cash requirements for servicing the loan tend to ebb and flow with the company's situation and therefore have a risk-mitigating effect. Such an arrangement is appropriate from the standpoint of the creditor as long as the phases in which the company is in a weak situation, *ie*, yielding low interest, are adequately balanced out by phases yielding high rates of interest. From the creditor's viewpoint, however, there is a gap between the risk inherent in a weak corporate phase and the risk premium.

It is conceivable and also common practice that the risk and risk premium may coincide by having the interest linked to performance indicators, such as the annual net profit, the operating result, the operating cash flow or similar ratios, in such a manner that weak results signifying an increased risk then lead to a higher return, and hence a reasonable risk premium. The risk-related return therefore fluctuates with the corporate risk, *ie*, the market value of the bond or the loan remains constant in the ideal case.

Collateral arrangements

Lenders who enter into a debt financing arrangement as creditors are exposed to the core risk of insolvency of the borrower, with the consequence that their claims to interest and repayment of the principal amount within the scope of the insolvency proceedings can only be fulfilled partially after a certain delay, or in the worst case not at all. As a rule, creditors are therefore interested in taking precautions at an early stage with a view to limiting the risk of insolvency and the risk of losses at insolvency. Some of the risk-mitigating instruments most commonly used by creditors are presented briefly below. These instruments, which are usually collected together under the term "collateral arrangements", can be classified into two groups:

(1) Traditional collaterals: These collaterals, *eg*, the provision of mortgages (encumbrances on real property) or of a guarantee are aimed at reducing the risk of loss at insolvency, *ie*, to increase the lender's chances of realizing his own claims in the event of insolvency — either in their entirety or at least to a greater extent than if no collateral had been provided.

(2) Covenants: A second approach towards limiting the core risk for the lender lies in including certain clauses, *ie*, so-called covenants or "good behaviour clauses", in the underlying financial contract. Under these covenants, the borrower company is under an obligation either to implement certain measures or to desist from performing certain actions, or to ensure that certain situations defined as "critical" do not occur.

Covenants that are included when signing a debt financing contract may be further characterized according to the nature of the obligations imposed upon the borrower. In view of this feature, a distinction is usually drawn between so-called financial covenants on the one hand and affirmative covenants on the other hand. Both terms are not technical terms. However, the distinguishing feature of financial covenants is normally seen in the fact that they obligate the borrower to ensure that certain financial ratios, which usually relate to the balance sheet and the profit and loss statement, do not exceed or fall below a stipulated critical value. Such metrics may, for instance, be the debt/equity ratio or the relationship between a specified level of debt and the cash flow, *ie*, the so-called dynamic debt/equity ratio. Here, it is possible to prescribe that the corresponding restrictions be observed for every individual year or for the moving average of several years. What

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specific steps the borrower then takes to observe such an agreement is, as a rule, left to his own discretion. A few examples for the most common covenants are as follows:

- Maximum debt to EBITDA (= Earnings before Interest, Depreciation, Taxes and Amortization);
- Minimum equity;
- Minimum debt service coverage ratio;
- Minimum interest coverage;
- Maximum leverage;
- Maximum senior debt to EBITDA; and
- Minimum EBITDA

In contrast, the distinguishing feature of affirmative covenants is that specific obligations to act are imposed on the borrower. These obligations may be:

- prohibitions or restraints;
- directives; or
- consultation requirements.

Prohibitions or restraints may include an agreement that may prevent the borrower from (further) encumbering certain properties in future (a negative pledge), or a ban on the dividend payouts to the shareholders unless a prescribed minimum of financial stability has been reached. Directives may, for example, be obligations of the borrower to insure buildings and inventories against various risks, *eg*, theft and fire, or to give all creditors equal treatment in respect of the collateralization, *ie*, they are treated *pari passu*. Consultation requirements may, for example, obligate the borrower not to implement any decisions on capital expenditure investment above a certain magnitude or to sell off any assets without the creditor's prior consent.

¶3-422 Debt financing through the credit market

Debt financing through the credit market is normally achieved via bank loan, *ie*, the long-term provision of funds by a bank. As a rule, a bank loan is made available in the form of an open account credit.

The duration or lifespan of a bank loan is generally more than four years. The duration is either fixed directly upon the granting of a loan or it is limited at a later stage through the possibility of termination after a lengthy period in which notice is excluded. If the possibility of termination is not exercised by the lender the loan is renewed automatically for another term. This credit facility is often referred to as an "evergreen", "revolving" or "standing" loan. Repayment of the principal amount generally takes place according to a fixed repayment schedule (instalment or annuity repayment). Frequently, a number of years are granted as a grace period for repayment at the beginning of the duration. It is possible, but rarer, that the loan is repaid in a single sum at maturity as a so-called "bullet" or "balloon" loan.

Financing the acquisition of foreign businesses

General

Investors have to decide in which portions an investment project shall be funded by equity and debt. In the case of an investment in a high tax country, the PRC investor will have an interest to reduce the taxable income in the country of the investment by financing the acquisition with local bank loans or shareholder financing (so-called "debt push-down"). In the case of investing in a low-tax country, the PRC investor might provide only equity and raise any debt in the PRC or in a country with a higher tax burden.

Bank financing

If the investment is funded by bank loans, it is important to verify whether interest payable on these loans are deductible in the state where the target or the holding company is located.

Certain jurisdictions (*eg*, Germany) provide a limitation of the deductibility of interest that also applies to interest on bank loans. Countries typically do allow a loss carry-forward regarding interests which were not deductible.

If a partnership is set up, certain states allow the deduction of interest on the partnership's level that occurred on the partners' level. This can result in a "double dip" situation where interest is deductible twice, once in the resident state of the partner and a second time in the resident state of the partnership.

Shareholder financing and debt push-down

A shareholder or partner of a corporation or partnership can provide not only equity but also debt.

If the acquisition of a subsidiary is funded on the level of the shareholder or partner, methods may be available to "push the debt down" into the target entity. The intention here is to offset interest payable against taxable income of the target and thus reduce the target's tax burden. A common way of debt push-down is:

(1) either the resolution of a dividend distribution and the switch of the dividend claim into a loan (novation); or

(2) the intercompany transfer of the shares in the target.

If the loan is granted to a holding company, it may be possible to offset the interest eventually against the target's income by setting up a tax group. Such a tax group may allow the consolidation of income of target and holding company. If a tax group cannot be established, a merger can be envisaged to achieve the same goals in practice.

As far as shareholder loans or loans granted by partners are concerned, often thin capitalisation rules apply. Pursuant to thin capitalization rules, the deductibility of interest may be restricted for tax purposes. Some jurisdictions provide for safe haven rules or allow a financing as far as a third party would have given such financing under the same conditions.

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Intercompany transactions

Between the investor and his target, a multitude of transactions may occur, regarding the following, for example:

- management services and employees;
- delivery of goods, products and manufacture;
- know-how and intellectual property; and
- businesses and functions.

The bases of these transactions are contracts concluded between the different entities involved. And the existence or the need of these contracts might affect related tax structuring options. This is because the establishment of the mentioned contractual relationships may trigger tax rules relating to:

- transfer pricing;
- permanent establishment; and
- capital gains taxation.

Transfer prices are prices charged by different entities of a multi-national enterprise (MNE) located in different jurisdictions with different tax rates for sales and services provided to each other. The overall taxable MNE profits can be manipulated by charging higher or lower prices depending on the applicable tax rates in the different jurisdictions. Most states are aware of these techniques and have implemented transfer pricing rules including rules on how to determine arm's length transfer prices and what to request in terms of transfer pricing documentation.

A particular business model may result in the creation of a so-called permanent establishment with the result of tax being imposed in a jurisdiction where a company is not incorporated (also see ¶3-932).

