmes may not be affected by the employee taking leave. Employers must continue to pay the employer portion of health benefits during the leave period.

Employers that offer "comparable" private paid leave plans may apply to the administrator to opt out of the programme, as long as the private plan does not impose a cost to employees greater than the payroll tax under the state programme. Employers will have to carefully determine whether private leave programmes are "comparable" to ensure they confer the same breadth of protections and benefits as the state programme. While employers will be required to contribute to the state programme starting on 1 January 2025, they will not be permitted to switch to a private programme until the spring of 2026. Employers are hoping that the proposed rules are revised to allow them to opt out of the state programme before contributions begin.

Employers also must post a workplace notice of the benefits available under the programme and must issue written notice to each employee within 30 days of the start of employment, which notice must include an explanation of benefits as well as information on employees' rights and obligations. This programme is one of the most generous state-managed paid leave programmes in the country and employers will need to consider their options and act well before claims begin being processed in 2026.

Civil actions for sexual harassment and related claims in employment

Effective 4 June 2023, the legislature passed An Act to Ensure Accountability for Workplace Sexual Harassment and Sexual Assault by Removing Certain Intentional Torts from Workers' Compensation Exemptions. This Act revised Maine's workers' compensation law to allow employees to bring civil actions for work-related intentional acts and omissions. Previously, Maine law required employees to pursue such claims under Maine's workers' compensation law. The Act also makes clear that an "employee, supervisor, officer or director" of an employer also can be liable for "sexual harassment, sexual assault or an intentional tort related to sexual harassment or sexual assault". This expands the potential scope of vicarious liability for an employer for unlawful conduct by supervisors or agents.

What does this mean for employers?

As Maine moves towards employee-friendly workplace cultures, policies and laws, current Maine employers must – more than ever – stay informed and adapt to maintain compliance with these new and expanded laws. Similarly, potential Maine employers must ensure they consider this myriad of new and expanding laws when planning and budgeting for their move into the state.

USA - MICHIGAN

Law and Practice

Contributed by:
Megan Norris
Miller, Canfield, Paddock and Stone, P.L.C.

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Miller, Canfield, Paddock and Stone, P.L.C. was founded in 1852, making it Michigan's oldest law firm. Starting as a banking firm, Miller Canfield now has over 200 attorneys across the United States, including Michigan, Washington, DC, Ohio, Illinois and California, as well as offices and affiliates in Asia, Europe and the Middle East. The firm continues to have a significant national banking practice. Other substantive practices include public finance, bankruptcy, employment and labour law, intellectual property, environmental law, real estate, trusts and estates, and litigation involving all areas of law. Significant matters include masterminding the structure that enabled the City of Detroit to get out of bankruptcy, negotiating the deal that enabled the building of the international bridge connecting Detroit and Canada, representing universities around the country in Title IX cases involving gender equity in college sports, and being one of the first law firms to earn (and maintain) Mansfield and Mansfield+ certification for diversity.

Author

Megan Norris is Miller Canfield's first female CEO, who continues to serve as a senior principal in the employment and labour law group. Megan is a member of the American College of Trial Lawyers, the College of Labor and Employment Lawyers, and the American Employment Law Counsel, all requiring peer-reviewed admission, and is a former President of the Detroit Bar Association. She was assisted by Miller Canfield's summer associate class, a group of students who have completed their first or second years of law school. The class members were assisted by Miller Canfield subject-matter experts in the various fields.

Miller, Canfield, Paddock and Stone, P.L.C.

150 West Jefferson,
Suite 2500
Detroit
Michigan 48226
USA

Tel: +1-313-496-7594
Email: norris@millercanfield.com
Web: www.millercanfield.com

1. Legal System

1.1 Legal System and Judicial Order

The United States is primarily governed by statutory civil law, although much of that statutory law comes from previous common law. The law is established independently at the municipal, state, and federal levels, with many overlapping requirements. Most of the time, the laws at the various levels do not conflict, but where they do, the higher level of governance prevails.

There are separate court systems for local, state, and federal laws. The judiciary for local laws is local. The judiciary for state laws begins locally, with appellate and Supreme Court review within the state. The federal judicial system begins at the state level, with appellate jurisdiction by assigned geographic circuit courts, and ultimate jurisdiction at the US Supreme Court.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

All potential foreign investments in US companies are reviewed by the Committee on Foreign Investment in the United States (CFIUS). The rules regarding these investments apply to both direct and indirect foreign investment (eg, via funds with foreign partners, via US companies controlled by foreign persons, or into a foreign company that has a US subsidiary).

Prior to 2020, most transactions did not require prior approval; the primary concern was to ensure that technology or funds from an acquired US business would not end up in a sanctioned country as a result of being acquired by a foreign investor. In 2020, new regulations were issued, and the list of transactions requiring prior approval was significantly expanded to include non-controlling investments that provide investors with certain rights in a broad range of US businesses, as well as certain real estate transactions. Sectors affected by this expansion include hi-tech, biotech, healthcare, aerospace, advanced manufacturing, finance, insurance, and energy.

Where prior approval is not required, there is a risk that the parties may be required to unwind the relationship or go through forced mediation if it turns out that the transaction was not appropriate.

2.2 Procedure and Sanctions in the Event of Non-compliance

The steps for a foreign investor to obtain approval are as follows:

- Typically, CFIUS screens proposed investments for potential issues during an informal stage, with no deadline.
- Certain transactions involving foreign persons in which a foreign government has a “substantial interest” are subject to an initial Formal Review. Within 30 days, CFIUS will issue a declaration either determining that there is no risk or that any risk has been resolved (in which case no further action is taken), or that there needs to be a review.
- There is then a 45-day National Security Review to determine whether an investigation is necessary. Factors include:
  (a) whether other laws apply;
  (b) whether the investment poses a threat to national security, critical infrastructure, or homeland security; and
  (c) whether the entity is state-owned or controlled.

The lead agency for the review will depend on the industrial activity of the investment. There is also a review by the Director of National Intelligence during this time period. The parties can withdraw and resubmit a notification at any point in the process. As in the previous stage, ultimately there is either a determination that there is no risk or risks have been resolved, in which case no further action is taken, or there is a determination that there will be an investigation.

- The next step is a National Security Investigation, which can take 45–60 days. Depending on the results of that investigation, the parties may resolve outstanding issues, or CFIUS may negotiate, impose, or enforce an agreement or condition. Where appropriate, the parties may negotiate a mitigation agreement and develop interim protocols, with specific timelines for resubmitting the notice.
- If outstanding concerns are not resolved, a negative determination can be sent to the President, who has 15 days to make a final decision to permit the transaction or order divestment. CFIUS has a list of 12 factors the President must consider (the President can also consider other factors) in deciding to block a foreign acquisition, including national defence and security (including making sure that human resources, technology, supplies and services are available), effects of the transaction on US technological leadership, effect on critical infrastructure, and the like.
- There is no appeal of the President's decision.

If at any time it appears that the parties cannot meet the required timeline, CFIUS will ask the parties to withdraw and refile.

If a party fails to seek approval where required, CFIUS can recommend blocking the proposed transaction or unwinding the completed transaction, even years after the fact. More often, CFIUS proposes restrictions, such as prohibiting participation in substantive decision-making, or taking other action, such as accessing intellectual property. In addition, civil penalties may result in up to USD250,000 per violation or the value of the transaction (whichever is greater) if there is a wilful violation of the regulations, mitigation orders, or conditions or agreements imposed by CFIUS.

2.3 Commitments Required From Foreign Investors

Typically, the United States expects commitments as a condition of foreign investment by negotiating rules and market access commitments concerning foreign investment in free trade agreements, and bilateral investment treaties.

The United States currently has 20 free trade agreements around the world. While each country is different, typical commitments expected from the foreign investor include market access, reducing or eliminating tariffs, and providing "most favorable nation" status in various areas.

2.4 Right to Appeal

There is no review of a President's denial. Investors cannot challenge such decisions in court.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

The following are the most common corporate vehicles available.

- Sole proprietorships – anybody engaging in business activities but not registered as any other kind of business is considered a sole proprietor. While a sole proprietor does not

get many of the advantages associated with other business models, the proprietorship can get a trade name. However, there is no separation between the proprietorship and the individual, so the individual can be held personally liable for the debts and obligations of the business. This model is best suited for low-risk businesses and owners who want to test their business idea before forming a more formal business.

- Limited partnerships and limited liability partnerships – the limited partnership has one general partner with unlimited liability, and additional partners (in any number) with limited liability. Profits are reported in personal tax returns, and the general partner must also pay self-employment taxes. The limited liability partnership (LLP) is similar to the limited partnership, but every partner is an owner with some liability. Each partner is only responsible for their own actions and will not be responsible for debts incurred by others in the partnership. Like sole proprietorships, partnerships are often established for groups who are contemplating becoming a more formal business. Partnerships are often used for professional groups with multiple owners (such as attorneys).
- Limited liability company (LLC) – this model borrows from both the partnership and corporate models. Personal assets, such as cars, houses, and personal bank accounts, are protected from the liabilities of the LLC, and the individual is not subject to corporate taxes for profits and losses that are passed through to personal income. However, each state has different rules regarding LLCs, and some require that the entity be dissolved and re-formed with ever change in membership. In some cases this can be addressed by the terms of the LLC agreement, but local laws and regulations should be considered before adopting this model.
- Corporation – there are many different types of corporations, with some commonalities. The laws regarding corporations differ from state to state. Generally, in this model, the corporation and the individual are entirely separate. Types of corporations include:
  (a) The most standard corporation, also called a C corps, is its own stand-alone entity. The corporation can be taxed on its profits and is financially responsible for its own wrongdoing. While individual owners usually are taxed on their personal income from the corporation and can be held legally liable for their own personal wrongdoing, the individuals are not responsible, either legally or financially, for the actions of the corporation. C corps are subject to regulations regarding record-keeping and reporting. The comings and goings of individuals do not affect the corporate structure.
  (b) Public corporations in many ways function like a C corps, in terms of their record-keeping and reporting requirements and their structure. But public corporations have outside shareholders and a board that is elected by those shareholders. This is an asset when it comes to raising money – the company sell stock or bonds. But it makes the corporate governance structure much more responsible to the outside stockholders, rather than just to the partners or working shareholders of the entity.
  (c) S corps, which are treated differently state by state (and are not recognised by some states), avoid the double taxation of a C corp, allowing some portion of the profits profits (and sometimes losses) to be passed through to the owner's per-

sonal income.
(d) Benefit corporations are legally treated like C corps for most purposes, but while they are for-profit corporations, they have as part of their mission the production of some public benefit in addition to a financial profit.
(e) Close corporations are similar to benefit corporations, but they are more likely to be relatively small, with less structure than most corporations. Many states bar close corporations from public trading of their shares
(f) Non-profit corporation – the purpose of a non-profit corporation (often called a 501(c)(3) after the tax code), as its name suggests, is not to make a profit, but rather to do work that benefits the public in some way. Its mission may be charity, education, religious, scientific, or some other similar purpose. Non-profit corporations are tax exempt, provided they have received a tax exemption from the Internal Revenue Service. Non-profit corporations are not allowed to distribute their profits to members or political campaigns.

- Co-operative – this is an organisation owned by, and operated for the benefit of, those using its services. Examples could include a neighbourhood food co-op, where every member pays in a certain amount, and then is entitled to distribution of a certain share of the food that comes in, or a local movie co-operative, where members pay in and then are entitled to view the movies for free.

As discussed above, some of these corporate structures limit the liability of shareholders. There is no minimum share capital or minimum number of shareholders for those structures which have shareholders; the companies can range from very small and closed to very large and open.

Partnerships, LLCs, and corporations are the most common structure for corporate activities that are going to include mergers and acquisitions, joint ventures, and the like. C corps and public companies are the most common corporate structure within the "corporate" category. Which will be the most appropriate in any given situation will depend on the nature of the venture and the circumstances.

3.2 Incorporation Process

The general steps for setting up a corporation are as follows.

- Choose a business name – in most states, the business name will need to include a designation of corporate status, such as "Inc." or "Co." This step should include a trade mark search to make sure you are not infringing on a trade mark. You should also check with the state Secretary of State to make sure that the name is available. This step can be done quickly.
- If you are going to do business under a name that is different from the corporate name, you need to register a DBA ("doing business as:"). This step can be done quickly.
- Determine directors – the number of directors needed will vary state by state and may also depend on the number of owners your corporation has. This step can be done quickly.
- File your Articles of Incorporation – how much time this will take will depend on how detailed the Articles are. They must include the name and address of the corporation, the purpose of the corporation, the name and address of the registered agent, and the type and number of shares of stock to be issued.
- Write corporate by-laws – if you think of the Articles of Incorporation as your Constitution, the by-laws are all of the specific policies passed in order to conduct business. This

does not need to include every policy the corporation may eventually have – that is what policy manuals are for. But it should include direction regarding how many shares of stock can be issued, how many directors are required, how directors are determined, how long they serve, how the Board is governed, and meeting and record-keeping procedures.
- Draft a shareholder agreement – this is not a required document, but it is helpful in the event of a change in shareholders, whether due to death or the departure of an owner who is transferring shares.
- Most of the above tasks can be handled relatively quickly if the founders of the corporation know what they want to do. Typically, legal advice is helpful for the corporate documents. The task may take longer if the entity is going to operate in multiple jurisdictions, each of which may have its own idiosyncratic requirements.
- Once the corporation is brought into existence, the corporation can issue stock, which will require establishing a record-keeping system.
- Obtain business permits and licences – these will depend on city, county, state, and federal laws, as well as any laws pertaining to the specific industry. The Small Business Administration is a useful source for this part of the process.
- Register your business – you will need tax ID numbers from both your state and the Internal Revenue Service.
- Open a corporate bank account – this is separate from the bank accounts of the owners. This step may require proof of some of the documents listed above, such as Articles of Incorporation and tax ID numbers.
- Check state law to make sure you have not missed anything.

3.3 Ongoing Reporting and Disclosure Obligations

Beginning 1 January 2024, the US Corporate Transparency Act (CTA) requires "reporting companies" to submit reports to the Financial Crimes Enforcement Network (FinCEN) regarding personal information about the company's "beneficial owners". The filing date for the reports depends on when the company was formed. Banks, "large operating companies" (more than 20 full time employees in the US, a physical office within the US, and more than USD5 million in gross receipts in the US), publicly traded companies, and tax-exempt entities, as defined by IRC Section 501(c). Companies have any other disclosure requirements as defined by individual states.

3.4 Management Structures

Management structures in law firms vary from entity to entity. A few common structures include:

- a CEO who reports to an elected Board;
- group leaders reporting to a CEO, who reports to an elected Board;
- partners who make joint decisions;
- executive committees chosen by management, who report to the CEO; and
- a CEO and COO who have equal authority.

Within these structures, there is significant variance in terms of how much leeway an executive has to act unilaterally (without day-to-day approval from the Board), as well as significant variance regarding terms of office for any particular position.

3.5 Directors', Officers' and Shareholders' Liability

In general, directors and officers have protection from liability, so long as decisions are made and actions are taken in good faith based on what the

actor believes is in the best interest of the company. The primary exception to this general rule is "piercing the corporate veil". This occurs most often when the business is not distinguishable from its owners, so every action is, in essence, self-serving. Piercing the corporate veil happens almost exclusively in small, privately held corporations, where the line between business and personal intent is often blurred. There are no cases finding that the veil has been pierced in publicly held corporations, because of the large number of shareholders and the extensive requirement of public filings.

4. Employment Law

4.1 Nature of Applicable Regulations

The rules governing employment relationships come from a number of sources.

- First, there are statutory laws, such as Title VII of the Civil Rights Act of 1964, which is the federal law that prohibits various forms of discrimination in the workplace, and the Americans with Disabilities Act (ADA), which specifically prohibits discrimination on the basis of disability and also affirmatively requires that certain accommodations be provided to individuals with disabilities. While the parameters of laws such as the Civil Rights Act have developed through case law expanding the legal expectations over time, more recently, laws like the ADA have not gone into effect immediately, and then have had fully developed federal regulations in place before enforcement begins.
- Employers are also governed by collective bargaining agreements, which are negotiated between the employer and the union (acting on behalf of the employees) and apply to all employees within the bargaining unit, as well as individual employment agreements entered into between the employer and an individual employee. Employers violating a collective bargaining agreement or employment agreement are typically found to be in breach of contract, with the contract governing the availability of damages. Employers violating a statute that protects employee rights may be required to pay additional damages, such as emotional distress.

4.2 Characteristics of Employment Contracts

In general, an employer and employee can enter into any contract to which they both agree, so long as nothing in the contract is requiring either party to act illegally. The parties can negotiate the monetary terms of the contract, any other mutually agreeable terms (such as working hours, job duties, reporting relationships, and the like), the duration of the contract, and the circumstances under which the contract may end, if any, prior to the anticipated end date. It is possible for a contract to be made verbally and be enforceable, but this is rare because of the likelihood of a subsequent dispute about the terms. A contract can have a set term determined by the parties, a term that is event-driven (eg, until a particular job is done), or can be open-ended (although it is common that there is some provision for what will allow one party or the other to end the contractual relationship).

4.3 Working Time

The rules that will govern a salaried employee's working time will depend on whether the employee is considered "exempt" (such that the employer does not need to pay overtime) under the Fair Labor Standards Act. Only certain kinds of employees (eg, executives, professionals, certain administrators, sales people, and certain computer workers) are considered

exempt under the FLSA. An "exempt" employee cannot be paid hourly. A non-exempt employee can receive a salary so that the employee will receive a set amount and will not have reduced pay if the workday fluctuates and is sometimes less than a full day. However, if the employee exceeds a 40-hour work-week in any given week, the employee will be eligible for overtime even though they are salaried. Overtime is paid at 1½ times the usual hourly rate. If the employee is salaried, the salary will be converted to a 40-hour work-week to determine the overtime rate.

4.4 Termination of Employment Contracts

Whether and how an individual employment contract can be terminated will depend on the nature of the contract. Employees without a contract are generally considered "at will", which means that they can be terminated at any time, with or without notice and with or without cause, for any reason that is not unlawful or for no reason at all. Employees can be at will even if they have a written contract; in many cases, the contract says that the employee is at will, but addresses other issues, such as compensation or job duties. If the employee has a written contract that is not at will, then the terms of the contract will dictate under what circumstances the employee can be terminated (the contract may say "for cause", in which case there may be a dispute about what constitutes "cause", or the contract may specifically define "cause"). What compensation an employee gets upon termination will depend on the contractual language. An employer is required to fully pay an employee for the time they worked, but is not required to pay severance at all or in any particular amount unless the contract requires it. However, if the employer is asking the employee to sign a release, the employer will be required to give some consideration (which does not need to be monetary) for that release.

The US does not have any law regarding "collective redundancies". What it has is a requirement relating to large layoffs. The WARN Act requires that, with limited exceptions, an employer with 100 or more employees (not counting those who have worked less than six months or have worked fewer than 20 hours/week) give at least 60 calendar days' notice of a plant closing or a layoff affecting more than 50 employees at a single site of employment.

4.5 Employee Representations

Employees are not required to be represented, informed, or consulted by management. If employees want to unionise, they can ask the employer to allow them to do so. Alternatively, if the employer does not choose to do so, the employees can show (by signing cards) that at least 30% of the workers who would be in the union want the union. If the employees make that showing, and the employer does not want to voluntarily recognise the union, then the National Labor Relations Board will hold an election to determine if more than 50% of the applicable employees want the union.

5. Tax Law

5.1 Taxes Applicable to Employees/ Employers

Employees are required to pay income tax, as well as Federal Insurance Contributions Act (FICA) taxes, which include Social Security and Medicare taxes. Employers are responsible for withholding these taxes from employees' wages and remitting them to the Internal Revenue Service (IRS). Employers are required to pay their

own share of FICA taxes and Federal Unemployment Tax Act (FUTA) taxes.

Federal income tax rates vary based on the type of taxpayer and their income level. The tax rates are progressive. The 2023 tax rates for a single taxpayer are as follows.

- 10% on income from USD0 up to USD11,000.
- 12% on income from USD11,001 up to USD44,725.
- 22% on income from USD44,726 up to USD95,375.
- 24% on income from USD95,378 up to USD182,100.
- 32% on income from USD182,101 up to USD231,250.
- 35% on income from USD231,251 up to USD578,125.
- 37% on income from USD578,126 and up.

Additionally, there may be state and local income taxes, which are imposed by state and local governments on the income earned by individuals within their jurisdictions. Thus, an employee may be required to pay state and local income taxes in addition to federal income tax.

With respect to FICA taxes, they are shared equally between the employee and the employer. The employee's share is withheld from their wages by the employer, and the employer pays an equivalent amount. The current tax rate for Social Security is 6.2% for the employee and employer separately. Social Security tax has a wage base limit, which is the maximum wage that is subject to the tax for that year. Currently, the wage base is USD168,000. The current tax rate for Medicare is 1.45% for the employee and employer separately. Additional Medicare tax applies to an employee's wages that exceed a threshold amount based on the employee's filing status. Employers are required to withhold the 0.9% Additional Medicare tax on wages paid in excess of USD200,000 in a calendar year, regardless of the employee's filing status. Medicare tax is not subject to a wage base limit.

