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Introduction

Mayer Brown JSM has been operating in Asia for over 150 years. We have a strong footprint across Asia with offices in China, Hong Kong, Singapore, Thailand, Vietnam and Japan. In other countries in Southeast Asia, Mayer Brown JSM has long experience in assisting clients with a wide variety of transactions and has close relationships with a number of well-established local firms. We regularly handle complex cross-border deals and, at the same time, use our local market knowledge and deep understanding of industry-specific issues to ensure we provide the best solutions for our clients. In addition to advising on the corporate, financial and structuring aspects of the transactions, our tax partner Pieter de Ridder based in our Singapore office is able to advise on various tax issues, tax planning opportunities and tax efficient structures for cross-border investments in each jurisdiction in Southeast Asia.

This publication is intended to give prospective investors an overview of the major legal and tax issues to consider when investing in Southeast Asian countries and India.

We hope you will find it useful in answering a number of frequently-asked questions regarding regulations on foreign investment, deal structures, corporate governance and tax.

Of course, we and the local firms featured in these pages would be happy to discuss any issues arising from your investment plans for the region. Please do not hesitate to contact us.



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VIETNAM

1. The legal system

- Vietnam has a socialist legal system based on the French civil law system. Cases are decided based on statutory provisions. Decisions of courts are generally not considered to be binding legal precedents for future cases, although in 2016 the Supreme Court endorsed certain cases as having precedential value.
- M&A activities in Vietnam are primarily governed by the 2014 Enterprise Law, the 2014 Investment Law, the 2006 Securities Law (amended in 2010) and general legal principles set out in the 2015 Civil Code and the 2005 Commercial Law.
- International treaties to which Vietnam is a party are also relevant for any M&A transaction related to Vietnam, including, most notably, Vietnam's commitments for accession to the WTO in 2007 ("WTO Commitments").

2. Are there any restrictions on foreign investment ownership?

- Generally, a foreign investor is entitled to own an unlimited proportion of equity in a local entity, except for certain service sectors (such as banking) in which foreign ownership is restricted or conditional.
- Foreign investors may incorporate a local company in the form of either a wholly foreign-owned company or a joint venture with Vietnamese entities, subject to certain sector-specific restrictions (such as advertising, logistics, and tourism). Please refer to the Annex for a list of common sectors for which foreign investment remains conditional or restricted.

3. What are the options available for an overseas investor in terms of the purchasing entity?

- Overseas investors may choose to acquire equity and become shareholders of an existing local entity, or incorporate either a new joint venture with Vietnamese partners or a wholly foreign-owned entity. Unless investing in sectors that restrict or impose conditions on foreign ownership and require participation of a local partner (such as advertising), or in the case where a Vietnamese partner has a particular piece of land that is ideally suited for development of the project, most foreign investors prefer the operational flexibility of establishing their own entity.
- A limited liability company ("LLC") can have no more than 50 members. A joint stock company ("JSC") must have at least three shareholders and there is no

limitation on the maximum number of shareholders. A JSC with 100 shareholders or more is a public company. An LLC has a simple corporate structure and therefore is preferable for foreign investors that intend to have complete control of a business. In the event there are multiple shareholders, a JSC may be preferable as a JSC may issue bonds and multiple classes of shares (whereas an LLC may not).

- Shareholders of a JSC are entitled to freely transfer their shares, except that founding shareholders are prohibited from transferring their shares within three years of incorporation unless approved by the general meeting of shareholders ("GMS"). In contrast, in an LLC, transfer of shares is subject to a mandatory right of first refusal by the other members. Equity transfers at prices lower than the market price are likely to be questioned by the tax authorities¹.
- For the initial issuance of shares, the minimum par value is VND10,000 (approx. US\$0.44).

4. Key corporate governance considerations for a local incorporated entity

- Investors in an LLC exercise their power to manage the company through the President for a single-member LLC if the owner elects to appoint only one representative, or a Members' Council for multi-member LLCs or single-member LLCs having three to seven representatives.
- In a JSC, the GMS is the highest management body. The Board of Management ("BOM") is responsible for overall management of a JSC. The BOM may have from three to 11 members, who are appointed by the GMS with a term of no more than five years. A shareholder or group of shareholders holding at least 10% of the shares in a JSC for six consecutive months is entitled to nominate a member for appointment to the BOM. Members of the BOM are elected in a cumulative voting process.
- For a JSC, the voting threshold for passing an ordinary resolution and a special resolution of the GMS is 51% and 65% of the voting shares of attending shareholders, respectively, unless the corporate charter (Vietnam's functional equivalent of the articles of association) provides otherwise. For the Members' Council of an LLC, this threshold is 65% and 75% respectively.
- Certain transactions between a JSC and its related parties (i.e., shareholders, managers and their related persons) are prohibited by law, while other

¹ Article 14.2 of Circular 78/2014/TT-BTC

transactions are subject to the approval of the GMS or BOM.

5. Brief overview of structure, documentation and execution

- There are three general options for structuring an M&A transaction: (i) share acquisition, (ii) asset acquisition and (iii) merger. Share acquisition is the most common structure in the Vietnamese market, as certain types of assets (in particular, land and fixtures) cannot be sold to foreign investors.
- Convertible loans are common investment structures due to regulatory restrictions on investment in certain sectors and long time lags for obtaining regulatory approvals for investment (despite many of which having now been phased out under the WTO Commitments).
- Transaction documentation for a share acquisition would include a customary sale and purchase agreement (“SPA”) or share subscription agreement, as well as a shareholders agreement, if the acquisition is for less than 100% of the target company’s shares.
- Investors may need to obtain regulatory consents depending on the target company and the type of transaction. For example, in the context of a share acquisition, if a foreign investor is subscribing for, or purchasing, 51% or more of the equity in the private target company, or the target operates in a foreign investment-restricted sector (such as education), approval from the relevant provincial Department of Planning and Investment (“DPI”) must be obtained.
- In the context of a private placement, defined under Vietnamese law as an offer to sell shares to less than 100 investors without using public media, the DPI must approve a placement for a privately held company and the SSC must approve the placement for a public company.
- The 2014 Investment Law provides that the DPI should issue the registration approval within 15 days from receipt of a complete application, although the registration process as a whole may take longer.
- In addition to regulatory consents, M&A transactions require internal approvals and relevant corporate documents including the meeting minutes, resolutions of management bodies, and the amended charter.
- In the context of privately held companies, the share transfer is effective when the target company’s register of shareholders is updated to reflect the transaction and for LLCs, when the DPI issues an amended enterprise registration certificate recording the name of the new owner. Share certificates are

often issued to investors in privately held companies; however, Vietnamese law does not attach legal value to certificates of securities as evidence of share ownership.

- As a post-closing procedure, documents showing registration of the proposed investment in the company pursuant to the law are often required (i.e., the amended charter for either a LLC or JSC).

6. What conditions precedent typically need to be satisfied before closing?

i. Target company regulatory conditions

- » If the target company operates in conditional sectors (for example, education and lending), the foreign investor should ensure that the target company has complied with all conditions and sub-licences required under the laws to operate in such sector.

ii. Specialised regulatory approvals

- » Foreign investment in certain specialised sectors is subject to specific regulations promulgated by (and in some cases requires the approval of) that regulator. Examples include the State Bank of Vietnam (“SBV”) with respect to commercial banks and consumer finance companies, and the Ministry of Finance (“MOF”) with respect to insurance companies. For such companies, DPI approval is usually not required.

iii. Antitrust requirement

- » Currently, antitrust compliance is not a significant concern for foreign investors as very few filings have been made to date. However, there is a draft Competition Law that will take effect in 2018, which may result in additional reporting and disclosure obligations.
- » Under the current law, there is no antitrust requirement applicable to M&A transactions resulting in the parties having a combined market share of less than 30% in the relevant market, nor is there a mechanism to make a voluntary notification. In case the proposed transaction will result in its parties’ combined market share in the relevant market at between 30% and 50%, a notification to the Vietnam Competition Administration Department (“VCAD”) is required². Certain transactions resulting in the parties’ combined market share of more than 50% are prohibited³.

² Article 20 Competition Law

³ Article 18 Competition Law

- » An M&A transaction may be subject to preliminary investigation upon (i) a complaint which has been accepted by the authority or (ii) discovery of indication of violation by the VCAD. The preliminary investigation may take around 30 days. Official investigations, which could take up to 300 days, may be carried out if the results of the preliminary investigation indicate that there are violations of the competition regulations⁴.
- » Parties to an M&A transaction violating the competition regulations may be subject to administrative sanctions including (i) monetary fine of up to 10% of the total revenue in the financial year before the year in which such violation was committed, and (ii) withdrawal of the enterprise registration certificate or compulsory demerger, split or sale of the acquired shares⁵.

iv. **Employment**

- » Foreign-owned entities are not restricted in hiring Vietnamese citizens under the labour regulations of Vietnam.
- » When hiring employees in Vietnam, priority should be given to hiring Vietnamese citizens and expatriates should only be employed if there are no suitably qualified Vietnamese candidates available. The use of expatriates by local entities (including foreign-owned companies) is subject to the approval of the local People's Committee and Department of Labour, Invalids and Social Affairs.
- » In a share acquisition deal, there is no need to consult with the employees of the target company. In the case of a corporate restructuring which results in a change of the employer, employment contracts may be automatically transferred to the buyer on the existing terms.
- » In a business or asset acquisition deal, the employer (i.e., the seller) is responsible for implementing a plan for employment by the purchaser of its current staff. Where an employee's labour contract is terminated due to such a transaction, the current employer shall pay for his/her unemployment allowance.
- » Foreign investors in share acquisitions should also ensure that due diligence is performed verifying the target company's compliance with payments into statutory social insurance schemes. This is an area that has resulted in warranty claims having

been brought on Vietnamese M&A deals previously.

v. **Material adverse change**

- » Inclusion of a no material adverse change clause is common in Vietnamese M&A transactions. There is no clear market standard as to preferred wording.

7. What are the options available to the foreign investor in terms of financing the transaction?

- i. General Overview** - Foreign investors will need to ensure that their Vietnam indirect investments are funded from Vietnam dong ("VND") accounts opened at licensed banks in Vietnam. A foreign investor may only open one indirect capital contribution account to fund its indirect investments in Vietnam. Investors are generally required to source the funds for this account from overseas accounts in their name. They should be aware that it may take one month or longer to open this account given Know Your Customer procedures and requirements that corporate documents submitted to the banks are legalised and consularised.
- ii. Onshore borrowing** - As discussed above, foreign investors must fund their investments in Vietnam through specific accounts in their name with funds sourced from overseas. As such, it is very difficult for foreign investors to avail themselves of local acquisition financing. While uncommon, local acquisition financing would theoretically be legally possible for an asset acquisition.
- iii. Offshore borrowing** - There are structural challenges to offshore acquisition financing as well, though this is becoming more common in the market. As discussed above, foreign investors are required to source their funds for Vietnam investments from accounts in their own name. Most acquisition financiers would prefer to fund the seller's account directly to avoid any leakage from the funding structure. Moreover, enforcement of share mortgages or other onshore security in Vietnam by an offshore acquisition financier would be difficult in practice and require special approvals from the SBV at the time of enforcement.

⁴ Article 86, 87, 88, 90 Competition Law

⁵ Article 23, 24, 25, 26, 27 Decree 71/2014/ND-CP

8. What are the key tax considerations for the foreign investor?

i. Corporate income tax

- » The standard corporate income tax rate on the taxable profits of a business in Vietnam is 20% (certain industries such as oil and gas are subject to a higher tax rate).

ii. Capital gains tax

- » Capital gains for foreign sellers are subject to 20% capital gains tax unless this is exempted under a favourable tax treaty. The taxable gain is determined as the amount of the sales proceeds less investment cost and transfer expenses.
- » However, gains from the sale of shares in a public company or listed company are subject to tax at 0.1% of gross sales proceeds, which provides an incentive to exit through a public rather than a private company.
- » The payment is due within 10 days from the date of official approval of the sale by a competent body or, where approval is not required, 10 days from the date of the SPA.
- » Foreign sellers will be required to show evidence of tax clearance to their remitting banks before the bank will permit the seller to remit foreign currency out of Vietnam.

iii. Withholding tax

- » Withholding tax of 5% applies to interest payments on loans. The payer is required to withhold the tax before paying income to lenders in the form of interest.
- » Vietnam is a party to a number of double tax treaties and treaty relief for withholding tax on interest payments may be available under such treaties.
- » Currently, there is no withholding tax on dividends. Vietnam levies 10% withholding tax on royalty payments unless reduced under a favourable tax treaty.

9. Is arbitration a common option for dispute resolution?

- Foreign investors often prefer to select international arbitration as the dispute resolution mechanism for transactions. Foreign court judgments would generally not be enforceable in Vietnam.
- Vietnam is a party to the 1958 New York Convention, and therefore an award rendered by a convention state member is enforceable in Vietnam. A foreign award from a country that is not a party to the convention may also be enforced in Vietnam on a reciprocal basis.
- To date, few international arbitration awards have actually been enforced in Vietnam, though the general perception is that the enforcement record is improving.

10. Is there a requirement that the agreement be executed in the local language?

- No, there are no language requirements unless the agreement is submitted to a Vietnamese regulator or a court, in which case a translation of the agreement must be submitted in the Vietnamese language.