Transfer of know-how or intellectual property might trigger capital gains taxation when a foreign state considers that functions and profit chances have been transferred abroad. Business processes can be structured in a cost- (and tax-) saving manner, *eg*, by implementing shared services. Shared Service Centres are normally used by groups that have a number of service supply entities.

Holding structure

If it is envisaged to invest abroad through a holding structure, a number of issues need to be considered as far as tax planning is concerned. The importance of the international DTT network has already been addressed above. Other tax implications related to the particular location of a holding company stem from various issues, the most important of which are explained below.

Income from participations

In most European countries, income derived from participation, *ie*, from shareholdings is either exempted or reduced from normal taxation. These benefits apply to capital gains on the disposal of shares as well as to dividend distributions. Where these

¶4-0304 M&A rules and merger control

Introduction

It was not until 1995 that the first Indonesian company laws were issued, which included regulations on mergers and acquisitions. Prior to that, M&A transactions were only governed by a single provision of the *Civil Code*, *ie*, Art 1338 about the freedom of contract, and certain other capital market regulations.

The amended *Company Law Number 40 Year 2007* now provides more detailed rules and regulations regarding consolidation, mergers, acquisitions and demergers.

Consolidation and merger

Indonesian company law does not provide a clear definition of a consolidation and/or merger. However, Art 122 of *Company Law Number 40 Year 2007* makes mention of the legal effect of a consolidation or merger, in that a company, including PT PMAs, that consolidates or undergoes a merger is liquidated by law without going through a formal liquidation process.

Consolidations and mergers require consolidation or merger drafts, which are aimed at obtaining approval from the General Meeting of Shareholders. Art 123 of *Company Law Number 40 Year 2007*, specifies the following information to be included in consolidation or merger drafts to be compiled jointly by the Board of Directors of companies intending to consolidate or merge:

- Name of each company that will be merged or consolidated;
- Reason and explanation of the Boards of Directors for the consolidation or merger, as well as the requirements for merger;
- Valuation procedure for the conversion of the shares of the merged company with the surviving company;
- Draft of the articles of association of the surviving company (in the case of a merger that causes an amendment to the articles of association);
- Certain financial statements for the previous three financial years of the merging or consolidating companies;
- Plans on how to continue or terminate some of the business activities of the company;
- Pro-forma balance sheet of the surviving company in accordance with accounting principles generally applied in Indonesia;
- Method of settlement of rights and obligations of the members of the Board of Directors, Board of Commissioners and employees of the merged company;
- Method of settlement of the rights and obligations of the merged company to third parties;
- Method of settlement of the rights of shareholders who do not agree to the merger of the company;

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- Names of the members of the Board of Directors and Board of Commissioners, as well as the honorarium and allowances for members of the Board of Directors and Board of Commissioners of the surviving company;
- Estimated period for the implementation of the merger or consolidation;
- Report in respect of the circumstances, development and results achieved of each of the companies in a merger or consolidation;
- Main activities of each company in the merger or consolidation and the changes of the business activities that occurred in the current financial year; and
- Details of problems arising during the current financial year that have affected the activities of the companies in the merger or consolidation.

The detailed information included in the consolidation or merger draft must be approved by the members of the Board of Commissioners of each company and be further approved by General Meetings of Shareholders of the merging or consolidating companies, and drawn up in notarial deed form in the Indonesian language. Afterwards, the respective consolidation and merger drafts shall be reported to or approved by the Ministry of Law and Human Rights, depending on the contents of the deed (as stated in the *Company Law*).

Article 126 (2) *Company Law Number 40 Year 2007* states that shareholders who do not agree to the consolidation or merger may request their shares to be bought at a fair price. This provision aims at protecting the right of the majority shareholders to implement merger or consolidation plans without being blocked by minority shareholders.

Furthermore, protection for third parties is provided by the requirement to announce the consolidation or merger in a national newspaper and to the employees of the companies before the respective General Meetings of the Shareholders are held. Any third party that may be affected by the consolidation or merger should submit their objection at least 14 days prior to the General Meetings of Shareholders, after which period the consolidation or merger is deemed to have been approved.

Share acquisitions

Share acquisition may be carried out by either a legal entity or an individual. Share acquisitions can imply the acquisition of all or a substantial part of the shares of a company, including a PT PMA, which may result in the transfer of control to the acquiring company. In the case of a change of controlling shareholders of the target company, special acquisition procedures must be followed that comply with investment related regulations (including the *Negative List Regulations*) and the *Company Law*. Note, however, that Indonesian laws also define certain cases where a transfer of shares is not classified as an acquisition and therefore acquisition procedures do not apply. One of these cases is the transfer of small amounts of shares of a listed company through the capital market.

Debt financing

Companies can also raise financing by loans from banks, shareholder loans or issuing bonds.

Only joint stock corporations are authorized to issue bonds. Korean law knows, among others, general bonds, convertible bonds, bonds with stock purchase warrants, mortgage bonds and participating bonds.

The inducement of loans from abroad to a Korean company needs to follow the regulations of the *Foreign Exchange Law* and *Foreign Investment Promotion Law* in order to secure the repatriation of principal and interest (see ¶4-0506).

Tax implications need to be considered when financing a Korean group company by shareholder loans or shareholder-guaranteed bank loans. Apart from transfer pricing issues with regard to the interest rate of shareholder loans (see "Transfer Pricing" under ¶4-0512), foreign investors need to consider the Korean thin capitalization rules in the finance planning of their Korean investments. Under the *International Tax Coordination Law*, if a Korean legal entity has borrowings from a foreign controlling shareholder and/or a third party lender benefiting from a guarantee extended by the foreign controlling shareholder and such borrowings generally exceed a ratio of generally 3:1 of the foreign controlling shareholder's equity investments in such Korean entity, then the interest expense attributable to such excess borrowing will not be deductible by the Korean entity for corporate income tax purposes.

Security

A pledge is created by the parties entering into a pledge agreement. As to registered shares of a joint stock company, the share certificate has to be delivered to the pledgee and the company has, at the request of the pledge, to enter his name and address in the register of shareholders and record his name on the share certificate. For a pledge of the units of contribution of a limited liability company, the restrictions of a share transfer apply *mutatis mutandis*.

Security rights over real property typically used in Korea include:

- a mortgage that gives the lender a security interest in the encumbered property without having to take physical possession of the subject property. When the mortgagee and mortgagor continue dealing and the amount owed by the mortgagor continuously changes, a so-called "*Kun*-mortgage" may be used. *Kun*-mortgages secure indebtedness arising from a series of transactions up to a pre-fixed amount. For creditors who seek to establish a blanket security interest in a factory which includes its underlying land, facilities, fixtures and equipment as collateral, factory mortgages are available;
- security transfer (*yang'do'dam'bo*), by which the borrower transfers ownership interest and title of the property to the lender, who holds it as security until the loan is repaid; and

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- provisional registration (*ka'dung'ki'dam'bo*) of the option to purchase real property. This security instrument was developed to save costs associated with creating a security transfer.

¶4-0506 Foreign exchange control

The Korean currency is not freely convertible and cross-border monetary transactions are heavily regulated under the *Foreign Exchange Law* and its enforcement decrees and regulations. Foreign investors can benefit from certain investment guarantees and incentives if their investment falls under the scope of application of the *Foreign Investment Promotion Law*. This law sets forth four types of foreign direct investments, whereas the following two are of interest for foreign business investors.

In the case of a purchase of shares or equity of a Korean company, the foreign investor must acquire shares or equity of a Korean company for the purpose of establishing continuous economic relationship with the company by participating in the management of the company and through other means. The amount of the investment by each foreigner must be at least KRW100 million and the foreign investor must, in general, hold at least 10 percent of the voting shares or equity of the Korean company.