FUTA taxes are paid exclusively by the employer. Employers are required to pay the standard FUTA rate of 6% on the first USD7,000 of wages paid to each employee annually. However, employers may receive a credit for state unemployment tax of up to 5.4%, which would result in a net FUTA rate of 0.6%.

5.2 Taxes Applicable to Businesses

A company generally must pay taxes to the federal government, its state of incorporation, and those state and local governments where it transacts business. Companies are subject to several types of taxes, including corporate income tax, employment taxes, and other specific taxes. The employment taxes that a company must pay are described in **5.1 Taxes Applicable to Employees/Employers** and include FICA taxes, FUTA taxes, and federal income tax withholding. The other types of taxes a company must pay depend on the tax classification of the business entity.

Corporate income tax is imposed on the taxable income of C-corporations. Taxable corporations must file an annual corporate income tax return. The federal corporate tax rate is 21%, and it applies to a corporation's profits. The taxable income of a corporation includes revenue minus expenses such as the cost of goods sold, general and administrative expenses, selling and marketing, and other operating costs. Generally, the income of a corporation is taxed at two levels: at the entity level when income is earned, and at the stockholder level when dividends are distributed. S-corporations do not have to pay federal

corporate income taxes. Instead, its income and expenses are passed through its shareholders, who must then report the income and expenses on their own tax returns. Partnerships, LLCs, and other entities also do not pay federal income taxes. Their income and expenses are reported by their owners on their own tax returns.

Companies may be subject to other specific taxes depending on their activities. For example, a company may have to pay excise tax, which is an indirect tax on specific goods, services, and activities. Federal excise tax is typically imposed on the sale of goods and services, such as fuel, heavy trucks, highway tractors, and other goods and services. Excise taxes are often passed on to consumers as part of the price of goods or services.

The US does not have a national VAT system. Instead, some state and local governments impose sales tax on the sale of certain goods and services. A company must collect sales tax from consumers and remit it to the state or local government in which it does business. Some states and local governments require a company to obtain a licence to sell or a sales tax permit prior to collecting sales tax from consumers. Depending on state and local laws, the sales tax rate and the types of goods and services that are subject to sales tax vary.

5.3 Available Tax Credits/Incentives

The main tax credits and tax incentives available through the federal government include those for renewable energy, research and development (R&D), education, and low-income housing.

Businesses and other entities, such as nonprofits and local governments, may be eligible for tax credits for activities relating to renewable energy. Federal tax incentives for renewable energy include the Production Tax Credit (PTC) and the Investment Tax Credit (ITC). The PTC provides tax credits for the production of renewable energy from sources such as wind, solar, biomass, geothermal, and hydropower. The credit is calculated based on the amount of energy produced and sold, and it is available for ten years from the date the equipment is placed in service. The ITC is a tax credit that reduces the federal income tax liability for a percentage of the cost of renewable energy property, such as solar energy systems. The credit can be claimed for 30% of the investment cost of the renewable energy property.

R&D tax credits provide a reduction of a company's tax liability for domestic expenses. Organisations that engage in activities to develop new or innovative products, processes, software, formulas, or inventions are eligible to receive an R&D tax credit. Qualifying expenditures include the design and development of innovative products or processes. Generally, between 6% and 8% of a company's annual qualifying R&D expenses can be applied, dollar for dollar, against its federal income tax liability. A company must claim the R&D tax credit by filing a form with the IRS.

Other federal tax credits and incentives exist for fostering social welfare. Tax credits for education include the American Opportunity Tax Credit and Lifetime Learning Credit. The Low-Income Housing Tax Credit offers credit for the development of low-income housing. Additionally, the Earned Income Tax Credit provides refundable credit to low-income workers.

5.4 Tax Consolidation

Tax consolidation is available in the US. It allows affiliated groups of corporations to file a consolidated federal income tax return. When a US

corporate group files a consolidated income tax return, it is treated as a single corporation for tax purposes. The consolidated income tax return reflects the consolidated income of all the corporations in the group, and the group has a single federal income tax liability. Transactions within the group are generally ignored, and the consolidated taxable income is based on the group's transactions and dealings with the parties outside of the group. Each corporation in a consolidated group is severally liable for the tax liability of the entire group.

To be eligible for tax consolidation, a common parent corporation must directly own at least 80% of the total voting power and value of at least one other corporation in the group. Additionally, at least one of the other corporations in the group must directly own at least 80% of the stock in each of the remaining corporations in the group. Eligible corporations exclude S-corporations, foreign corporations, regulated investment companies, real estate investment trusts, tax-exempt corporations, life insurance companies, and domestic international sales corporations.

5.5 Thin Capitalisation Rules and Other Limitations

There are thin capitalisation rules in the US that apply to companies with high debt-to-equity ratios. The Tax Cuts and Jobs Act, enacted in 2017, introduced new thin capitalisation rules that limit the deductibility of net business interest expense. Under the rule, net interest expense can only be deducted up to 30% of the company's adjusted taxable income, which is similar to EBITDA (earnings before interest, taxes, depreciation, and amortisation). Excess deductions can be carried forward indefinitely. The rule applies to any debt outstanding on 1 January 2018. After 2022, the adjusted taxable income is calculated similarly to EBIT (earnings before interest and taxes), making the limitation apply to a larger number of companies.

5.6 Transfer Pricing

Transfer pricing rules in the US are governed by Internal Revenue Code (IRC) Section 482, which gives the IRS the authority to reallocate income, deductions, credits, and allowances among commonly owned or controlled businesses. Section 482 ensures that prices charged by one affiliate to another in an intercompany transaction yield results that are similar to the results that would have been realised if uncontrolled taxpayers had engaged in the same transaction. IRC Section 482 applies to transactions between a variety of entities, including those owned directly or indirectly by a common parent company, a partner and partnership, two partnerships owned by the same partners, a common parent of a group and a subsidiary, a partnership and corporation owned by the same persons, and an entity and each of its 50% of shareholders if the shareholders have the same business interests in the jointly owned entity.

The method applied by the IRS to determine the appropriate income of an entity is to compare the prices charged between the entity and related entities for the transfer of goods, services, or intangible property with the prices that would be charged between unrelated entities. This is known as the arm's length standard, which looks to market prices to determine the reasonableness of intercompany prices charged for the transfer of goods and intangibles and provision of services between related entities. Additionally, Section 482 provides a special rule regarding transfers or licences of intangible property. Under the rule, the income relating to the transfer or licence of intangible property must be commensurate with the income attributable to

the intangible property. The rule allows the IRS to look to the actual income produced by an intangible asset.

5.7 Anti-evasion Rules

There are several statutory provisions and regulations in the US aimed at preventing tax avoidance. In addition to IRC Section 482, discussed in **5.6 Transfer Pricing**, the Base Erosion and Anti-Abuse Tax (BEAT) prevents tax avoidance. The BEAT acts as a minimum tax and is primarily focused on preventing foreign-parented corporate groups from reducing or eliminating US tax through deductible payments from US subsidiaries to foreign affiliates. The tax due equals the excess of a minimum tax rate applied to a corporation's taxable income after adding back deductible payments made to foreign affiliates over the corporation's tax liability at the regular corporate rate. The minimum tax rate is 10% between 2019 and 2025 and 12.5% in 2026 and later. The BEAT applies to certain corporations that have annual gross receipts for the prior three-year period of at least USD500 million and a base erosion percentage of 3% or higher.

There are also criminal felonies in the US aimed to deter tax evasion. Under IRC Section 7201, any person who wilfully attempts to evade any tax imposed by the IRC is guilty of a felony. Upon conviction, the individual may be fined up to USD100,000, and a corporation may be fined up to USD500,000. Additionally, imprisonment of up to five years may be imposed on any individual convicted under the provision. Section 7202 provides that failure to collect, account for, and pay any tax imposed by the IRC also constitutes a felony with similar penalties.

6. Competition Law

6.1 Merger Control Notification

Not all mergers and acquisitions are subject to premerger notification under Federal jurisdiction, outlined by the Hart-Scott Rodino Antitrust Improvements Act of 1976 (HSR Act). However, notification may be required due to the size of parties, size of transaction, or it being a non-exempt transaction. The thresholds for when mergers or acquisitions are subject to notification are revised annually. If the transaction meets the required disclosure thresholds set forth in the HSR Act, it is subject to premerger notification regardless of whether it is a joint venture, acquisition of assets, equity or voting securities. If a premerger notification is required parties must file a notification with the Federal Trade Commission (FTC) and the Department of Justice (DOJ). The parties must provide detailed information about their market shares and business operations and wait for government review. Parties are subject to a waiting period prior to the finalisation of the transaction. Parties may also be subject to notification and review by state authority, including review by industry specific regulators or the state attorneys general.

6.2 Merger Control Procedure

While not all mergers and acquisitions require a premerger filing, those that do require a filing must begin the process by filing a Notice of Proposed Deal and a Notification. Both the seller and buyer must file the forms and provide relevant data about their business and the industry. Once the filing is complete the parties are subject to a 30-day waiting period (15 days if it is a cash tender offer or bankruptcy) or until the agencies grant early termination of the waiting period.

Although the proposed deal is filed with both the DOJ and FTC, only one agency will review it. The matter is cleared to one agency and subsequently reviewed by that investigative agency. The agency can either issue a request for additional information from each party (Second Request); allow the initial waiting period to expire; or terminate the waiting period early. If the waiting period is terminated or expires, the parties can conclude their deal.

If the agency requests additional information, the parties may be required to provide further documentation. Typically, this includes business documents, data pertaining to the company's products or services, market conditions, and the likely effects of the merger. Once the parties comply with the Second Request, the agency is afforded 30 more days (ten days if it is a cash tender offer or bankruptcy) to review the necessary documentation.

The agency may then decide to either close the investigation and let the deal continue unchallenged, enter into an agreement with the companies to draft and adhere to provisions that will restore competition, or to stop the entire transaction and seek a preliminary injunction that will restore competition.

6.3 Cartels

Under US Federal law, anti-competitive agreements and practices are governed by Federal antitrust laws. The FTC Act, the Sherman Act Section 1 and 2, and the Clayton Act are amongst those that work to prevent unfair business practices that are likely to reduce competition. Anti-competitive activities can generally be grouped into two categories: agreement between competitors (horizontal conduct) and monopolisation (single firm conduct).

Furthermore, to determine whether a particular practice is anti-competitive, the actions will be analysed under the per se rule or the rule of reason. The per se rule applies to agreements and practices that are considered inherently harmful to competition and are presumed to be illegal without the need for a detailed analysis. Price fixing, group boycotts, and bid rigging are amongst the business practices that are considered per se illegal under the anti-trust laws. The rule of reason requires a further analysis of the actual impact on competition by looking at the (i) definition of the relevant product and geographic market, (ii) market power of the defendant(s) in the relevant market, and (iii) the existence of anti-competitive effects. The burden is initially on the plaintiff to establish the agreement produced anti-competitive effects, either through direct or indirect evidence.

6.4 Abuse of Dominant Position

Section 2 of the Sherman Act governs unilateral conduct and economic dependency. This section makes it unlawful to monopolise, attempt to monopolise, or conspire to monopolise. To determine if a party has a monopoly or is dangerously close, an analysis of the client's market share in the relevant market is necessary. Typically, courts find that there is a probability of a monopoly when the defendant has a market share of 50% or more. Monopoly power or conduct will only be considered illegal if it is accompanied by anti-competitive intent and conduct that is exclusionary or anti-competitive. Section 2 of the Sherman Act pertains to monopolisation or attempted monopolisation that influences either interstate or foreign commerce. It is essential to evaluate the effects of the conduct to determine the applicability of Section 2.

7. Intellectual Property

7.1 Patents

A patent is a legal right granted by the United States Patent and Trademark Office (USPTO) that gives the patent holder the exclusive rights to an invention. Such rights include the exclusion of others from making, using, or selling the patented invention without permission. The USPTO is responsible for granting and issuing patents and disseminating information regarding patents and trade marks. The three types of patents processed by the USPTO are utility, design, and plant patents.

Patent-eligible inventions must be:

- able to be used;
- have a clear description of how to make and use the invention;
- new or "novel" in its nature; and
- "not obvious" as it relates to a change to something already invented.

To register a patent, an inventor (be it an individual, their representative, or a company to whom an inventor has assigned or is contractually obligated to assign an invention) must file an application with and pay a filing fee to the USPTO. The application must include a detailed description of the invention, claims defining the scope of the invention, and any necessary illustrations that further define the purpose and function of the invention. The USPTO examines the application to ensure that it meets all legal requirements. If the application is approved, the USPTO issues a patent, which is authenticated with the Office's seal.

Certain patents may be valid and enforced for up to twenty years from the date the application was filed, while others are given a fifteen-year period from the date of grant. Certain maintenance fees must be paid to the USPTO to enforce the patent. Enforcement of patents involves legal actions against parties that infringe on the patent holder's rights. Infringement can occur through unauthorised making, using, selling, or importing of the patented invention. Remedies for patent infringement include monetary damages and injunctions to prevent further infringing behaviour.

7.2 Trade Marks

A trade mark is defined as a word, phrase, symbol, design, or a combination thereof that identifies and distinguishes the source of the goods or services of one party from those of another. The Lanham Act specifically defines a trade mark as any word, name, symbol, or device used by a person, or which a person has a bona fide intention to use in commerce. While one is not required to register a trade mark, doing so allows for more legal rights and protections under federal law.

For instance, a USPTO registered trade mark cannot be registered by another party without the original registrant's permission and prevents other parties from using a trade mark that is similar to the registered trade mark's associated goods and services. The length of protection for a trade mark can be indefinite, provided that the trade mark is continuously used in commerce and proper maintenance filings are made. Once a trade mark is registered, it can become incontestable after five years of continuous use, which provides stronger protection against challenges.

To register a trade mark, one must file an application with and pay a filing fee to the USPTO. The application must specify the legal or statutory basis for filing the application, which can be either "use in commerce" or "intent to use."

The former indicates that the applicant is already using the trade mark in interstate commerce, while the latter indicates that the applicant has a bona fide intention to use the trade mark in interstate commerce. The application is then examined by a Trade mark Examining Attorney to ensure that it meets all legal requirements. If an application is based on an intent to use the trade mark in commerce, the USPTO issues a Notice of Allowance to requisition a Statement of Use submission, which requires an applicant to include a real-life example showing how one would use their trade mark in commerce. Once the application is approved, the trade mark is published in the official gazette, allowing third parties to oppose the registration. If no opposition is filed, or if the opposition is unsuccessful, the trade mark is registered. Service marks, collective marks, and certification marks follow a similar registration process.

Enforcement of trade mark rights can be pursued through various means. Trade mark owners can file lawsuits in court to stop infringement and seek remedies such as monetary damages and injunctions. Typically, the more unique and creative the trade mark, the more effective and easier it is to protect.

7.3 Industrial Design

An industrial design is the ornamental design of a useful object, which is protected through the issuance of a design patent granted by the USPTO. An industrial design must be primarily ornamental (non-functional) and applied to an article of manufacture. For applications filed on or after 13 May 2015, industrial designs are granted a 15-year period of patent protection from the date of the grant. A fourteen year period is granted for industrial design patents filed before this date. Overall, the registration process, enforcement, and remedies available for infringement of industrial design patents are not dissimilar to those provided to plant and utility patents.

7.4 Copyright

A copyright is a legal protection granted to the creator of an original work of authorship that is fixed in a tangible medium of expression. Types of works for which copyrights are registered include literary works, performing arts, visual arts, motion pictures, photographs, computer programs, databases, blogs, and websites. Copyright protection generally includes the life of the author and an additional seventy years after their death. For works made for hire, or which are contractually made for a company within the scope of employment, the copyright protection term can last up to either ninety-five years from the year of first publication or one hundred and twenty years from the year of creation.

To register for a copyright, an author must submit a copy of the work, an application form, and a fee to the US Copyright Office, the last of which varies depending on the nature of the original work (ie, a group of unpublished works, a group of newsletters, or a group of serials). Copyright registration is not mandatory but provides several legal benefits. For example, registered copyrights provide holders with the exclusive rights to reproduce, distribute, perform, and display their works, as well create derivative works. Commonly sought after remedies for copyright infringement include injunctions and monetary damages.

7.5 Others

Software and databases are made up of different components, all of which can be subject to different kinds of intellectual property protection under federal law. Coding and data arrangement, for example, may be eligible for copyright once

an applicant proves the originality of such technological work. Similarly, patents may be granted to protect a software's function or technical processes, as well as a database's structure or data maintenance and retrieval methods. Just as importantly, contractual agreements are a very helpful tool for protecting software and databases, as these agreements can specify the terms under which such works can be used, shared, or modified. Some can also contain provisions for software escrow to protect the licensee's interests in case the licensor breaches his contractual obligations with respect to the work's usage.

Trade secrets are defined as information that:

- has either actual or potential independent economic value by virtue of not being generally known;
- has value to others who cannot legitimately obtain the information; and
- is subject to reasonable efforts to maintain its secrecy.

The Economic Espionage Act of 1996 criminalises theft of trade secrets when:

- there is an intention or knowledge that the offense will benefit a foreign entity; and
- when there is an intention or knowledge that the offense involves a product or service in interstate or foreign commerce and benefits anyone other the owner of the trade secret while also injuring the owner.

Fines and imprisonment are often imposed on offenders of this law.

A trade secret owner can also establish a private civil cause of action for the unauthorised use or disclosure of a trade secret under the Defend Trade Secrets Act of 2016. Such claims can also be brought forth and enforced under the Michigan Uniform Trade Secrets Act (MUTSA), resulting in remedies such as injunctive relief, monetary damages, and payment of attorney's fees. Courts may also issue protective orders to maintain the confidentiality of the trade secrets throughout a litigation, such as by sealing records, holding in camera hearings, and restricting disclosure without court approval.

8. Data Protection

8.1 Applicable Regulations

The United States does not have a singular data protection law that addresses every category of data; however, the United States have several federal laws that protect specific types of data. There are four main federal laws that cover the main categories of data protection: US Privacy Act of 1974, HIPAA, COPPA, and the Gramm-Leach-Bliley Act.

The US Privacy Act of 1974 establishes the rules for federal agencies to collect, maintain, use, and spread personal information. This provides individuals the right to know what information is being used and collected. HIPAA sets the national standard for privacy, confidentiality, and consent for protecting an individual's medical records. COPPA addresses data protection specifically for children under the age of 13. This law requires net operators to receive parental consent, communicate how the data is handled, provide access to the child's guardian to keep or remove the child's data. The Gramm-Leach-Bliley Act (1999) protects consumers' financial information for commercial and investment banks, securities firms, and insurance companies.

Only a few states have tailored data privacy laws. Michigan, being one of them, follows the Michigan Privacy Act (2022) which is designed to protect data for Michigan users by establishing standard for businesses on how to collect and process personal data.

8.2 Geographical Scope

United States courts have established that foreign companies who target US consumers with its products or services must follow US data protection regulations, especially when its products or services can have a substantial effect on interstate commerce. However, foreign entities do not have to apply their own data protection laws while engaging US consumers. These rules provide protection to US consumers from unfair or deceptive practices.

8.3 Role and Authority of the Data Protection Agency

There are two main government agencies that oversee enforcing data protection laws: the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC). The overall role of the FCC is to protects individuals from unwanted foreign communications, images, and other intrusions while ensuring that industries comply with its rules. The FTC enforces companies to implement data security programs to protect consumer information through the FTC Safeguard rule.

9. Looking Forward

9.1 Upcoming Legal Reforms

Right now, the legislator is doing very little with regard to legislative reform because the Senate and House have split control, there is a presidential election coming in November, and it is very difficult to get the necessary votes for anything.

Trends and Developments

Contributed by:
Megan Norris
Miller, Canfield, Paddock and Stone, P.L.C.

Miller, Canfield, Paddock and Stone, P.L.C. was founded in 1852, making it Michigan's oldest law firm. Starting as a banking firm, Miller Canfield now has over 200 attorneys across the United States, including Michigan, Washington, DC, Ohio, Illinois and California, as well as offices and affiliates in Asia, Europe and the Middle East. The firm continues to have a significant national banking practice. Other substantive practices include public finance, bankruptcy, employment and labour law, intellectual property, environmental law, real estate, trusts and estates, and litigation involving all areas of law. Significant matters include masterminding the structure that enabled the City of Detroit to get out of bankruptcy, negotiating the deal that enabled the building of the international bridge connecting Detroit and Canada, representing universities around the country in Title IX cases involving gender equity in college sports, and being one of the first law firms to earn (and maintain) Mansfield and Mansfield+ certification for diversity.