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Annex

Common sectors for which foreign investment remains conditional or restricted:

Distribution	Foreign investors are entitled to establish wholly foreign-owned companies providing distribution services of all legally imported and produced products, subject to the approval of the Ministry of Industry and Trade. Establishing more than one retail outlets by a foreign-invested company (regardless of the level of foreign shareholding) may be subject to an economic needs test requirement with limited exceptions.
Banking	Foreign banks are permitted to form 100% subsidiaries with equity of at least VND 3,000 billion (approx. US\$131 million) in the form of an LLC, subject to SBV approval. Foreign investors are entitled to acquire shares in domestic banks with the aggregate foreign shareholding not exceeding 30% of such bank's equity and no single individual foreign shareholder (and related persons) may hold more than 20% of the equity in a domestic bank. Foreign investors acquiring 5% or more of a domestic bank's equity must also fulfil certain conditions as to profitability and an asset base.
Insurance	Foreign insurance service providers are entitled to establish 100% foreign-invested insurance companies with the approval of MOF. Insurance companies are subject to several conditions including minimum equity and reserves, which vary depending on the type of insurance to be provided.
Logistics	Most logistics services are open to 100% foreign investment. However, limitations on foreign ownership are still applicable to some strategic services, such as 50% for container handling service, and less than 100% for customs clearance service.
Education	The education sector is now 100% open to foreign investment. The institutions may be required to fulfil several conditions, such as minimum investment capital, facilities including land area, teaching programmes, number of teachers and approval of the curriculum. As education is a conditional sector, a foreign investor's acquisition of even a <i>de minimis</i> stake in a Vietnamese educational institution requires DPI registration.
Aviation	Foreign ownership in aviation companies is capped at 30%. Airlines with up to 10 airplanes must have equity of at least VND 700 billion (approx. US\$ 30 million) for international service and VND 300 billion (approximately US\$13 million) for domestic service. Transfer of shares of a domestic airline to a foreign investor is permitted after two years from being licensed and subject to the approval of the Ministry of Transportation.
Energy	Investment in renewable energy projects (hydropower, solar, and wind) must be included in the Prime Minister's master plan for power, or added to the master plan before the licensing process may begin. After this, the project must obtain in-principle approval from the National Assembly, the Prime Minister or the local People's Committee, depending on the size and scope of the project, and the foreign investor is ultimately issued with an investment registration certificate ("IRC"). After the issuance of IRC, the foreign investor may incorporate the project company.



THAILAND

1. The legal system

- The legal system in Thailand follows the civil law system in continental Europe. Cases are decided based on statutory provisions. Decisions of courts are not considered to be binding legal precedents for future cases.

2. Are there restrictions on foreign investment ownership?

- Yes. The main piece of legislation is the Foreign Business Act B.E. 2542 (1999) (“FBA”), which limits the rights of foreigners to engage in certain business activities such as trading and provision of services in Thailand.
- The FBA restricts businesses in three categories: (i) absolutely prohibited to foreigners without exceptions (e.g., land trading, the press, forestry from a natural forest), (ii) permission required from the relevant Minister with the approval of the Council of Ministers (e.g., production of sugar from sugar cane, salt farming, mining), and (iii) permission required from the Ministry of Commerce (e.g., brokerage or agency businesses, sale of goods and beverages, hotel business).
- However, in case of a foreign company which is promoted by the Board of Investment of Thailand (“BOI”), such company may be permitted to operate a restricted business (for the second and third categories only), and the company would not be required to obtain permission from the relevant Minister with the approval of the Council of Ministers or from the Ministry of Commerce, as the case may be. The company would still be required to obtain a certificate from the Ministry of Commerce.
- Foreigners are also prohibited from owning land in Thailand, although leasing land is permitted. Foreign companies, with BOI approval, may be permitted to own land for BOI-promoted business activities.

3. What are the options available for an overseas investor in terms of the purchasing entity?

- A foreign entity or individual may directly acquire and hold up to 49% of the total share capital of a Thai target company without being subject to the FBA.
- If a foreign investor opts to use an acquiring vehicle, a private limited company incorporated in Thailand is commonly used.
- There is the statutory minimum requirement of three shareholders for a company incorporated in Thailand.

- There is no minimum required registered capital value, but the minimum required par value of a share is 5THB.
- A Thai company must have a registered office in Thailand.
- The registration of the incorporation of a company may be completed within one day, provided that the complete set of application and documents is submitted.

4. Key corporate governance considerations for a local incorporated entity

- There is no requirement on the nationality of a director, but a director must be a natural person.
- A company secretary is not required.
- The company must appoint an auditor upon the registration of its incorporation and also subsequently on an annual basis. The existing auditor may be re-appointed.
- A company is required to prepare a balance sheet and a profit and loss account annually for auditing by the company’s auditor. The financial statements must then be submitted for adoption at a general meeting of the company within four months from the end of the fiscal year.
- If dividends are distributed, a company must appropriate at least 5% of the profits into a reserve fund until the reserve fund is at least 10% of the capital of the company or a higher amount as stipulated by the company. The reserve cannot be distributed until liquidation.

5. Brief overview of structure, documentation and execution

- Both share deals and asset deals, but share deals may be more common as less transfer tax is incurred if the target company owns real property.
- The contents of a sale and purchase agreement (“SPA”) in Thailand are broadly similar to an SPA for acquiring a company in Singapore, England or Hong Kong. It is common for:
 - » Completion to be subject to conditions precedent (see below)
 - » A tax indemnity to be provided by the sellers
 - » Warranties to be qualified by disclosures in a disclosure letter
 - » Liability to be capped, with a *de minimis* threshold
 - » No general material adverse change condition precedent
 - » Data room to be set up for the purpose of buyer’s due diligence

- For a share deal, at completion, (i) an instrument of transfer is executed by both transferor (seller) and transferee (buyer) and by the witnesses and each party keeps a copy, (ii) the old share certificate of the transferor is cancelled and a new share certificate is issued to the buyer by the target company, (iii) the particulars of the share transfer is recorded in the share register book of the company, and (iv) the updated list of shareholders of the company is filed with the Department of Business Development, Ministry of Commerce. The effective date of the share transfer is the date on which both parties execute the share transfer instrument. The completion process may be concluded within one day.
- In case of an asset deal where the target company has a BOI certificate, it may be possible to transfer the BOI-promoted business activity to the buyer upon an application to the BOI by both the transferor and transferee. If approved, the transferee will be entitled to BOI certification privileges such as being 100% or majority foreign-owned in operating the BOI-promoted activity, and being entitled to own land for such BOI-promoted activity.
- In case of a share deal where the target company has a BOI certificate, there is usually a notification requirement for any change in the ratio of the company's Thai shareholders to foreign shareholders and change in the shareholding of foreign nationals.

6. What condition precedents typically need to be satisfied before closing?

i. **Antitrust approval**

- » Thailand's new Trade Competition Act B.E. 2560 (2017) ("TCA") came into force on 5 October 2017.
- » The TCA stipulates that prior approval from the Trade Competition Commission ("TCC") is required for any merger that may create a monopoly or dominant business operation, as defined in the guidelines published by the TCC.
- » The TCC takes up to 90 days to complete the approval procedure. A business operator granted permission to proceed with the merger is required to do so within the time period and in accordance with conditions set by the TCC.
- » Under the TCA, the term "merger" includes: (i) mergers among producers, sellers, producers and

sellers, or service providers, resulting in one business remaining and the others' business terminating, or a new business coming into existence; (ii) acquisition of all or part of the assets of another business in order to control its business policy, business direction, administration or management as set out in the guidelines published by the TCC; and (iii) acquisition of all or part of the stocks of another business, whether directly or indirectly, in order to control its business policy, business direction, administration or management as set out in the guidelines published by the TCC.

- » In addition, any merger resulting in a significant reduction of competition in a market must be reported to the TCC within seven days from the date of the merger.

ii. **Employment**

- » Foreign employees are required to obtain work permits from the Department of Employment before commencing work in Thailand.
- » A work permit application must be sponsored by a local employer. The local employer must have fully paid-up registered capital of at least two million THB (approx. US\$60,000) and the ratio of foreign employees to Thai employees must not exceed 1:4.
- » There is no need to consult the employees of the company in a share or asset acquisition deal.
- » In an asset acquisition deal, employment contracts may be transferred to the buyer on the existing terms with the employees' consent. In practice, each employee will be required to sign (i) a new employment contract with the new employer, and (ii) a consent letter for the employment transfer with both the original employer (seller/transferor) and the new employer (buyer/transferee) to confirm that the employment period will continue from the date of employment by the original employer and that the terms of employment with the new employer will be the same or not less favourable.

iii. **Material adverse change**

- » No material adverse change as an express condition precedent is not common, unless there is a long gap between signing and completion.



7. What are the options available to the foreign investor in terms of financing the transaction?

- i. **Onshore borrowing** – Banks may lend THB to non-residents (including foreign-owned companies), which are not financial institutions for any purpose in Thailand including investments in financial assets.
- ii. **Offshore borrowing** – Foreign financing is not specifically prohibited. The foreign funds repatriated out of Thailand is subject to withholding tax on interest earned by foreign banks from the financing.
- iii. **Exchange control** – Foreign currencies can be transferred or brought into Thailand without limit, provided that if such amount is US\$50,000 or more, the submission of a form and notification of the purpose of the fund transfer with supporting evidence is required. Remitting currency overseas requires approval from the Bank of Thailand (“BOT”). In practice, however, the approval of most transactions is subject to exchange control regulation, which is delegated by the BOT to the commercial banks in Thailand.

8. What are the key tax considerations for the foreign investor?

- i. **Corporate income tax**
 - » Businesses in Thailand are subject to corporate income tax on their taxable profits at the general rate of 20%.
- ii. **Capital gains tax**
 - » If a foreign investor derives a gain from the sale of shares of a Thai company such gain would be subject to a withholding tax of 15% unless this is exempted under a favourable tax treaty. The purchaser of the shares is required to withhold the tax.
 - » Gains realised on the sale of shares of companies listed on the Stock Exchange of Thailand are exempt from tax.
 - » Revenue (or “trading”) gains are generally taxable if they are sourced in Thailand, unless they are specifically exempted from tax under the Thai Revenue Code.
- iii. **Share transfer tax**
 - » Stamp duty is payable on share transfer

instruments in relation to shares of a Thai company. The rate is 0.1% of the transfer price.

- » The document must be stamped within 15 days after the signing of the document if it is signed in Thailand, or within 30 days after receiving the document in Thailand if the document is signed overseas.
- » The passing of legal title in the shares is not conditional upon payment of stamp duty, although penalties may be incurred for late payment.

iv. **Property transfer tax**

- » The registration of the transfer of immovable property in case of a corporate seller is subject to (i) a government transfer fee of 2% of the official appraisal price; (ii) a withholding corporate income tax of 1% of the official appraisal price or transfer price, whichever is higher; and (iii) a specific business tax of 3.3% of the official appraisal price or transfer price, whichever is higher.
- » The government transfer fees and taxes are payable at the relevant land office at the time of the registration of the transfer.

v. **Withholding tax**

- » If a person makes certain types of payments, such as payment of interest, to any non-resident company, the payer is required to deduct withholding tax at a current rate of 15%. Any payment on commission or fees relating to any loan or indebtedness, service fees or royalty payments for the use of movable properties could also be subject to withholding tax.
- » Royalties paid to a foreign corporation not carrying on business in Thailand are subject to a withholding tax of 15% subject to any reduction specified in a double tax agreement.
- » The abovementioned withholding tax may be avoided or reduced if a favourable tax treaty applies between Thailand and the country of the recipient.

vi. **Dividend income**

- » Dividends paid to non-resident companies and individuals are subject to a withholding tax at a flat rate of 10%.

9. Is arbitration a common option for dispute resolution?

- Yes. There has also been an increased use of arbitration for dispute resolution where the seat is in foreign jurisdictions such as Singapore, Hong Kong or England.
- The typical governing law for M&A transactions is Thai law.

10. Is there a requirement that the agreement be executed in the local language?

- No, there are no language requirements.

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A vibrant photograph of the Singapore skyline. In the foreground, a pond is filled with large green water lily leaves and several purple flowers. A white walkway with a railing and lush greenery runs along the edge of the pond. In the background, a dense cluster of modern skyscrapers, including the Marina Bay Sands, rises against a clear blue sky with a few white clouds. The word "SINGAPORE" is centered in a white box with a green border.

SINGAPORE

1. The legal system

- The legal system of Singapore has its roots in the English common law system. Therefore, many aspects of Singapore law are similar to English law. With respect to company law, Singapore law is heavily influenced by English law and Australian law.

2. Are there any restrictions on foreign investment ownership?

- No, but certain regulated industries may require prior approval for a change in ownership.
- Foreign individuals/foreign-owned entities may readily incorporate a company in Singapore.

3. What are the options available for an overseas investor in terms of the purchasing entity?

- Most acquisitions by foreign investors are made using a Singapore private, limited liability company. Such entities can be readily incorporated (usually within a day).
- The maximum number of shareholders of a private limited company is 50.
- The minimum share capital requirement is S\$1. However, if the business operates in a regulated sector, there may be minimum paid-up capital requirements as determined by the relevant authority.
- There is no par or nominal value requirement for shares.
- The company must have a registered office in Singapore. Registration must be made with the Accounting and Corporate Regulatory Authority (“ACRA”). The company name must be approved by ACRA before incorporation.

4. Key corporate governance considerations for a local incorporated entity

- Upon registration, the company must appoint at least one director, one shareholder and one company secretary (within six months of incorporation).
- At least one director is required to be an “ordinarily resident in Singapore”, generally (i) a Singapore Citizen or (ii) a Singapore Permanent Resident or (iii) an EntrePass holder or (iv) an employment pass holder. Corporate secretarial firms in Singapore offer nominee director services to meet this requirement.
- All directors must be individuals.
- The company secretary must be an individual with

principal or only place of residence in Singapore.