Alternatively or concurrently, the foreign parent company or its affiliate may provide a long-term loan, *ie*, a loan with a maturity of five years or more to the foreign-invested Korean company.

The foreign investor is required to file a report with a foreign exchange bank prior to the transaction. The foreign exchange bank will normally accept the report within a few days after filing, assuming that the industry in which the company conducts business has been declared open for foreign investment.

¶4-0507 Property law

Introduction

The Korean *Civil Code* is the basic law governing real properties in Korea. It provides for, among others, the ownership, security interests and leasing of real property. In addition, the *Real Property Registration Act* governs the registration of rights over real property.

Acquisition of ownership rights/registration

Korea has a dual registration system for real property, consisting of a land registry and a building registry. Ownership interests must be registered under both registries because land and any structure on such land are considered separate real properties. If one wishes to acquire the ownership right by contract, valid against third parties, one must register certain documents with the appropriate authority after the execution of the

the Companies Registry to provide a one-stop company and business registration service upon the implementation of the new on-line incorporation system. Under the new system, any person who submits an application for company registration will be deemed to have applied for business registration at the same time. Thus, it is no longer necessary to apply for a Business Registration Licence separately upon the incorporation of a new company.

For those who need to have a company urgently, they can buy a shelf company instead of incorporating one from the very beginning. This is usually a speedier and offers more straightforward option. A shelf company is basically a ready-made company duly incorporated, but has not started any business activity. A person can purchase a shelf company from a firm of solicitors, an accountancy firm or a firm offering secretarial services. Once a person has bought a shelf company, he can "activate" the company by appointing new directors and secretaries, and commencing business activities. Activation of a shelf company does not take long and is less complicated than incorporating a new company. In short, the purchase of shelf companies is a convenient alternative for many business people. There is no distinction between a shelf company and a company incorporated from the very beginning in practice because the name and the constitutional documents of the shelf company can easily be changed to suit individual requirements.

Financing the company

There are two main sources of funding available for a company: (1) share capital and / or (2) loan capital. There is no prescribed maximum share capital for any company. The minimum share capital can be as low as HKD1. The authorised share capital (which is the maximum amount of capital which a company may issue) attracts a capital duty at the rate of HKD1 per HKD1,000 (subject to a maximum cap of HKD30,000). A company may, by an ordinary resolution in the general meeting, increase its authorised share capital. Share capital may be divided into different types or classes of shares such as ordinary, preference or deferred shares, with special rights attached to them as prescribed by the company's articles of association.

The other way of financing a company is by way of loan or debt. The company can borrow money from shareholders or a third party. The directors have the power to borrow money on behalf of the company. Shareholders' loans are likely to be on very favourable terms (*ie*, long-term loans at little or no interest and no security required). Third party loans will usually come from a bank and will be on the usual commercial loan terms. Loans from a bank will almost certainly be on less favourable terms than shareholders' loans and will also usually require security from the company. Also, the bank may require the directors or majority shareholders of the company to provide personal guarantees.

Shareholders

A company must have at least one shareholder who can be an individual or a company of any nationality, domicile or residence. The maximum number of shareholders in a private company is 50. The number of shareholders in a public company is unlimited.

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Directors

A private company must have at least one director and a public company or a company limited by guarantee must at least have two directors. A company has the freedom to decide the maximum number of directors. In a private company, directors can be individuals (over 18 years old) or companies of any nationality, domicile and residence. Corporate directors are, however, not allowed in a public company or a company limited by guarantee.

If authorised by the articles of association, it is also possible for a director to appoint an alternate director. Alternate directors can attend and vote in the board meeting on behalf of the appointing director who for some reason cannot attend the board meeting himself. Alternate directors are quite common in Hong Kong, because business people who act as directors are often travelling out of Hong Kong.

Management and control

Unlike a partnership or sole proprietorship, where the person who owns the business also controls the business, ownership and management are separate in the case of a company. Another salient difference between a company and partnership is that a shareholder of a company is not an agent of the company and he has no authority to make a contract on behalf of the company unless there is clear authorisation from the board of directors of the company.

Under a corporate structure, shareholders own the company, but directors manage the affairs of the company. Shareholders have no automatic right to manage the business unless they are also elected as directors. This is particularly true in the case of a listed company, where the shares of the company are also held by the public. Shareholders, however, have the right to receive dividend and vote on certain resolutions, including the appointment and removal of directors. In a small or family company, however, separation of ownership and management is less clear. The main reason is because the founder members of the company will themselves usually become the only shareholders and directors.

Under the *Companies Ordinance*, certain specific matters can only be dealt with by shareholders in the general meeting of the company, not by directors. Such matters include:

- alteration of the objects clause in the memorandum of association;
- alteration of the articles of association;
- change of name of the company;
- alteration of the share capital of the company;
- reduction of the share capital of the company; and
- removal of directors.

General meetings of a company are either Annual General Meetings (AGMs) or Extraordinary General Meetings (EGMs). General meetings of a company are supposed

According to the *Law 6/80/M*, dated 5 July 1980 (Macau Land Law), three types of lands exist as follows:

- Public domain land;
- Private domain land (a residual category, *ie*, land that does not qualify as public domain land nor private ownership land); and
- Private ownership land.

Land may be the object of:

- a sale;
- a concession by *Aforamento*;
- a Concession Leasehold; and
- precarious use or occupation.

Article 39 of the *Macau Land Law* defines the entities that may obtain rights over land or hold special licenses to their occupation, as follows:

- individuals of any nationality;
- legal entities irrespective of the place of incorporation; and
- other entities of public nature.

Land that may be the object of a concession leasehold are:

- rustic land (raw land, *ie*, without any kind of construction); and
- urban land or with urban interest lands.

The Chief Executive of the Macau SAR is responsible for the concession of lands and any other rights related to the lands.

The most common and usual way of granting land in Macau is through concession leasehold contracts executed with the Macau Government on behalf of the Macau Special Administrative Region. The concession leasehold may be:

- provisory, during a certain period of time to be established; and
- definitive, as soon as the clauses of the Concession Leasehold Contract are fulfilled and the land is delimited.

Sub-concessions are only permitted when:

- there is a public interest that applies for the celerity of the development of the land granted; or
- in favour of credit institutions that, to promote and accelerate the development, have loaned on the land concessionaires and the concessionaires have defaulted the loan agreements.

Annual rent to be paid under a concession leasehold is stipulated in the Concession Leasehold Contract and must comply with applicable laws and regulations.

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The term of a concession cannot exceed 25 years, but may subsequently be renewed successively for 10 years, provided that the concessionaire of the land submits a declaration to the Macau Government at least six months before the term. The renewal is subject to the payment of a special lump sum contribution which shall be fixed from time to time by the Macau Government by reference to the updated rent calculated according to applicable laws and regulations.

Provisory concessions shall be granted by a public auction, through a public bid or through proposals in writing. Public auctions may not be used, *inter alia*, when the concession will be for developments with public interest.

Concessions are obtained upon an application to the Macau Government, followed by information and advices from different public departments on a variety of issues. The application must have certain contents, such as:

- details of the applicant;
- identification of the land;
- specification of the use;
- price offered by the useful domain (*domínio útil*) or the annual rent per square meter, which cannot be lower than what is established in the law; and
- the number of concessions that the applicant holds as concessionaire.

In addition, the following documents need to be submitted:

- a Commercial Registry Certificate;
- a Plan for the utilization of the land, with the localization of the land;
- a Declaration stating that the applicant will renounce foreign jurisdictions; and
- the certificate from the Macau Land and Real Estate Registry.

Upon filing of an application, the following issues have to be considered by the authority in charge:

- the adequacy of the land development proposal;
- third parties rights;
- terms and phases of the land development taking into consideration the nature and volume of construction works projected; and
- accessory issues that may have to be introduced in the Concession Leasehold Contract in order to protect the public interest of the Macau SAR and third parties' rights.