Author

Megan Norris is Miller Canfield's first female CEO, who continues to serve as a senior principal in the employment and labour law group. Megan is a member of the American College of Trial Lawyers, the College of Labor and Employment Lawyers, and the American Employment Law Counsel, all requiring peer-reviewed admission, and is a former President of the Detroit Bar Association. She was assisted by Miller Canfield's summer associate class, a group of students who have completed their first or second years of law school. The class members were assisted by Miller Canfield subject-matter experts in the various fields.

Miller, Canfield, Paddock and Stone, P.L.C.

150 West Jefferson,
Suite 2500
Detroit
Michigan 48226
USA

Tel: +1-313-496-7594
Email: norris@millercanfield.com
Web: www.millercanfield.com

MILLER CANFIELD

Contributed by: Megan Norris, **Miller, Canfield, Paddock and Stone, P.L.C.**

The Continued Development of Disability Law in the United States

Introduction

Historically, United States law has largely focused on what an entity cannot do, as opposed to what an entity can or must do. For example, the National Labor Relations Act, passed in 1935, provided that employers could not interfere in their employees' right to bargain. Similarly, the Civil Rights Act of 1964 prohibited employers, public facilities, and voting locations from discriminating on the basis of race, color, sex, religion, and national origin, and the Age Discrimination Act of 1967 prohibited discrimination against employees who are 40 years old or older.

The Americans With Disabilities Act (1990), unlike most other discrimination statutes, is different in that it not only contain prohibitions (against discrimination and retaliation), but also affirmatively requires employers (as well as public entities and places of public accommodation, such as shopping malls), to do things for certain individuals that they are not required to do for all individuals. Under the ADA, this takes the form of "accommodation" – assistance or modification that is provided to disabled individuals that is not provided to others.

While the ADA is not new, it differs from other employment statutes in that it is not static; as technology develops and major changes in the world take place (as has been the case since COVID-19), the actions employers may need to take to accommodate employees also change.

Background

The Americans With Disabilities Act (ADA) was enacted in 1990 and took effect in 1992. The ADA, like previous civil rights laws, prohibits discrimination against certain people – in this case, qualified individuals with disabilities. While the statute provides examples of possible accommodations (such as technical aids or devices, modification of policies, qualified readers or interpreters, job restructuring, or modified work schedules), there is no limit to what accommodation could be required other than that it must be "reasonable" and cannot pose an "undue hardship" on the employer.

General guidelines

First, the accommodation must be related to limitations caused by a disability. For example, if an employee is denied a leave of absence because they did not submit the appropriate supporting documentation, and the failure to submit the documentation was not related to the nature of the disability, there is no duty to accommodate. If the accommodation is for personal reasons (such as a different work schedule due to other commitments), there is no duty to accommodate.

Second, the individual does not get to choose their preferred accommodation, so long as the accommodation accomplishes the goal of enabling the individual to do what needs to be done. So if an individual with a hearing impairment who purchased a theater ticket in the 50th row of an auditorium requires an accommodation to hear the presentation, the theater can provide an amplification device, even if the individual would prefer to be moved to the front of the theater. Likewise, if an employee with attention deficit disorder wants to move to a private office instead of working in a cubicle, the employer can instead provide the employee with noise-cancelling headphones or move the employee to a less populated area of the office.

Third, an individual who is "regarded as" disabled has a right to not be discriminated against,

but is not entitled to any accommodation since the individual does not actually have a disability.

Ultimately, it is the disabled individual's obligation to establish that a reasonable accommodation exists.

The interactive process

The ADA relies heavily on the "interactive process". While sometimes it is obvious what accommodation is needed and there is immediate agreement, it is expected that in many situations there will be communication to determine what should be done. Both parties have a duty to engage in this process in good faith. In most cases, it is the individual's duty to identify the need for an accommodation, the individual's duty to provide documentation supporting that need where appropriate, and ultimately the individual's duty to show that a reasonable accommodation exists. But the entity has a duty to communicate with the individual regarding the accommodation request, to consider the request, and to offer an accommodation that is reasonable and effective, if possible.

If the process, whatever it may be, is successful – ie, a satisfactory accommodation is provided to an individual – then the entity is likely to be found to have complied with the ADA regardless of the process. But if the process is not successful because the entity concludes that no appropriate accommodation exists, then the entity is likely to be scrutinised. Opposing counsel, judges, and jurors are remarkably capable of coming up with potential accommodations, so it behoves the entity to make the necessary effort at the front end.

Examples of reasonable accommodation

There is no finite list of accommodations, and new accommodations become possible as technology advances. For example, when the ADA was passed in 1990, there was very little wireless technology, so a person working in a manufacturing plant would be causing a safety hazard if they were walking around with an amplifying headset that was plugged into the wall some place. Now, it is likely that the individual could have a headset that is not tethered to a particular place and does not have any wires on the ground.

While the technology will always advance and there is no limit to the ability to think of new ways to do things, the following are examples of typical accommodations.

- Modification of job duties.
- Removal of certain stressors.
- Modification of policies (such as allowing temporary work from home if the employee can still perform the essential functions of the job, or allowing temporary use of "customer" handicapped parking spaces).
- Physical modifications in the workplace (such as a special chair).
- Qualified readers or interpreters.
- Technological aids or devices.
- Modification of work schedules (such as short breaks for medication, or potentially shifting hours to better accommodate symptoms).
- Shift to part-time (with the understanding that benefits may be affected).
- Leave of absence for a defined period.
- The allowance of trained service animals (the employee, not the employer, is responsible for getting the animal).
- While not included in the ADA regulations, the Department of Transportation and the Fair Housing Act require that "comfort" pets (animals that are not specifically trained to service persons with disabilities, but provide

a calming presence for such individuals) be allowed in certain circumstances.
- Reassignment to a new position (if there is a vacancy). There is a dispute within the circuits as to whether an employer is required to place a disabled employee in a position or simply allow the employee to compete for it. Reassignment is always a last resort; the employer should attempt to accommodate the employee in the existing position whenever possible.

The employer is not required to provide aids or devices for personal use. For example, if the employee needs hearing aids for many purposes, including going to doctors' appointments and the like, it is not the employer's burden to provide such technology to the employee in the workplace. On the other hand, if there is something unique to the employment setting that requires particular technology as an accommodation, the employer is responsible for providing that technology.

Examples of accommodations that are not reasonable

- Providing a "stress free" environment.
- Taking away essential job duties.
- Creating a new position.
- Bumping another employee.
- Changing the employee's supervisor.
- An open-ended "work when able" schedule (unless that is the norm for the position).
- Unscheduled leave in violation of attendance policies.
- Indefinite leave.
- Creating a position, bumping an existing employee, or promoting the disabled employee.
- Pets which, due to their behaviour or the nature of the position, are not appropriate in the workplace.

Threats to safety and health

An employer is not required to (i) employ an individual who poses a direct threat to the safety or health of themselves or others in the workplace or (ii) provide accommodations creating such safety or health problems.

"Direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or devices." (42 U.S.C. Section 12182(3).)

Determination of whether an individual poses a direct threat requires an assessment of the employee's present ability to perform the essential functions of the job, based on a reasonable medical judgement that relies on the most current medical knowledge, as well as objective evidence, such as:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.

The ADA does not allow blanket exclusions. For example, an employer cannot broadly state, "we cannot have anybody with epilepsy working here because they might have a seizure". An employer may be allowed to temporarily remove an employee from the workforce while the individualised assessment is made, but ultimately the employer needs to evaluate every request for an accommodation on its own individual merits.

A direct threat may be reduced to an acceptable level with reasonable accommodation. In other words, there are often many potential dangers in the workplace, which can be caused or experienced by non-disabled employees; anybody can

get in a car accident. The question is whether the individual with a disability is more likely to either experience that danger themselves or inflict that danger on others, in which case the situation may be unreasonable. Courts are more likely to find that a direct threat exists in safety-sensitive positions, so a disoriented police officer is more likely to be considered a direct threat than a disoriented school teacher.

Undue hardship

An employer is not required to make an accommodation that constitutes an "undue hardship," taking into consideration the institution's resources, the cost of accommodation, and the effect of the accommodation on the business. (42 U.S.C. Section 12111(10).) The employer bears the burden of proving that there is an undue hardship.

While courts often find that there is an undue hardship when there is a negative effect on other employees (such as violating the terms of a collective bargaining agreement to give the disabled employee a position that would otherwise go to someone with more seniority), companies should be very wary of relying on some sort of cost/benefit analysis to establish undue hardship. Invoking the defence of cost will open the door to discovery regarding the cost of the accommodation relative to the organisation's resources. Judges (and juries) will look at factors such as the amount of executive compensation or the cost of lavish business retreats in far away, warm, sunny places, and how those expenses compare to the cost at issue. Jurors will not have much sympathy for the employer in these situations, when the employer declines to spend money to accommodate a disabled individual but is spending money on many other things.

Recent developments

The effects of changes to technology and culture

The "comfort pet" scenario above is an example of the accommodation requirements expanding significantly with no change in the law. When the ADA was enacted over 30 years ago, nobody would expect that we would now frequently find dogs – and not necessarily just small dogs in a closed carrier – on airplanes. In addition to trained service dogs (such as leader dogs for the blind, or dogs trained to help an infirm individual pick up things), public transportation in the United States now routinely allows animals of various kinds. In the workplace, the employer is allowed to consider such issues as safety (Does the dog bite?), professionalism (Is the dog always barking when the employee is on the phone with a customer?), health (Are others in the workplace allergic to the dog?), and productivity (Is everybody spending time playing with and petting Fido instead of working?). But the employer will generally be expected to go through the interactive process to assess these issues, rather than simply declaring "we don't allow dogs."

Similarly, when the ADA was enacted almost everybody worked on site; we did not have the technology that allows individuals to work on their computers at home, fully connected to their employer's system. But in addition to this technological issue, the situation was very different even four years ago; most of us got up in the morning and went to work, without thinking anything of it. Then COVID-19 hit, and suddenly many of us were working from home full time. Job descriptions were not changed, but the culture was. Since COVID-19, employers have had to come up with arguments for why on-site attendance is important, rather than having that just be the default. Absent any violation of

the law, this is not a legal issue; employers are allowed to demand that their employees show up for work, whether that is necessary or not. But when evaluating whether there is a possible accommodation, employers will have to explain why being present is an essential job function in that particular situation.

Recent cases on governmental immunity

Historically, state universities in the United States, such as the University of Michigan or the University of California-Los Angeles (UCLA) are considered arms of the State. As such, although they in most ways function independent of the State, these universities are immune from suit because the 11th Amendment to the US Constitution prohibits lawsuits against states unless they consent or Congress allows the suit. Thus, courts have ruled that individuals cannot sue State universities under Title I of the ADA (the non-discrimination provision regarding employment). (See, eg, Board of Trustees of University of Alabama v Garrett, 531 U.S. 356, 360 (2001).)

On 24 June 2024, the Sixth Circuit (which covers the states of Tennessee, Kentucky, Ohio and Michigan) joined the Fifth (Texas, Louisiana and Mississippi) and Ninth Circuits (California, Nevada, Oregon, Washington, Idaho, Montana, Arizona and Alaska) in holding that States are similar immune from suits under Title V of the ADA, which contains the anti-retaliation provision.

While states have legal protections from suit as described above, public entities, including states, remain governed by the ADA.

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Trends and Developments

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James McPhillips, Meighan O'Reardon, Vipul Nishawala and Kelley Bledsoe
Clifford Chance

Clifford Chance is a full-service law firm in the USA that advises domestic and multinational clients globally, with many of the world's leading businesses relying on its superior service and deep experience. A team of more than 400 lawyers guides clients in banking and finance, capital markets, corporate, litigation and dispute resolution, real estate, tax, pensions and employment, and sectors such as funds and investment management, insurance, private equity, technology, and transportation. Unmatched in cross-border and multijurisdictional matters, the firm's lawyers in New York, Washington, DC, and Houston collaborate with US-qualified attorneys in Asia-Pacific, Europe, and South America. Clifford Chance's US tech group, part of the global tech group, innovates by blending technology knowledge to advise on transactional and litigation matters. The team has long advised technology leaders on transactions, disputes, antitrust, and regulatory issues – working with developers, vendors, and users and growing alongside these evolving businesses.

Authors

James McPhillips is a partner at Clifford Chance and leader within the strategic sourcing and commercial transactions group. James advises clients in a variety of industries on complex technology and commercial transactions, with a particular focus on strategic digital transformation projects and cloud services transactions. James' most recent experience includes counselling clients on the legal implications of developing, purchasing, deploying, and using generative AI systems and tools. He also has extensive experience advising clients on strategic IT and business process outsourcing transactions, software-as-a-service (SaaS) agreements, core systems implementations, software licensing and development arrangements, and other related corporate and commercial transactions.

Meighan O'Reardon is a partner at Clifford Chance and leader within the firm's strategic sourcing and commercial transactions group. She focuses on negotiating and managing complex services and technology deals across multiple industries – notably in the financial services, healthcare, and manufacturing sectors. Meighan is regularly called upon to lead third-party contracting work associated with large corporate transactions, including IT and business process Transition Service Agreements and post-deal operations integration. She regularly supports transformational initiatives to procure new services and technologies to improve efficiency, reduce costs and implement new technology solutions. Meighan is a member of the International Association of Privacy Professionals, a Certified Information Privacy Professional and a Certified Artificial Intelligence Governance Professional.

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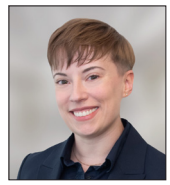
Clifford Chance

Vipul Nishawala is global co-head of Clifford Chance's strategic sourcing and commercial transactions group, a team of more than 75 lawyers worldwide that advises clients on their most important outsourcing, core systems, cloud, professional services and digital transformation transactions and initiatives. Vipul is a recognised leader in this space, with more than 25 years of experience in structuring and negotiating strategic outsourcing, services, and technology-driven deals for clients across industries – most notably for major financial institutions. He has extensive experience in IT and business process outsourcings, complex cloud arrangements, licensing transactions, adoption of AI systems, and core systems deals.



Kelley Bledsoe is a strategic sourcing and commercial transactions attorney at Clifford Chance. Kelley advises on transformative outsourcing and technology solutions transactions that facilitate long-term business relationships and drive operational efficiency and cost savings. She counsels a range of organisations – including multinational corporations, financial institutions, health systems, health insurers, benefits administrators and healthtech start-ups – on service provider selection and requests for proposals, deal structuring, contract drafting and negotiations, data privacy and protection strategies, and post-contracting vendor management. Kelley is a member of the International Association of Privacy Professionals, a Certified Information Privacy Professional and a Member of the DC LGBTQ+ Bar Association.

Clifford Chance

Two Manhattan West
375 9th Avenue
New York
NY 10001-1696
USA

Tel: +1 212 878 8000
Fax: +1 212 878 8375
Email: Inna.Jackson@cliffordchance.com
Web: www.cliffordchance.com

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New Technologies, New Regulations and New Vulnerabilities: The Forces Changing Outsourcing in 2024

Although organisations have used outsourcing to drive innovation and efficiency for decades, the rapid evolution of new technologies, major shifts in the global regulatory landscape, and the need for digital resilience are requiring companies to fundamentally rethink their sourcing strategies. Lawyers, procurement specialists and business leaders must evolve their sourcing programmes to respond to the challenges and opportunities presented by these forces. Those companies that adapt to the new realities on an enterprise level, in terms of what they outsource and how well they do it, will better be able to compete in their respective markets.

Background

Outsourcing is the practice of engaging third parties to perform functions (such as supplying products and performing services) that a company otherwise would perform for itself. It was originally introduced as a means for an organisation to shed non-core elements of its operations so that it could focus investment and human capital on functions central to the enterprise's mission and revenue generation. Since its adoption, outsourcing has become a common business practice used by organisations for a range of reasons. These include achievement of greater efficiencies, realisation of cost savings, improvement of performance levels, access to scarce talent, and – in some instances – risk mitigation. Some entities also rely on outsourcing to gain a first-mover advantage for the implementation of next-generation technology solutions.

The practice originated with back-office IT operations, but outsourcing today can be used for almost any business function, including those normally reserved for a company's middle and front offices. Commonly outsourced areas today include:

- IT functions such as infrastructure management, applications development, cloud services, and co-location;
- business process functions, including finance and accounting, procurement, recruiting, call centres, and transaction processing; and
- implementation and maintenance of major new technology, such as core banking systems, enterprise resource planning (ERP) systems, claims processing platforms, and other mission-critical systems.

For customers, a successful outsourcing arrangement must reflect a well-thought-out business case, and must adequately address the customer's strategic, technical, operational, regulatory, security, legal, and financial requirements. Appropriate flexibility is also important so that the parties can adapt their relationship over time. However, outsourcing involves inherent commercial and legal risks, including the potential for poor service quality, confidentiality and data breaches, cost overruns, loss of in-house expertise, and heighted regulatory scrutiny in certain industries.

Key trends and developments

Companies, especially those with a global footprint, are currently confronted with pressures on an unprecedented scale, including the need to adopt next-generation technology, comply with increasingly complex global regulatory structures, and operate digitally resilient businesses. These trends have a major impact on how, what, and when companies outsource to third parties.

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Innovative tech solutions and qualified tech talent are in high demand

The rapid advancement and proliferation of technology, most notably AI, has led to a growing expectation and demand for transformational digital solutions. These include, for example, better solutions for operational technical support, more efficient data analytics and commercialisation, enhanced cybersecurity, and optimised customer experience. This trend exists for enterprises of various sizes and across industries, and organisations continually face the choice between building and maintaining new solutions in-house or leveraging the marketplace for third-party solutions.

Given the pace of technological change, most companies opt to seek out third parties to provide these innovations. Reliance on third parties through outsourcing in these instances reduces risk and enables greater flexibility as these new technologies rapidly advance, allowing for upgrades and advancements to be rolled out in the future. In many cases, a company will not have the in-house capabilities to embark on a large-scale development programme to create and implement new technology.

Additionally, the development and implementation of new technology solutions requires qualified talent, including engineers, data scientists and – in today's climate, increasingly – AI specialists. These resources are in incredibly high demand and are difficult to find and retain. Although this challenge is also present for the world's most sophisticated third-party providers of technology and outsourced services, an organisation is far more likely to acquire the reliable talent it needs through its third-party suppliers.

Regulatory compliance demands are increasing

Regulatory compliance for customers is a critical concern in outsourcing. Laws and compliance requirements that apply directly or indirectly to outsourcings affect nearly all organisations (eg, regulations governing AI, anti-bribery, privacy, sanctions, and export control), but companies in highly regulated industries must contend with specific obligations. Examples of this increasingly complex regulatory framework in the USA include the following.

- In financial services, regulators in the USA have issued interpretive guidance that requires financial institutions to establish and maintain risk management practices for their third-party relationships, which ensure the safety and soundness of their activities. On 6 June 2023, the Office of the Controller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation issued the Interagency Guidance on Third-Party Relationships: Risk Management, which aims to promote consistency in the agencies' supervisory approach to third-party risk management, outlines the third-party risk management life cycle and applicable principles for each stage, and describes sound risk management principles.
- In healthcare, outsourcing is affected by the Health Insurance Portability and Accountability Act of 1996 (HIPPA) and the Health Information Technology for Economic and Clinical Health Act of 2009, which focus on privacy and security of protected health information (PHI). All covered entities and their business associates, which include suppliers with access to PHI, are subject to specific privacy and security requirements. Failure to comply may lead to civil and criminal penalties by federal and state regulators. State-level laws

supplement federal requirements and focus on protecting PHI.
- State laws regulating privacy and the use of AI play an increasingly significant role in the regulatory landscape for outsourcing in the USA. Privacy laws ensure that organisations conducting business in or engaging with residents in these states adhere to specific requirements regarding personal information collection and processing. By way of example, California pioneered the California Consumer Privacy Act, as amended by the California Privacy Rights Act, which grants consumers extensive rights over their personal data (including the right to know, access and delete it) and imposes stringent obligations on businesses regarding data handling and transparency. In addition, many states are actively pursuing regulation of AI, with laws ranging in application and scope (including regarding governance, transparency, third-party review, and non-discrimination). The recent Colorado Artificial Intelligence Act is a front runner in state AI regulation and requires developers of high-risk AI systems to use reasonable care to avoid algorithmic discrimination. Organisations outsourcing data processing activities or procuring AI-driven services must ensure that their third-party providers comply with all applicable state-level requirements to avoid compliance risk.

Outside the USA, the EU has in place several laws that have a particular impact on what, where and how an organisation outsources. Although some of the following are not outsourcing-specific, all affect US-based companies with operations or customers in the EU.

- The General Data Protection Regulation (GDPR) is an EU regulation that came into effect on 25 May 2018. It is designed to protect the privacy and personal data of EU citizens and residents and applies to any organisation that processes the personal data of such individuals, regardless of where the organisation is located. Key provisions of the GDPR include the right to access, the right to be forgotten, the right to data portability, and the requirement for organisations to obtain explicit consent before processing personal data. Non-compliance with the GDPR can result in significant fines.
- The European Banking Authority (EBA) has established stringent guidelines for financial institutions regarding outsourcing arrangements. These Guidelines on Outsourcing Arrangements, effective since 30 September 2019, aim to ensure that financial institutions maintain robust governance frameworks and manage risks associated with outsourcing.