- The company must appoint an auditor within three months after incorporation (unless exempt from audit requirements).
- The time requirement for incorporating a company may be as short as one day, as the company registration process is computerised.

5. Brief overview of structure, documentation and execution

- Both share deals and asset deals, but share deals are more common.
- The contents of a sale and purchase agreement (“SPA”) in Singapore are broadly similar to an SPA for acquiring a company in England or Hong Kong. It is common for:
 - » Completion to be subject to conditions precedent (see below)
 - » A tax indemnity to be provided by the sellers
 - » Warranties to be qualified by disclosures in a disclosure letter
 - » Liability to be capped, with a *de minimis* threshold
 - » No general material adverse change condition precedent
 - » Data room to be set up for the purpose of buyer’s due diligence
- Warranty and indemnity insurance is increasingly popular.
- For a share deal, at completion, an instrument of transfer is delivered, a share certificate issued and the share transfer takes legal effect when the electronic register of members kept by ACRA is updated by the Registrar of Companies. The effective date of update of the register is the date of filing with ACRA, and the completion process may be concluded within one day.

6. What condition precedents typically need to be satisfied before closing?

i. Antitrust approval

- » The merger notification regime in Singapore is voluntary. No antitrust approval is required prior to signing or closing but laws regarding competition must be taken into account.
- » The Competition Commission of Singapore (“CCS”) requires all parties of a proposed merger to conduct a self-assessment in accordance with the guidelines published by the CCS to determine whether a merger filing is necessary.

- » A filing before closing is highly recommended if the parties find that their merger may substantially lessen competition, by exceeding the indicative thresholds set by the government:
 - the post-merger entity will have a market share of 40% or more; or
 - the post-merger entity will have a market share of between 20% and 40% and the post-merger market share of the three largest firms is 70% or more.
- » At the end of Phase 1 review, the CCS may hand down its decision, which takes around 30 working days. If further investigation is required before a decision can be reached, a Phase 2 review may be conducted, which takes around 120 working days.
- » The CCS is also unlikely to investigate a merger that only involves small companies (i.e., companies with turnover in the preceding year of < S\$5 million (approx. US\$3.7 million) in Singapore or < S\$50 million (approx. US\$37 million) globally).
- » However, under the Competition Act, CCS reserves its power to investigate a merger that does not cross these thresholds, yet raises competition concerns.
- » The CCS has the discretion to take enforcement actions against any company that causes an “appreciable adverse effect” on market competition in Singapore. This includes the imposition of fines, prohibition of the anticipated merger, requiring a merger to be dissolved or modified in such manner as the CCS may direct, entering into specified agreements designed to prevent or lessen the anti-competitive effects, and disposal of certain operations, assets or shares.

ii. Employment

- » While Singapore does not impose any restrictions or regulations against foreign companies hiring in Singapore, there are provisions in place regarding foreigners’ employment.
- » As part of the government’s effort to strengthen the Singaporean workforce, for jobs ranging from a monthly salary of S\$3,600–S\$12,000 (approx. US\$2,660–US\$8,870), there is no quota on the number of hires but employers are required to advertise certain job openings locally prior to engagement of a foreign employee. For lesser-paying jobs, the government regulates foreign

employment levels with quotas and levies, which fluctuate depending on the sector.

- » There is no need to consult the employees of the company in a share acquisition deal.
- » In an asset acquisition deal, employment contracts may be automatically transferred to the buyer on the existing terms. However, this excludes employees who fall out of the scope of the Employment Act, such as managers or executives with monthly basic salary of more than S\$4,500 (approx. US\$3,330), whose contracts will need to be separately negotiated with the purchaser.
- » A foreigner must have a valid work permit issued by the Ministry of Manpower before commencing employment. There are different types of passes and permits applicable to different types of employees. The typical processing time for applications is around one week to 4 weeks, depending on the type of pass applied for.
- » Prior governmental approval must be obtained for any acquisition of landed residential property by foreign individuals/entities. Industrial and commercial properties may be purchased without governmental approval.

iii. Material adverse change

- » No material adverse change as an express condition precedent is not common, unless there is a long gap between signing and completion.

7. What are the options available to the foreign investor in terms of financing the transaction?

- i. Onshore borrowing** - Banks may lend SGD to non-residents (including foreign-owned companies), which are not financial institutions for any purpose (including investments in financial assets) in Singapore.
- ii. Offshore borrowing** - Foreign financing is permitted for non-residents, subject to withholding tax on interest earned by foreign banks from the financing.
- iii. Exchange control** - There are no restrictions nor limits on non-residents maintaining SGD or foreign currency bank accounts in Singapore and no restrictions on remitting currency overseas.



8. What are the key tax considerations for the foreign investor?

i. Corporate income tax

- » Businesses in Singapore are subject to corporate income tax at the general rate of 17% on their taxable income. Singapore operates a semi-territorial tax system, which does not impose tax on offshore sourced income not received in Singapore unless the income is exempted from income tax as a qualifying foreign exempt dividend or branch profit.

ii. Capital gains tax

- » Capital gains are not taxable in Singapore.
- » However, revenue (or “trading”) gains are generally taxable if they are sourced in Singapore, unless they are specifically exempted from tax under the income tax law.

iii. Share transfer tax

- » Stamp duty is payable on any written document that relates to a transfer of shares of a Singapore-incorporated company, such as an SPA, transfer document for shares and mortgage for shares. The rate is 0.2% of the higher of the consideration paid per share or the net asset value per share.
- » The document must be stamped within 14 days after signing the document if it is signed in Singapore or within 30 days after receiving the document in Singapore if the document is signed overseas.
- » Qualifying internal reorganisations and amalgamations are exempt from stamp duty provided that a timely application is made for the exemption.

iv. Property transfer tax

- » Stamp duty is payable on any written document that relates to any immovable property such as tenancy agreements, transfer documents (concerning sale, purchase, acquisition or disposal of properties) and mortgages for properties.
- » The rate is 1% for the first S\$180,000 (approx. US\$133,000), 2% for the next S\$180,000 (approx. US\$133,000) and 3% thereafter. Certain categories of buyers/sellers may be subject to buyer’s stamp duty, additional buyer’s stamp duty (“ABSD”) or seller’s stamp duty.
- » ABSD rates are at a flat 15% for the total amount, and is payable on top of the buyer’s stamp duty.

However, ABSD only applies to the purchasing of residential and not commercial properties.

v. Withholding tax

- » If a person makes certain types of payments, such as payment of interest to any non-resident company, the payer is required to deduct withholding tax at a current rate of 15%. Any payment on commission or fees relating to any loan or indebtedness, service fees, royalty payments for the use of movable properties or payment for the use of scientific and industrial knowledge could also be subject to withholding tax.
- » A 10% withholding tax applies to royalty payments made to non-residents.
- » Singapore does not levy withholding tax on dividends, regardless of the location of the shareholder(s).
- » Withholding tax may be avoided or reduced if a favourable tax treaty applies between Singapore and the country of the recipient (Singapore has a favourable tax treaty network with some 90 countries).

vi. Dividend income

- » Dividends received from Singapore companies are not subject to income tax, whereas dividends received from overseas companies are subject to (17%) income tax only if the dividend is received in Singapore (a dividend is received in Singapore if it is brought into Singapore or paid to a Singapore bank account of the recipient based in Singapore or if it is deemed received in certain cases), unless the dividend qualifies as a foreign tax exempt dividend under the income tax law.
- » In order to qualify as a tax-exempt dividend, the dividend must be (i) paid by a company in a jurisdiction with a headline tax rate of at least 15%, (ii) paid out of profits which have been taxed in that jurisdiction (the effective tax rate on the profit needs not be 15% and the “tax” alluded to could be either income tax or dividend withholding tax in that jurisdiction), and (iii) the Comptroller of the Inland Revenue Authority of Singapore is satisfied that the tax exemption would be beneficial to the person resident in Singapore.
- » A concessionary tax exemption may apply to dividends paid by overseas holding companies, which do not satisfy these conditions, provided

that the Singapore company has sufficient substance and the ultimate source of the dividends originates from companies which satisfy the abovementioned two tests.

9. Is arbitration a common option for dispute resolution?

- Yes. There has also been an increased use of Singapore as the seat of arbitration.

10. Is there a requirement that the agreement be executed in the local language?

- No, there are no language requirements.

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INDONESIA

1. The legal system

- The legal system of Indonesia has its roots in the Dutch civil law system. This was developed under the 1945 Constitution, which retained legislation from the colonial period but has been progressively replaced with specific primary legislation.
- Two of the most important pieces of legislation in an M&A context are the Civil Code and Law No. 40 of 2007 on Limited Liability Company (“Company Law”). Article 1338 of the Civil Code codifies the principle of freedom to contract, and therefore enables parties to execute typical M&A instruments such as a sale and purchase agreement (“SPA”) and a shareholders’ agreement (“SHA”).

2. Are there any restrictions on foreign investment ownership?

- Yes. Foreign investment in an Indonesian company is permitted under Law No. 25 of 2007 on Capital Investment (“Investment Law”) but is subject to a fairly extensive regulatory framework. A limited liability company is known as a *perseroan terbatas* (“PT”) in Indonesia. If a foreign investor directly or indirectly acquires equity in a PT company, that transaction will require prior approval from the Indonesian Investment Coordinating Board (*Badan Koordinasi Penanaman Modal*, “BKPM”). This is because the BKPM is required to supervise any company, which has a direct or indirect foreign shareholder pursuant to the Investment Law.
- Upon receipt of that BKPM approval, the PT company receives an additional classification, and is known as a *Perseroan Terbatas Penanaman Modal Asing* (“PMA”) company. The PMA company will remain under the supervision of the BKPM so long as it retains a direct or indirect foreign shareholding, however small. Any subsequent direct acquisition of, or subscription for, equity in the PMA company, will require BKPM approval. This chapter will therefore predominantly focus on PMA companies.
- It is also possible to form a PMA company from the outset, provided there is the requisite initial foreign investment. The proposed shareholders would obtain BKPM approval before incorporating the company, which would otherwise be incorporated in the usual manner. Once a PMA company has been approved, any subsequent direct share transfers in a PMA company would also require BKPM approval.
- The principal instrument under which foreign investment in a PMA company’s activity is regulated

is Presidential Regulation No. 44 of 2016 on the List of Business Fields Closed and Business Fields Open with Conditions to Investment, informally known as the “Negative List”.

- A PT company may conduct multiple lines of business. A PMA company may, in theory, also do so; but in practice a PMA company is likely to be approved to conduct only one main line of business (or closely linked lines of business). Lines of business are codified in Indonesia under what is called the Formal Classifications of Business Activities (*Klasifikasi Baku Lapangan Industri* or “KBLI”). The Negative List, in turn, lists the KBLI codes that are either closed to foreign investment, partially open to foreign investment or subject to specific conditions for foreign investment. For example, power generation of greater than 10 megawatt is open to PMA companies with up to 95% foreign ownership, whereas hotel ownership up to two stars is restricted to PMA companies with up to 67% foreign ownership. Some businesses, such as retail, are restricted entirely to domestic ownership.
- When calculating the shareholding percentage, any direct or indirect share in an Indonesian shareholder held by a foreigner means that the shareholder is deemed to be 100% foreign for the purposes of determining its shareholding in the PMA. For example, consider a PT company (“Target”) that is 60% owned by Indonesian Shareholder A and 40% by Indonesian Shareholder B. If Shareholder B sold all its shares in the Target to a Singapore-based buyer, the Target would (following BKPM approval) be designated a PMA company with a 40% foreign shareholding for Negative List purposes. If, then, another foreign investor acquired 10% of the shares in Shareholder A, two consequences would occur: (i) Shareholder A would be classified as a PMA company; and (ii) Shareholder A would, therefore, because of its PMA status, be considered entirely foreign for the purposes of the Negative List. The Target would be considered 100% foreign-owned, even though in reality the beneficial Indonesian ownership in the Target would be 54%. Therefore, while indirect changes in a PMA company’s shareholding (e.g., transfers of shares in a parent company of a shareholder) are not a rule regulated by the BKPM, investors always need to consider the implications of even a small foreign investment into the chain of ownership of a shareholder who had previously been entirely Indonesian.

- It should be noted that the Negative List is only a starting point, as any foreign investment is subject to specific sector regulations. For example, there are specific restrictions on foreign shareholding in the mining sector (currently capping most production stage foreign ownership at 49%). The BKPM also always has discretion to refuse approval for a foreign investment, even if the investment is consistent with the Negative List, although it rarely does so.
- Indonesia has tried to expressly limit so-called pure nominee structures, which aim to work around these restrictions. The Investment Law prohibits structures where one party owns shares on behalf of another. Regulations do not provide additional detail on how this restriction works, and it is therefore strongly influenced by policy considerations, which change from time to time. At its core, though, it is acknowledged that such law prohibits structures where Indonesians agree to hold shares on behalf of foreigners where the purpose of the structure is to control and benefit from an Indonesian company in a manner inconsistent with the Negative List prohibitions. If a company is public, it is also regulated by Indonesia's Financial Services Authority (*Otoritas Jasa Keuangan*). This summary, though, focuses on private M&A.
- Practically, the BKPM is moving towards acting as a "one-stop shop" to manage the process by which a PMA company obtains all of its operating licences. Ministries have delegated authority to the BKPM to issue certain licences and have begun to second staff to the BKPM to provide the necessary expertise to assist the BKPM officials with this role.