After all the above issues have been cleared, and public departments and other entities (Fire Department, Electricity Company, etc) have been consulted, the Macau Land and Public Works Department shall form a view on whether the application will be approved or not and, subsequently, the Chief Executive shall issue a dispatch granting the land and ordering the provisory delimitation of the land and the realization of a public bid, when there is no ground for its dispensation. After the delimitation of the land, the Chief

- Phase 1 entails a quick review and allows merger situations which clearly do not raise competition concerns to proceed without undue delay. The CCS will normally complete a Phase 1 review within 30 working days.
- If the CCS is unable to form a view during Phase 1, it will proceed to a more extensive Phase 2 review and require further information. The CCS will normally complete a Phase 2 review within 120 working days.

¶4-0805 Financing

Equity financing

Companies may raise financing by issuing shares. Shares may be issued in any denomination and, under Singapore law, do not have a par value. In addition to ordinary shares which carry voting rights, companies may also issue non-voting shares known as "preference shares" as these usually carry a right to dividends on a preferential basis. They may be redeemable or non-redeemable, convertible or non-convertible. Venture capitalists will often subscribe for preference shares in a start-up, which may carry a right of redemption under certain circumstances, and may also be convertible to ordinary shares just prior to the successful listing of the company. In addition to raising capital from non-shareholders, companies may also seek to raise capital from their existing shareholders by engaging in a rights issue.

Companies may also seek to raise financing by listing on Singapore Exchange Securities Trading Limited (SGX). The SGX has two boards: a Main Board and Catalist. Companies that seek to list on the Main Board must meet the minimum listing criteria which are both qualitative and quantitative. Quantitative criteria comprise matters such as achieving a minimum shareholding spread, having a minimum amount of pre-tax profits and/or achieving a minimum capitalisation level. The listing process for the Main Board generally takes about 12-16 weeks. The company will need to issue a prospectus that must meet the disclosure requirements set out in the *Securities and Futures Act*. It must also file a listing application with the SGX.

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Companies that seek to list on Catalist do not need to meet minimum quantitative criteria but must be sponsored by a financial institution that is registered as an approved sponsor on Catalist. A prospectus meeting the disclosure requirements set out in the *Securities and Futures Act* must also be issued, and a listing application filed with the SGX. The listing process for Catalist is generally shorter than that for the Main Board taking about five to six weeks.

Companies that are already listed on another exchange may also seek to raise capital on SGX either by seeking a secondary listing or by issuing Global Depository Receipts.

Debt financing

Companies can also raise financing by relying on debt, either via loans from a bank or, by issuing bonds to the public.

Bank loans

Singapore is a major financial centre and there are some 120 commercial banks operating in Singapore. The cost of borrowing in SGD has often been quite low. Singapore does not impose any exchange controls in respect of borrowings in currencies other than Singapore dollars, *ie*, companies are free to borrow in USD or any other foreign currencies and, other than there being some restrictions against speculating in Singapore dollars, borrowers are also free to borrow in Singapore dollars.

There is no limit imposed generally by law on the amounts that a borrower can borrow, *ie*, there are no generally applicable thin capitalisation rules or rules which limit borrowing to a ratio of the capital of the borrower (though in certain industries, there may be a minimum capitalisation requirement by virtue of the industry that the company is in).

Debt funding to companies is often by a mixture of loans from shareholders and from external sources such as banks, while equity funding maybe by way of ordinary shares or preference shares (please see the section on "*Equity Financing*" above). Preference shares may be seen as a type of financing that is in between the external (bank) financing and the pure equity financing (ordinary shares), in that in terms of control of the borrower:

- they carry some voting rights (less than the ordinary shares, while unless other contractually provided, bank lenders have no voting rights at the board of directors of the borrower); and
- they have priority in liquidation over ordinary shareholders.

There are no stamping or registration requirements for loan agreements and no governmental approvals for borrowings.

In recent years, banks have started to adopt the loan documents of the Asia Pacific Loan Market Association.

Debt capital markets

Companies may also seek to raise debt financing through the issuance of debt securities, such as bonds or notes. These debt securities may be issued to the public, or to institutional and sophisticated investors by way of private placements. An issue of debt securities will need to be accompanied by a prospectus which meets the requirements of the *Securities and Futures Act* (SFA), or pursuant to an exemption under it.

Debt securities, including foreign debt securities, may be listed on the SGX. In order to list debt instruments issued by a Singapore incorporated issuer, the issuer must be either already listed on the SGX (in which case the issue of debt securities must have a principal amount of at least SGD750,000), or it satisfies any of the following conditions and the debt securities have a principal amount of at least SGD750,000:

- the debt issuer must satisfy certain specified quantitative criteria in relation to matters such as achieving a minimum shareholding spread, having a minimum

made during these periods, the offeror must ensure that prior acquisitions are not made on terms that are better than the terms of the takeover bid, and that subsequent acquisitions are on identical terms to the takeover bid.

Bid conditions

There may be conditions attached to a takeover bid. Such conditions are not prescribed by Canadian securities laws and vary according to the following:

(1) the business of the target;

(2) the nature of the consideration offered;

(3) the extent of regulatory approvals required; and

(4) whether the bid is hostile or friendly.

Moreover, a hostile bid will customarily contain additional conditions relating to the occurrence of events that are not in the control of the bidder but within the control of the target.

Plans of arrangement

Under a plan of arrangement, the target company and the purchaser negotiate and execute an arrangement agreement and the target company prepares an information circular setting out the terms of the arrangement. Prior to completion of the information circular, a court preliminary order must be obtained. In order to approve the arrangement, a special meeting of the securityholders must be convened. Generally, approval must be received in the form of a special resolution. The requirements for a special resolution vary across the corporate law statutes of the provinces. After this approval is obtained, the target company can then apply for a final court order approving the arrangement.

Proxies in respect of a securityholder meeting held to consider an arrangement can be solicited and validly deposited up to 48 hours prior to the time of the securityholder meeting but later deposits may be accepted at the discretion of the chairperson of the meeting. However, proxies can be revoked at any time up to the start of the securityholder meeting. A securityholder meeting held to consider an arrangement can be adjourned to any future date by a simple majority vote of the shareholders in attendance at the originally scheduled meeting or at the discretion of the chairperson of the meeting.

Merger control

The *Competition Act* provides for the effective regulation of commercial activities in matters affecting competition. The purpose of this statute is to maintain and encourage competition in Canada. For the purposes of this section, we will focus only on the merger provisions of the *Competition Act*.

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Pre-merger notification requirements

Under the *Competition Act*, a proposed transaction will generally require notification to Canada's Competition Bureau (the "Bureau") where thresholds relating to both the size of the parties and the size of the transaction are exceeded. The size-of-the-parties threshold is surpassed where the parties to the transaction, together with their affiliates, have assets in Canada, or have annual gross revenues from sales in, from or into Canada, that exceed CAD400 million. The size-of-the-transaction threshold distinguishes among different types of transaction. For an asset acquisition, the threshold is met if the aggregate value of the Canadian assets acquired or the annual gross revenues from sales in or from Canada generated from those assets would exceed CAD70 million. For a share acquisition, the threshold is met if:

(a) the aggregate value of the assets in Canada owned by the subject corporation or by corporations controlled by the subject corporation or the annual gross revenues from sales in or from Canada generated from those assets would exceed CAD70 million; and

(b) as a result of the proposed acquisition of the voting shares, the acquiror, together with its affiliates, would own more than 20 percent of the voting shares of a public corporation or more than 35 percent of the voting shares of a private corporation, or if the acquiror already owns more than the above percentages before the transaction, would own more than 50 percent of the voting shares of either a public or private corporation.