The guidelines require institutions to perform thorough due diligence on service providers, maintain a detailed register of all outsourcing arrangements, and ensure that contracts with third-party vendors include specific provisions for data and system security. Additionally, critical or important functions often referred to as "material outsourcing" must meet enhanced scrutiny to ensure they do not impair the institution's ability to manage risks and comply with regulatory obligations. Further, the contracts with third-party vendors for critical or important functions must ensure full access to all relevant business premises, and unrestricted rights of inspection and auditing.

EU branches of non-EU institutions are required to comply with the guidelines, including in cases of intra-group outsourcing. However, the guidelines do not apply to intra-entity outsourcing (eg, where an EU branch outsources a function to the headquarters or another branch of the same

legal entity). Failure to comply with the EBA's requirements can lead to banking activity limitations or suspension.

- The European Union Artificial Intelligence Act (the "EU AI Act") is a 2024 law that aims to regulate the use of AI within the EU. The EU AI Act establishes a risk-based approach to AI regulation, with AI classified as posing unacceptable risk, high risk, limited risk and minimal risk. Most of the law addresses high-risk AI systems and most obligations fall on the providers of such systems, with particular emphasis on general-purpose AI providers. Requirements include establishment of a risk management system throughout the AI system's life cycle, data governance for training, validation and testing data sets, adequate record-keeping, and human oversight.

The law has extraterritorial application and applies to any AI providers that intend to place on the market or put into service AI systems in the EU or if the AI system's output is used in the EU, as well as to third-country AI users if the AI system's output is used in the EU. The EU AI Act also sets out penalties for non-compliance, which can reach up to EUR35 million or up to 7% of an organisation's worldwide annual turnover for the preceding financial year (whichever is greater).

- The Digital Operational Resilience Act (DORA) aims to enhance the security and resilience of the financial sector in the face of increasing digital threats and challenges. DORA entered into force on 16 January 2023 and applies from 17 January 2025.

Companies (and regulators) double down on resilience

In today's volatile world, building digital resilience and redundancy is imperative for organisations. Outsourcing agreements must be flexible and adaptable to accommodate unforeseen disruptions, corporate events, and changing business needs. Disruptions can include natural disasters as well as man-made events such as cyber-attacks. In addition, the increased expectation and prevalence of remote working continues to affect outsourcing arrangements, as certain functions cannot be delivered remotely in accordance with required specifications.

Global regulators are focusing increasingly on resilience. By way of example, the aforementioned DORA is intended to enhance the cybersecurity and cyber-resilience of the financial sector in the EU by establishing a common set of rules and standards for information and communication technology (ICT) risk management, testing, reporting, and oversight for financial entities and ICT service providers. It also seeks to foster information sharing and co-operation among financial authorities and stakeholders in order to address potential cyberthreats and cyber-incidents. DORA applies to US-based financial institutions to the extent they have operations in the EU.

In the USA, the Securities and Enforcement Commission (SEC) has issued cybersecurity rules that aim to protect investors and markets from cyberthreats. The rules require public companies to disclose material information about their cybersecurity risks and incidents, as well as to maintain effective policies and procedures to prevent, detect, and respond to cyber-attacks. The rules also impose sanctions and penalties for violations of the SEC's cybersecurity standards and guidance.

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Conclusion

The pressure on businesses to operate cost-effectively, to remain at the forefront of new technology, and to keep operations resilient will continue to propel outsourcing as a key business strategy. The functions a company outsources – and how well the company does so – will ultimately have a material impact on core business performance. Those entities that can ensure the risks of outsourcing are understood and mitigated will be able to realise the greatest commercial gains and best leverage their outsourcing relationships.

US VIRGIN ISLANDS

Trends and Developments

Contributed by:
Marjorie (Jorie) Roberts, Sean E Foster, Renée Marie André, David Bornn and Lisa M Wisehart
Marjorie Rawls Roberts PC

Marjorie Rawls Roberts PC has decades of experience in representing companies and individuals in business, securities, tax, trusts and estates, and real estate matters in the USVI. The firm's clients are based in the USVI, the US mainland, other US territories and international locations. The firm also provides comprehensive estate planning services and advice regarding the requirements for bona fide USVI residency. It represents clients before the USVI Economic Development Authority, the University of the Virgin Islands Research and Technology Park, and other government agencies as they seek economic incentives.

Authors

Marjorie (Jorie) Roberts is the managing partner of Marjorie Rawls Roberts PC and holds law degrees from Harvard Law School, Cambridge University and New York University. She previously worked in both the public and private sectors, including for global law firm Gibson, Dunn & Crutcher, the US Treasury Department and the USVI Bureau of Internal Revenue, and as general counsel and vice president of Globalvest Management Company. She is admitted to practise law in the USVI, the State of California, the Third Circuit Court of Appeals, and before the US tax court and the US Supreme Court. Jorie is also a solicitor in England and Wales and is licensed to practise law in the BVI.

Sean E Foster is a partner with Marjorie Rawls Roberts PC and assists clients with the formation and design of new business ventures and the restructuring of existing business ventures to optimise tax efficiencies, asset protection and wealth succession. He received a BBA cum laude from Texas Tech University and a JD cum laude from the University of Oklahoma. Prior to joining the firm, he was associated with the law firm Ober, Kaler, Grimes & Shriver in Washington, DC. He is admitted to practise law in the USVI, Texas, Virginia and the District of Columbia, a solicitor in England and Wales, and licensed to practise law in the British Virgin Islands.

Contributed by: Marjorie (Jorie) Roberts, Sean E Foster, Renée Marie André, David Bornn and Lisa M Wisehart, **Marjorie Rawls Roberts PC**

Renée Marie André is a partner with Marjorie Rawls Roberts PC and represents clients before the Economic Development Commission, as well as in probate, trusts and estates, real estate and corporate transactions. She holds degrees from Paine College in Georgia and the West Virginia University College of Law. Renée has also served as a federal judicial clerk at the US District Court of the Virgin Islands and serves on the Court Improvement Project Committee for the Family Division of the Superior Court of the Virgin Islands.

Lisa M Wisehart is a paralegal with Marjorie Rawls Roberts PC. She graduated from Purdue University and received her JD from Indiana University Maurer School of Law – Bloomington, where she served as managing editor of the Indiana Journal of Global Legal Studies. She then clerked for the Indiana Court of Appeals for several years. Lisa currently focuses on working with clients in the Economic Development Program and the Research and Technology Park Program. (Lisa is not admitted to practise law in the USVI.)

David Bornn is a senior attorney with Marjorie Rawls Roberts PC and represents clients in the energy, hospitality and government relations sectors, among others. He graduated from Trinity College and received his JD from Villanova University School of Law. David has practised transaction law since 1981 in the USVI. He served as chief legal counsel to Governor Albert Bryan Jr from 2018–22, and is admitted to practise law in the USVI and the Third Circuit Court of Appeals.

Marjorie Rawls Roberts PC

PO Box 6347
St Thomas, VI 00804
5093 Dronningens Gade
Suite 1, St Thomas
VI 00802
US Virgin Islands

Tel: +340 776 7235
Fax: +340 776 7951
Email: jorie@mrrvilaw.com
Web: www.mrrvilaw.com

MARJORIE RAWLS ROBERTS, P.C.
ATTORNEYS AT LAW

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Doing Business in the US Virgin Islands: an Introduction

Background

The US Virgin Islands (USVI) is an unincorporated territory of the United States of America (USA) located approximately 1,100 miles southeast of Miami, Florida. Acquired from Denmark in 1917, the USVI is made up of the islands of St Croix, St John, St Thomas and Water Island, plus numerous uninhabited cays, with a total population of just over 90,000. The USVI uses US currency, and no exchange controls exist.

The USVI's prime natural resources include pristine beaches, crystal-clear seas, a mild year-round climate, the natural harbour on St Thomas, the Virgin Islands National Park on St John, and the rainforest on St Croix. These assets, combined with the investment security of a US jurisdiction and a variety of federal and local incentives, have cemented the territory as a stable place to do business, with tourism as the major local economic activity.

Beyond tourism, the USVI attracts a growing number of consulting businesses and technology businesses owned by US citizens who have moved to the USVI to take advantage of its specialised economic incentive programmes for entrepreneurs who want to live and work in paradise. In 2020, the USVI completed a long-term economic strategy and action plan (Vision 2040), with goals that include diversifying the territory's economic base through growth in target industries, including professional and technical services, renewable energy, agribusiness, coastal/ocean resources and health sciences.

The USVI is particularly well suited to attract and utilise all types of renewable energy, and is actively working with investors on a significant solar power expansion and implementation of wind power.

The USVI also offers banks that are insured by the Federal Deposit Insurance Corporation (FDIC), and is covered by the USA's extensive network of bilateral investment treaties (but not tax treaties). The USVI has two federal judges and is part of the Third Circuit Court of Appeals. It has direct flights to many mainland cities and attracts many yachts seeking a secure, well-located and attractive home base.

With respect to transportation, the Virgin Islands Port Authority recently embarked on a public-private partnership with the goal of redeveloping and modernising the territory's two airports: the Henry E. Rohlsen Airport on St Croix, and the Cyril E. King Airport on St Thomas. Among other goals, the project is intended to stimulate economic growth in the USVI by increasing the efficiency and safety of airport operations, expanding airport capacity and attracting private investment to the territory.

Tax system overview

The Internal Revenue Code of 1986, as amended (the "Code"), applies in the USVI under a "mirror" system whereby "the USVI" is effectively substituted for "United States" wherever the latter appears. Consequently, the income tax provisions of the Code, the Treasury Regulations promulgated thereunder, and revenue rulings and revenue procedures issued by the Internal Revenue Service are generally applicable in the USVI, with certain limitations.

As a US territory, the USVI occupies a unique status; although it is part of the US, it has been granted authority by the US Congress to enact special tax laws to encourage investment in business operations. The USVI therefore offers

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many opportunities for investors and especially entrepreneurs who seek a politically stable jurisdiction with targeted economic incentives, legitimate protection of their assets from taxes, and an enticing location with excellent telecommunications. The three major USVI incentive programmes available to entrepreneurs are as follows.

Economic Development Commission Program

The infrastructure to support hotels and tourism businesses (among others) in the USVI has largely been in place for more than 63 years through the Economic Development Authority (EDA) and its various investment programmes and their predecessors. The Economic Development Commission (EDC) Program, administered by the EDA, offers exemptions and reductions to entities qualified as EDC beneficiaries, and reductions to direct and indirect owners of entities qualified as EDC beneficiaries if the owners are bona fide residents of the USVI (see discussion below).

Benefits under the EDC Program include the following.

- A credit equal to 90% of the otherwise applicable income tax, which applies to the income from the benefitted business as distributed to bona fide USVI resident owners on their allocations or dividends. A USVI corporation pays an effective tax rate of approximately 23.1% on its eligible income; with the 90% tax credit, the effective rate is 2.31% (salaries and other forms of compensation, such as guaranteed payments, are fully taxable).
- Beneficiaries are also exempt from the territory's 5% tax on gross receipts on revenue received from the approved business activities.
- Beneficiaries are also exempt from USVI property tax for the property occupied by the beneficiary for its approved business activities.
- Beneficiaries also receive an exemption from USVI excise tax on building materials and machinery used in the construction of their business facilities and on raw materials brought into the USVI to produce goods.
- In addition, a beneficiary's customs duties are reduced from 6% to 1% on raw materials and component parts imported from outside the USA. No local customs duties are imposed on US-made products.

No withholding tax is imposed on payments to US corporations or US-resident individuals. Beneficiary companies with foreign owners are exempt from withholding tax on interest payments, and are subject to a reduced withholding tax rate of 4.4% on dividend payments made overseas to corporate owners. Similarly, no income tax is withheld on interest paid to non-resident alien individuals, and the tax rate on dividends paid to non-resident individual owners is 4%.

Finally, to be eligible for EDC Program benefits, the income must satisfy applicable federal source and effectively connected income regulations, as set out in Section 937(b) of the Code and the Treasury Regulations promulgated thereunder.

To qualify under the EDC Program, an applicant in a qualifying business must generally make a minimum capital investment of USD100,000 (exclusive of inventory) and meet certain minimum employment requirements. Typically, a business must employ at least ten full-time employees, but "designated service businesses" – which are typically financial or consulting firms

exclusively serving clients outside the USVI – are only required to employ five full-time employees, and the EDA has the authority to lower the five-employee minimum or permit a business to have several years to meet the five-employee minimum upon a showing of good cause. A full-time employee is someone who works at least 32 hours a week. A beneficiary must post all positions with the USVI Department of Labor (DOL) and notify the DOL when positions are filled, among other reporting requirements.

At least 80% of the beneficiary's employees must be USVI residents, unless a waiver is granted. Beneficiaries must purchase goods and services locally when available, make certain contributions to scholarships and public education, and provide a plan for civic participation. Beneficiaries must also provide employee benefits and enact a management training programme.

The application process requires a detailed application, including details of the beneficiary's ownership, financial information and a background check for beneficial owners with more than a 5% interest. Submission of the application is followed by the application's presentation at a public hearing before the EDC commissioners and a review of the application by the EDC commissioners. Since 2020, the public hearings have been held virtually and the EDC has not yet indicated when, if ever, public hearings will return to being in person.

Upon approval by the EDC, benefits are available for initial periods of 20 years for investments on the islands of St Thomas and St John, and for 30 years on St Croix. Beneficiaries that make an additional investment in the beneficiary business in infrastructure, new construction or refurbishment during the term of their existing certificates may be entitled to extensions of their benefits upon the expiration of their certificates. Separate from the above options, a beneficiary may seek an extension of 100% of benefits for an additional ten years on the same terms.

In 2016, an International Financial Service Entity (IFSE) was added to the list of businesses eligible for benefits. An IFSE must also be licensed as a bank pursuant to the International Financial Services Center Regulatory Act administered by the Division of Banking, Insurance and Financial Regulation in the Office of the Lieutenant Governor.

In recent years, new hotel applicants under the EDC Program have committed to constructing low-density developments, including "glamping" style accommodation designed to promote environmental sustainability and low-impact construction. Other hotel beneficiaries have restored historic structures in the USVI to showcase local culture and traditions.

Hotel Development Program

The Hotel Development Act (HDA) Program is also administered by the EDA, and was initially passed in 2011 to provide a means for financing new hotel development projects (and hotels seeking substantial upgrades) in the USVI. In 2019, the HDA Program was amended to provide for the development, construction, reconstruction and renovation of commercial facilities and other hotel facilities. The hotel room occupancy tax (HROT) can now be 100% utilised by developers of new hotels, or up to 50% of the HROT for existing hotels where at least 70% of the units were previously damaged – by hurricanes, for example – for the development, construction, reconstruction and renovation of the facility.

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The 2019 amendment also provides for the imposition of an economic recovery fee (ERF) to finance, fund or cover the costs incurred in the renovation, reconstruction, construction, improvement and development of hotel properties and related facilities or infrastructure. The amount of the ERF is the difference between the percentage rate of HROT applicable at the time of the application (currently set at 12.5%) and a percentage rate over such tax, not to exceed 7.5%, which is determined by the applicant and subject to implementation protocols. The ERF can be collected and deposited into an ERF trust account for a period of 30 years, and is only available to applicants applying before 31 December 2028. Any funds remaining after completion of the approved project can be used by the developer for other expenditures for improving or enhancing the ERF project.

Enterprise Zone Commission Program

Businesses seeking to invest in historic preservation have additional opportunities available through the Enterprise Zone Commission (EZC) Program administered by the EDA, which offers tax incentives to businesses investing in designated historic and commercial districts. The mandate of the EZC Program is to facilitate the investment of private resources in productive business enterprises located in severely distressed Enterprise and Commercial Zone areas on St Croix and St Thomas, and to provide jobs for the residents of these areas.

The benefits available to beneficiaries under the Enterprise Zone Plan Program are an income tax credit of 90%, a gross receipts tax exemption of 100% and a property tax benefit of 100%. Applicants must have businesses/activities that are in accordance with the incentivised activities in the plan for the zone in which the applicant is applying. For example, applicants in the Garden Street area of downtown Charlotte Amalie, St Thomas, must be engaged in "live work", sports and entertainment, good community, experiential tourism or arts and restaurants.

To qualify under the EZC Program, an applicant must (among other things) make a minimum capital investment of USD10,000 and employ a minimum of two full-time USVI resident employees, either directly or through a contractor. The application process requires the submission of a description of the history and current condition of the property within the Enterprise Zone and details of the construction or rehabilitation efforts to be undertaken. Applications are considered by the EZC commissioners; upon approval, benefits are available for five years.

Research and Technology Park Program

The Research and Technology Park (RTPark) Program seeks to support the USVI's expanding technology and knowledge-based sectors to promote the growth, development and diversification of the USVI economy. In addition, the RTPark works to broaden the capabilities of the University of the Virgin Islands (UVI) by providing it with financial support and training opportunities for UVI students and creating a research environment that combines the resources of UVI with those of the public sector and private industry.

RTPark beneficiaries currently operate in the areas of data analytics, web content development, interactive media management, e-commerce, software development and licensing, technology-based management and business process services, internet advertising, telecommunications and information technology, application development, financial technology and medical device technology. Oversight of the RTPark Program is vested in the seven-member RTPark

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board of directors (the "board"), which includes the chairperson of the UVI board of trustees and the president of UVI.

In most cases, an applicant, through a legal representative, negotiates the terms of its tenancy with the RTPark's executive director. Negotiations include:

- the amount of the one-time entry fee paid by the applicant (typically at least USD50,000 and up to USD100,000, depending on the size of the applicant);
- the applicant's obligation to pay annual management fees to the RTPark (typically between 2% and 4% of the applicant's gross income);
- the structuring of a charitable donation to UVI that can include scholarships, internships, faculty support, funds for specific programmes and in-kind contributions of time, typically starting at a total of USD35,000 annually; and
- the percentage of equity interest to be awarded to the RTPark (which can be non-voting and have different distribution rights to those of other owners), which is typically 1%.

Once negotiations have been finalised, a term sheet is entered into between the applicant and the RTPark, providing the basis for the formal application that covers the applicant and its owners. The final terms are memorialised in the Protected Cell's Park Tenant Agreement, which serves as the operative document defining the relationship between the Protected Cell and the RTPark. Each RTPark application requires payment of a USD2,500 application fee.

Benefits under the RTPark Program are initially available for 15 years and can be renewed for an initial period of ten years, followed by subsequent renewal periods of five years, subject to board approval. As with the benefits under the EDC Program, the RTPark offers numerous tax exemptions and reductions, the most notable of which is a 90% reduction on tax liability for the business and also for owners of beneficiaries if the owners are bona fide residents of the USVI. Furthermore, a Protected Cell in the RTPark receives a 90% tax credit against its income tax liability on income from the business for which benefits are granted. Such income must be effectively connected with conducting a USVI trade or business under Sections 934(b)(1) and 937 of the Code. For a corporate Protected Cell, the reduction results in an effective tax rate of approximately 2.31% on eligible income. If the beneficiary's owners are individual residents of the USVI, they will receive a reduction in their dividends or allocations. Salaries, however, are fully taxable.

No withholding tax is imposed on payments to US corporations or individual residents. Furthermore, RTPark beneficiaries with foreign corporate owners are exempt from withholding tax on interest payments and enjoy a reduced withholding rate of 4.4% on dividend payments overseas (while the withholding rate on non-resident individuals is 4%). The tax rates on royalties paid to non-resident individuals or foreign corporations are 4% and 4.4%, respectively. The withholding tax is paid by the withholding agent (typically the RTPark beneficiary) to the Virgin Islands Bureau of Internal Revenue (BIR) on Form 8109 and then reconciled annually on Form 1042.

As with the EDC Program, beneficiaries receive an exemption from USVI gross receipts tax, otherwise imposed at 5% on the gross receipts of a business, with no deductions. This exemption does not apply to gross receipts from business activities that are not covered by a ben-

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eficiary's grant of RTPark benefits. Moreover, the BIR requires each beneficiary to report its gross receipts (monthly, assuming annual gross receipts of more than USD225,000) on Form 720 VI and then indicate that the beneficiary is exempt from payment of the tax pursuant to its status as an RTPark beneficiary.

Beneficiaries receive an exemption from USVI excise tax on building materials and machinery used in the construction of their facilities, and on raw materials brought into the USVI to produce articles. Otherwise, a tax ranging from 2% to 25% applies to the fair market value of many items. In addition, several statutory exemptions from excise tax apply, regardless of beneficiary status.

Beneficiaries receive an exemption from the USVI property tax, although the personal homes of beneficiary owners do not receive the property tax exemption, even if the respective owners maintain home offices. Moreover, if a beneficiary rents an office, the property tax exemption does not pass through to its landlord.