3. What are the options available for an overseas investor in terms of the purchasing entity?

- In principle, a foreign investor may invest in an Indonesian company (subject to the requirements in Section 2 of this Chapter) through either an offshore or an Indonesian vehicle. For the reasons given in Paragraph 4 of Section 2 of this Chapter, investing through a foreign-owned Indonesian subsidiary does not assist with reducing the foreign ownership percentage.
- Under the Company Law, the minimum paid-up share capital for any PT company is 25% of the company's authorised capital. The authorised capital under the Company Law must currently be at least Rp50 million

(approx. US\$3,800) for a PT company and Rp2.5 billion (approx. US\$188,000) for a PMA company.

- The BKPM must also approve the initial investment plan of a PMA company (including the sources and uses of its debt and equity funding). The BKPM will typically issue an in-principle license to a target company upon the initial foreign investment. Based on the approved investment plan, a full business license will be granted to the company after it has "realised" that investment. For example, a PMA company building a project would apply the funds, which had been approved as its initial investment to the construction of that project. Upon completion and the start of operations, it would apply to the BKPM for the full business license because at that point it would have realised its investment. Future investments and changes in the investment plan must also be approved by the BKPM.

4. Key corporate governance considerations for a PMA company

- A PMA company must obtain an Investment Registration (*Pendaftaran Penanaman Modal*) from the BKPM (see above).
- Every Indonesian company must execute a Deed of Establishment, including Articles of Association, in notarial deed form, and file these with the Ministry of Law and Human Rights ("MOLHR"). The MOLHR registry functions as the companies registry in Indonesia for all companies.
- Every Indonesian company must have at least two shareholders, one director and one commissioner.
- The board of directors have executive power to act on behalf of the company, except as limited by the Articles. The board of commissioners is required to supervise the activities of the board of directors.
- All directors and commissioners must be individuals.
- Every Indonesian company must hold a general meeting of shareholders ("GMS") within 60 days from the date when it obtains its status as a legal entity, and hold an annual GMS at, the latest, six months after the end of the company's financial year. An extraordinary GMS can be held at any other time, subject to compliance with the Articles of Association; or it can be held at any time as the company may require throughout the year.
- Every Indonesian company must, at each annual GMS, appoint an auditor or auditors to hold office until the next annual GMS.

5. Brief overview of structure, documentation and execution

- Share deals are more common than asset deals in Indonesia.

The contents of an SPA for an Indonesian target are broadly similar to an SPA for acquiring a company under a common law jurisdiction. It is common for:

- Completion to be subject to conditions precedent (see below);
- A tax indemnity to be provided by the sellers;
- Warranties to be qualified by disclosures in a disclosure letter;
- Liability to be capped, with a *de minimis* threshold; and
- A data room to be set up for the purpose of buyer's due diligence.

- It is also common for the shareholders to enter into a SHA, which will include lists of directors' and shareholders' reserved matters. These are particularly important in Indonesia because the Articles of Association of the company are required to conform to a standard template published by the Notaries' Association, which does not replicate many of the more complicated provisions in an international SHA. The template does, however, recognise directors' and shareholders' reserved matters. This is also one of the key ways for a minority foreign shareholder to maintain a level of control over operations of the company, given the issues with nominee structures.
- At closing for a share acquisition, a standard form notarial deed of acquisition is signed, and the target will issue a new share certificate and update its shareholder register. The notarial deed of acquisition is sometimes also referred to as a "SPA" in Indonesia, with the commercial sale and purchase agreement being referred to as the "Conditional SPA" or "CSPA". The share transfer takes legal effect between the parties once the seller and buyer sign the notarial deed of acquisition. However, the acquired company must then submit a notification of the transfer (through a notary) to the MOLHR. The transfer is only perfected against third parties once the MOLHR has either acknowledged or, in some cases, approved the transfer. This MOLHR process is managed by the

notary since only the notary has access to the MOLHR system. There have been instances in Indonesia where the notary's access to the system has been "blocked" by another notary, as there is only one access slot in the system for a particular company's details, which cannot be accessed if already in use. A prudent international buyer should not pay consideration until it has received confirmation of MOLHR approval/ acknowledgement, or, at worst, pay the consideration into escrow. This places a risk on the seller, as it will be exposed for that period by virtue of having signed the notarial deed of acquisition. In practice, parties rely significantly on the notary's ability to process the transaction quickly to minimise this exposure period. Acquisition financiers would not typically release funds until this MOLHR process has been completed.

- The MOLHR only recognises corporate entities, which are registered with it. Therefore, it will refuse any application that is based on a shareholder's name, which is not already registered in its system.

6. What condition precedent typically needs to be satisfied before closing?

- BKPM approvals and approvals from relevant sector regulator;
- No insolvency event and no force majeure event;
- No material adverse change (although this is heavily dependent on the specific transaction);
- Payment of severance compensation as described below;
- Foreign work permits for any foreign directors or employees who will reside and work in Indonesia. It should be noted that, in principle, even foreign-based directors may need a work permit for an importing or exporting company to obtain a customs registration number, but policy around this has changed several times; and
- Lender or third party consents if required under contracts.

EMPLOYEE TRANSFER AND SEVERANCE

- The target may not terminate its employees' contracts because of the acquisition. In the case of a change in ownership (broadly, a change in majority ownership of the target), employees have a right to treat the change as a termination event and leave the company with payment of all accrued benefits, as well as multipliers

in certain circumstances. For workers who have been with the target for a lengthy period (e.g., more than eight years) this can be a substantial sum.

- As most employees will usually prefer to retain their jobs, in practice, parties negotiate an appropriate level of payments as compensation for employees waiving their rights in the paragraph above. This could typically be between one to three months' compensation as an ex-gratia payment, but depends heavily on individual circumstances, and whether a trade union is involved (for example, a collective agreement may deal with this). A buyer will usually require that, as a condition for paying any such amount, the employees agree to resign and be re-hired, thus restarting the time period for accrual of benefits and long service pay.
- This process will usually be built into a SPA as a condition precedent to closing. A buyer should require the seller to manage the process. Financial liability may be shared between seller and buyer, but there is no standard position for how the risk is allocated. For example, the buyer may agree to assume a certain proportion of the liability, but capped at an agreed amount.

7. What are the options available to the foreign investor in terms of financing the transaction?

- Offshore to offshore lending** - An offshore bank may lend to an offshore parent of an Indonesian company. The parent can on-lend or can use the proceeds of the loan to capitalise the Indonesian subsidiary (in particular, subject to BKPM requirements for approving the debt element of an investment plan for a PMA company).
- Offshore to onshore lending** - An offshore bank may lend to an Indonesian company. If there is a foreign parent, the parent can be the guarantor.
- Onshore to onshore lending** - A foreign bank licensed in Indonesia, or a domestic bank, may lend to an onshore borrower.
- iv. An Indonesian company may not borrow a loan denominated in foreign currency without holding a specified credit rating and hedging a specified proportion of the foreign currency repayment exposure against foreign currency revenue, details of which are set out in Bank Indonesia regulations. It is possible for start-ups to use a parent company rating

for a three-year period. An Indonesian borrower must also report all details of any loan to Bank Indonesia.

8. What are the key tax considerations for the foreign investor?

- Corporate Income Tax**
 - » The current corporate income tax rate is 25%, which also applies to capital gains. Lower rates apply to small businesses and certain public companies.
- Value added tax**
 - » Value added tax ("PPn") is due at the general rate of 10% on goods imported into Indonesia or sold in Indonesia. The PPn rate is 0% for goods exported to overseas countries. The PPn is also due on services rendered to or by businesses in Indonesia, regardless of whether these are cross-border services or services provided between businesses within Indonesia. The PPn charged by suppliers is generally creditable provided that the company paying the PPn is registered for PPn and does not provide PPn-exempt services.
- Withholding tax**
 - » A withholding tax of 20% is applied to dividends paid from a PMA company to a non-resident recipient. This can be reduced if a favourable tax treaty applies (e.g., the tax treaty with Singapore can reduce this to 10%). Indonesia also levies withholding tax on interests, royalty and service fees, which may be reduced if a favourable tax treaty applies. In order to successfully apply a tax treaty, the overseas tax treaty company must satisfy certain substantive and business purpose conditions.
- Share transfer tax**
 - » An effective tax rate of 5% applies to sales of non-listed Indonesian company shares, unless this is exempted from Indonesian tax under a favourable tax treaty.

9. Is arbitration a common option for dispute resolution?

- Yes, it is very common for foreign investors to insist on arbitration in the transaction documents. Indonesian courts will not recognise the judgment of a foreign

court, but will recognise the award of a foreign arbitral institution from a jurisdiction, which is a signatory to the New York Convention. Arbitration in Singapore under either Singapore International Arbitration Centre or International Chamber of Commerce is common. In order for an international arbitration award to be acknowledged and take effect, it will first need to be registered at the Central Jakarta District Court.

law to have the Indonesian language version as the governing version in the event of inconsistency with the English version.

10. Is there a requirement that the agreement be executed in the local language?

- Yes. Any agreement with an Indonesian person or company must be executed in Bahasa Indonesia, and it is prudent to do so even for agreements governed by other laws. The standard practice is to execute the agreement in bilingual form with the English language governing (but ensuring the translation is robust as the governing language provision has not yet been tested in the courts). Note that certain contracts (such as construction services contracts) are required by

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MALAYSIA

1. The legal system

- Malaysia's legal system is based on the English common law legal system as well as those of India and Australia. Save for some areas, which have been developed to cater for local needs and/or requirements, Malaysia's laws are broadly similar to English law.

2. Are there any restrictions on foreign investment ownership?

- The Malaysian economy is trade-centric and its government views foreign investments as a crucial element in the country's economic development.
- In its efforts to boost foreign investment levels, Malaysia has adopted more business and investor-friendly policies by relaxing regulatory restrictions in certain sectors that used to act as barriers to entry for foreign and domestic investors alike.
- An example of this was the trimming of the country's negative list that prohibited foreign participation in industries reserved for its citizens and domestic companies.
- Consonant thereto, 100% foreign ownership is now allowed in the education, retail, healthcare and logistics services sectors.
- A further example of this was the removal in 2009 of its previous Foreign Investment Committee guidelines, which had mandated a 30% shareholding allocation in local companies to citizens belonging to particular ethnicities who are collectively referred to as the Bumiputera class. The removal of the aforesaid guidelines has enabled foreign and domestic parties who do not belong to the Bumiputera class to take over or merge with local companies without the need to obtain approval from the Foreign Investment Committee.
- Notwithstanding the above, it is pertinent to note that the acquisition of local companies in certain sectors where such limits to foreign equity have been removed are still subject to the approval or review by relevant ministries and agencies if such companies fall under their purview. This is to ensure that the said companies meet the requisite qualifications for incentives, which were obtained by virtue of the composition of the companies' shareholding or management personnel prior to their acquisition.

3. What are the options available for an overseas investor in terms of the purchasing entity?

- The method most frequently used by foreign investors for such exercises are through private limited companies. Such companies can be easily incorporated within one to two days. Shelf companies are also readily available for investors who prefer not to incorporate a new entity.
- Private limited companies in Malaysia can have up to 50 shareholders.
- With the advent of the Companies Act 2016, which came in to force in 2017, there is now no par or nominal value requirement for a company's shares.
- Companies are also required to maintain a registered office in Malaysia where its registers and statutory documents must be kept and be made available for inspection.
- All companies in Malaysia must be registered with the Companies Commission of Malaysia and must have their names approved by the Commission before incorporation.

4. Key corporate governance considerations for a local incorporated entity

- The Companies Act 2016 requires a company to have a minimum of one director, one shareholder and one company secretary.
- Where a company has a sole director, it is a requirement that the director ordinarily resides in Malaysia by having a principal place of residence in Malaysia.
- All directors must be natural persons and at least 18 years of age.
- The company secretary must be a natural person of 18 years of age or above.
- The company secretary must be a citizen or permanent resident of Malaysia.
- A company shall only appoint a person or a firm as an auditor if the said person or at least one partner of the firm has consented in writing to act as the auditor.

5. Brief overview of structure, documentation and execution

- The most common M&A transaction structure in Malaysia is by way of a share acquisition, which will

involve the execution of a shares sale agreement (“SSA”).

- The contents of a SSA in Malaysia are broadly similar to a SSA for acquiring a company in Singapore, England or Hong Kong. It is common for:

- » Completion to be subject to conditions precedent (see below)
- » Vendor to provide warranties in respect of the sale shares to be free from any encumbrances and the status quo of the company’s business
- » Liability to be capped, with a *de minimis* threshold
- » No general material adverse change to the condition precedent
- » Data room to be set up for the purpose of purchaser’s or its appointed professional parties to conduct due diligence

- For a share acquisition, the completion of the SSA will usually take place upon the payment of consideration and the delivery of the instrument of transfer. The share transfer takes legal effect upon the payment of the stamp duty and the entry of the same by the company secretary to the register of members. The effective date of update of the register is the date of its filing with the Companies Commission of Malaysia, and the completion process may be concluded within one day.
- As a result of the SSA, the parties may also consider entering into a shareholders’ agreement to regulate the parties’ obligations in the Company.

6. What conditions precedent typically need to be satisfied before closing?

i. Antitrust approval

- » The Malaysian Competition Act 2010 does not have any merger control provisions. As such, the Competition Act 2010 does not require any notification or pre-merger clearance such as an antitrust approval to be filed or obtained for any mergers or acquisitions.
- » Despite the lack of merger control provisions, businesses must ensure that the outcome of mergers or acquisitions does not breach any prohibitions under the Competition Act 2010. The Competition Act 2010 comprises two main areas of prohibitions, namely: (i) the prohibition on anti-competitive agreements; and (ii) the

prohibition on the abuse of a dominant market position. The Malaysian Competition Commission has the power of enforcement over any contravention of the Competition Act 2010.