Notification process

In cases where a proposed transaction is notifiable, notification must be made by both the acquiror and the entity being acquired. Pre-merger notification filings are subject to a processing fee of CAD50,000 per notification.

The parties must wait 30 days following a filing before completing a proposed transaction. Except in the circumstances of a hostile takeover bid, the waiting period begins to run from the time that a complete filing is received by the Bureau. If the Commissioner of Competition (the "Commissioner") considers that filing to be incomplete, she can require additional information to be provided. This could postpone the commencement date for the waiting period. In addition, the Commissioner has the ability, within 30 days of receiving an initial filing, to formally require that additional information be provided. This process is known as a secondary information request (SIR). If the filing parties receive a SIR, they cannot close the transaction until an additional period of 30 days has passed after all of the additional information requested in the SIR has been provided.

Separate from the statutory waiting periods, the Bureau has also implemented self-imposed targets, or "service standards", for completion of the Bureau's review of a notified transaction. The service standard applicable to any particular transaction, and the time expected to complete a review of the transaction, will depend upon whether the Bureau classifies the transaction as "non-complex", "complex" or "very complex". Depending on the classification, the target maximum turnaround time for review can

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Non-income earning representative office

For companies which do not intend to engage in commercial transactions and where the activities to be performed in Mexico are limited to identify potential clients or to liaise with Mexican clients, the establishment of a non-income earning representative office in Mexico may be advisable. Similar to the establishment of a branch, a resolution approving the establishment of a non-income earning representative in Mexico must be adopted by the foreign company. Since this type of entity is not engage in commercial activities, its registration with the Public Registry of Commerce and the authorization of the Foreign Investment Bureau should not be required. However, in practice, some governmental agencies may require obtaining of such authorization and registration.

¶4-1004 M&A rules and merger control

M&A rules

Under Mexican law, a merger can be defined as the form of corporate restructuring whereby:

- a Company transfers the totality of its patrimony, rights and obligations to a Surviving Company, while giving up its own legal existence; or
- the merger of two or more companies to form a new entity which will give up their legal existence.

Both scenarios require compliance with several provisions set forth in the by-laws of the merged and merging companies as well as those of the *General Corporations Law* (GCL).

Procedurally, in Mexico a merger follows the following pattern:

- The terms of the merger and the balance sheets of the merging and merged companies must first be approved by an extraordinary shareholders/partners' meeting of each company.
- The merging company and the merged company must execute a merger agreement setting forth the specific terms and conditions of the merger.
- Relevant merger excerpts and the corresponding balance sheets must be published in the Official Gazette of the domicile of both companies. The merged company must also publish the approved procedure for the discharge and satisfaction of its liabilities *ie*, the procedure of payment of outstanding debts.
- The merger resolutions must be formalized before a notary public in Mexico, and subsequently registered before the Public Registry of Commerce of the corporate domicile of the merged and merging companies, to be effective against third parties.
- Certain notices must be filed with competent governmental authorities, including the National Foreign Investments Registry and the Ministry of Finance and Public Credit (*Secretaría de Hacienda y Crédito Público*).

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Merger control

Under the Mexican *Antitrust Law*, a "combination" is defined as any "merger, acquisition of control, or any other act" carried out among competitors, suppliers, customers, or any other economic agents by means of which companies, associations, shares, partnership interests, trusts, or assets in general may be combined.

In the event that any combination reaches any of the following thresholds, the Mexican Antitrust Commission (COFECO) must be notified before the transaction becomes effective:

- one or a series of acts leading to a combination, and irrespective of the place of its execution, involves in Mexico, either directly or indirectly, an amount greater than the equivalent of 18 million times the general minimum wage effective in the Federal District (*ie*, approximately USD73,100,000);
- one or a series of acts giving rise to the combination involves the accumulation of 35 percent or more of the assets or shares of an economic agent, whose annual assets in Mexico or annual sales originated in Mexico, are greater than the equivalent of 18 million times the general minimum wage effective in the Federal District (*ie*, approximately USD73,100,000); or
- one or a series of acts giving rise to the combination involves the accumulation of assets or corporate capital in Mexico, greater than the equivalent of 8.4 million times the general minimum wage effective in the Federal District, *ie*, approximately. USD33,000,000, and two or more economic agents, whose assets or annual volume of sales, jointly or severally, amount to more than 48 million times the general minimum wage effective in the Federal District, *ie*, approximately USD188,000,000, participate in the combination. Under this hypothesis, both elements (*ie*, accumulation of assets and estimation of assets or sales of the economic agents) must occur.

Upon receipt of a notification, COFECO may within 10 business days order the economic agents involved not to conclude the deal until a favourable COFECO's resolution is issued. If no such order is issued, the transaction can in principle go ahead as planned. If an order has been issued following the date of issuance of the order receiving the filing of clearance for the combination, COFECO shall within 35 business days from the date of filing of the application for clearance of the combination, issue its final resolution. COFECO is entitled to request additional information during the first 15 business days following the date of filing. In this case, the 35-day period will be counted from the date when all the requested information has been received. COFECO's failure to render its final resolution within the 35-business day period shall be understood as there being no objection on COFECO's part against the combination.

A fast-track clearance procedure exists for cases where economic agents file an analysis, accompanied by appropriate information "clearly evidencing that the combination will have no purpose or effect that diminishes, damages, or impedes competition and free trade". In fast-track cases, COFECO shall issue a final resolution within 15 business days following the date of issuance of the order receiving the filing of

environmental liens and other liens in the jurisdiction in which the company whose assets are being acquired is organised (or, if acquiring real property, in the county where the real property is located) and to clear any liens prior to acquiring the assets.

¶4-1108 Intellectual property

Introduction

The US legal system has a statutory and common law framework that provides certain rights and protections for owners of intellectual property (IP), the intangible personal property that is the result of creations of the mind. The law of IP defines when and how IP is created, who owns it, what rights of exploitation the owner has over such property, the duration of the owner's rights, and the limitations and exceptions to the owner's otherwise exclusive rights over the property.

In the US, IP is generally divided into four broad categories: (1) copyrights; (2) trademarks; (3) patents; and (4) trade secrets. Rights and protections of IP are generally based on federal laws for copyright, trademark and patents; state law generally governs the protection of trade secrets.

The US Patent and Trademark Office (USPTO) is the federal agency that provides for the granting of US patents and registering trademarks. Protections for IP rights are enforced through the court system and the US Customs Service. The majority of disputes are instituted by the owners of IP through civil law suits. While most IP laws contain criminal enforcement provisions, prosecutors in criminal cases primarily focus on large-scale piracy and counterfeiting activities. The US Customs Service is authorised to exclude goods from entering into the US if the goods would infringe US trademarks and copyrights (see, *eg*, 19 CFR §§ 133.0-133.7 (1972)).

Copyrights

US federal copyright law provides protection for "original works of authorship" that are fixed in a tangible medium, including literary, dramatic, musical, artistic and certain other intellectual works. Subject to certain limitations and exceptions, the owner of a copyright has the exclusive right to reproduce, adapt, distribute, perform and display the work. One major limitation is the doctrine of "fair use" which allows limited use of copyrighted materials without permission from the rights holder for purposes such as criticism, comment, news reporting, teaching, scholarship or research. Purchasers of lawful copies have limited rights under the "first sale" doctrine. A copyright is secured automatically upon creation and generally lasts for the term of the author's life plus an additional 70 years after the author's death. Then the work returns to the public domain. However, in order to recover certain statutory damages or other remedies, as well as gain the benefit of presumption of ownership, copyrights need to be registered with the US Copyright Office. Copyright ownership becomes more complicated if the work has been produced by a group of collaborators or by one or more independent contractors because each contributor is deemed a co-owner of the copyright unless they have agreed

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otherwise. Companies using independent contractors often enter into agreements whereby the contractors assign their right, title and interest in the work being created to the company. Companies often also establish workplace guidelines under which their employees agree that any works created in the course of employment are deemed to be solely owned by the company.

