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A Guide to Private M&A in Asia

CAMBODIA | CHINA | INDONESIA | LAO PDR | MALAYSIA
MYANMAR | PHILIPPINES | SINGAPORE | THAILAND | VIETNAM

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Foreword

According to the ASEAN Investment report, foreign direct investments ("**FDI**") inflows to developing Asia remained robust at US$662 billion in 2022. This performance stands in contrast to the downturn of FDI flows in developed nations, which suffered from volatility in principal conduit economies and a decline in merger and acquisition ("**M&A**") activities. Developing Asia was the largest recipient of FDI in 2022, with ASEAN recording a record high of US$224 billion (5.5% up from 2021) and China recording US$189 billion.[1] Going into 2023 and 2024, ASEAN remains attractive as a destination for FDI, benefiting from the China + 1 strategy. The region offers various opportunities and challenges for investors considering Private M&A transactions.

To assist such investors, this Guide provides an overview of key information on the legal and regulatory framework, the procedures and requirements, the tax implications, and the dispute resolution mechanisms that are relevant to business acquisitions in Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. For more information about the merger control regime in these jurisdictions, please click **here** for our Competition Quick Guide to Merger Control Regimes in ASEAN.

This Guide to Private M&A in Asia is prepared by Rajah & Tann Asia Regional M&A Practice Group.

This publication is up to date as of July 2024.

[1] "*A Special ASEAN Investment Report 2023*" prepared by the ASEAN Secretariat and the United Nations Conference on Trade and Development (UNCTAD), and supported by the Government of Indonesia through the Ministry of Investment (December 2023), available here.

About RTA Regional M&A Practice Group

Our Regional M&A Practice Group services a diverse array of clients, ranging from small-to-medium enterprises (SMEs) to listed multinational corporations, global conglomerates and the world's leading companies in the Global Fortune 500.

Across all our offices, we work together as one highly-rated team with in-depth and extensive experience having dealt with the most significant cross-border M&A transactions, both public and private, including high profile, complex and challenging deals in Asia and beyond. Our M&A partners are valued by clients for their wealth of industry insights and their ability to present sound, innovative and commercial solutions in challenging M&A transactions. Many of our M&A partners in the region are recognised as leading practitioners in this field by various international publications and they have garnered numerous accolades in the public and private M&A space.

A key pillar to our strength in cross-border transactions is our Rajah & Tann Asia network with offices in Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam, as well as dedicated desks focusing on Brunei, Japan and South Asia. With the most extensive legal network in Asia, our lawyers have a tight grasp of the local culture, business practices and language not just within their own home countries, but within the other markets in which they frequently conduct cross-border deals as well. Our depth of transactional and regulatory experience allows us to advise clients strategically and creatively, from structuring to eventual execution and implementation of the transaction.

This gives us an unparalleled edge over our competitors in presenting and pursuing solutions that are both practical and cost-effective. It provides our clients with the "home advantage" in any competitive M&A bids or tenders.

Our team draws on the expertise of our other practice groups to provide specialist advice on the different facets of the transaction, such as cross-border issues, regulatory compliance, competition and antitrust issues, tax structuring as well as industry-specific issues.

Our regional network enables our offices to work together closely to provide seamless "one-stop shop" service to our clients to meet their needs in cross-border M&A transactions, from advising on antitrust and other market access restrictions, obtaining local regulatory approvals to conducting legal due diligence across the region and providing a seamless legal due diligence report.

Cambodia

Market Entry: Key Legal Considerations

Governing Legislation

- Law on Commercial Enterprises (as amended in 2022)
- Law on Commercial Registration Rules and Register 1995 (as amended in 1999 and in 2022)
- Law on Investment (2021)
- Law on Taxation (2023)
- Civil Code (2007)
- Law on Competition (2021)
- Sub Decree No. 60 on Requirements and Procedures for Business Combination (2023)

Regulating Body

- Ministry of Commerce
- General Department of Taxation
- Cambodia Competition Commission
- Council for the Development of Cambodia
- National Bank of Cambodia
- Ministry of Economy and Finance
- Securities and Exchange Regulator of Cambodia

Antitrust / Competition Law Issues

- Cambodia adopts a system of compulsory pre- and post-notification.
- Parties to the business combination are required to pre-notify the Cambodia Competition Commission ("**CCC**") of the proposed business combination and also register the same, where any party of the proposed business combination or its group falls under one of the thresholds.
- Thresholds are classified into three big categories, being general business, banking and financial institutions, and insurance and securities. They range from approximately US$85,000,000 to approximately US$1,125,000,000 for assets, approximately US$67,500,000 to approximately US$105,000,000 for turnover and approximately US$10,250,000 to approximately US$30,000,000 for transaction value.
- For transactions that meet at least half of any thresholds, the parties are required to file a post-merger notification to the CCC.