Because the USVI is outside the US customs zone, it has enacted its own customs law, imposing a 6% duty on items not manufactured in the US. An RTPark beneficiary's customs duties are reduced from 6% to 1% on raw materials and component parts imported from outside the USVI. Materials made in the US are exempt from any customs duty. As with the excise tax, several statutory exemptions from customs duties apply, regardless of beneficiary status.

Manufacturing and agriculture as growth sectors

The USVI legislature has provided a number of tax benefits and economic incentives to encourage agriculture, including the Farmers, Fishermen and Consumers Assistance Act, which gives certain tax exemptions to the farming and fishing industry, including an exemption from gross receipts tax on sales of products derived from the agricultural business. The EDC Program includes agriculture, food processing, product assembly and manufacturing as eligible activities. The USVI Economic Development Bank, administered by the EDA, provides low-interest loans and micro-credit for USVI farmers and fishers, and farmers can qualify for property tax exemptions on agricultural land.

In addition, in 2020 the USVI legislature enacted the Virgin Islands South Shore Trade Zone Act (the "SSTZ Program"), which designates 3,000 acres on the south shore of St Croix as an Enterprise Zone and entitles approved applicants under the SSTZ Program to a credit equal to 90% of the otherwise applicable income tax, in addition to exemptions from the gross receipts tax, property tax, excise taxes and customs duties.

The goal of the SSTZ Program is to designate an area that eliminates traditional barriers to commercial trade and investment in support of light manufacturing, trans-shipment, industrial development and the territory's blue economy initiative. Among other requirements, an applicant in a qualifying business must make a minimum capital investment of USD100,000 (exclusive of inventory) and employ a minimum of ten full-time employees and one paid apprentice. The SSTZ Program will be administered by the EDA, and benefits under the programme will be available for a 20-year term.

Opportunity Zones – federal benefits for USVI investments

Several US programmes are also available for investors in the USVI. The Tax Cuts and Jobs Act

was passed in December 2017 and established the Opportunity Zone Program, which provides immediate and long-term tax advantages to US investors in Opportunity Zones. Investors can defer capital gains taxes on earnings from many types of investments up to 2027, can reduce taxes on the capital gain invested into an Opportunity Fund by 10% or 15%, depending on whether the qualifying investment is held for five years or seven years, and can gain permanent exclusion from capital gains taxation on Opportunity Fund investments held for at least ten years. The USVI has 14 designated Opportunity Zones.

Other tax credits are also available in the USVI, such as the 20% income tax credit for preserving historic properties and income tax credits for owners of certain newly constructed or substantially rehabilitated low-income rental housing projects.

Choice of entity

The USVI provides many options when choosing to form a legal entity within the jurisdiction, including corporations, limited liability companies and partnerships, such as:

- general partnerships;
- limited partnerships;
- limited liability limited partnerships;
- limited liability partnerships; and
- trusts.

The USVI has adopted the Uniform Limited Liability Company Act, and the formation and governance of an LLC are similar to that imposed in the 50 states and the District of Columbia.

Except for general partnerships (which are formed by the agreement of the partners) and trusts, all entities are formed through filings with the Office of the Lieutenant Governor of the USVI, Division of Corporations and Trademarks. Federal law applies in the USVI, including the Securities Act of 1933 and the Securities Exchange Act of 1934. In addition, the USVI has adopted the Uniform Securities Act for territorial-level securities regulations. The USVI imposes an annual franchise tax on LLCs and corporations, based on the capital used in the USVI trade or business, with the minimum franchise tax being USD300 annually. Partnerships pay a set annual fee of USD150.

Residency requirements

Many USVI economic incentives and related programmes provide personal tax benefits for bona fide USVI residents on their allocations or dividends. To be a bona fide USVI resident, a person must meet one of five alternative physical presence tests each year, have a closer connection to the USVI than any other location, and have a USVI tax home.

The most-used "physical presence" test involves being in the USVI for all or part of 183 days in a given year; however, individuals who travel frequently can satisfy the physical presence test by spending no more than 90 days in the USA each year or by not having a significant connection to the USA at any time during the year (like having a home located in the USA).

The establishment of a "closer connection" involves such factors as having a home, filing returns as a USVI resident, obtaining a USVI driver's licence, registering to vote and voting in the USVI, and having a USVI bank account, although no single factor is determinative. A "tax home" is an individual's principal place of business. In most cases, the individual must be a bona fide resident of the USVI for the entire year to get benefits on their income from the

benefitted business, although there is a "year of move" rule permitting individuals to be bona fide residents if they move to the USVI in the first half of a year and remain USVI residents for the next three years.

Applicability of the net investment income tax

Finally, Section 1411 of the Code imposes a Medicare contribution on unearned income, and specifically imposes a tax equal to 3.8% of an individual's net investment income for a taxable year. The Treasury Regulations promulgated under Section 1411 of the Code provide that bona fide residents of US territories are subject to the tax only if they have a US income tax filing requirement. However, bona fide residents of the USVI have no income tax obligation (or related return filing requirement) with the USA, provided that they properly report income and pay income tax to the BIR. Therefore, the tax imposed by Section 1411 does not apply to bona fide residents of the USVI because they will not have an income tax liability to the USA if they fully comply with the tax laws of the USVI.

VIETNAM

Law and Practice

Contributed by:
Thang Nguyen, Stanley Boots, Minh Nguyen and Nguyet Le
ACSV Legal

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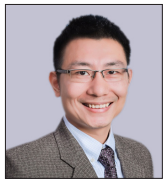
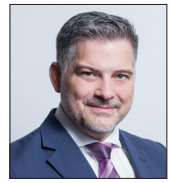
ACSV Legal is a vibrant and dynamic Vietnam-based law firm located in HCMC with unparalleled domestic expertise. It has one of the premier corporate/M&A practices in Vietnam and has extensive experience in private equity transactions with a strong commercial focus. Its lawyers have advised various clients on (re-) structuring their businesses in light of investments in or outside Vietnam. The firm's clients are typically businesses within South-East Asia that are experiencing significant growth, as well as leading international and local corporations that need advice on a broad array of multi-jurisdictional transactions. ACSV Legal has advised its clients on matters in a wide range of sectors and industries such as healthcare, beauty and fitness, pharmaceutical, food and beverages, IT and technology, hospitality and leisure, education, retail, manufacturing and distribution, apparel and fashion, fintech and payment services. It has a team of more than 30 experienced lawyers who are qualified in Vietnam and the UK in civil and common law jurisdictions. The languages spoken at ACSV Legal include Vietnamese, English, German, Italian, Dutch and French.

Authors



Thang Nguyen is a partner at ACSV Legal and joined the team in February 2022. He has more than 20 years of experience practising corporate and commercial law with leading legal consultancy services providers and global law firms in Vietnam. His key areas of practice include corporate and M&A transactions, investment structures, funding arrangements across a wide range of industry sectors, including banking and finance, hospitality, manufacturing, real estate, construction, retail, technology, oil and gas, and energy. Thang has assisted numerous investors in relation to their investments in Vietnam, including advising on the structuring of proposed business operations in Vietnam. He has also provided numerous clients with regulatory advice and assistance with respect to general corporate matters in relation to their day-to-day operations and commercial matters. Thang obtained his LLB and LLM from the Law School of the National University in Hanoi. He is a member of the Hanoi Bar Association. Thang is a native Vietnamese speaker and speaks English fluently.



Stanley Boots is a partner at ACSV Legal. Prior to joining ACSV Legal, Stanley practised in the project finance teams of Hogan Lovells, DLA Piper and Ashurst. His practice areas cover projects and project financing, public-private partnerships, public financing, sustainability and, most recently, decentralised financing using Web3 and AI technology. He has worked on secondment to a major Japanese utility handling both convention power and renewable energy projects and served as legal counsel in Korea's largest energy company, SK Corporation. Stanley has a BA in Biology from Earlham College (Indiana, USA) and a JD in Law from the Education Northwestern School of Law of Lewis & Clark College (Oregon, USA). He is a qualified solicitor of the Law Society in England and Wales and has been practising with an Asia focus since 1999. Besides being a native English speaker, Stanley is fluent in Japanese.

Minh Nguyen is a special counsel and head of the dispute resolution practice at ACSV Legal. She joined in 2019 after having worked for nearly ten years for various international law firms and corporations, including a magic circle firm, and as legal compliance manager in the SEA&NZ Business Unit of the largest brewing company in the world. Minh has directly advised and represented clients in some multimillion-dollar cases arbitrated at the SIAC, the ICC and the VIAC. She obtained an LLM in International Arbitration from Pepperdine University and attended the intensive International Commercial Arbitration course at Harvard Law School in January 2023. Minh is currently a member of Young Singapore International Arbitration Centre Committee (YSIAC Committee) and a member of the Legal Science Council of the Vietnam International Arbitration Centre (VIAC). She is fluent in English and Vietnamese.

Nguyet Le joined the team in July 2017 and is a senior associate at ACSV Legal with extensive experience in the legal sector. Prior to working at ACSV Legal, she worked at a large law firm in Vietnam. She was admitted to the Ho Chi Minh City Bar in 2020. Nguyet specialises in licensing matters for foreign direct investment projects and offers expertise in business operations, due diligence exercises, and legal research for M&A and corporate law. Nguyet's client portfolio includes the educational, retail and beauty clinic sectors.

ACSV Legal

Level 11
Empress Tower
138-142 Hai Ba Trung Street
District 1
Ho Chi Minh City
Vietnam

Tel: +84 28 3822 4539
Fax: +84 28 3822 4239
Email: info@acsvlegal.com
Web: acsvlegal.com

1. Legal System

1.1 Legal System and Judicial Order

The legal system in Vietnam follows the civil law tradition and is noticeably influenced by continental European codifications of civil law (particularly the French Civil Code). The Vietnamese legal system consists of a constitution, codes, laws, ordinances, decrees, decisions, circulars, directives and resolutions. Legal texts are published in the Official Gazette. Decrees and circulars contain guidelines on how to implement laws, codes and ordinances. Local governmental agencies may also issue official letters further guiding the implementation of any of these pieces of legislation.

The people's courts are the judicial bodies of Vietnam and exercise judicial power. The people's procuracies exercise the power to prosecute and supervise judicial activities. Vietnam's court system is separated into local, regional and national levels. Usually, a civil case brought before a competent Vietnamese court will undergo a maximum of two instances: the first instance and the appellate instance. The constitution of Vietnam governs the Vietnamese judicial system, together with the Law on the Organisation of People's Courts and the Law on the Organisation of People's Procuracies.

The Supreme People's Court is the highest court. Below that, there are three levels of people's courts: the High People's Courts, the Provincial-Level People's Courts and the District-Level People's Courts. The High Courts in Hanoi, Da Nang and Ho Chi Minh City are appellate and cassation courts and are responsible for the northern, central and southern regions of the country, respectively. The Provincial Courts are both trial and appellate courts, and the district courts are trial courts.

Business, commerce or labour-related cases where one party or the related asset is located offshore, or which require judicial assistance by an overseas representative agency of Vietnam, foreign court or other foreign competent authority, are generally subject to the jurisdiction of the Provincial Court.

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

Foreign investment into Vietnam requires approval and licensing by the local authorities, with the scope and shape largely dependent on the nature of the envisaged business. The 2020 Law on Investment, which entered into force on 1 January 2021 and was amended in 2022, retains a clear distinction between foreign and Vietnamese investors. A variety of different procedures apply to foreign investors, defined by the volume and type of their desired Vietnamese engagement. Foreign investors are required to register their investment or obtain certain documents before they can start with their investment projects.

According to the law, when assessing the investment conditions and procedures, a foreign investor is, or is considered as such:

- an individual with a foreign nationality;
- an organisation incorporated in a foreign jurisdiction; or
- a Vietnamese-incorporated enterprise in the following cases:
  - (a) more than 50% of its charter capital is held by a foreign investor(s), or a partnership has a majority of partners who are foreign individuals in the case of a partnership enterprise;

(b) more than 50% of its charter capital is held by an enterprise(s) prescribed in (a) above;
(c) more than 50% of its charter capital is held by a foreign investor(s) and an economic organisation(s) prescribed in (a) above.

From the perspective of a foreign investor, Vietnamese investment law makes a general distinction between "conditional/restricted" and "unconditional/unrestricted" business lines. The conditional/restricted lines, to which certain additional requirements may apply, are foreign activities in Vietnam in industries that are considered "sensitive" or "crucial to the national interests of Vietnam". Some restricted business lines may not be performed under foreign ownership at all.

Under the 2020 Law on Investment, there are currently 229 conditional business lines which include, among others:

- accounting services;
- insurance services;
- securities trading;
- betting and casinos;
- oil and gas;
- healthcare-related businesses;
- businesses related to transport;
- real estate businesses;
- educational businesses;
- banking and finance related businesses;
- agriculture-related businesses.

A foreign investor in the market to purchase an existing (Vietnamese) entity – depending on the nature and scope of that entity's business – may need to obtain prior approval from the Department of Planning and Investment (DPI) ("M&A Approval") before capital can be contributed to or acquired in an existing enterprise.

2.2 Procedure and Sanctions in the Event of Non-compliance

A foreign investor generally needs to undergo a two-step procedure to obtain a licence to operate in Vietnam. In the first step, the investor applies for an Investment Registration Certificate (IRC). In the second step, through the issuance of an Enterprise Registration Certificate (ERC), a new (foreign-owned) company is born.

For local investment by means of M&A, there is a special rule set, which requires the investor to announce the acquisition to the competent authorities and obtain their approval.

Due to the close monitoring of the local business landscape through the competent authorities (DPI) and the tight grip of the State Bank of Vietnam on compliance with strict foreign exchange regulations, investing in Vietnam without authoritative approval is hard to imagine in practice.

Should a foreign investor find a way to pour his/her money into a local business illegally, possible consequences may include mandatory termination of part of or the entire operations of the investment project.

2.3 Commitments Required From Foreign Investors

Commitments from investors (in addition to the investment capital they promise to deploy during their engagement in Vietnam) are not generally regulated. In practice, there are situations where the Vietnamese licensing authority will, at its discretion, make its agreement dependent on certain commitments from the investor (eg, contribution to infrastructure developments in the location of the business, etc). There are,

however, no generally imposed commitments for foreign investors, outside of the general obligation to comply with all the laws of Vietnam while doing business there.

2.4 Right to Appeal

There may be possibilities for a foreign investor to challenge the negative decision of an investment-related authority (mostly DPI) in court under the 2015 Law on Administrative Procedures. However, such a challenge is not likely to have a positive result, since this will only occur when the investor is able to prove that the decision affects its legitimate rights and benefits. This is likely to be difficult as, due to the absence of relevant laws and regulations, any dispute over the requirements of an investment endeavour or the legality of an intended corporate structure and business model will generally be solely governed by the discretion of the competent authority. Vietnamese investment law, therefore, grants the authorities a high level of decision power, which can pose an obstacle to the feasibility or efficacy of some investment types. In these situations, in which the DPI or another authority communicates that it deems an investment to be problematic, investors will often be given the chance to – through their local counsels and advisers – restate their intentions and amend their business plans according to the competent authority's opinions.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

A foreign investor will usually choose one of two main types of legal entities to carry out a project. Currently, typical options for a foreign-owned legal entity include:

- a limited liability company (LLC) in the form of either a single-member LLC or a multiple-member LLC; and
- a shareholding or joint stock company (JSC).

There are two other types of common commercial presences that could be established to represent foreign investors in Vietnam:

- a representative office; and
- a branch.

The activities these presences can perform depend on the treaties that exist between Vietnam and the country in which the head office is based. For business activities that are outside the scope of a treaty or where no treaty exists, an authorisation from the competent Vietnamese authorities is needed. Considering that these are not independent legal entities, the parent company is liable for various aspects such as debts and obligations. Legal claims can be brought against the parent company.

Representative Office

If a foreign investor desires to have a presence in Vietnam but does not wish, or is not ready yet, to invest in Vietnam, it may set up a representative office if certain conditions are met. In general, setting up a representative office is quicker and less complicated than acquiring licences and approval for the setting up of a commercial company. One of the conditions is that the business of the foreign investor must have been in operation for at least one year before the foreign investor can submit an application.

Vietnamese law prohibits a representative office from performing activities that generate profit. It cannot conclude agreements for selling or providing products, but it can, for example, conduct business enhancement or marketing activities

such as displaying goods or services at its office. A representative office can also play an important role in facilitating operations and business objectives on behalf of the offshore company by liaising with the authorities.

The head of the representative office can sign economic or commercial contracts with businesses in Vietnam on behalf of the offshore company on the condition that there is a specific power of attorney from the offshore company for each contract. A representative office can employ foreign and Vietnamese staff to work at the representative office in accordance with the law of Vietnam.

Branch

Foreign investors in certain business sectors, such as banking, IT, construction, franchising, non-life insurance and some securities services, could set up a branch as an alternative to establishing a new company. However, certain requirements need to be met. A foreign investor must have operated its offshore business for at least five years before the foreign investor can establish a branch in Vietnam.

Branches are permitted to conduct a wide range of commercial activities including the purchase and sale of goods, unless this is specifically prohibited in the licence granted to the branch or under the local laws.

Definitions of Independent Legal Entities

- A single-member LLC is an enterprise under the ownership of an organisation or individual;
- A multiple-member LLC is an enterprise under the ownership of two to 50 organisations or individuals; and
- A JSC is an enterprise with at least three shareholders. There is no restriction on the maximum number of shareholders. Shareholders may be organisations or individuals.

Liability

- The single-member LLC's owner is liable for debts and other liabilities up to the single-member LLC's charter capital;
- The members of a multiple-member LLC are liable for debts and other liabilities to the extent of their contributed capital; and
- The shareholders of a JSC are liable for the debts and other liabilities of the JSC to the extent of their own contributed capital.

Minimum Investment Capital

General

There is no defined minimum investment capital in unconditional businesses. However, a certain amount of capital contribution might be required in particular fields, where investment requires a high cash flow or poses large financial liabilities and risks upon the investment vehicle:

- The charter capital of a single-member LLC and a multiple-member LLC shall be the total value of capital contributed by the member(s) to the company.
- The charter capital of a JSC consists of the total aggregated par value of shares of all classes sold by the company.
- At the time of the registration of establishment, the charter capital is the total value of assets or capital that the owner or members undertake to contribute to an LLC, or the total aggregate par value of shares of all classes which have been registered for subscription by shareholders of a JSC, and stated in the charter of such company.

Capital contribution can be in the local currency (VND, Vietnamese dong), freely convertible foreign currency, gold, land use rights, intellectual

property rights, technology, technical know-how, or other assets which can be valued in VND.

Capital contribution time limit

- The owner of a single-member LLC and the members of a multiple-member LLC must contribute assets or capital as registered with the relevant authorities within 90 days from the date of issuance of the ERC.
- The shareholders of a JSC must pay, in full, the number of shares registered for subscription within 90 days from the issuance date of the ERC unless the company's charter or share subscription agreement stipulates a shorter time limit.

In case the capital is not contributed within the required or agreed period, the following procedure will apply:

- The owner of a single-member LLC must register an adjustment of the charter capital equal to the actual value of the contributed capital within 30 days from the last day on which the charter capital should have been fully contributed. The owner is responsible to the extent of the capital he/she has undertaken to contribute for the financial obligations of the company arising before the adjustment of the charter capital is registered.
- A member of a multiple-member LLC who fails to contribute all the capital as undertaken automatically ceases to be a member of the company; a member of a multiple-member LLC who fails to pay part of the capital as undertaken shall have the rights corresponding to the capital already paid. The capital of a multiple-member LLC that has not been contributed will be offered for sale pursuant to the decision of the members' council. The multiple-member LLC must register adjustment of the charter capital in aforesaid cases within 30 days from the last day on which the charter capital should have been fully contributed.
- A shareholder of a JSC who fails to contribute capital for all the number of shares registered automatically ceases to be a shareholder of the company, and the shareholder of a JSC who fails to pay for part of the number of shares registered for subscription will have rights in proportion to the number of shares paid.
- In case shares have not been fully paid, the shareholder of a JSC who did not pay in full has the shareholder's rights and duties equivalent to the paid shares, and cannot assign the right to purchase the number of unpaid shares to someone else; the shares of the JSC that have not been paid for are deemed unsold shares, and the Board of Management has the right to sell such shares. The JSC must register adjustment of the charter capital and founding shareholders in aforesaid cases within 30 days from the last day on which the shares should have been fully paid.

3.2 Incorporation Process

A foreign investor must generally apply for an investment registration certificate (IRC), which is issued by the competent DPI, before an economic organisation can be incorporated. The economic organisation must be incorporated in accordance with the laws on enterprises or other local laws corresponding with its form.