Trademarks

Trademarks are subject to both federal and state trademark laws, which provide for the protection of the use of a device (including a word, phrase, symbol, produce shape, or logo) by a manufacturer or merchant to identify its goods and services against confusingly similar use by others. The *Trademark Act of 1946* (more commonly known as the "Lanham Act") provides the statutory framework for regulating federal protection of trademark whereas the *Model State Trademark Bill*, developed by the International Trademark Association, is used as the basis of state trademark statutes and has been adopted in 46 states. While trademark common law rights arise from the actual and continuous use of a mark, in order to obtain the greatest protection for a mark, it is advisable to register the mark with the USPTO in order to provide notice to third parties and entitle the registrants to sue for trademark infringement. Assignments of registered marks must also be recorded with the USPTO in order to provide constructive notice to purchasers for value. The main test of trademark infringement is the likelihood of confusion. Both state and federal anti-dilution law also provide protection for distinctive marks against uses by junior users that dilute their distinctiveness. Trademark counterfeiting statutes attempt to address the growing problem of counterfeit or imitation of a trademark typically with the intent to deceive a consumer as to its authenticity.

Patents

Patents in the US are governed by the federal *Patent Act* and are generally based on a first-to-file system. Patents may cover any non-obvious, novel and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof submitted to the USPTO for review. The owner of a patent has the right to exclude others "from making, using and selling the invention" for 20 years from the date an application was filed with the USPTO. Patents can also be filed for ornamental designs and genetically modified plants. Patents allow a holder to sue for infringement to recover damages and/or enjoin the sale of infringing products. Valid patents can defeat independent discovery so developers should be aware of any prior art and obtain a license from a holder of any patent(s) a developer improves or relies upon. State laws do not provide any protection for patents. As with copyrights, companies using independent contractors often enter into agreements whereby the contractors assign their right, title and interest in any invention to the company, and establish workplace guidelines under which their employees agree that any patent filing made on an invention will designate the company as the owner of the patent itself, with the employee individually listed as an inventor.

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¶4-1307 Property law

Introduction

Subject to consent which may be required under the Overseas Investment Legislation, overseas persons are free to acquire or lease property in New Zealand without any need for consent from any regulatory body (see ¶4-1302 for a discussion on Overseas Investment Legislation).

Sale and purchase of land

Agreements for the sale and purchase of land are required to be in writing and signed by the parties or their representatives, and may be either unconditional or subject to conditions for the benefit of either party. Usually, these conditions are required to be satisfied by the purchaser. Common conditions include the purchaser arranging the necessary finance, obtaining and approving of builder's reports and completion of general due diligence, or the purchaser obtaining and approving a Land Information Memorandum (LIM). A LIM is a comprehensive report produced by the relevant local Council and contains all the relevant information the Council knows about the property (such as, consents, District Plan classifications, potential hazards, requisitions and rates).

Changes in land ownership are registered on a centralised electronic register system, which can be searched by the public. While the public has access to this information, only authenticated, registered users (usually solicitors) are able to transfer property or register various interests such as mortgages. Electronic lodgement of documents is compulsory, and with very few exceptions being those cases where original signatures are required (*eg*, court orders), this has resulted in the withdrawal of paper based lodgements.

Land development

Where an investor intends to develop land in New Zealand, the provisions of the *Building Act 2004* and the *Resource Management Act 1991* (the RMA) are important.

The *Building Act 2004*, in conjunction with the *Building Code*, regulates the construction of buildings. It requires that building consent be obtained from the relevant local Council for construction or alteration to an existing building. When granted, a building consent will often be subject to various conditions.

In addition, work must start within twelve months after the consent has been issued and it must be completed within two years from the date the building consent was granted, although the ability to apply for an extension exists in both cases. At the end of the building project, a code compliance certificate should be applied for from the Council which confirms that the work complies with the building consent. In the case of buildings used by members of the public, if people want to start using the premises before a code compliance certificate is issued, then the owner can apply for a certificate for public use. This will only be granted if the Council is satisfied that the public can use the building safely.

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Environmental

The RMA is New Zealand's principal environmental statute. Its purpose is to promote the sustainable management of the environment by "remedying, avoiding or mitigating" the adverse effects of proposed activities on the environment.

Local government is largely responsible for implementing the RMA and, for this purpose, local government is divided into two tiers (regional and district councils). Regional councils manage and monitor environmental matters relating to air, land, water bodies and water ways. District councils focus on regulating activities relating to land use. Under the RMA, district councils are responsible for controlling the effects of land use (including hazardous substances and noise), land subdivision and the effects of activities on the surface of lakes and rivers. Regional council functions under the RMA include controlling water quality and quantity, the discharge of contaminants to land, air or water, hazardous substances and natural hazards.

The RMA establishes a consent process for the approval of development proposals. Under the RMA, applications for resource consents must be made to regional councils, local councils, or both, depending on the proposed development. Following the consent process, the relevant local authority may grant consent, with or without conditions. Applicants, or any person who makes a submission in relation to an application, have a right of appeal to the Environment Court.

In M&A transactions involving interests in land, investors will usually undertake an environmental investigation as part of their due diligence. Depending on the circumstances, this may include engaging third party environmental consultants. The scope of their investigation will depend on the investors risk appetite and its perception of possible environmental issues on the site. Phase I environmental investigations generally consist of a desktop exercise involving an environmental audit to determine whether all necessary consents have been obtained, whether the consents are still current, and whether there are any contamination issues noted on a public register (including the LIM). If a potential contamination issue is identified then a purchaser may decide to undertake a Phase II environmental investigation. Phase II environmental investigations involve environmental consultants attending at the site of interest and undertaking tests to determine contamination levels.

To alleviate some of this risk, purchasers may obtain environmental warranties from a seller and they may also attempt to obtain an environmental indemnity. It is common to obtain an environmental indemnity for an identified environmental issue.

Security interests

Topical issues relating to the provision of security are considered in "Funding via registered banks and NBDTs" under ¶4-1305. As far as security interests over personal property are concerned the PPSA, which came into force on 1 May 2002, provides a set of rules for security interests created over personal property. The PPSA does not affect security over land.

then disappear. Many variations of this basic form of statutory/legal merger may appear such as a merger between a parent and a subsidiary, or a triangular merger under which the consideration shares may be issued by a member of the acquiring company's group. The legal merger is the only merger that is directly regulated in the Dutch Civil Code.

Acquisitions

Introduction

Under Dutch law, a distinction must be drawn between of private (non-listed) companies, and public (listed) companies. Generally speaking, when acquiring a private company, parties have a lot of freedom. Partly due to European legislation, bidders for public companies need to comply with several rules governing the bidding process.

Share deals

The most common method for acquiring a business is by a transfer of shares. Such transfer can only be done by a notarial deed.

Potential bidders for public (listed) companies should be aware that three types of public offers can be distinguished:

- friendly offers;
- hostile offers; and
- mandatory offers.

In a friendly offer, the management of the target company recommends that its shareholders accept the offer. Usually management and the bidder conclude a so called "merger protocol" in which they agree on the price and principal deal terms (*eg*, legal structure, conditions precedent, competing bids and break fees). As soon as such agreement has been reached, parties are obliged to immediately publicly announce the offer and its main features in a press release.

In a hostile offer, the management of the target company does not recommend the offer. Usually a bidder makes a hostile offer after negotiations for a recommended offer have failed. However, since 2007, it is no longer mandatory to consult management prior to a hostile bid. Many listed companies have anti-takeover devices in place to prevent hostile bids.