- » Pursuant to the guidelines issued by the Malaysia Competition Commission, an “anti-competitive agreement” means an agreement which has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services in Malaysia or in any part of Malaysia. The Malaysian Competition Commission may also assess whether an enterprise is abusing its dominant position. A dominant enterprise may abuse its position by:
 - directly or indirectly imposing an unfair purchase or selling price or other unfair trading condition onto a supplier or customer;
 - limiting or controlling production, market outlets or market access, technical or technological development or investment to the prejudice of consumers;
 - refusing to supply to particular enterprises or group or category of enterprises;
 - discriminating by applying different conditions to equivalent transactions that discourages new market entry or market expansion or investment by an existing competitor, seriously damages or forces a competitor that is just as efficient from the market or harms competition in the market in which the dominant enterprise operates or in any upstream or downstream market;
 - imposing conditions in a contract which have no connection with the subject matter of the contract;
 - any predatory behaviour towards competitors; or
 - buying up scarce supply of inputs (either goods or services) where there is no reasonable commercial justification to do so.

ii. Employment

- » Malaysia does not impose any restrictions or regulations on foreign companies hiring in Malaysia. However, there are certain restrictions imposed by the Employment Restriction Act 1968 regarding the employment of foreign nationals in Malaysia.
- » Under the Employment Restriction Act 1968, a foreign national may be employed only if a valid employment permit has been issued.



- » The foreign nationals are only permitted to work in the manufacturing, construction, plantation, agriculture and service sectors, and a quota must first be obtained by the employers from the Ministry of Home Affairs prior to their employment.
- » The Employment Act 1955 confers certain protections on employees in Malaysia in the event of a takeover of business with which they are employed or of an asset purchase.
- » One such protection is the service of the termination notice to the employee, which must not be less than the minimum notice period as prescribed by Employment Act 1955 unless the employer and employee have contractually agreed to a longer notice period.
- » There are no further obligations imposed on employers to notify their employees of the status of their employment once a termination notice has been issued unless otherwise agreed in the employees' employment contracts.
- » Termination notices for employees who do not fall within the ambit of the Employment Act 1955 shall be in accordance with the provisions of their respective employment contracts.
- » Automatic transfers of employment contracts in business or asset acquisitions are not recognised in Malaysia.

iii. **Material adverse change**

- » No material adverse change as an express condition precedent is not common, unless there is a long gap between signing and completion.

7. What are the options available to the foreign investor in terms of financing the transaction?

- i. **Onshore Borrowing** – Non-residents are permitted to borrow any amount of credit facilities in Malaysian Ringgit from a licensed onshore bank or a resident to finance activities in the real sector of Malaysia. The real sector is the sector for the production of goods and services, which includes all industries except for financial services. Non-residents are allowed to finance or purchase any residential or commercial property in Malaysia (excluding financing for purchase of land only).
- ii. **Offshore borrowing** – Foreign financing is permitted for non-residents, subject to withholding tax on interests earned by foreign banks from the financing transaction.

- iii. **Exchange control** – Non-residents are allowed to borrow in foreign currency in any amount from a licensed onshore bank or maintain any number of external accounts with any financial institution in Malaysia. In addition, there is no restriction on the amount of Ringgit funds to be retained in the external accounts.

8. What are the key tax considerations for the foreign investor?

i. **Profits tax**

- » The general corporate income tax rate due on the taxable profits of a business in Malaysia is 24%. Qualifying offshore sourced profits or investment income is not taxable.

ii. **Capital gains tax**

- » Capital gains are not taxable in Malaysia unless the gain may be characterised as a trading profit, which is taxable unless it is offshore sourced income.

iii. **Share transfer tax**

- » Stamp duty is payable on any written document that relates to a transfer of shares of a company incorporated in Malaysia, such as a SSA, transfer document for shares and mortgage for shares. The rate is 0.3% of the higher of the consideration paid per share or the net asset value per share.
- » The document must be stamped within 30 days after signing the document, if it is signed in Malaysia.
- » Qualifying internal reorganisations and amalgamations are exempt from stamp duty. However, the application for the exemption process may take several months.

iv. **Property transfer tax**

- » Malaysia levies a real property gain tax on gains derived from the sale of (i) a real property; or (ii) shares of a real property company, which predominantly owns real property or properties in Malaysia. The rate ranges between 5% and 30% depending on the number of years of the ownership of the real property or real property shares concerned, and whether the transferor is a Malaysian citizen (who may ultimately be exempted from the tax). In addition, Malaysia levies stamp duty on the sale of a real property in Malaysia.

v. **Withholding tax**

- » Malaysia does not levy withholding tax on dividends, but 15% withholding tax is due on interest payments to foreign parties and 10% withholding tax applies to royalties and service fees paid to foreign parties unless reduced under a favourable tax treaty. Payments of service fees to foreign parties for services rendered outside Malaysia are generally not subject to withholding tax.

vi. **Dividend income**

- » Dividends received by a Malaysian company are generally not taxable.

9. **Is arbitration a common option for dispute resolution?**

- Yes, commercial arbitration is commonly used as an alternative form of dispute resolution in Malaysia. The relative low cost of arbitration in Malaysia compared with other regional seats, coupled with a weak Ringgit, has contributed to making Malaysia a popular and cost-effective seat of arbitration.
- Arbitral awards are also readily enforceable in the Malaysian Courts.

10. **Is there a requirement that the agreement be executed in the local language?**

- No, there are no language requirements.

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CAMBODIA

1. The legal system

- Cambodia has a civil legal system, which has been strongly influenced by French law.

2. Are there any restrictions on foreign investment ownership?

- No, but certain regulated industries may require prior approval for a change in ownership.
- Foreign individuals/foreign-owned entities may readily incorporate a company in Cambodia.

3. What are the options available for an overseas investor in terms of the purchasing entity?

- Most acquisitions by foreign investors are made using a Cambodia private limited company. Such entities can be easily incorporated, although processing times generally take about four to six weeks and often longer for companies in regulated industries.
- The maximum number of shareholders of a private limited company is 30.
- The minimum share capital requirement is KHR4 million (approx. US\$1,000). However, if the business operates in a regulated sector, there may be additional capital requirements as determined by the relevant authority.
- The company must have a registered office in Cambodia, where the registers are kept. Registration must be made with the Ministry of Commerce (“MoC”). The company name must be approved by the MoC before incorporation.

4. Key corporate governance considerations for a local incorporated entity

- Upon registration, the company must appoint at least one director and one shareholder.
- There are no residency requirements for directors of Cambodian companies, but foreign directors must have work permits to conduct business in Cambodia.
- All directors must be individuals.
- Companies that have approved Qualified Investment Projects or meet two of the following criteria must submit yearly audit reports to the General Department of Taxation (“GDT”):
 1. Annual turnover of KHR3 billion (approx. US\$750,000) or above;

2. Total assets of KHR2 billion (approx. US\$500,000) or above; or
3. 100 or more employees.

- Companies should submit monthly and annual tax filings to the GDT and an annual declaration to the MoC.

5. Brief overview of structure, documentation and execution

- Both share deals and asset deals are utilised, but share deals are more common.
- The contents of a sale and purchase agreement (“SPA”) in Cambodia are broadly similar to an SPA for acquiring a company in Singapore or Hong Kong. It is common for:
 - » Completion to be subject to condition precedents (see below)
 - » A tax indemnity to be provided by the sellers
 - » Warranties to be qualified by disclosures in a disclosure letter
 - » Liability to be capped, with a *de minimis* threshold
 - » No general material adverse change condition precedent
 - » Data room to be set up for the purpose of buyer’s due diligence
- For a share deal, the share transfer takes legal effect when the share transfer application is approved and the Memorandum and Articles of Association updated by the MoC. For a company that has an approved Qualified Investment Project or is licensed in a regulated industry, additional regulatory approvals may be required prior to submission to the MoC.

6. What conditions precedent typically need to be satisfied before closing?

i. Antitrust approval

- » No antitrust approval is required prior to signing or closing. There are currently no laws regarding competition that must be taken into account.

ii. Employment

- » While Cambodia does not impose any restrictions or regulations against foreign companies hiring in Cambodia, there are provisions in place regarding foreigners’ employment.
- » Generally, foreign employees may not compose more than 10% of a company’s staff. An exemption for this quota may be requested from the Ministry

of Labour and is often granted to foreign-invested enterprises.

- » There is no need to consult the employees of the company in a share acquisition deal.
- » In an asset acquisition deal, employment contracts may be automatically transferred to the buyer on the existing terms. However, this is subject to agreement by the buyer to honour all seniority and benefits of the transferred employment contracts.
- » A foreigner must have a valid work permit issued by the Ministry of Labour in order to be legally employed in Cambodia.

iii. **Material adverse change**

- » No material adverse change as an express condition precedent is not common, unless there is a long gap between signing and completion.

7. What are the options available to the foreign investor in terms of financing the transaction?

- i. **Onshore borrowing** – Banks may lend US dollars or Cambodia riel to non-residents (including foreign-owned companies) for any lawful purpose in Cambodia including investments in financial assets. Such loans are generally secured by land title or other hard asset security interests.
- ii. **Offshore borrowing** – Foreign financing is permitted for non-residents, subject to withholding tax on interest earned by foreign banks from the financing.
- iii. **Exchange control** – There are no formal restrictions nor limits on non-residents maintaining US dollars, Cambodian riel or other currency bank accounts in Cambodia. There are no restrictions on remitting currency overseas.

8. What are the key tax considerations for the foreign investor?

i. **Profits tax**

- » There is no separate capital gains tax in Cambodia; rather, Cambodia imposes an analogous “tax on profit” (“TOP”). All earned income from capital gains from the sale of various asset and immovable property by a company is taxed the same as regular TOP at the rate of 20%, with a notable exception for insurance activities which is taxed at a rate of 5% (on gross premium income

only; income derived from other business activities is subject to the standard TOP rate of 20%).

- » Resident taxpayers are subject to tax on worldwide income/profits while non-residents are taxed on Cambodian-sourced income/profits only.

ii. **Share transfer tax**

- » Stamp duty is payable on any written document that relates to a transfer of shares of a Cambodia-incorporated company, such as an SPA and transfer document for shares. The rate is 0.1% of the consideration paid per share, payable within three months of execution of the transaction.
- » A flat rate of KHR1 million (approx. US\$250) is payable on the registration of any legal document with the GDT.

iii. **Property transfer tax**

- » Tax on immovable property is payable on any transaction that relates to any immovable property such as land, buildings and construction or infrastructure on the land.
- » Tax on immovable property is imposed at the rate of 0.1% of the value of the immovable property exceeding the threshold of KHR100 million (approx. US\$25,000). The immovable property’s value is determined by the Immovable Property Assessment Committee. The property tax return must be filed and taxes must be paid by 30 September each year.
- » Stamp duty is applied at a rate of 4% to the transfer of ownership or possession of the following:
 - all immovable property including buildings and other structures;
 - land; and
 - all means of transportation.

iv. **Withholding tax**

- » Cambodia levies withholding tax (“WHT”) on specified domestic transactions as well as specified payments to non-resident parties.
- » Payments of certain Cambodian-sourced income by a resident taxpayer carrying on a business in Cambodia to a Cambodian resident are subject to the following WHT:
 - performance of services (15%), except payment to a tax-registered taxpayer and supported by a valid VAT invoice;

- royalties (15%);
 - interest payments (15%); and
 - rental payments (10%).
- » WHT on payments to resident entities may be offset against the TOP of those resident entities.
- » Payments by a resident taxpayer to a non-resident are subject to the following WHT unless reduced by a favourable tax treaty (e.g., Cambodia’s tax treaty with Singapore):
- interest (14%);
 - royalties, rental and other income connected to the use of property (14%);
 - management and technical fees (14%) – while these fees are not currently defined in the Law on Taxation and tax regulations, the GDT has, in practice, adopted a very broad definition of management fees and technical services; and
 - dividends (14%).
- » WHT does not apply to payments for goods.
- » WHT generally applies to the expenses or payments listed above that are accrued in a resident taxpayer’s accounting books. However, please note that if the Cambodian entity pays these expenses in advance, it must also subject these advance payments to the appropriate WHT rate. The WHT is due to be remitted to the tax authorities by the 20th day of the month following the accrual or the payment of the expense.

v. Dividend income

- » Distributions of dividends are subject to addition tax on dividend distribution (“ATDD”) as follows:

Distribution of profits which are subject to a TOP rate of	ATDD
20% or 30%	Nil
0%	20%

- » Dividends received from resident companies are not subject to income tax, while dividends received from non-resident companies are subject to income tax in Cambodia. However, a credit for tax paid overseas on foreign source income is generally allowed.

9. Is arbitration a common option for dispute resolution?

- Yes. Cambodia is a signatory to the New York Convention and international arbitration in Singapore or Hong Kong is commonly used.

10. Is there a requirement that the agreement be executed in the local language?

- No, there are no language requirements for the SPA, but some documentation, including share transfer applications with the MoC, is required to be in the Khmer language.

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MYANMAR

1. The legal system

- As the legal system of Myanmar has its roots in the English common law system, laws in Myanmar are similar to English law.

2. Are there any restrictions on foreign investment ownership?

- The Myanmar Investment Commission (“MIC”) from time to time issues notifications and regulations covering investment by foreign investors in various businesses sectors in Myanmar. Notification No. 15/2017 of April 10, 2017 by the MIC (“MIC Notification No. 15/2017”) contains a list of restricted investment activities.