ERC

All private business enterprises in Vietnam must have an ERC, and some also require an IRC. For instance, domestic investors or enterprises where foreign investors hold 50% or less of equity only need an ERC for a newly established enterprise. The ERC is issued by the DPI. It con-

tains information about the company registration, such as the name of the enterprise; enterprise code number, which serves as its identification number for its entire corporate life cycle; address of the head office of the enterprise; information of the owner or members in the case of an LLC; full name, permanent residential and contacting address, nationality and identity card or passport number of legal representatives; and charter capital.

IRC

Foreign investors and companies in which foreign investors hold more than 50% of equity may, in addition to the ERC, be required to obtain an IRC for a newly established enterprise. Foreign investment in an existing enterprise through an M&A transaction does not require an IRC. Instead, application for an M&A Approval may be required in certain cases.

The IRC is also issued by the DPI, except for certain projects within the industrial/economic/export processing/high-tech zones, which are issued by the management board of those zones. The IRC is required in case a foreign investor, or enterprise treated as a foreign investor, carries out an investment project by establishing a company in Vietnam. When investors apply for an ERC, the IRC must be included in the file. It contains information registered by the investors about an investment project, such as information of the investors, economic organisation implementing the investment project, investment capital, location for implementation of the investment project, and scale and objective of the project.

Timeline and Required Documentation

ERC

In general, it takes about three business days to obtain an ERC.

IRC

The preparation of the application dossier for an IRC, including the translation and execution of all documents, might take from two to four months.

Investors will need a variety of documents translated, legalised and notarised to be included in the application file. Documents such as a copy of the foreign investor's passport, corporate documents and financial documents may also need to be legalised. It is important to note that the Vietnamese licensing authorities only accept foreign documents complying with Vietnam's constitution and laws on territory and national sovereignty over seas and islands. Accordingly, foreign passports with a "U-line" thereon (eg, Chinese passports) will not be accepted in Vietnam.

Once the file has been submitted, the IRC should, in principle, be issued within 15 days of the submission of the complete file in simple cases (eg, those not subject to any investment policy decision).

In practice, it might take longer to obtain an IRC and ERC.

Post-Establishment Formalities

Once the ERC has been obtained, several administrative formalities need to be fulfilled within the respective time limits, such as payment of licence tax and publication on the national enterprise registration information portal.

A company will also need to open bank accounts and make company seals to be able to initiate its operation. A foreign-invested company incorporated by foreign investors via issuance of IRC or having more than 50% charter capital owned by foreign investors is required to open a direct investment capital account.

3.3 Ongoing Reporting and Disclosure Obligations

Changes of Business Registration Contents

Any changes to the information specified on the ERC (eg, owner or members of LLC) or the business registration contents (eg, foreign shareholders of JSC) must be registered or notified by the company to the DPI within ten days from the day on which the change occurs.

Changes of Investment Projects

Investors must conduct procedures to amend the IRC if any amendment of the investment project changes the contents of the IRC.

Periodical Investment-Related Report Obligations

Investors and economic organisations implementing investment projects (companies incorporated via IRC) are subject to the investment-related report obligations under the laws of Vietnam (eg, periodical investment supervision and assessment reports, online investment project implementation reports).

Tax Declarations

A company has to submit monthly or quarterly reports to the regional tax office for value-added tax (VAT) return, corporate income tax (CIT) return, personal income tax (PIT) returns and a report of using the VAT invoices. Reports for VAT and CIT may also need to be submitted on a receipt basis in certain circumstances, such as when transferring real estate. A company has to pay VAT, CIT and PIT by the deadline when the reports have to be submitted. If the reporting or payment is not done before the deadline, a fine can be imposed.

Auditing

Foreign-owned entities, credit institutions, insurance enterprises, public companies and institutional securities traders must be audited at least once a year, and the audit must be completed within 90 days from the end of the calendar year. All auditing activities will follow the Vietnam Accounting Standards, which differ from the International Financial Reporting Standards (IFRS). These Vietnam standards are issued by the Ministry of Finance based on the international standards on auditing.

Vietnam is expected to adopt the IFRS shortly, which will likely impact the current way of doing business in Vietnam.

3.4 Management Structures

The two most common legal entities in Vietnam are the LLC and the JSC. They are distinguished by a defined management structure under the Vietnamese Law on Enterprises, which prescribes the following bodies of corporate governance:

LLC

- With respect to a single-member LLC, the management structure must include a president or a members' council and a director or general director if owned by an organisation, or a president and a director or general director if owned by an individual. As for those owned by a state-owned entity (SOE), the structure must also include an inspection committee.
- With respect to a multiple-member LLC, the management structure must include a members' council, a chairperson of the members' council and a director or general director. As for SOEs or their subsidiaries, the structure must also include an inspection committee.

JSC

- With respect to a JSC, except for public ones, which may need to be managed under

another structure if stipulated in the Law on Securities, the management structure must include a General Meeting of Shareholders, a Board of Management (BOM), and a director or general director.
- If a JSC has at least 11 shareholders or the corporate shareholder(s) hold at least 50% of total shares, the structure must also include an inspection committee. Otherwise, at least 20% of the BOM's members must be independent and there must be an audit committee under the BOM.

The director or general director is the person who manages the day-to-day business operations of the company. Vietnamese laws do not set out a terminological difference between a director and general director. In practice, an enterprise can opt to appoint this person as either director or general director based on its business models and management requirements. He/she usually is also the (only) person endowed with legal representation rights for the company, which makes him/her the entity's most important executive organ in practice.

Within the permissible realm of Vietnamese laws, investors can structure their investment vehicle according to their needs and preferences. Their choices will be recorded in the company charter, which will also specify the timing and procedure of (obligatory, annual) board meetings and other organisational standards.

3.5 Directors', Officers' and Shareholders' Liability

Overview

As of 1 January 2018, a new Criminal Code came into force, bringing Vietnamese laws more in line with international standards. A broad range of Criminal Code violations can lead to criminal liability for a business. Certain violations, particularly ones committed by individual employees, may not lead to criminal liability; however, they may still damage the business's reputation. It is important to note that violations in relation to tax, competition, environment, business and trading that are not crimes can still be administratively sanctioned both for an individual and for a corporate entity. The main difference between the two systems is that the statute of limitations under the administrative procedure is much shorter, and the punishments are lower.

The Criminal Code applies to both foreign and Vietnamese commercial juridical persons. However, for a subsidiary, the parent company will not be responsible as it is an independent entity, but for a representative office or branch, the parent company could be responsible as they are not independent legal entities. Under the Criminal Code, there is no provision on criminal offences committed in a corporate group (parent and subsidiary). So, it is not yet clear under what conditions the foreign parent company could be held criminally responsible for offences committed by directors, managers or representatives of local Vietnamese entities.

If a convicted commercial juridical person is divided, separated, consolidated or merged, the succeeding corporate legal entity inherits rights and duties from the convicted corporate legal entity and will be responsible for any pecuniary penalties and damages.

The fact that a corporate legal entity is criminally liable does not exempt an individual from criminal liability.

Liability of Legal Representatives

Legal representatives shall represent the enterprise to exercise the rights and perform the obligations arising out of transactions of the

company, and represent the enterprise to act as the person lodging a petition for resolution of a civil matter, as a plaintiff, defendant or person with related interests and obligations in arbitration proceedings or courts and to exercise other rights and perform other obligations in accordance with law.

In case a company is subject to the execution of judgments, decisions or compulsory enforcement of an administrative decision regarding tax management, the legal representative of such company may be subject to postponement of exit from Vietnam's territory in accordance with the law on entry and exit.

Besides this, a legal representative may be charged with certain violations of the 2019 Labour Code regarding the dismissal or laying off of staff, forcing someone to resign, anti-competitive behaviour, or evasion of social, unemployment or health insurance payments. Further to this, it is important to realise that in Vietnamese law there is no relevant provision dealing with the liability of directors or managers for not having adopted (intentionally or negligently) measures to prevent a crime. However, according to the Criminal Code, any person (with some exceptions) who conceals a crime or who knows that a crime is being prepared, is being carried out or has been carried out but fails to report it could be criminally liable.

Liability of Shareholders

Shareholders' liability is generally limited to the extent of their capital contributions to a company. This means that shareholders are not personally liable for the debts or obligations of the company beyond the amount they have invested or agreed to contribute. However, there are specific circumstances wherein shareholders may assume liability surpassing their capital contributions. In cases where shareholders have used the corporate structure to engage in fraudulent activities, abuse their powers or evade legal obligations, the courts may "pierce the corporate veil" and hold shareholders personally liable. This allows the courts to look beyond the company's legal entity and hold shareholders accountable for their actions.

It is essential to recognise that shareholders can also incur liability for specific statutory violations or breaches of regulatory requirements. For instance, shareholders who participate in unlawful activities or contravene laws pertaining to the company's operations may be subject to legal actions and potential liabilities. Furthermore, shareholders who provide personal guarantees or undertake obligations on behalf of the company may bear personal liability for fulfilling those obligations.

Consequences

Depending on the offence and the person or entity having committed the offence, the punishment can be a monetary fine, restraining measures, a forced suspension or termination of business operations, or a ban on conducting certain business activities and/or raising capital. In the case of aggravating circumstances such as recidivism, committed in a professional way or by a group, in the case of abuse of power and position, committed in the name of an agency or organisation, punishments can be higher.

Additional measures that can be applied include:

- compulsory dismantlement of works;
- compulsory removal from Vietnam's territory;
- destruction of goods; and
- bans and confiscatory measures.

4. Employment Law

4.1 Nature of Applicable Regulations

Governing Law

The 2019 Labour Code, which came into effect on 1 January 2021, applies to all individuals – foreign and Vietnamese – working for Vietnam-based organisations or Vietnamese individuals, but also to Vietnamese nationals working overseas. Exceptions to this rule exist where an international treaty to which Vietnam is a party states otherwise.

The 2019 Labour Code sets out provisions to protect the rights of employees and employers. Its provisions define the nature of the employment relationship and list the permissible clauses of labour contracts.

Labour Contracts

A labour contract sets out an agreement between an employee and an employer on a paid job, that details the wage, the working conditions and the rights and obligations of each party. An agreement, though agreed by the parties to be named otherwise, still remains a labour contract as long as it has contents demonstrating a paid job with wage, administration, management and/or supervision by a party.

Minimum Wage

The wage rate of an employee working in the private sector must not be lower than the minimum wage rate stipulated by the government. There are various regional minimum wage rates which might have to be considered in the investment decision when scouting for ideal locations within Vietnam. The minimum wage rate of a region is linked to the respective cost of living there and the pricing structure of the commercial environment, both of which are under regular review by the government.

4.2 Characteristics of Employment Contracts

Under Vietnamese law, there are two types of labour contracts:

- definite-term labour contract (term of up to three years); and
- indefinite-term labour contract (no duration defined).

Labour contracts can only be concluded and terminated in written form, except that a labour contract with a term of less than one month may be concluded and terminated verbally in certain cases. Definite-term contracts (depending on the employed individual) may not be subject to additional limitations. Generally, Vietnamese law is in favour of indefinite-term labour contracts and does not allow employers to renew definite-term labour contracts more than one time with one individual.

4.3 Working Time

The regular working time is a maximum of eight hours a day and 48 hours a week. With respect to work requiring contact with dangerous and/or harmful factors, employers are responsible for applying the work time limits in accordance with national technical regulations and related laws.

Employers are entitled to require employees to work overtime under the following conditions:

- the employee agrees; and
- overtime hours will not exceed 50% of the normal working hours per day, with a maximum of 12 hours per day, 40 hours per month and 200 hours per year.

In some special sectors and industries, such as textiles and garments, leather, electronic products, aquaculture processing and telecommu-

nications, and in extraordinary cases such as a lack of necessary workforce for urgent work, overtime is higher and capped at 300 hours per year.

An employer is required to notify the relevant Department of Labour, Invalids and Social Affairs (DOLISA) in writing of the implementation of an overtime policy exceeding 200 hours per year.

4.4 Termination of Employment Contracts

No At-Will Employment

Vietnam does not follow at-will employment practices. Accordingly, an employer cannot unilaterally terminate a labour contract with an employee early without cause and without following mandatory procedures. Subject to the cause of labour termination, the employer must follow a strict procedure as set out in the 2019 Labour Code to validate the unilateral labour termination.

Cases of unilateral labour termination by an employer

According to the 2019 Labour Code, the cases of termination of an employment contract by an employer are limited to the following:

- unilateral termination of an employee based on objective reasons, including but not limited to a situation of continuous sickness, injury or treatment lasting over six or 12 months or over a half of contract term (dependent on the type of employment contract) where the ability to work has not recovered, or force majeure events necessitating workforce reduction regardless of mitigation efforts, or due to employee fault;
- retrenchment where the employer can lay off multiple employees without their consent on the grounds of a change in organisational structure, technology or products; economic depression; or changes in government policies;
- termination of multiple employees due to a change of control; and
- disciplinary action of dismissal.

Financial compensation for the terminated employee

To lawfully terminate the employment relationship, the employer needs to settle all payables to the employee until the effective date of the termination, including:

- wages, benefits and compulsory contributions (ie, social insurance, health insurance and unemployment insurance); and
- job loss allowance or severance allowance subject to the cause of termination (where applicable).

Retrenchment

To ensure the validity of retrenchment, the following significant procedures and requirements must be fulfilled by the employer:

- substantiate the grounds for retrenchment and establish its correlation with the need for layoffs;
- develop a comprehensive labour usage plan;
- engage in consultation with employee representatives through a workplace dialogue process;
- provide affected employees with offers for new positions (if available), and only after their rejection, include them in the list of employees to be laid off in the labour usage plan;
- publicly inform employees about the labour usage plan within 15 days of its approval;

- provide a 30-day advance notice to the provincial People's Committee and the affected employees.

Termination of multiple employees due to a change of control

Below are the significant procedures and requirements that must be satisfied to validate the termination. The employer must:

- substantiate the grounds for termination and establish its connection to the need for layoffs;
- develop a comprehensive labour usage plan;
- engage in consultation with employee representatives through a workplace dialogue process;
- provide affected employees with offers for new positions (if available), and only after their rejection, include them in the list of employees to be laid off in the labour usage plan;
- publicly inform employees about the labour usage plan within 15 days of its approval;
- provide a 30-day advance notice to the provincial People's Committee and the affected employees.

Unilateral termination by the employer

An employer is entitled to unilaterally terminate a labour contract in the following circumstances:

(a) the employee repeatedly fails to perform work in accordance with the terms of the labour contract as determined based on the assessment criteria of work performance level in the rule issued by the employer upon consulting opinions of an organisation representing employees at the grassroots level, which includes the trade union at grassroots level and other organisation of employees at an enterprise (labour union), if any;
(b) the employee is ill or injured and remains unable to work after having received treatment for a period of 12 consecutive months (indefinite-term contract) or six consecutive months (definite-term contract with a duration between 12 and 36 months), and more than half of the contract duration (definite-term contract with a duration less than 12 months);
(c) the employer, although having taken all measures to remedy the problem, has to reduce the number of jobs due to natural disasters, fire, epidemics or other force majeure reasons;
(d) the employee fails to attend the workplace within 15 days from the expiry of the suspension of the labour contract;
(e) the employee reaches retirement age;
(f) the employee arbitrarily leaves his/her work without proper reason for five consecutive working days or more; or
(g) the employee provides untruthful information affecting his/her recruitment.

In the case of (a), (b), (c), (e) and (g) above, the employer must send the employee a written notice of termination as detailed below; at least:

- 45 days for indefinite-term contracts;
- 30 days for definite-term contracts with a duration between 12 and 36 months; and
- three working days for definite-term contracts of less than 12 months; or three working days for termination of the contract due to illness or injury of the employee.

Unilateral Termination by Employee

An employee may unilaterally terminate the labour contract prior to its expiry by sending a prior notice of at least 45 days for indefinite-

term labour contracts, 30 days for definite-term contracts with a duration between 12 and 36 months, or three working days for definite-term contracts with a duration less than 12 months.

The prior notice is, however, not required in the following cases:

- the employee is not assigned to the job or workplace, or is not provided the working conditions as agreed upon in the labour contract, except for extraordinary cases where the employer is permitted under laws to assign jobs other than those agreed in the labour contract;
- the employee is not paid in full or on time, except for force majeure cases where the payment is delayed as permitted under law;
- the employee is maltreated or is subject to forced labour or other behaviour affecting his/her health, dignity or honour, including sexual harassment at the workplace;
- a female employee is pregnant and must quit the job as prescribed by a competent health establishment;
- the employee reaches retirement age; or
- the employer provides untruthful information affecting the implementation of the labour contract.

Collective Labour Agreements

Vietnam also recognises the concept of collective labour agreements. These are written agreements which have been agreed between the employer and the labour collective following a collective bargaining session. The labour collective only needs a simple majority to vote in favour of the collective labour agreement. It is binding, and both the employers and employees, whether starting work prior to or as from the binding date, must implement it, and comply with it, when it has been signed by legal representatives of the employer and the labour collective.

The collective labour agreement shall prevail over labour contracts and other rules of the employer if it stipulates greater rights, obligations and interests for the parties. In Vietnam, sector-specific agreements, known as industry collective labour agreements, exist. An industry collective labour agreement may also apply to a non-member enterprise if it has a scope of application covering more than 75% of employees or enterprises in the same industry in the industrial zone, economic zone, export processing zone or high-tech zone as decided by the competent authority.

Trade Unions

A trade union at an enterprise is the most common type of labour union in Vietnam. According to the Law on Trade Unions, the trade union is formed on a voluntary basis as a grassroots-level unit of the national trade union, and together with state agencies, economic and social organisations, cares for and protects the legitimate and legal rights and interests of the employees at the company (labourers).

The trade union can also participate in investigating and monitoring operations of the company. All employees are entitled to form a trade union, and the employer is required to acknowledge the status of a legally established trade union, and on request, to assist with the formation and provide facilities for the trade union to function.

An employer, whether in the public or private sector, is required to contribute to a fund for trade union activities with a contribution that is equal to 2% of the employer's salary fund, which serves as the basis for the social insurance (SI) contribution for its employees, irrespective of

whether a trade union has been established at the workplace.

Workers' Union

Aside from the trade union, employees may also establish, access and take part in operations of a workers' union at an enterprise, which is a new type of labour union introduced under the 2019 Labour Code, if granted a registration certificate by the competent authority.

A workers' union can operate in parallel with, and with the rights and obligations equal to those of, a trade union protecting the legitimate and adequate rights and interests of employees in the labour relationship at the enterprise. It cannot, however, at the same time, have both members who are ordinary employees and members who are employees directly involved in making decisions on working conditions, labour recruitment, labour discipline, termination of labour contracts, or assigning employees to do other work.

At the time of registration, a workers' union must have at least the number of members who are employees working at the enterprise as stipulated by the government.

4.5 Employee Representations

Other than the powers and rights given to trade unions, it is not mandatory for employees to be represented, informed or consulted by management in Vietnam.

For the sake of clarification, under the 2019 Labour Code, while a representative organisation of employees at the grassroots level (ROE), including a grassroots trade union or workers' union at an enterprise, is voluntarily established by employees to protect their legitimate rights and interests in labour relations with their employer, the involvement of the ROE is required in certain circumstances, specifically:

- circulation of the performance improvement plan;
- retrenchment;
- termination with multiple employees due to a change of control;
- establishment of pay scales, payrolls and labour productivity norms;
- circulation of bonus regulations;
- issuance or amendment of internal labour regulations; and
- application of disciplinary measures.

If an ROE is not established within the company, the employer may be required to seek the involvement of a trade union at a higher level. However, this process can be time-consuming and may prolong the overall process of addressing the matters that require ROE participation.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

PIT

Scope

PIT law applies, in principle, to both Vietnamese and foreign individuals who are residents in Vietnam or have income sourced from Vietnam. An individual is considered a resident if he/she:

(a) is present in Vietnam for 183 days or more in a calendar year or during a period of 12 consecutive months from the date of entry into Vietnam (can be checked from entry/exit stamps in passport);
(b) holds a temporary or permanent resident card with respect to foreigners, or a regular residential location registered as a perma-

nent residence address in Vietnam with respect to Vietnamese citizens; or

(c) has an irregular residential location or locations in Vietnam such as a hotel room(s) and/or leased house(s) in Vietnam with an aggregated lease term of 183 days or more in a tax year.

If these criteria are not met, an individual will be considered a non-tax resident in Vietnam. In cases (b) and (c) above, an individual may be considered a non-resident if he/she is present in Vietnam for less than 183 days in a tax year and able to prove that he/she is considered a resident of another tax jurisdiction.

Taxable Income

Generally, taxable income comprises ten main types: income from employment, business, capital investments, capital transfers, real estate transfers, winnings or prizes in excess of VND10 million, inheritances in excess of VND10 million, copyrights in excess of VND10 million, franchising royalties in excess of VND10 million, and gifts in excess of VND10 million.

Tax Rates

For employment incomes of residents, a progressive system applies ranging from 5% to 35% depending on the annual or monthly taxable income. As for non-tax residents, a flat rate of 20% is imposed on the income derived from Vietnam.