If a party together with its group companies is able to exercise at least 30 percent of the voting rights at a general meeting of a listed company, it is obliged to make a mandatory offer for all other shares. The offer must be unconditional and the price must be equal to the highest price paid by such bidder in the preceding 12 months — or, if such purchases have not been made, the average quoted share price in the previous 12 months. The obligation also arises when one party reaches the 30 percent threshold together with another party with whom it acts in concert, *eg*, by an explicit or implicit voting agreement.

Insider trading rules play an important role in public offers. In principle, companies listed in the Netherlands need to disclose price sensitive information immediately. When

a company has, however, a legitimate interest to suspend disclosure — which is usually the case during negotiations on a recommended offer — such suspension is allowed (until an agreement has been reached) provided confidentiality can be ensured and the public is not misled by the non-disclosure. In case of rumours, an emergency press release may be necessary.

Furthermore, the bidder, the target and the target's board members need to notify the AFM on certain of their transactions related to the target — some of which details also need to be published in the offer memorandum.

Asset deals

Acquisitions can also be conducted by way of an asset deal where all assets of the target company are acquired. The management of a company may only decide to sell (almost) all assets of its company after approval by the general meeting of shareholders. A notarial deed is usually not necessary, but exceptions apply, *eg*, for real estate. Dutch law stipulates that in the event of such transfer of assets, all employees will transfer along with these assets and will automatically be employed by the new owner of the assets.

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Approvals

Save for competition aspects in principle, no third party approval is needed for a private M&A transaction. Exceptions exist in case of the involvements of banks or other financial institutions as already explained in ¶4-1702.

Companies entering into an M&A transaction are however obliged to consult with their respective Dutch Works Councils prior to a transaction. The establishment of a Works Council is obligatory for companies with more than 50 employees. And, they must do so at such time that the Works Councils can still influence the decision of whether or not to transfer control. Negative advice from the Works Council results in mandatory postponement of the acquisition by at least one month during which the Works Council may take the matter to court. Furthermore, the relevant trade unions also need to be informed prior to the transaction and can oblige the company to enter into discussions with them.

Merger control

Business concentrations may result in powerful companies which are dominant enough to affect competition significantly or eliminate competition in a specific market. To prevent this, the Dutch Competition Act provides for a system of ex ante assessments of mergers and acquisitions above specific turnover thresholds. The Dutch Competition Authority (NMa) has to be notified of a proposed concentration, which cannot be pursued unless NMa clearance is received.

¶4-1705 Financing

The Netherlands has a high level financial system with an easily accessed world-class banking system. All major international banks are represented in the

This chapter provides a basic summary of the procedures and workings of the litigation process before the courts of England and Wales, which are governed by the *Civil Procedure Rules* (CPR).

Which court will handle the case?

Civil claims with a value in excess of GBP50,000 are usually handled by the High Court. Lower value, less complex disputes are dealt with by the County Court.

The High Court comprises the Queen's Bench, Chancery and Family Divisions. Commercial disputes are dealt with by either the Queen's Bench or the Chancery Divisions. Cases involving a sufficiently technical or scientific element can be referred to the specialist Technology and Construction Court.

The procedure

Pre-action

Unless there are good reasons to the contrary, all parties are expected to enter dialogue to try to resolve their disputes before issuing legal proceedings and, if they do not, they may be penalised by the court in costs. Usually, a party is required to write a detailed letter setting out his claim and enclosing any supporting documents. The intended defendant should be allowed a reasonable period (say 30 days) to respond.

Commencing proceedings

The usual way to commence proceedings is to issue a claim form in court and serve it on the other party to the dispute. The claim form sets out a summary of what is claimed. A more detailed document setting out the full "particulars" of the case, ie, the facts on which the claimant relies and the basis for holding the defendant liable must be served within14 days of serving the claim form.

If the defendant intends to dispute the claim, he must serve a defence setting out why he is not obliged to meet the claim.

The particulars of claim and the defence are called "statements of case". Each party or its legal representative must sign the respective statements to confirm to the court that it is true.

Defended claims

Once a claim is defended, the court will ask the parties to complete an "allocation questionnaire", describing certain features of the claim and/or defence, and will allocate the claim to one of the three tracks: small claims, fast track or multi-track. All claims with a value in excess of GBP25,000 will be assigned to the multi-track.

Court process for multi-track claims once proceedings are issued

The CPR requires all parties to conduct litigation with the "overriding objective" in mind. This is to deal with cases justly having regard to the identity and financial status of

the parties, the sums in issue and the importance of what is at stake and the complexity of the issues. Steps taken must be proportionate to the case.

There will be an early hearing for the court to set the steps to trial (directions), the period within which the trial will take place (the trial window) and the length of the trial (the trial estimate).

Standard directions

Each party is under an obligation to disclose to the other all documents within its control on which it either relies or which adversely affect its case or another party's case or which support another party's case. "Documents" includes paper documents and electronically stored information. Communications between a lawyer and his client made for the giving or receiving of legal advice will not have to be revealed, neither will communications between the lawyer and the client or a third party made with the dominant purpose of helping in the conduct of the litigation. These documents are "privileged".

Written statements of the witnesses who will give evidence at the trial are exchanged in advance of trial. This enables the parties to assess each other's case and narrow the issues in dispute. Witness statements usually stand as that witness's evidence in chief at trial and they can be cross-examined in court on that evidence by the other party.

Independent experts with relevant expertise may also be called, with the permission of the court, to provide a report on a technical issue. Expert reports are exchanged before trial and the experts are expected to meet before the trial to identify any areas of agreement.

The CPR encourages parties to consider the use of ADR, such as mediation, and engage in discussions at any time during the proceedings to try to settle the dispute. Communications genuinely aimed at settlement are regarded as "without prejudice" meaning they cannot be shown to the trial judge until after judgment and only for the purposes of claiming costs. Under the CPR, if a winning party fails to beat a formal offer to settle the litigation, he will have to bear the other party's costs of the proceedings from a certain time period after the offer to settle was made.

Trial

Trials in the High Court are heard by a judge. Before trial the judge is provided with each party intends to rely. The parties must agree and prepare paginated bundles of all relevant documents they wish to refer to the judge or to a witness during the trial. All witnesses must attend trial for cross examination unless the opposing party agrees that a witness' attendance is not necessary. Any witness of fact, who refuses to attend trial, can be served with a witness summons requiring him to do so. The process of cross-examination is adversarial, not inquisitorial. The judge must be impartial and may put questions to the witnesses to clarify matters of fact or of expert testimony.

Civil proceedings are recorded and the parties can obtain transcripts of the proceedings in court including the judgment. Civil trials are open to members of the public, unless there are good reasons why this should not be the case.

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Also the names of companies registered in Switzerland enjoy protection against identical or confusingly similar company names (see *Code of Obligations*). Before adopting a name for a new Swiss company, it is therefore advisable to conduct a search to make sure that it does not infringe the name of a pre-existing Swiss company.

Patents

Swiss patent law is based on the "first to file" principle (see *Patent Act*). Chinese companies intending to enter into the Swiss market should therefore make sure that their products do not infringe existing patents held by third parties and timely register their patents with respect to Switzerland. Switzerland is a member of the *European Patent Convention* and it is therefore possible to obtain a European Patent extending to Switzerland. Switzerland is furthermore a contracting party to the *Patent Cooperation Treaty*. Patents are granted for new, commercially applicable inventions. The term of protection for patents is 20 years and may not be extended. Supplemental protection certificates may however extend the life of a patent for pharmaceutical products for a maximum period of five years. Patent rights can be freely assigned (Von Büren/Marbach, 2008). A new specialized Swiss Federal Patent Court will soon become effective and replace the first instance jurisdiction of the cantonal courts in patent validity and infringement matters.