Classification of activities	Examples
Reserved for the Union Government	Manufacturing of security and defence products; air traffic services; control of electric power station.
Reserved for Myanmar citizens	Publication and distribution of periodicals in ethnic languages including Myanmar; prospecting and exploration of jade/gem stones; mini-market and convenience store with floor area below 10,000 square feet.
Permitted to foreigners only in a joint venture with Myanmar citizens	Manufacturing, distilling of alcohol; development, sale and lease of residential apartments and condominiums; cultivation of crops in agriculture land and distributing them to local markets and exportation.
Permitted subject to approval by the relevant ministry	Construction of new railway tracks, stations and buildings related to train operation; large-scale power projects; publishing of periodical newspapers in foreign languages; commercial livestock farming.

- Activities not mentioned in the MIC Notification No. 15/2017 may, in principle, be conducted without restrictions. There are, however, exceptions to this rule in practice. Other laws may also impose restrictions on investment activities. For example, under the MIC Notifications foreign investment in the education sector is not restricted; however, in light of a recent draft law, the Ministry of Education and the Directorate of Investment and Company

Administration (“DICA”) has put applications by interested foreigners on hold. The Myanmar authorities have also imposed joint venture requirements on investment activities on a case-by-case basis even where it is not required by the law.

- Investment projects in Myanmar can be implemented in one of the following three ways: (i) with an MIC Permit, which is required if the project meets certain conditions or exceeds certain thresholds (such as investment amount, environmental impact, etc.); (ii) with an Endorsement (also translated as “Approval Order”), which is, in effect a mini-MIC Permit, and is only available where the investor needs to use land under a contract exceeding one year or if the project features on the “Promoted Sector List” issued by the MIC which is granted tax incentives; or (iii) simply setting up a locally incorporated company and obtaining operating permits and licences, if required.
- Companies with foreign shareholding are barred from trading activities (e.g., purchase and import and subsequent resale of goods) in Myanmar.

3. What are the options available for an overseas investor in terms of the purchasing entity?

- The most preferred entry strategy for foreign investors entering the Myanmar market is to invest in a limited company with or without a joint venture partner depending on foreign ownership restrictions.
- Subject to appropriate and necessary approvals and consents from DICA and/or the relevant ministry, based on the nature of the business activity and sector of investment, Myanmar entities in which a foreign investor may directly or indirectly invest include:
 - » A **limited liability company** – Subscribe for shares or purchase shares of the limited company.
 - » A **joint venture company** – This is typically a limited liability company with one or more foreign and local shareholders.
 - » A **public company** – This is not permitted for foreigners at this time, although the new Companies Act signed into law on 6 December 2017 will, once it takes effect later in 2018, permit up to 35% foreign ownership in a Myanmar company. Foreign investors may, however, consider structuring the investment through the issue of convertible loan notes by the target company.
 - » A **branch office** (of a foreign company) – Invest directly or purchase shares in the foreign company.

4. Key corporate governance considerations for a local incorporated entity

- All companies are required to be registered with DICA.
- For a private company, the following are key:
 - » Minimum two and maximum 50 shareholders; and
 - » Minimum two directors.
- All directors should be individuals.
- A general meeting shall be held within 18 months from the date of its incorporation and thereafter once at least in every year at such time (not being more than 15 months after the holding of the last preceding general meeting).
- Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.
- In practice it takes around one week (from the date of first submission of documents) to obtain a temporary certificate of incorporation. The company can start operations from the date of receipt of the temporary certificate of incorporation, but is required to submit a minimum 50% of the authorised capital in order to obtain the permanent certificate of incorporation (within two months from date of temporary certificate).

5. Brief overview of structure, documentation and execution

- Both share deals and asset deals are common.
- The contents of a sale and purchase agreement (“SPA”) in Myanmar are broadly similar to a SPA for acquiring a company under a common law jurisdiction. It is common for:
 - » Completion to be subject to condition precedents (see below)
 - » A tax indemnity to be provided by the sellers
 - » Warranties to be qualified by disclosures in a disclosure letter
 - » Liability to be capped, with a *de minimis* threshold
 - » No general material adverse change condition precedent
 - » Data room to be set up for the purpose of buyer’s due diligence
- Non-compete provisions are void under Myanmar Laws and may be difficult to enforce in Myanmar even if the contract is governed by the laws of another country;
- For a share sale, at completion, an instrument of transfer is delivered, a share certificate issued and

the physical share transfer form (with appropriate stamp duty paid) is prepared for submission to DICA. An acknowledgement of receipt from DICA is usually issued immediately upon filing of the documents. DICA’s acceptance and confirmation of such submission (certificate of registration of document) takes around two to three months, upon which the share transfer takes legal effect. However, in practice, a share sale is deemed to have been completed when the physical share transfer form is filed with and an acknowledgment of receipt is received from DICA. The effective date of update of the register is the date of filing with DICA.

6. What conditions precedent typically need to be satisfied before closing?

- Permission of DICA and relevant ministry if post-investment or post-transfer of shares a Myanmar company becomes a foreign company.
- No insolvency event and no force majeure event.
- In case of asset/business transfer deals:
 - » Payment of severance compensation in accordance with labour laws and consent of employees who are being transferred as part of a sale of assets;
 - » Assignment of contracts and liabilities in a sale of assets; and
 - » Third party consents if required under third party contracts.

7. What are the options available to the foreign investor in terms of financing the transaction?

- Offshore to offshore lending** - An offshore bank may lend to an offshore parent of a Myanmar company. The parent can on-lend or can use the proceeds of the loan to capitalise the Myanmar subsidiary. The offshore-to-offshore lending itself does not require Central Bank of Myanmar (“CBM”) approval, but bringing the cash into Myanmar requires permission from the MIC (in case it is brought in as capital) or the CBM (as a group internal loan).
- Offshore to onshore lending** - The offshore bank may lend to a Myanmar company, such as a Myanmar subsidiary. If there is a foreign parent, the parent can be the guarantor. This requires CBM approval.
- Onshore to onshore lending** - A foreign bank licensed in Myanmar may lend to an onshore borrower (which must be a foreign company or a joint venture). This requires no CBM approval. If the borrower has an MIC Permit, approval from the MIC is required.



8. What are the key tax considerations for the foreign investor?

i. Corporate Income Tax

- » The current corporate income tax rate is 25% for Myanmar companies, branches registered under the Myanmar Companies Act 1914, and companies operating under permission from the MIC (i.e., foreign-owned resident companies with an investment licence from the MIC granted under the Foreign Investment Law and Myanmar Investment Law 2016).

ii. Withholding tax

- » With effect from 1 April 2017, a company has the legal obligation to deduct withholding tax (“WHT”) from payments that are subject to WHT, regardless of whether the income recipient has agreed to the deduction or not. A company shall be liable for the WHT if it is not deducted.

- » Below is a summary of WHT rates:

Types of Payment	Residents	Non-residents
Interests	0%	15%
Royalties	10%	15%
Goods (Locally purchased goods and not imported goods)	2%	2.5%
Services	2%	2.5%
Lease	2%	2.5%

- » The withholding tax may be reduced if a favourable tax treaty applies (e.g., Myanmar’s tax treaty with Singapore).

iii. Capital gains tax

- » Capital assets include land, buildings and their rooms, vehicles, and work-related capital assets. The expression also includes shares, bonds, securities and similar instruments. Capital gains tax (“CGT”) is applicable to both resident and non-resident taxpayers deriving a profit from the sale, exchange, or transfer of capital assets in Myanmar. CGT is payable by the person deriving the profit. A CGT return must be lodged by any person who sells, exchanges or transfers capital assets, even if there is a loss.
- » If the total value of the capital asset that was sold, exchanged or transferred does not exceed MMK10 million (approx. US\$7,320), CGT will not be applicable.

- » The CGT rate for all taxpayers (with the exception of those deriving a gain from an oil and gas asset or a company holding an oil and gas asset) is 10%, and is imposed in either MMK or a foreign currency.

iv. Share transfer tax

- » CGT of 10% will be applied on the gain from transfer of shares of a Myanmar company unless exempted under a Double Taxation Avoidance Agreement.
- » Stamp duty is payable on any written document that relates to a transfer of shares of a Myanmar-incorporated company, such as a sale and purchase agreement, transfer document for shares and mortgage for shares.
- » The document must be stamped either before the signing or within 30 days after signing the document.

v. Property transfer tax

- » The fundamental legislation for property tax (“PT”) is the City of Rangoon Municipal Act 1922, City of Yangon Development Law 1990 and the Yangon City Development Law 2013 (“YCDL”). Accordingly, the Yangon City Development Committee (“YCDC”) was created to administer these laws and collect PT. PT only applies to certain land, buildings or land and buildings (“Premises”) located within the territory of Yangon. In other areas of Myanmar, for instance Mandalay or Nay Pyi Taw, PT is administered in accordance with relevant local regulations.
- » Section 2(4) of YCDL provides that PT includes four categories of taxes: miscellaneous tax, lighting tax, water tax and sanitation tax. The rate for each category is as below:
 - Miscellaneous tax: maximum of 20% of annual value of premises
 - Lighting tax: maximum of 5% of annual value of premises
 - Water tax: maximum of 12% of annual value of premises
 - Sanitation tax: maximum of 15% of annual value of premises
- » PT will be levied on the annual value of the land or Premises. Different rates and calculation methods will be applied depending on the use of the Premises. PT is paid once per year. The annual value of the property will be determined by YCDC or local authorities where the premises are located.

vi. **Dividend income**

- » Under the current Myanmar income tax law, there is no tax applied on dividends.

9. **Is arbitration a common option for dispute resolution?**

- Yes. Although Myanmar courts as a rule would respect the choice of a foreign law as the law governing an agreement and the choice of foreign arbitration as the dispute resolution mechanism. However, given the lack of experience of Myanmar courts in international commercial matters, the courts may have difficulties in handling the enforcement of a foreign judgment or an arbitration award in Myanmar.

10. **Is there a requirement that the agreement be executed in the local language?**

- No, there are no language requirements.

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PHILIPPINES

1. The legal system

- The legal system in the Philippines is a combination of continental civil law and the Anglo-American common law system.
- Mergers and acquisitions in the Philippines are governed by several individual statutes and issuances, foremost of which are the following:
 - » The Corporation Code of the Philippines (Batas Pambansa Blg. 68), which governs (among other matters) the creation, governance, mergers or consolidations, and dissolution of corporations, as well as the rights of shareholders and powers of directors;
 - » The Civil Code of the Philippines (Republic Act No. 386), which applies in general to property, obligations, and contracts;
 - » The Securities Regulation Code (Republic Act No. 8799) and its Implementing Rules and Regulations, when listed companies are involved; and
 - » The Philippine Competition Act (Republic Act No. 10667), its Implementing Rules and Regulations, and related rules issued by the Philippine Competition Commission.

2. Are there any restrictions on foreign investment ownership?

- Yes. The 1987 Constitution of the Philippines, the Foreign Investments Act of 1991 (Republic Act No. 7042), the Retail Trade Liberalization Act (Republic Act No. 8762), and other statutes impose caps on foreign equity in certain industries and economic activities in the Philippines. These laws are commonly referred to as the “nationality requirements” for foreign investment in the Philippines.
- The Foreign Investment Negative List (which is modified and reissued from time to time) lists the particular industries and the permitted foreign equity ownership for each and specific industries in which foreign investors are absolutely prohibited from holding any equity. If an investment falls within an industry in the Foreign Investment Negative List, the maximum foreign equity ownership is 40% (depending on the category of industry of the list, there are also limitations of 30%, 25%, 20% or 0%). If an investment falls within an industry that is not in the Foreign Investment Negative List, there is no limitation, and the foreign investor may hold up to 100% equity ownership.

3. What are the options available for an overseas investor in terms of the purchasing entity?

- A foreign investor may (a) enter into a joint venture with a domestic corporation and form a new domestic corporation, or (b) acquire shares in an existing domestic corporation, or (c) enter into a merger or consolidation with another domestic corporation, all subject to existing nationality requirements under the Constitution and special laws, as enumerated under the Foreign Investment Negative List.