For non-employment-related income, the rates vary from 0.1% to 20% subject to whether the taxpayer is a resident or non-resident and depending on the type of income; the way PIT is calculated also depends on the type of income.

Nevertheless, if a resident performs services but does not have a labour contract, or the labour contract is of a term under three months with payments each time amounting to VND2 million or more in total, in general, 10% will be withheld and paid directly to the tax authorities.

Mandatory (Social) Insurance

Vietnamese employees and their employers are required to contribute to SI, healthcare insurance (HI) and unemployment insurance (UI). Foreign employees, together with their employer, are not required to contribute to UI, but are subject to the SI and/or HI in certain circumstances.

The rates of SI, HI and UI contributions paid for Vietnamese employees are:

Employee:

- SI: 8.0%
- HI: 1.5%
- UI: 1.0%
- Total: 10.5%

Employer:

- SI: 17.5%
- HI: 3.0%
- UI: 1.0%
- Total: 21.5%

The salary used for the calculation of the contributions consists of the monthly salary rate and certain allowances prescribed in the labour contract. However, the contribution amount is subject to a cap of 20 times the minimum salary for SI/HI contributions, as well as 20 times the minimum regional salary for UI contributions. It is important to note that the minimum salary and minimum regional salary are determined by the government and undergo an annual review.

Statutory employer contributions are tax-exempt for employees and are not counted as taxable income or additional compensation. Employee contributions to statutory obligations are tax-deductible, reducing their taxable income and potentially lowering their tax liability.

Certain foreign employees who are internally transferred within a group, as well as employees who have reached the statutory retirement age, are exempt from mandatory SI contributions.

5.2 Taxes Applicable to Businesses

CIT

Scope

CIT law applies to a corporate taxpayer in Vietnam. Unlike PIT law, CIT law does not explicitly include the concept of resident or non-resident. Instead, it adopts the principle that a corporate taxpayer, whether located in Vietnam or overseas, must pay CIT for its incomes raised in Vietnam, or raised worldwide through its business facilities in Vietnam, unless otherwise stipulated in treaties to which Vietnam is a party.

For instance, if a foreign investor has a subsidiary company incorporated in Vietnam or has a permanent establishment in Vietnam, this foreign investor must pay the CIT to the Vietnamese authorities on its worldwide income earned through the Vietnamese subsidiary company or in connection with operations of the permanent establishment. However, CIT law also applies to companies without a permanent establishment in Vietnam. If this is the case, the company is only required to pay tax on income raised in Vietnam.

CIT is also imposed on earnings obtained through the production and trading of goods or services, or from other activities such as capital transfers or real estate transactions, etc.

Tax Rates

The general tax rate is 20% and applies to all companies, except for those prospecting, exploring and extracting oil, gas and other rare resources which are subject to higher tax rates. Tax incentives of a 10% or 17% CIT rate may be applied under certain conditions.

Calculation

CIT is calculated based on the taxable profit of a company. The elements needed for this calculation are:

- total revenue that is domestic or foreign sourced;
- deductible expenses;
- non-taxable income; and
- carry-forward losses and other assessable income.

For expenses to be deductible, the following criteria need to be satisfied:

- the expenses arose from and are related to the activities of production and business of the enterprise; and
- the expenses are supported by complete invoices, source vouchers and/or bank statements as stipulated by law. Note that it is necessary to provide non-cash payment source vouchers if the expenses reach or exceed VND20 million.

Fines, penalties and taxes are not deductible. Under certain conditions, and sometimes limited to a maximum duration, start-up expenses, charitable contributions, payments to foreign affiliates (royalties, loan interest and service fees), depreciation and amortisation of tangible and non-tangible assets, and interest expenses can be deducted; net operating losses can be carried forward for a certain amount of time.

Capital Gains Tax

It is important to realise that under Vietnamese law, gains on the disposal of capital or securities in a Vietnamese entity, such as an LLC or JSC, are subject to CIT or PIT.

For a corporate entity disposing of capital or securities in a Vietnamese entity, the gain is treated as other income and will be taxed at the standard rate of 20%.

However, for a foreign corporate entity that has not had a permanent establishment in Vietnam, performs business in Vietnam for a period of under 183 days, or has not adopted Vietnamese accounting regimes or been issued with a tax code, the CIT tax rate is 0.1% of the proceeds when disposing of securities of a JSC; and when capital of an LLC is disposed, CIT on gains from transfers of capital will be levied at a rate of 20% on the respective income.

An emerging trend is the introduction of taxation not only on the transfer of interests in Vietnamese entities but also on the transfer of interests in overseas parent companies (both direct and indirect) of Vietnamese companies.

Foreign Contractor Tax

Foreign organisations and individuals carrying out business in Vietnam or deriving income raised in Vietnam may be subject to foreign contractor tax (FCT). Generally, FCT is composed of CIT and VAT. The FCT tax rates, and the income used for calculating FCT, vary depending on the transaction and taxpayers' tax filing status.

The applicable tax rates and taxable incomes may be different from those stated above where the taxpayer fails to meet any of the following requirements:

- the taxpayer possesses a permanent establishment in Vietnam in case of a corporate one, or is a tax resident in Vietnam in case of an individual one;
- the taxpayer performs business in Vietnam for a period of 183 days or more; or
- the taxpayer has adopted Vietnamese accounting regimes, registered with a tax authority and been issued with a tax code.

The foreign contractors may benefit from double taxation agreements between Vietnam and their home country.

5.3 Available Tax Credits/Incentives

Tax Incentives

Vietnam grants tax incentives to its foreign investors in order to attract more investment and to be more competitive for investors on the global stage. The existing regimes for these incentives vary greatly and differ between sectors and industries.

Industries and Sectors

Tax and land use incentives can be granted to new investment projects, or projects extended from the existing ones, in "investment-encouraged" geographical areas located across the country or business sectors including, among others, education, healthcare, high technology, scientific research, environmental protection, infrastructural development, or projects with capital of at least VND6 trillion (USD240 million) in which at least VND6 trillion is paid within three years from the date the IRC or in-principle approval was granted and satisfies either of the following criteria: the total revenue is at least VND10,000 billion per year within three years from the year in which the revenue is earned or the project has more than 3,000 employees.

Incentives are also given to high-tech companies and producers of high-priority products, which include accessories, components and spare parts used for assembling goods in the textile and garment industry, footwear and leather industry, electronics industry, agricultural machinery industry, automobile industry, shipbuilding industry or prioritised mechanical sector, and supporting products used in high-tech industries. Investors can also be entitled to certain incentives where investing in product distribution chains, technical or other purpose facilities or co-working spaces supporting small and medium-sized enterprises and start-ups.

Auxiliary Industrial Zone

Projects on the infrastructure development of an Auxiliary Industrial Zone, including subzones, can be entitled to tax exemption and reduction of land rent, a land lease term of up to 70 years, and priority access to loans from the Vietnamese State, Official Development Assistance funds, foreign loans under government guarantees and other kinds of loans.

Investment projects related to manufacturing supporting industry products, as listed in Decree No. 111/2015/ND-CP of 3 November 2015, might enjoy certain tax incentives relating to CIT, export and import duties. Additionally, these projects may have priority to participate in training or assistance programmes for start-ups, small and medium-sized enterprises, and relevant other programmes of competent authorities.

Eco-industrial Zone

Eco-enterprises in Eco-industrial Zones (EIZs) can enjoy preferential loans from the Vietnam Environment Protection Fund, the Vietnam Development Bank and/or other financial sources related to clean industry. They will have priority to participate in technical support or investment enhancement programmes. Finally, they shall be given priority in providing information related to the technology market and the possibility of co-operating in effecting industrial symbioses in the scope of production and business activities of these enterprises.

Specific Areas

Investors that invest in areas with poor socio-economic conditions, such as areas which have weak infrastructure or a lack of experienced labour force, or in remote rural areas, can qualify for tax reduction and exemption.

Tax Holidays

Tax holidays can consist of tax rate reductions of 10% and 17% for 15 years and ten years respectively, starting from the commencement of the operation. It can also consist of a 50% reduction for two to nine years; or consist of a tax exemption for two to four years, followed by a tax rate reduction.

Other Incentives

If they meet the relevant criteria, enterprises may qualify for participation in training or assistance programmes, and other programmes organised by the competent authorities. Qualifying enterprises may also receive preferential loans, participation in technical support or investment enhancement programmes, information on the technology market and co-operation opportunities, exemption from import duty on goods imported, and exemption from and reduction of land rental fees and non-agricultural land-use tax.

5.4 Tax Consolidation

There is currently no regime in place which allows for tax consolidation.

5.5 Thin Capitalisation Rules and Other Limitations

Except for certain sectors such as securities companies, Vietnam does currently not have any thin capitalisation rules or similar limitations in place. However, the Government of Vietnam is currently considering the implementation of a debt-equity ratio, which is under discussion and may be implemented in the near future.

5.6 Transfer Pricing

The Vietnamese government has released tax administration regulations applicable "to enterprises having controlled transactions" – Decree No. 20/2017/ND-CP ("Decree 20") in April 2017, which was replaced by Decree 132/2020/ND-CP ("Decree 132") as from 20 December 2021. Before Decree 20 was issued, transfer pricing rules in Vietnam were considered to be rather lax. Investors could enter the market without any major concerns about their transfer pricing policies.

Today, companies that are considering investment in Vietnam, as well as those companies that are already operating in the country, need to comply with the stricter regulatory requirements of Decree 132. It makes an attempt to replicate the standards set forth by Organisation for Economic Co-operation and Development guidelines and base erosion and profit shifting (BEPS) actions.

5.7 Anti-evasion Rules

Under the current Law on Tax Administration of Vietnam (No. 38/2019/QH14), tax authorities have been endowed with additional enforcement powers, which directly translates into more stringent and successful prosecution of tax evaders. Specifically, in cases where there is suspicion of tax evasion, tax authorities may exercise the following powers during tax inspection:

- Collection of information related to tax evasion.
- Impoundment of documents and exhibits related to tax evasion.
- Inspection of premises for documents and exhibits related to tax evasion.

6. Competition Law

6.1 Merger Control Notification

The Competition Law defines the concept of economic concentration, which covers mergers, consolidations, acquisitions of control stocks, and joint ventures between enterprises.

An economic concentration is prohibited if it causes or potentially causes substantial anti-competitive effects on the Vietnamese market. Enterprises must file a dossier of notification to the Vietnam Competition Commission (VCC) regarding their planned economic concentration, if it falls within any of the following circumstances:

- Total assets in the Vietnamese market of the enterprise or a group of affiliated enterprises to which such enterprise is a member are valued at VND3,000 billion (USD120 million) or more in the fiscal year preceding the expected year of the economic concentration;
- Total sales or purchase volume in the Vietnamese market of the enterprise or a group of affiliated enterprises to which such enterprise is a member are valued at VND3,000 billion (USD120 million) or more in the fiscal year preceding the expected year of the economic concentration;
- Transaction value of the economic concentration is valued at VND1,000 billion (USD40 million) or more; or

- The combined market share of the enterprises planning to participate in the economic concentration accounts for 20% or more of the total share in the relevant market in the fiscal year preceding the expected year of the economic concentration.

Where the economic concentration is carried out outside the territory of Vietnam, the same threshold for notification of domestic economic concentration applies, except in cases where the transaction value of economic concentration is valued at VND1,000 billion or more.

Greater thresholds are applied with respect to the economic concentration performed by enterprises that are credit institutions, insurance enterprises and securities companies.

6.2 Merger Control Procedure

The aforementioned economic concentration may only be implemented after the VCC's confirmation has been obtained, stating that the economic concentration is not prohibited under the Competition Law. Certain economic concentrations, though not prohibited, can only be performed and maintained where relevant conditions are satisfied as stipulated in the confirmation of the VCC.

6.3 Cartels

Under the regulations of Vietnamese competition law, there are several agreements that restrict competition and therefore risk illegality. To determine whether an agreement is legal, it is important to look at the relevant contents of the agreement, the relevant market of the parties to the agreement, the trade life cycle of the parties' products and services, and/or the level of restrictive effect on competition assessed by the VCC.

Such agreements are absolutely prohibited if they:

- prevent, restrain and disallow other enterprises from entering the market or developing business;
- abolish from the market enterprises other than the parties of the agreements; or
- conspire in biddings.

If the parties have the same relevant market, prohibited agreements include:

- directly or indirectly fixing prices;
- distributing outlets, sources of supply of goods, or provision of services; and
- restricting or controlling produced, purchased or sold quantities or volumes of goods or services.

If the parties have the same relevant market and the agreements may cause an appreciable restrictive effect on competition, prohibited agreements are those that:

- restrict technical or technological development and investments;
- impose conditions or unrelated obligations on the signing of purchase or sale contracts for goods or services;
- prevent transactions with parties other than the parties thereto;
- limit consumption or supply of goods or services of parties other than the parties thereto; or
- may cause other restrictive effects on competition.

If the parties have different production, distribution or supply businesses constituting a trade life cycle of a product or service and the agreements may cause an appreciable restrictive effect on

competition, prohibited agreements are those that:

- directly or indirectly fixed prices;
- distribute outlets, sources of supply of goods, or provision of services;
- restrict or control produced, purchased or sold quantities or volumes of goods or services;
- restrict technical or technological development and investments;
- impose conditions or unrelated obligations on the signing of purchase or sale contracts for goods or services;
- prevent transactions with parties other than the parties thereto;
- limit consumption or supply of goods or services of parties other than the parties thereto; or
- may cause other restrictive effects on competition.

In case the agreement benefits consumers and certain criteria are met, such as leading to technical innovation, an exception may be granted.

6.4 Abuse of Dominant Position

An enterprise or a group of enterprises with a dominant or monopoly position in the market is prohibited from performing the following acts:

(a) selling goods or services at prices below the total cost price resulting in eliminating competitors;
(b) imposing unreasonable purchase or sale prices of goods or services, or fixing minimum resale prices, causing damage to customers;
(c) restricting production or distribution, limiting the market, or hindering technical or technological development, causing damage to customers;
(d) applying different commercial terms on similar transactions, causing restrictions to market entry or expansion by other enterprises or elimination of other enterprises;
(e) imposing conditions or unrelated obligations on the signing of sale or purchase contracts, causing restrictions to market entry or expansion by other enterprises or elimination of other enterprises;
(f) preventing competitors from entering or expanding the market; or
(g) other acts abusing the dominant position as prescribed by other laws.

An enterprise or a group of enterprises with a monopoly position is prohibited from performing acts mentioned in (b) to (f) above and from imposing adverse conditions on consumers, taking advantage of the monopolistic position to unilaterally change or cancel an executed contract without legitimate reasons or performing other acts abusing the monopolistic position as prescribed by other laws.

7. Intellectual Property

7.1 Patents

Generally, Vietnam allows protection for the following subject matters of patent rights:

- process or method; and
- products.

Vietnamese regulations distinguish two types of patents, namely:

- utility solutions (petty patent); and
- patent for invention.

A patent in Vietnam can be filed in one of the three following ways:

- Direct filing: A foreign patent applicant could file their patent in Vietnam directly.
- PCT Patent: Within 31 months from the first filing date to the International Bureau of the World Intellectual Property Organization or from the priority date, the applicant must submit the PCT application to Vietnam's National Office of Intellectual Property (NOIP).
- Paris Convention: Within 12 months from the first filing date in a country which is a signatory of the Paris Convention Treaty, the applicant must submit the patent application to the NOIP.

Vietnamese regulations stipulate that a patent shall be locally protected if it meets the following requirements:

- novelty step;
- inventive step (not applicable to utility solution); and
- industrial applicability.

The validity for patents for utility solutions is ten years from the filing date.

The validity for patents for inventions is 20 years from the filing date. In order to maintain the validity of a Vietnamese patent, the owner must pay the annuity fee annually, subsequent to the granting of the patent.

Documentation required to file a Vietnamese patent:

- specification of the patent. If it is a PCT patent, we could download it from WIPO's website;
- claims of patent or amended claims, if any;
- drawing (if any);
- certified copy of priority document (if any); and
- name and address of inventor and applicant.

7.2 Trade Marks

The trade mark system in Vietnam protects visible letters, numerals, words, pictures, images, including three-dimensional images or their combinations, or graphically representable sound trade marks that are used to identify a business's products or services.

Trade name rights are established through persistent and public use rather than having to be formally registered. With respect to online domains, these are handled on a first-come, first-served basis by the respective authority.

Locally registered trade marks last for ten years and can be renewed indefinitely for further ten-year periods. Costs related to the maintenance of these assets are low. The registration of a trade mark can take up to 15 months to complete. Trade marks can either be registered in Vietnam or by employing the mechanisms of the Madrid Protocol.

7.3 Industrial Design

Industrial design means the outward appearance of a product embodied in three-dimensional configuration, lines, colours or a combination of such elements. Under Vietnamese law, industrial property rights to an industrial design shall be established based on a decision of the competent state body. This authority grants a protection title in accordance with the registration procedures stipulated in the Law on Intellectual Property of Vietnam or the recognition of international registration pursuant to an international treaty to which Vietnam is a member.

Generally, an industrial design is eligible for protection when it satisfies the following conditions:

- it is novel;
- it is of a creative nature; and
- it is susceptible to industrial application.

However, the following items are ineligible for protection as industrial designs:

- outward appearance of a product which is necessarily due to the technical features of the product;
- outward appearance of civil or industrial construction work; and
- shape of a product which is invisible during the use of the product.

Generally, the following organisations and individuals have the right to register industrial designs:

- authors who have created industrial designs through their own labour and at their own expense; and
- organisations or individuals who have supplied funds and material facilities to authors in the form of job assignment or hiring, unless otherwise agreed by the parties involved.

Applications for registration of industrial designs under the Law on Intellectual Property of Vietnam must be prepared in a regulatory template and accompanied by certain documents and photos describing the registered subject matter and specifying the registration rights. The application should be submitted to the Intellectual Property Office of Vietnam ("IP Office"). The IP Office will examine and consider whether the applications are valid. By law, it shall take one month from the submission date for formality examination, and it shall take seven months from Vietnam's IP Gazette publication for substantive examination. In practice, it could take longer and normally will take from one year to 1.5 years from the filing date to receive the outcome of the registration. For applications which are considered valid, the IP Office will issue a notice of acceptance of the valid application or carry out procedures for granting a protection title.

Per the applicable "first to file" principle, where two or more applications for registration are filed by different parties for registration of industrial designs identical to or insignificantly different from each other, a protection title may only be granted to the valid application with the earliest priority or filing date amongst applications which satisfy all conditions for the granting of a protection title.

Where there are two or more applications that satisfy all the conditions for the granting of a protection title and have the same earliest priority or filing date, a protection title may only be granted to a single application from such applications with agreement from all applicants. Without such an agreement, all such applications shall be refused the granting of a protection title.

A protection title, also known as an industrial design patent, shall recognise the owner of the industrial design; the author of the industrial design; and the subject matter, scope, and term of protection. An industrial design patent shall be valid throughout the entire territory of Vietnam as from the grant date until the end of five years after the filing date and may be renewed for two consecutive terms, each of five years.

7.4 Copyright

Registration of Copyright

The registration of copyright is conducted at the National Copyright Office, which is the competent authority for all copyright issues within the Vietnamese jurisdiction. In Vietnam's definition of the term, "copyright" also applies to comput-

er programs, which cannot be patented instead because they lack one or more of the requirements for being granted a patent. Vietnam's copyright IP is governed by the Berne Convention on copyright, which states that the minimum period of protection from publication will be (i) 75 years for cinematographic works, photographic works, works of applied art and anonymous works from the first publication date and (ii) the author's life plus 50 years after the death of the author for other types of works.

While no copyright registration is required in Vietnam, most patent experts suggest registering copyright with the country's copyright authorities.

7.5 Others

Software, databases and trade secrets can also be protected under the Law on Intellectual Property of Vietnam, provided that they meet the criteria for protection.

Specifically, software can be considered a "computer program" as defined by the Law on Intellectual Property of Vietnam, which is a set of instructions that are expressed in the form of commands, codes, diagrams or other forms, when attached to a medium or device operated by a computer programming language, and that enable the computer or device to perform a specific task or achieve a specific result. A computer program can receive copyright protection as a literary work, whether expressed in the form of source code or machine code.

Trade secrets are an object of industrial property rights and are defined as information obtained from financial and intellectual investment activities which have not yet been disclosed and are able to be used in business. Intellectual property rights over trade secrets are established based on legally obtaining a trade secret and maintaining its confidentiality, rather than formal registration, due to its confidential nature.

Databases, per se, are not considered intellectual property under the Law on Intellectual Property of Vietnam unless they meet the conditions to be classified as an IP rights object, such as literary, artistic and scientific works or trade secrets.

IP protection, though it has improved over the last few years, has always been one of Vietnam's biggest issues and a strong reason for hesitation over foreign direct investment into the country. Despite recent efforts by Vietnamese lawmakers to close the gaps in the regulatory framework, it is the implementation that still causes issues in practice. Lacking an appropriate IT infrastructure and specialised training, the competent authorities lag behind in trying to implement the laws and enforce powers to protect the intellectual property of registered owners.