Copyrights

Swiss copyright law protects literary and artistic works, including applied arts and software provided that they have "individual character", *ie*, are the result of an individual intellectual creation or expression (see *Copyright Act*). Copyright protection is granted automatically, *ie*, no registration or other formalities (such as the use of a copyright notice) are required. Because both China and Switzerland are members of the WTO/TRIPS Agreement, Chinese copyrights are automatically protected in Switzerland as well. Copyright protection lasts for the life of the author plus 70 years (except for copyright in software, which extends for the life of the author plus 50 years). Under Swiss law, the copyright always originally belongs to the individual author (no "work for hire" doctrine). The right of commercial exploitation of a copyrighted work may be freely transferred or licensed. On the other hand, the author's moral rights are deemed to be non-transferable (Von Büren/Marbach, 2008).

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Designs

Novel designs (*ie*, patterns and shapes) with individual character may be registered in Switzerland (see *Designs Act*). If a design is merely functional, it is excluded from design protection under Swiss law. Designs need to be registered in order to be valid. The initial period of protection lasts five years and may be extended up to a maximum of 25 years (Von Büren/Marbach, 2008).

It should be noted that Swiss law (unlike, *eg*, German law) does not provide for the possibility to protect utility models.

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¶4-2209 Labour law[10]

Introduction

Swiss labour law bears the stamp of the essentially "liberal" character of Swiss legislation as opposed to certain European jurisdictions. Switzerland has remained outside the general evolution in matters like protection against dismissal, co-determination for employees and union rights within a company.

This overview shall provide a summary of Swiss labour law, including the related social security scheme, and of the Swiss work permit regime.

Framework governing employment contracts

The contractual regime

Most of the relations between employer and employees are regulated by individual employment contracts drafted based on the relevant provisions of the *Code of Obligations*. There are, moreover, numerous collective employment contracts whereby employers and employers' associations, on the one hand, and employees' associations (labour unions), on the other hand, jointly establish provisions concerning, *eg*, the conclusion, content and termination of the individual employment relationships of the participating employers and employees. Collective employment contracts are genuine compromises between the interests of employers — or employers' associations — and employees' associations. It is due to such contracts that labour strikes rarely occur in Switzerland and that labour peace is appreciably safeguarded.

The law on employment contracts and the pertinent provisions of public law (concerning, *eg*, maximum weekly working hours, security in the work place) apply to Swiss citizens and foreigners alike.

Termination of employment contracts

The termination of an employment contract does not require advance approval by a governmental or regulatory body. Where the employment contract has not been entered into for a fixed period of time, notice may be given by either party at any time without special justification. According to statutory law, the notice period is between one and three months, depending on the years of service. These periods may be altered by written agreement, but, in practice, periods in excess of six months are rarely provided for. Restrictions exist with regard to the termination of employees who are absent from work due to illness, accident or military service or in case of pregnancy of an employee.

Employment contracts, whether they were entered into for a definite or an indefinite period of time, may be terminated by either party based on just cause at any time with immediate effect. Any circumstance under which the terminating party cannot in good faith be expected to continue the employment relationship is considered "just cause". Whether or not such circumstances are found to exist, however, is a matter for the judge's discretion.

have entered into a double taxation treaty with Switzerland. Depending on the treaty, the withholding tax may be recovered fully or partially or may be exempt at source. Swiss withholding tax refund or exemption at source is also granted to companies resident in an EU member state as such companies can likely benefit from the Swiss *EU Savings Directive* which more or less implemented the *EU Parent Subsidiary Directive* (Höhn, 1993).

In case of a Chinese parent company, Swiss withholding taxes can be reduced to 10 percent under the Chinese Swiss Double taxation treaty. This requires an application to the Swiss Federal Tax Authorities.

Interposing a Luxembourg intermediary holding company between a Chinese parent and its Swiss subsidiary company could reduce Swiss withholding tax to zero. Dividends distributed by the Swiss company in such a structuring first flow to the Luxembourg holding and the 35 percent Swiss withholding tax is reduced to zero under the Swiss Luxembourg double taxation treaty (provided all requirements for treaty benefits are met). Such dividend income in turn is very likely exempt from Luxembourg corporate income tax under the Luxembourg participation exemption. Once the Luxembourg holding distributes this income as dividends to the Chinese parent, likely no Luxembourg withholding tax is triggered either. As a result dividends of the Swiss subsidiary no longer are subject to any withholding tax in Europe. Such tax structuring needs to be analyzed on a case by case basis and may be confirmed in advance tax rulings.

Value added tax (VAT)

As a rule, anyone who makes, in a regular and independent manner, taxable transactions in Switzerland that exceed CHF100,000 is liable to VAT in Switzerland.

Proceeds of sales made and services rendered in Switzerland are subject to VAT at the standard rate of 8 percent (which is reduced to 2.5 percent for goods for standard needs and to 3.8 percent for services in connection with the provision of accommodation). However, exported goods and services benefit from a VAT exemption. On the other hand, goods or services imported from abroad are subject to 8 percent Swiss VAT. A Swiss company usually fulfils the conditions to be deemed a VAT payer and has, therefore, to register as such with the Federal Tax Authority (Höhn/Waldburger, 2001; *Value Added Tax Act*).

Special tax reliefs

Taxation of holding companies

In general, holding companies whose main purpose is the administration of their investments in other companies (subsidiaries in Switzerland or abroad) enjoy the following preferential tax treatment on both the cantonal and the federal tax levels.

On a cantonal tax level, holding companies are generally exempt from any tax on profits and pay only a reduced tax on capital.

Even though the federal direct tax does not recognize the concept of a holding company, substantial tax reductions are granted to qualified dividend income and/or

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capital gains of holding companies. If a holding company holds more than 10 percent of the share capital of another Swiss or foreign company, or participations with a current market value of more than CHF1 million, its taxable income is reduced by reference to a ratio between the net earnings generated by the participations and the total net profit. Net earnings are the earnings derived from participation, minus financing costs related thereto, and a 5 percent deduction to cover administrative costs. As a rule, capital gains on the sale of a participation benefit from the same reductions.

Auxiliary companies

Auxiliary companies (also called "administrative" or "mixed companies") usually provide services to other entities of the group abroad or to foreign companies. Most cantons generally grant tax privileges to these companies. An auxiliary company can have a limited commercial activity in Switzerland.

As a general rule, at least 80 percent of the income from its activities must be derived from non-Swiss sources (*ie*, a maximum of 20 percent of income may be linked to Swiss sources). Many cantons additionally require that at least 80 percent of its costs must be related to activities undertaken abroad.

Provided a company qualifies as an auxiliary company, it may apply for a tax ruling and is entitled to a treatment where its foreign sourced income is only subject to a combined federal, cantonal and communal effective income tax rate of about 8-12 percent.

Tax holiday

There is no federal tax holiday as such, but there are specific economic measures in favour of certain underdeveloped areas of Switzerland which effectively achieve the same goal. The Confederation may thus grant assistance to businesses which establish themselves in areas that are economically underdeveloped. Federal aid may be granted as security on commercial loans and/or as a contribution to the payment of interest on such loans. However, this is only available if the company settles in certain parts of the country.

Business incentives may be granted by a canton for cantonal and communal income tax purposes for locating new business activities in the canton or in a specific region in the canton. Business incentives may in particular be obtained under an advance tax ruling procedure for creating a new presence or for an expansion project which has particular economic relevance for the canton. The new business activity must furthermore not be in direct competition with existing local businesses. Lastly, and potentially most importantly, business incentives are generally granted in connection with the creation of new jobs locally. By international standards, the number of jobs which need to be created to benefit from business incentives are generally quite low (*eg*, beginning at 10 to 20 jobs in most cantons). Business incentives are obtained by negotiation with the relevant cantonal economic promotion office, often in cooperation with the cantonal tax authorities. Incentives may include up to a ten year tax holiday at the cantonal/communal level as well as low interest loans on new buildings, easy access to work permits etc.

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