INCORPORATING A LOCAL SUBSIDIARY

- Alternatively, a foreign investor may incorporate a local subsidiary that is either wholly-owned or at least majority-owned by a foreign “parent” corporation, and acquire the assets or shares of another domestic corporation, also subject to existing nationality requirements as noted above. Such local subsidiary, which is treated as a domestic corporation separate and distinct from the foreign parent, is vested with all the powers of a corporation under domestic law, including the power to acquire shares in incorporated joint ventures or existing domestic corporations.
- Below is a list of the basic requirements for setting up a corporation in the Philippines:
 - » **Incorporators** - The corporation must be incorporated by a minimum of five but not more than 15 natural persons, all of whom must be of legal age and the majority of whom must reside in the Philippines.
 - » **Amount of capital stock** - There is no minimum requirement for capital stock under the Corporation Code, provided that the paid-up capital shall be at least PhP5,000 (approx. US\$95). There are also specific laws prescribing the minimum paid-up capital required depending on the type of industry. Moreover, the law requires that 25% of the corporation’s authorised capital stock be subscribed and at least 25% of the subscription price must be paid at the time of incorporation.
- A corporation only acquires juridical personality and corporate existence upon the issuance of a Certificate of Incorporation by the Securities and Exchange Commission (“SEC”). The procedures for the application for a Certificate of Incorporation comprise:
 - » Reservation of the corporate name;

- » Preparation of documents such as the articles of incorporation, by-laws, Treasurer's Affidavit (stating that at least 25% of the authorised capital stock has been subscribed and 25% of the subscribed stock has been fully paid), and SEC Form F-100 or the documents under the Foreign Investments Act of 1991;
 - » Payment of SEC fees and official filing of the incorporation documents with the SEC; and
 - » Processing of application and issuance of a Certificate of Incorporation by the SEC within four to eight weeks from the date of official filing.
- For corporations engaged in certain activities, such as issuers of securities, investment companies, mutual fund companies, clearing agencies, exchange, lending and financing companies, a secondary licence is likewise required. The initial application for issuance of a secondary licence shall be filed simultaneous with the application for primary registration or incorporation above.
 - Upon the issuance of the SEC Certificate of Incorporation, the corporation shall have corporate existence. However, for purposes of engaging in business, it must comply with the post-incorporation requirements and registrations, such as securing the business permit from the local government unit and registering with the Bureau of Internal Revenue, which may take a further eight weeks.
- #### 4. Key corporate governance considerations for a local incorporated entity
- The board of directors exercise the corporate powers of a corporation, conduct all business and control and hold all property of such corporations. The board of directors must be composed of not less than five and not more than 15 directors, all of whom should be individuals, and a majority of whom must be residents of the Philippines. Each director must own or subscribe to at least one share of the capital stock of the corporation, whose share shall stand in his name on the books of the corporation. Further, the Revised Code of Corporate Governance (SEC Memorandum Circular No. 6, Series of 2009) mandates certain corporations covered (including listed corporations, corporations selling equity or debt to the public etc.) to have independent directors comprising 20% of the board membership, but in no case less than two.
- As a general rule, Philippine law does not impose any nationality requirement on directors of a domestic corporation. By way of exception, however, the Anti-Dummy Law (Commonwealth Act No. 108) provides that for corporations engaged in nationalised or partly nationalised business activities as described above in paragraph 2, the number of foreign nationals who may serve as directors of the corporation must not exceed the proportion of the actual and allowable foreign equity in the corporation.
- The corporation must also elect the following corporate officers:
 - » **A president**, who is required to be a director;
 - » **A treasurer**, who may or may not be a director; and
 - » **A secretary**, who shall be a resident and citizen of the Philippines.
- No person may act as president and secretary or president and treasurer simultaneously, but otherwise, any two positions may be held by the same person.
 - As noted above, Philippine law generally does not impose any nationality requirement on the president of a corporation, unless the corporation is engaged in a nationalised activity that imposes nationality requirements on the corporation's officers. In respect of the secretary, however, the Corporation Code requires that he/she must be a citizen and resident of the Philippines. Although there is no law requiring the same, the SEC, as a matter of policy, requires that a treasurer of a corporation be a resident of the Philippines in view of the nature of the treasurer's functions.
 - Philippine corporations are likewise required to appoint external auditors for the preparation of the financial statements. Such auditor must be accredited by the Philippine Board of Accountancy. In addition, external auditors of certain corporations must be accredited by the SEC, such as listed companies, pre-need companies, investment houses or companies, brokers and dealers of securities, and financing or lending companies, among others.
- #### 5. Brief overview of structure, documentation and execution
- Acquisitions in the Philippines may be made in the form of either share or asset purchases. However, share purchases are more common.

- Prior to negotiations, it is a usual practice for the investor to engage a law firm to conduct a due diligence check on the target company. Resolution of issues identified in the due diligence process is usually made a condition precedent for the closing of the transaction.
- A Sale and Purchase Agreement (“SPA”) in the Philippines usually includes the following:
 - » Conditions precedent to closing (as discussed above and below)
 - » Representations and warranties of the seller in respect of the target company and/or the assets
 - » Negative, affirmative and standstill covenants of the seller prior to closing
 - » Indemnity provisions in case of breach of any of the representations and warranties or default in the performance of any commitment or undertaking in the SPA
 - » Liability for the taxes applicable to the transaction
 - » Closing deliverables, including the execution of implementing deeds for the transaction and turnover of documents of title relevant to the shares or assets being transferred
- At closing, the transfer of shares is ordinarily documented through a Deed of Sale of Shares between the selling shareholder and the purchaser and a Declaration of Trust and Irrevocable Special Power of Attorney to be executed by the seller in favour of the purchaser to authorise the purchaser to exercise all the rights in and to the sale shares pending completion of the share sale transaction.
- Further to the execution of the share transfer document, the following taxes are due on the transaction:

Tax Type	Tax Rate	When Due
Documentary Stamp Taxes (“DST”)	PhP 1.50 (approx. US\$0.03) for every PhP 200 (approx. US\$3.85) of the par value or fractional part of the par value.	DST payment is due within five days after the close of the month when the share transfer document was executed
Capital Gains Tax (“CGT”)	15% of the net gains realised from the sale of the shares.	CGT is payable within 30 days after the share transfer document was executed

- The transaction shall be considered as being legally completed only upon settlement of the above taxes and issuance by the Philippines Bureau of Internal Revenue of a Tax Clearance Certificate (“TCC”) and a Certificate Authorizing Registration (“CAR”). The CAR allows the investor/purchaser to have the stock certificates covering the purchased shares reissued in his or her name. The TCC and CAR are usually issued three weeks after the submission of the relevant documents proving payment of the necessary taxes. Upon issuance of the TCC and CAR, the transfer may then be recorded in the corporation’s Stock and Transfer Book — at which time the legal title in the shares shall vest in the purchaser.

6. What conditions precedent typically need to be satisfied before closing?

- Material adverse change**
 - » No material adverse change with respect to its business, structure, ownership, financial viability, or litigation. The parties may further define what shall constitute a material adverse change.
- Review by and approval from the Philippine Competition Commission (“PCC”)**
 - » The Philippine Competition Act prescribes certain conditions and thresholds whereby the submission of the merger or acquisition agreement to the PCC for its review becomes mandatory. In case the transaction meets any of those conditions or thresholds, the purchase agreement must be submitted to the PCC so that the latter may determine that the agreement or the transaction is not anti-competitive, as defined by law.
 - » Below is a summary of the notification thresholds under the Philippine Competition Act:

Type of Transaction	Size of Transaction Threshold
Merger or acquisition of assets within the Philippines	<ul style="list-style-type: none"> • Aggregate value of assets in the Philippines being acquired exceeds PhP2 billion (approx. US\$38 million); or • Gross revenues generated in the Philippines by assets acquired in the Philippines exceed PhP2 billion (approx. US\$38 million)

Type of Transaction	Size of Transaction Threshold
Merger or acquisition of assets outside the Philippines	<ul style="list-style-type: none"> • Aggregate value of assets in the Philippines of the acquiring entity exceeds PhP2 billion (approx. US\$38 million); and • Gross revenues generated in or into the Philippines by those assets acquired outside the Philippines exceed PhP2 billion (approx. US\$38 million)
Merger or acquisition of assets inside and outside the Philippines	<ul style="list-style-type: none"> • Aggregate value of assets in the Philippines of the acquiring entity exceeds PhP2 billion (approx. US\$38 million); and • Gross revenues generated in or into the Philippines by assets acquired in the Philippines and any assets acquired outside the Philippines collectively exceed PhP2 billion (approx. US\$38 million)
Merger or acquisition of voting shares of a corporation or an interest in a non-corporate entity	<ul style="list-style-type: none"> • Aggregate value of assets that are owned by the corporation or non-corporate entity or by entities it controls, other than assets that are shares of any of those corporations exceed PhP2 billion (approx. US\$38 million); or • Gross revenues from sales in, into or from the Philippines of the corporation or non-corporate entity or by entities it controls, exceed PhP2 billion (approx. US\$38 million)
Joint venture	<ul style="list-style-type: none"> • Aggregate value of the assets that will be combined in the Philippines or contributed into the proposed JV exceeds PhP2 billion (approx. US\$38 million); or • Gross revenues generated in the Philippines by assets that will be combined in the Philippines or contributed into the proposed JV exceed PhP2 billion (approx. US\$38 million)

iii. **Regulatory approvals**

- » Prior approval or authorisations from certain regulatory bodies may be required for the transaction, depending on the business activity of the target company, especially where a substantial portion of the target company is being acquired, leading to a change in ownership.

iv. **Corporate approvals**

- » The parties to the transaction should secure the necessary corporate approvals for the execution of the SPA and the implementation of the transactions contemplated by the agreement. Where the subject of the sale constitutes all or substantially all of the assets of the selling corporation, approval of shareholders representing at least two-thirds of the outstanding capital stock of the selling corporation would be required to authorise the sale.

v. **Lender's approval**

- » Where the target company has outstanding loans from banks or other financial institutions, it is also possible that the company will have to secure written consent from the financial institutions in order to dispose of its shares or effect an overall change in ownership.

vi. **Settlement of outstanding claims or assessments**

- » It is common for investors to request that outstanding tax assessments, loan balances, or third-party claims be settled or updated, and the proof of settlement or update be presented, prior to closing.

vii. **Tender offer**

- » If the investor will acquire a substantial portion of a company listed on the stock exchange, it is mandatory that it undertakes the tender offer process, which requires the approval of the SEC and the Philippine Stock Exchange.

viii. **Employees Consent**

- » In the case of a share transfer, the consent of



employees is not required as a purchaser will usually step into the shoes of the seller, and the employees' employment contracts with the target company are not affected. However, in case of an asset transfer, a "transfer" of employment to the purchaser is subject to the employee's consent, as the purchaser is required to enter into a new employment contract with the employee. Since such transfer amounts to termination of employment, this shall entail notification to the Philippine Department of Labour and Employment of the employee's separation, as well as payment of separation pay.

- » In addition, for transfer of employees under an asset transfer, work permits and employment visas of foreign non-resident employees issued in respect of the previous employment with the seller shall be cancelled and new work permits and visas are required to be secured from the Philippine Bureau of Immigration.

ix. **Compliance with Bulk Sales Law**

- » In case of acquisitions involving the sale of all or substantially all of the business of the seller, the Bulk Sales Law imposes upon the seller several obligations, including notification of creditors, applying proceeds of sale to the pro-rata payment of bona fide claims of the creditors, etc. Failure to comply with such requirements will render the sale fraudulent, void and without legal effect.

7. What are the options available to the foreign investor in terms of financing the transaction?

- Local and offshore banks and financial institutions are qualified to offer facilities in Philippine peso ("PhP") or in US dollars ("USD") or other non-PhP currencies to finance investments by non-resident corporations. However, the following are generally subject to approval by the Bangko Sentral ng Pilipinas (the Central Bank of the Philippines):
 - » Loans denominated in USD or other non-PhP currencies from banks operating in the Philippines; and
 - » Loans from offshore sources.
 - » Otherwise, the foreign firm may invest jointly with an equity partner, with whom it can split the liability for the purchase price and the risks of the transaction.

8. What are the key tax considerations for the foreign investor?

i. **Corporate income tax**

- » Businesses in the Philippines are subject to corporate income tax on their taxable profits at the general rate of 30%. A surcharge of 10% applies to improperly accumulated earnings.

ii. **Capital gains tax**

- » Unless this is exempted under a favourable tax treaty, the sale of shares in the Philippines is subject to the payment of CGT computed at 15% of the gains, which shall be paid by the seller within 30 days after the closing of the transaction (i.e., the execution of the implementing deed for the sale of shares). In case of sale of shares of a listed company, the CGT shall be 6/10 of 1% of the gross selling price or the gross value in money of the shares sold. CGT is due within 30 days from the date of notarisation of the Deed of Assignment or Deed of Sale.

iii. **Documentary stamp tax**

- » The sale of shares is also subject to the payment of DST computed based on the par value of the stock being sold, the rate being 3.75% for every PhP200 (approx. US\$3.85) of the par value or fractional part of the par value. The DST shall be paid within the first five days of the immediately succeeding month after execution of the deed of sale of shares. While the parties may agree as to which party shall bear the cost of the DST, the actual payment of the DST is made by the seller.

iv. **Donor's tax**

- » If shares are sold at a price lower than their fair market value, the difference may be considered a donation on the part of the seller. Consequently, the seller may be liable for donor's tax at a rate of 6% on any amount in excess of PhP250,000.00, which is imposed on the difference between such selling price and fair market value.

v. **Withholding tax**

- » The Philippines levies withholding tax on dividends, interests, royalty and service fees paid to a foreign party. Dividends paid to a foreign corporation are subject to 30% withholding tax. However, the rate may be reduced to 15% if the country in which the foreign corporation is registered either: (a) grants a tax sparing credit of

20%, or (b) does not impose any tax on such dividends received. Interest paid to a foreign corporation is subject to 20% withholding tax and royalties or service fees paid to a foreign corporation are subject to 30% withholding tax. The abovementioned withholding taxes may be avoided or reduced if a favourable tax treaty applies.

9. Is arbitration a common option for dispute resolution?

- Yes, arbitration is often resorted to as an intermediate means of dispute resolution, prior to lodging any action in a court of law. If the parties fail to amicably settle any claim or controversy arising from the agreement, they may agree to submit the same to arbitration. The Philippine Dispute Resolution Center Arbitration Rules are frequently selected by parties to govern arbitration between them.

10. Is there a requirement that the agreement be executed in the local language?

- No. Philippine statutes and issuances are written in English, and business is conducted mostly in English as well. Legal documents, especially those of a commercial nature, are therefore rarely executed in a language other than English.

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INDIA



1. The legal system

- The Indian legal system is founded on the English common law system. However, in recent times, the Indian securities and corporate laws have been aligned increasingly with the legal position in the United States of America.