8. Data Protection

8.1 Applicable Regulations

In February 2021, the Ministry of Public Security (MPS) released the initial draft of the Decree on Personal Data Protection ("Draft PDP Decree") for public consultation. This Draft PDP Decree marked a significant milestone as it represented the first comprehensive legal framework for personal data protection (PDP) in Vietnam. Throughout the development process, the Draft PDP Decree underwent various revisions to address numerous concerns from the public. On 7 March 2022, the government issued Resolution 27/2022, approving the then-latest version of the Draft PDP Decree, and entrusted the MPS to share it with the Standing Committee of the

National Assembly (SCNA) for further consultation. Subsequently, on 7 February 2023, the Government issued Resolution 13/2023, approving the then-latest version of the Draft PDP Decree and seeking the SCNA's appraisal. After a thorough review period, the Draft PDP Decree was officially adopted on 17 April 2023, and became Decree No. 13/2023/ND-CP ("Decree 13"), which came into effect on 1 July 2023. Decree 13 represents the first-ever unified regulation on PDP in Vietnam.

Decree 13 is divided into four chapters and 44 articles, providing comprehensive coverage of PDP and some brand-new requirements. Notable contents of Decree 13 include the following regulations:

- recategorisation of personal data into basic personal data and sensitive personal data;
- new data processing requirements, including new legal bases for data processing and disclosure without consent; specification of the forms of consent; time limits for data processors and/or data controllers and/or data controllers cum data processors to respond to the requests from the data subject with regard to data provision, data deletion and data modification;
- new data protection measures, including de-identification/encryption requirements, appointment of data protection officers, data accessibility from government authorities, and registration for cross-border transfer of data;
- mandatory impact assessments for data processing and cross-border transfer of data; and
- the right of individuals to access their personal data, to correct or delete their personal data, to object to the processing of their personal data, and to port their personal data to another controller.

Decree 13 stipulates several cases where personal data can be processed without the data subject's consent, including:

- protecting the life and health of the data subject or others in an emergency. The personal data controller, data processor and any third party must prove this applies;
- when publicising personal data in accordance with the law;
- when state agencies handle data during a declared state of emergency regarding national defence and security, social order and safety, natural disasters or dangerous epidemics;
- when there is a risk threatening security and national defence but short of declaring a state of emergency;
- preventing and combating riots, terrorism, crimes and legal violations as prescribed by law;
- fulfilling the data subject's contractual obligations with relevant agencies, organisations and individuals according to the law; and
- for activities of state agencies as specified in specialised legislation.

Moreover, Decree 13 establishes provisions for handling children's personal data. Children's rights and best interests must always be guaranteed. Children's personal data requires consent from seven-year-olds and older, and from parents or guardians, except in specified cases.

Decree 13, however, is silent on administrative sanctions for violations. The administrative sanctions for violations in the field of PDP are now integrated into the Decree on Administrative Sanctions for Cybersecurity Violations, of which the latest draft is still pending final approval. Its tentative date of enforcement is the end of 2024.

It is noteworthy that in late February 2024, the MPS released a dossier proposing the development of a PDP Law. This signals the Vietnamese Government's efforts to accelerate the finalisation of the PDP legislative framework in Vietnam. The draft law remains pending.

8.2 Geographical Scope

Decree 13 binds foreign and local companies based in Vietnam to the same standards of protection. Decree 13, however, does not directly apply to offshore companies. However, when there is a cross-border transfer of data, Decree 13 requires the transferor to submit the contact details of the transferee to the MPS.

8.3 Role and Authority of the Data Protection Agency

The MPS and its Department of Cybersecurity and Hi-tech Crime Prevention (A05) are in charge of the execution and implementation of Decree 13.

9. Looking Forward

9.1 Upcoming Legal Reforms

Draft Amended Law on Commercial Arbitration

In November 2021, the Standing Committee of Vietnam's National Assembly assigned the Vietnam Lawyers' Association to be responsible for reviewing and examining the implementation of the 2010 Law on Commercial Arbitration and proposing a draft amendment to the 2010 Law on Commercial Arbitration. The purpose of the draft amendment is to address shortcomings observed during the enforcement of the existing law, such as ensuring the impartiality and independence of arbitrators and improving the recognition and enforcement of foreign arbitral awards in Vietnam, etc, to align with international standards in the practice of international arbitration. It appears that the draft amendment is still being refined through public consultations before its submission to the National Assembly.

New Land Law

On 18 January 2024, the National Assembly of Vietnam approved Land Law No. 31/2024/QH15 ("2024 Land Law"), which will take effect from 1 January 2025, replacing the prevailing land law adopted in 2013. The 2024 Land Law aims to address the shortcomings of the 2013 Land Law and introduce important changes to boost the growth of the real estate market. The adoption of the new land law complements the new Real Estate Business Law (adopted on 28 November 2023) and the new Housing Law (adopted on 27 November 2023), both of which will also come into effect on 1 January 2025. To warm up the real estate market, the Vietnamese Government has proposed that the National Assembly expedite the effective date of the 2024 Land Law, the 2023 Real Estate Business Law and the 2023 Housing Law to 1 August 2024.

Notably, the 2024 Land Law allows disputes between parties arising from land-related commercial activities to be resolved by Vietnamese commercial arbitration institutions according to the regulations of Vietnam's commercial arbitration law. This provision is considered one of the striking points in the new Land Law, as opposed to referral to the exclusive jurisdiction of the Vietnamese courts under the 2013 Land Law. This change encourages parties' autonomy in deciding which dispute resolution forum will resolve their disputes. However, it appears that, according to this provision, the disputants are not allowed to resort to a foreign arbitration institution such as the Singapore International Arbitration Centre or Hong Kong International

Arbitration Centre for resolving land-related commercial disputes.

Draft Decree on Administrative Sanctions for Cybersecurity Violations

To enforce Decree 13 on personal data protection (as mentioned in **8. Data Protection**), the MPS has been working on a draft Decree on Administrative Sanctions for Cybersecurity Violations ("Sanctioning Decree"), which also provides sanctions for personal data violations. The initial version of the draft Sanctioning Decree was made available for public consultation in September 2021. Currently, the latest version of the draft Sanctioning Decree is the fourth draft, which was released to the public in May 2024 ("Fourth Draft Sanctioning Decree"). According to the Fourth Draft Sanctioning Decree, the most severe administrative penalty is still a fine of up to 5% of the total revenue in Vietnam of the violator for the preceding fiscal year, for:

- multiple personal data violations in marketing and advertising business;
- multiple personal data violations in illegal collection, transfer, purchase and sale of personal data; or
- causing disclosure or loss of personal data of five million Vietnamese citizens or more due to violations in personal data processing impact assessment and cross-border transfer of personal data.

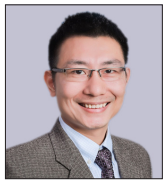
With the introduction of the Fourth Draft Sanctioning Decree, we expect the final version to be passed in the near future.

Trends and Developments

Contributed by:
Thang Nguyen, Stanley Boots, Minh Nguyen and Nguyet Le
ACSV Legal

ACSV Legal is a vibrant and dynamic Vietnam-based law firm located in HCMC with unparalleled domestic expertise. It has one of the premier corporate/M&A practices in Vietnam and has extensive experience in private equity transactions with a strong commercial focus. Its lawyers have advised various clients on (re-) structuring their businesses in light of investments in or outside Vietnam. The firm's clients are typically businesses within South-East Asia that are experiencing significant growth, as well as leading international and local corporations that need advice on a broad array of multi-jurisdictional transactions. ACSV Legal has advised its clients on matters in a wide range of sectors and industries such as healthcare, beauty and fitness, pharmaceutical, food and beverages, IT and technology, hospitality and leisure, education, retail, manufacturing and distribution, apparel and fashion, fintech and payment services. It has a team of more than 30 experienced lawyers who are qualified in Vietnam and the UK in civil and common law jurisdictions. The languages spoken at ACSV Legal include Vietnamese, English, German, Italian, Dutch and French.

Authors



Thang Nguyen is a partner at ACSV Legal and joined the team in February 2022. He has more than 20 years of experience practising corporate and commercial law with leading legal consultancy services providers and global law firms in Vietnam. His key areas of practice include corporate and M&A transactions, investment structures, funding arrangements across a wide range of industry sectors, including banking and finance, hospitality, manufacturing, real estate, construction, retail, technology, oil and gas, and energy. Thang has assisted numerous investors in relation to their investments in Vietnam, including advising on the structuring of proposed business operations in Vietnam. He has also provided numerous clients with regulatory advice and assistance with respect to general corporate matters in relation to their day-to-day operations and commercial matters. Thang obtained his LLB and LLM from the Law School of the National University in Hanoi. He is a member of the Hanoi Bar Association. Thang is a native Vietnamese speaker and speaks English fluently.

Contributed by: Thang Nguyen, Stanley Boots, Minh Nguyen and Nguyet Le, **ACSV Legal**

Stanley Boots is a partner at ACSV Legal. Prior to joining ACSV Legal, Stanley practised in the project finance teams of Hogan Lovells, DLA Piper and Ashurst. His practice areas cover projects and project financing, public-private partnerships, public financing, sustainability and, most recently, decentralised financing using Web3 and AI technology. He has worked on secondment to a major Japanese utility handling both convention power and renewable energy projects and served as legal counsel in Korea's largest energy company, SK Corporation. Stanley has a BA in Biology from Earlham College (Indiana, USA) and a JD in Law from the Education Northwestern School of Law of Lewis & Clark College (Oregon, USA). He is a qualified solicitor of the Law Society in England and Wales and has been practising with an Asia focus since 1999. Besides being a native English speaker, Stanley is fluent in Japanese.

Nguyet Le joined the team in July 2017 and is a senior associate at ACSV Legal with extensive experience in the legal sector. Prior to working at ACSV Legal, she worked at a large law firm in Vietnam. She was admitted to the Ho Chi Minh City Bar in 2020. Nguyet specialises in licensing matters for foreign direct investment projects and offers expertise in business operations, due diligence exercises, and legal research for M&A and corporate law. Nguyet's client portfolio includes the educational, retail and beauty clinic sectors.

Minh Nguyen is a special counsel and head of the dispute resolution practice at ACSV Legal. She joined in 2019 after having worked for nearly ten years for various international law firms and corporations, including a magic circle firm, and as legal compliance manager in the SEA&NZ Business Unit of the largest brewing company in the world. Minh has directly advised and represented clients in some multimillion-dollar cases arbitrated at the SIAC, the ICC and the VIAC. She obtained an LLM in International Arbitration from Pepperdine University and attended the intensive International Commercial Arbitration course at Harvard Law School in January 2023. Minh is currently a member of Young Singapore International Arbitration Centre Committee (YSIAC Committee) and a member of the Legal Science Council of the Vietnam International Arbitration Centre (VIAC). She is fluent in English and Vietnamese.

Contributed by: Thang Nguyen, Stanley Boots, Minh Nguyen and Nguyet Le, **ACSV Legal**

ACSV Legal

Level 11
Empress Tower
138-142 Hai Ba Trung Street
District 1
Ho Chi Minh City
Vietnam

Tel: +84 28 3822 4539
Fax: +84 28 3822 4239
Email: info@acsvlegal.com
Web: acsvlegal.com

Vietnam remains an attractive destination for foreign direct investment, contributing to the country's sustained annual growth. The World Bank reports that Vietnam is showing mixed signs of recovery and anticipates growth to reach 5.5% in 2024, with a gradual rise to 6% by 2025. The International Monetary Fund forecasts that Vietnam's economic growth will let it maintain its position as the fifth-largest economy in South-East Asia. The top destinations for foreign investment within Vietnam are Quang Ninh, Hai Phong, Bac Ninh and Binh Duong provinces and Ho Chi Minh City.

High Potential Sectors

Technology

Strong M&A activity within the technology sector in Vietnam in the years 2022 and 2023 accounted for almost 40% of the total M&A transaction value in that period. Vietnam's strategic geographical proximity to China and the available and competitive technical workforce make it attractive to international technology companies to set up manufacturing operations here. The government also issued a decree in February 2024 covering establishing and expanding high-tech zones, investment incentives, and support policies for projects within these zones. Other key areas within the technology sector that are on the rise include software development, IT outsourcing, artificial intelligence, e-commerce and cybersecurity.

Healthcare

The ageing population and declining birth rates have boosted demand for healthcare services and related products. With a growing middle class, healthcare spending is expected to increase. The Ministry of Health estimated that approximately 40,000 Vietnamese seek out medical services abroad each year, for a total of approximately USD2 billion.

Public hospitals, which form the backbone of the Vietnamese healthcare system, face significant challenges, including chronic overcrowding, insufficient and obsolete equipment, budgetary constraints and a shortage of qualified medical staff. The private healthcare sector shows significant investment potential, as demonstrated by the recent acquisition of FV Hospital by Thomson Medical Group and the strategic partnership between American International Hospital and Raffles Medical Group from Singapore.

Renewable energy

The Prime Minister has issued the implementation plan for the National Power Development

Plan No. 8 (PDP8), an important milestone as PDP8 sets out the country's power mix that sees it shifting from coal-fired power generators to renewable energy sources. The Ministry of Industry and Trade (MOIT) has also released a draft amendment to the Electricity Law that specifically addresses the development of renewable energy and new energy and includes high-level provisions regulating offshore wind power projects. It is expected that MOIT and the Government will continue to issue new regulations, including tariff frameworks, direct power purchase agreements and carbon credit market development mechanisms.

Increase in Business Restructuring Transactions

However, in the face of a challenging 2023, several sectors in Vietnam have seen an uptick in restructuring exercises, eg, manufacturing, fast-moving consumer goods, real estate, hospitality, retail, food and beverages, etc. Business restructuring is an option for underperforming companies to weather through the stagnation resulting from economic challenges and to regain their competitive position in the market through optimisation of operations, finances and corporate structure.

Corporate restructuring options in Vietnam include:

- Divestiture: divesting underperforming businesses or assets that do not generate satisfactory profit in the group.
- Spin-off: dividing underperforming businesses or assets to form new separate companies for better management and a more streamlined corporate structure.
- Merger and consolidation: merging or consolidating different companies within the group to optimise expenses and debts.
- Acquisition of desirable businesses or assets.
- Debt restructuring (including coming to agreement with creditors on conversion of debt into equity, or receiving new debt for refinancing).
- Internal personnel restructuring/rearrangements.

The decision-making process should centre around the desirable outcomes sought to be achieved (ie, efficient operations, reduced expenses, optimised debt structure, retention of key high-performing employees, etc). Several companies have seen successful turnarounds due to a well-planned and well-executed business restructuring exercise that took into account legal, financial and practical priorities and challenges.

Commitment to Improving Vietnam's Business Environment

The Vietnamese government has expressed its commitment to improving Vietnam's business environment in 2024 in line with international standards. The Ministry of Planning and Investment has been tasked with overseeing institutional reform to achieve this, including removing legal barriers to project implementation, streamlining inspection activities and deploying the National Single Window. Other government objectives include increasing access to capital and promoting investment, innovation, digital transformation, green conversion and quality of business services.

Developments in the Financial Sector

Banking transaction security and foreign exchange transactions are prominent topics in 2024, drawing significant attention and scrutiny from authorities. In line with data privacy trends, the State Bank of Vietnam (SBV) has consistently issued directives to banks to enhance the

security and safety of payment activities. These directives require credit institutions and payment intermediaries to review internal processes and regulations, particularly post-audit e-KYC. Additionally, the SBV has collaborated with the Ministry of Public Security to inspect the security of information systems and the opening and use of payment accounts at various credit institutions and payment intermediary service providers.

E-money regulation

Notably, there has been a remarkable surge in cashless payment transactions in 2024. The first four months of 2024 saw an increase of 57% in the volume of cashless payment transactions and a 40% increase in total transaction value compared to the same period in 2023. In contrast, ATM transactions continued a downward trend. These statistics underscore the accelerating shift towards digital and mobile payment solutions, highlighting the rapid transformation in consumer behaviour with cashless payments.

Decree 52/2024/ND-CP, which governs the use of non-cash payments, will come into effect in 2024. This decree defines electronic money (e-money) in Vietnam as "the equivalent value in VND stored electronically" based on prepaid funds provided to banks or payment service organisations offering electronic wallet services. According to the decree, e-money can be stored through electronic wallets (e-wallets) and prepaid cards. However, virtual currencies remain excluded from the scope of this decree as they are not regulated by the country's financial authorities.

The SBV emphasised that Decree 52, which provides a clear definition of e-money in Vietnam for the first time, will play a crucial role in preventing and eliminating illegal payment methods issued by unauthorised organisations. It will also support competent agencies in combating related legal violations. The SBV explained that these regulations will strengthen the management role of relevant state agencies in international payment activities. Additionally, the regulations encourage collaborations in delivering cross-border payment services amidst rapid technological developments and innovations that support e-commerce.

These developments are leading to a closer review and management of foreign exchange transactions from commercial banks regarding foreign loan use. The SBV is making determined efforts to elaborate on the criteria for foreign borrowing by local businesses. Clearly, the SBV aims to balance its policy objectives with the needs of relevant stakeholders, moving towards a more rigorous foreign borrowing management regime. Going forward, this regime may significantly impact financing, capital markets and M&A transactions in Vietnam.

Cybersecurity Concerns and Governmental Action

Vietnam saw a significant increase in cyberattacks in 2023, which intensified around March and April of 2024. The Department of Cybersecurity and Prevention of High-Tech Crime under the purview of the Ministry of Public Security anticipates that cybersecurity attacks aimed at disrupting business operations and stealing sensitive information will become increasingly complex. The Vietnamese Police warn that such attacks will target key essential infrastructure, such as economic, financial and energy institutions. Institutional victims of large-scale cybersecurity attacks now include VNDirect, Vietnam's third-largest securities company; PVOIL, a subsidiary of state-run giant Petrovietnam; and Vietnam Post.

This led the Vietnamese Prime Minister to issue a directive on 8 April 2024 mandating Vietnamese ministries and sectoral and local government agencies to review and assess the current cybersecurity measures. The Ministry of Justice has released the latest draft decree on administrative sanctions for cybersecurity violations, including for breaches of the Law on Data Privacy (see immediately below). The latest draft sanction decree is still in discussion in May 2024 and likely to be issued at the end of this year.

Data Privacy

With the issuance of the long-awaited Decree 13 on data privacy in 2023 and the proposition submitted in early 2024 on building and passing a Law on Data Privacy, it appears that the Vietnamese government has taken pivotal steps to tighten the regulations governing the processing and cross-border transfer of personal data, especially that of the Vietnamese citizens. This is in line with the direction of the Vietnamese government in building up and strengthening a digital government.

Real Estate

In the real estate arena, market sentiment is optimistic for a recovery, particularly in the second half of 2024. The Vietnamese government has made a concerted effort through effective policy deployment to resolve 'bottlenecks', including the introduction of new legislation, and the SBV is reforming the legal framework and procedures and increasing preferential credit packages to allow individuals and enterprises easier access to bank loans.

The introduction of the 2024 Land Law, the 2023 Real Estate Business Law and the 2023 Housing Law is anticipated to untie the difficulties of the real estate market, which has slowed down post-COVID. Among many positive legal reforms enshrined in these laws, the rule allowing Vietnamese people who have settled abroad permanently but still retain Vietnamese nationality to be entitled to the same land use rights as those residing in Vietnam is most positively welcomed.

Sustainable Development Aspirations

Vietnam is boldly pursuing environmental sustainability, aligning with the ambitious Sustainable Development Goals and embracing the green revolution. With a robust economy and steadfast commitment to sustainability, the nation is focusing on initiatives like carbon credits and green investments to drive positive change. Legislative measures are being drafted and implemented to bolster the energy sector, improve economic efficiency, curb carbon emissions, and address global climate change challenges through mitigation and adaptation strategies.

Recent years have seen Vietnam make remarkable progress in slashing carbon emissions, expanding renewable energy sources and strengthening conservation efforts. Embracing carbon credits has emerged as a key strategy, supporting projects combating greenhouse gas emissions and earning credits that ignite international markets. This incentivises environmentally friendly endeavours and generates revenue for sustainable development. Therefore, the demand and opportunities for establishing a carbon credit market are closely linked to Directive 13/CT-TTg.

The visionary Decision No. 165/QD-TTg, issued on 7 February 2024, outlined Vietnam's Hydrogen Energy Development Strategy until 2030, aiming for 100–500,000 tons of hydrogen production per year by 2030 and 10–20 million tons by 2050. Additionally, Decision 13/2020/QD-TTg encourages solar power development, while Decision 39/2018/QD-TTg promotes wind

power. Despite Vietnam's attractive investment environment, financing and investment barriers persist, posing challenges to renewable energy projects. Access to affordable capital, long-term financing and a stable regulatory framework are crucial to attract foreign investors.

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