2. Are there any restrictions on foreign investment ownership?

- As India is an exchange-controlled economy, the Department of Industrial Policy & Promotion under the Ministry of Commerce & Industry of the Government of India formulates the broad policy framework relating to foreign direct investment (“FDI”) in India on an annual basis (“FDI Policy”). Further, under the powers conferred upon it by the Foreign Exchange Management Act, 1999 (“FEMA”), the Reserve Bank of India (“RBI”) has issued the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 (“FEMA Regulations”), which are to be complied with along with the FDI Policy. The FEMA, FDI Policy and FEMA Regulations (collectively “FDI Regulations”) form the exchange control-related regulatory structure governing FDI into India.
- FDI in India may be made either through the “Automatic Route” or the “Approval Route”. A non-resident investor does not require any approval from the Government of India for FDI undertaken through the Automatic Route, whereas a non-resident investor requires prior approval of the designated competent authority under the Government of India for FDI under the Approval Route.
- FDI is allowed in all sectors except a few such as atomic energy, gambling and betting, lottery, etc. Further, FDI in certain sectors is allowed only up to certain “sectoral caps” (i.e., prescribed shareholding percentage ceilings) – for example, 26% in print media and 49% in insurance. Alternatively, FDI in a sector may be allowed under the Automatic Route up to a prescribed shareholding percentage ceiling and only under the Approval Route beyond such ceiling – for example, telecom and defence (49% ceiling under the Automatic Route and no limit under the Approval Route).
- Further, there are additional restrictions under the FDI Regulations in respect of the following:
 - » Eligible investors and eligible investee entities
 - » Permissible instruments for investment

- » Conditions for FDI with respect to certain sectors such as pharmaceuticals, real estate, etc.
- » Entry and exit pricing restrictions
- » Remittance and reporting requirements

3. What are the options available for an overseas investor in terms of the purchasing entity?

- Subject to compliance with sectoral caps, there is no legal requirement for setting up an Indian purchasing entity in stock purchase transactions. Usually, Indian purchasing entities are used in asset purchase transactions, while most stock purchase transactions are structured as direct acquisitions by the foreign buyer.
- If an Indian purchaser entity is necessitated by deal structure, the most preferred entity type is a private limited company (“PLC”). Key features of a PLC are:
 - » Liability is limited to capital contributed
 - » The maximum number of members is capped at 200
 - » Right to transfer the shares of a PLC is restricted
 - » No minimum capital requirement
 - » Requires an Indian registered office and at least one Indian resident director
 - » Generally requires seven to 14 days to be incorporated
- Further, historically, foreign investors have also routed investments through special purpose vehicles incorporated in jurisdictions such as Mauritius, Cyprus or Singapore that are party to a double taxation avoidance agreement (“DTAA”) with India towards managing capital gains tax incidence in India. However, subsequent to recent amendments to India’s DTAA’s with Mauritius, Cyprus and Singapore, whereby the key benefits under these DTAA’s were taken away, such structures have become significantly less relevant.

4. Key corporate governance considerations for a local incorporated entity

- The Companies Act, 2013 (“Act”) lays out the corporate governance regime with respect to unlisted companies.
- Under the Act, every private company is required to constitute a board of directors, comprising at least two directors (out of which at least one must be an Indian resident), with the maximum number of directors capped at 15. The Act mandates that the directors must be individuals.

- Every private company having a paid up share capital of at least INR50 million (approx. US\$750,000) is mandatorily required to appoint a whole-time company secretary.
- Every company is mandatorily required to appoint an individual or a firm as an auditor. Any private company having a share capital of INR500 million (approx. US\$7,500,000) cannot appoint or re-appoint an individual as auditor for more than one term of five consecutive years and an audit firm as auditor for more than two terms of five consecutive years. Further, a person or firm may be appointed as an auditor only where such person or the majority of partners in the firm practising in India are qualified as chartered accountants. The Act further bars certain persons (officers/employees of the company, persons having business relationship with the company etc.) from being appointed as an auditor.

5. Brief overview of structure, documentation and execution

• Transaction structures in India include:

- » Share purchase
- » Asset purchase/slump sale
- » Court-approved schemes of arrangement

- The most common structure is that of share purchase, but there are buyers who have chosen asset purchase/slump sale in order to ring-fence the buyer from hidden liabilities. Further, some transactions are structured as court-approved schemes of arrangement to take advantage of certain tax and accounting benefits available under the structure.
- Regarding the documentation and execution process, the following definitive documentation is generally standard in relation to the implementation of the structures above in addition to preliminary documentation such as letters of intent, term sheets and memoranda of understanding:

i. **Share purchase:**

- » Share purchase agreement/share subscription agreement – clauses pertaining to purchase and sale, payment mechanisms/structures, pre-closing obligations, closing mechanism, representations and warranties (qualified by specified disclosures), acquirer indemnification, hold-back and escrow arrangements, earn-outs, limitation of liability and dispute resolution are standard

- » Disclosure letter
- » Employment and restrictive covenants agreements
- » Waiver letter(s)
- » Restated charter documents
- » For issuance/transfer of shares
 - In case of issuance of shares, the shares are to be allotted by the board of directors after the issuing company has passed the requisite resolutions and issued the duly stamped share certificates (at which point the share issuance takes legal effect); in the event of the allottee being a non-resident, such issuance is to be reported to the RBI in Form FC-GPR within a period of 30 days from the date of such issuance.
 - In case of transfer of shares, the prescribed share transfer form “SH-4” is to be duly stamped, executed and delivered to the company along with the share certificate; subsequent to the receipt of such documentation, the board of directors registers the transfer of such shares by passing a resolution and recording the same in the register of members (at which point the share transfer takes legal effect). Additionally, in the event of any transfer of securities between an Indian resident and a person outside India, such transfer is to be reported to the RBI in Form FC-TRS within 60 days from the date of remittance into India of the purchase consideration. The board of directors is permitted to register a transfer only upon receipt of a duly endorsed Form FC-TRS, at which point the share transfer takes legal effect.

ii. **Asset purchase/slump sale:**

- » Business transfer/asset purchase agreement covering the transfer of the identified assets and identified liabilities, representations and warranties, indemnification, hold-back and escrow arrangements, earn-outs etc.
- » Assignment and/or novation agreements with respect to subsisting contracts
- » Relevant consents and waiver letters

iii. **Scheme of arrangement/merger:**

- » The scheme of arrangement between the companies concerned, their members and their creditors

- » Petition to be filed with the National Company Law Tribunal, with the aforementioned scheme annexed thereto

6. What conditions precedent typically need to be satisfied before closing?

- The following condition precedents typically need to be satisfied by the target entity before closing:
 - » Satisfactory completion of due diligence.
 - » Undertaking the necessary statutory corporate actions in addition to obtaining the requisite corporate approvals and waivers of pre-emptive rights/no-objection undertakings from shareholders, lenders/financial institutions, vendors, etc.
 - » The Competition Act, 2002 (“Competition Act”) regulates various classes of combinations (mergers, acquisitions, amalgamations and de-mergers). Obtaining the approval of the Competition Commission of India (“CCI”) is a pre-requisite where the relevant financial thresholds are met and where no *de minimis* exemptions are available under the Competition Act; accordingly, the same may be included as a condition precedent in the transaction documentation.
 - Failure to make the filings with the CCI as above will result in a penalty of up to 1% of the combined assets or turnover of the entities concerned being levied on the entities to the combination, and the intended combination not taking effect on account of the absence of approval from the CCI.
 - Further, the CCI is to be notified within seven days from the date of acquisition in respect of any share subscription, financing facility or other acquisition by any public financial institution, foreign institutional investor, bank or venture capital fund. Accordingly, the same may be included as a condition subsequent in the transaction documentation.
 - » Seeking any other applicable regulatory approvals from the appropriate regulators.
 - » Continuity of key managerial personnel, transfer of employees and continuity of statutory benefits under labour legislations in case of asset purchase transactions.
 - » Foreigners may be employed at an Indian concern, subject to the grant of an appropriate

employment visa by the concerned authority, which is usually granted to highly skilled and qualified professionals drawing an annual salary in excess of US\$25,000. Additionally, such employees must also register with the jurisdictional Foreigner Regional Registration Office.

- » Obtaining a valuation certificate as required by the FDI Regulations in respect of a cross-border transaction.
- » Non-occurrence of any event with a material adverse effect (the meaning of such term as contractually agreed between the concerned parties), or that would affect the subsistence and accuracy of representations and warranties as of closing.
- » No administrative, investigative or judicial proceedings having been initiated as of closing.
- » Absence of change in the capital structure of the target entity or shareholders’ rights or indebtedness as of closing.

7. What are the options available to the foreign investor in terms of financing the transaction?

- The prudential norms promulgated by the Department of Banking Operations and Development under the RBI prohibit Indian banks from lending to any person or entity for the purpose of acquisition of shares of Indian companies. Additionally, Indian banks are also prohibited from providing loans against shares as security for the purpose of acquiring Indian companies.
- Public companies and private companies that are subsidiaries of public companies are also prohibited from providing financial assistance in any form to facilitate the purchase of their own shares. Also, under the Indian exchange control laws, it is not permissible for an Indian company to obtain external commercial borrowing for the purpose of acquiring Indian companies.
- In light of the above-stated restrictions, certain acquirers have, typically in respect of target entities generating significant cash flows and that operate in a sector subject to relatively lesser regulation, employed offshore lending mechanisms wherein the debt is raised by a special purpose vehicle (incorporated specifically for such purpose) from an offshore bank to finance the transaction.

8. What are the key tax considerations for the foreign investor?

i. Corporate income tax

- » Domestic companies in India are subject to corporate income tax at the general rate of 30% and foreign companies earning income in India (including branches) are subject to 40% corporate income tax. These tax rates are subject to prescribed surcharges as amended from year to year. A Minimum Alternate Tax is imposed at 18.5% (plus surcharges) on the adjusted book profits of corporations whose tax liability is less than 18.5% of their book profits.

ii. Capital gains tax

- » Profit or gains arising from the transfer of a “capital asset” (as defined under the Income-tax Act, 1961 (“ITA”) is taxable under the ITA and is classified either as “short-term capital gains” (in relation to an asset that is held by the assessee for less than 36 months) or as “long-term capital gains” (in relation to an asset held by the assessee for more than 36 months). For computation of capital gains tax on the unlisted shares of a company, the period of holding is 24 months instead of 36 months whereas for computation of capital gains tax on a listed security, the period of holding is 12 months. The capital gains tax may be exempted if a favourable tax treaty applies.

iii. Stamp Duty

- » Unless an instrument is duly stamped in accordance with the applicable law at the stipulated rate, such instrument may not be admitted into evidence by a court or tribunal, or acted upon or authenticated by any public officer. Each state’s government issues regulations pertaining to the procedure for stamping of instruments/documents and calculation of the quantum of stamp duty.
- » Any instrument chargeable with duty and executed out of India is to be stamped within three months of it being first received in India.

iv. Withholding tax

- » Withholding tax is charged at a rate ranging from 5% to 40% (unless withheld at a lower rate specified under an applicable tax treaty) in respect of interest, royalty, rental or service fee payments made to non-residents on the basis of, and for, specified nature of payment(s) to such non-residents.

v. Dividend income

- » The ITA provides for taxation of the distributed profits of domestic companies at an effective rate of 20% (known as the dividend distribution tax). The dividend distribution tax is not reduced under India’s tax treaties. Further, dividend received from a foreign company is taxable at the rate of 15%. However, such dividend received from a foreign company is deductible from the calculation of tax on the distributed profits of the domestic company (subject to the above-stated tax liability of 15% being discharged).

vi. General Anti Avoidance Rules

- » The General Anti-Avoidance Rules (“GAAR”) (as included under the ITA and effective from 1 April, 2017 onwards) codify the “substance over form” rule in respect of an “impermissible avoidance arrangement” (“IAA”) i.e., an arrangement in which the main purpose is to obtain a tax benefit and which creates rights/obligations not ordinarily created between persons dealing at arm’s length, results in misuse or abuse of the provisions of the ITA and is not entered into or carried out in a *bona fide* manner.
- » In the event of classification as an IAA, the GAAR enables the tax authority to disregard a part or the entirety of the IAA and undertake specific steps in relation to the IAA, such as to disregard corporate structure, classify debt as equity and vice versa, re-characterise any deduction or expenditure, as appropriate. However, investments made prior to 1 April, 2017 are grandfathered and protected from the applicability of GAAR. Additionally, there is a minimum threshold of tax benefit of INR30 million (approx. US\$465,000) for the applicability of GAAR. Further, in respect of foreign portfolio investors (“FPI”), the tax authority has clarified that GAAR will not be invoked where the jurisdiction of the FPI is “finalised based on non-tax commercial considerations and the main purpose of the arrangement is not to obtain tax benefit”.
- » Subsequent to amendments pushed through by the Indian Government in 2012, the ITA enabled the taxation of indirect transfers of Indian capital assets by providing that a share shall be deemed to be situated in India if the value of such share is derived, directly or indirectly, from assets located in India. Such shares are deemed to derive their value substantially from assets (tangible or intangible) located in India when the value of the

Indian assets on the specified date exceeds INR100 million (approx. US\$1.5 million) and which represent at least 50% of the value of all assets owned by such foreign company.

9. Is arbitration a common option for dispute resolution?

- Arbitration is extremely common and is the preferred dispute resolution mechanism in cross-border mergers and acquisitions transactions involving India. The most popular arbitral fora are the Singapore International Arbitration Centre (“SIAC”) and the International Chamber of Commerce. SIAC is considered the most time- and cost-efficient forum for arbitration. While Singapore is a treaty-notified jurisdiction whose arbitral awards are recognised by Indian Courts for enforcement, recent judicial pronouncements have muddied the waters to some extent with respect to Indian Courts’ ability to grant interim relief in cases involving arbitrations outside India.
- Further, on account of India being a foreign-exchange-controlled economy, the enforcement of a foreign arbitral award (even where appropriate orders for enforcement have been passed by the competent Indian Court) may require authorisation from the RBI where the enforcement of the arbitral award involves the remittance of funds outside India.

10. Is there a requirement that the agreement be executed in the local language?

- No, there are no language requirements in respect of an agreement/instrument executed in India.

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