ESTABLISHING A COMPANY	
MINIMUM SHARE CAPITAL	Minimum share capital of KHR4 million.
FOREIGN OWNERSHIP RESTRICTION	Generally, no foreign ownership restrictions save for certain prescribed sectors such as cigarette manufacturing, movie production, gemstone mining and traditional media industries.
TIME REQUIRED TO SET UP	Eight to 15 working days (for new setup applicable to online portal) but excluding any specific licences or Qualified Investment Project ("**QIP**") status approval for investment incentives and guarantees.
DIRECTOR REQUIREMENTS	• At least one director for private limited company and three directors for public limited company. • No requirement as to nationality or residency. • Director must be at least 18 years old. • Corporate director is not allowed.

FAQs: Private M&A Deals

How are Private M&A deals commonly done in Cambodia?

In Cambodia, Private M&A deals are commonly done by way of (a) share acquisition, which can be in the form of a transfer of existing shares or issuance and subscription for new shares; and (b) business and assets acquisition.

What are the regulatory approvals required in a Private M&A deal?

Merger notification

Parties to the business combination are required to pre-notify the CCC of the proposed business combination and also register the same, where any party of the proposed business combination or its group falls under one of the thresholds.

For transactions that meet at least half of any thresholds, the parties are required to file a post-merger notification to the CCC.

Approvals from the authorities

Depending on the industry and the sector of the target company as well as the type of company, approvals may be required from the industry/sector regulators such as the National Bank of Cambodia, the Ministry of Economy and Finance, the Securities and Exchange Regulator of Cambodia, Ministry of Mines and Energies, etc. If the target company is also an investment company with the QIP status, approval is also required from the Council for the Development of Cambodia in addition to the Ministry of Commerce ("**MOC**") and the General Department of Taxation.

Approvals from the internal managerial bodies of the parties

Resolutions of shareholders and board of directors adopted in accordance with the articles of the company in compliance with the law on commercial enterprises are usually required. Notwithstanding any requirement otherwise stated in the articles of the company or in the relevant laws, it is a practice that the Council for the Development of Cambodia and MOC require a unanimous consent of all the shareholders for any changes of the articles of the company including the share transfer or issuance and subscription of new shares.

What are the rights and liabilities that are automatically transferred in a Private M&A deal?

Share acquisition

All rights and liabilities attached to the shares are effectively transferred to the new owners, which include rights to receive dividends, rights to attend and vote in the shareholders' meeting, rights to nominate any board members, etc., and liability for the losses incurred by the target company (limited to the amount already contributed as per the shareholding). The rights and liabilities of the target company do not change.

Business and assets acquisition

Registration of the transfer of the business and assets of a company will be required or the agreement to transfer such business and assets will be entered into as may be applicable and relevant. As such, the rights and liabilities pertaining to such assets will ordinarily be passed on to the purchaser.

What transfer taxes are payable on a share sale and an asset sale?

Share and asset transfers are subject to varying rates of stamp duties.

Share transfer

Stamp duty is payable at the rate of 0.1% of the value of the transferred shares for general business companies or 4% of the value of the transferred shares for real estate companies (real estate company refers to a company that directly or indirectly owns real estate which is worth more than 50% of the total assets of the company).

Asset transfer

Movables: In relation to transfer taxes on an asset sale, most movable properties are not subject to transfer tax, save for vehicles. Transfer of vehicles is subject to stamp duty at the rate of 4% of the value of the property.

Immovables: Transfer of immovable properties is subject to stamp duty at the rate of 4% of the value of the transaction or the market value of the property, whichever is higher.

What consultation or approval rights do employees have in a Private M&A deal? Are employee contracts automatically transferred in a Private M&A deal?

The Labour Law is silent on the right to consultation or consent of the employee in the event that the employer decides to enter into a share acquisition or business and assets acquisition. However, they have the right to consent to the transfer of their employment contracts in the case of assets acquisition.

Share transfer

In a share transfer, whether or not there is a change in control of the target company, which is the employer, such transfer does not affect the employment relationship between the corporate employer and the existing employees.

Asset transfer

In an asset transfer, the employees of the business are not automatically transferred to the buyer.

The employment contracts of such employees must first be terminated by the seller or transferred through a contractual arrangement with the consent of the employees by and among the seller, the buyer and the employees. The termination and re-employment must comply with contractual and labour regulation requirements and procedures.

Can an agreement relating to the purchase of shares or assets provide for a foreign governing law? If so, are there any local laws that would still automatically apply to the Private M&A deal?

Cambodian law does not prohibit the parties to a contract from selecting a foreign law as the governing law of the contract. This is the case even if both parties to the contract are Cambodian companies.

However, the Cambodian courts do not hear or apply foreign law, so if a foreign law is chosen, it will be necessary to use a foreign court or commercial arbitration as a competent dispute resolution mechanism. Nonetheless, for a foreign court judgment to be recognised and enforceable in Cambodia, the country of such foreign court judgment will need to enter into an agreement for the reciprocal recognition of judgments with Cambodia, among other conditions. Cambodia has not signed such an agreement with any country with the exception of Vietnam (with practical enforcement remaining to be tested) and therefore no other foreign court judgment will be enforceable in Cambodia. Therefore, the commonly used dispute resolution mechanism, if a foreign law is used as the governing law, is commercial arbitration.

The procedures for the M&A transaction (e.g. procedures for registration of the share transfer/subscription for new shares) and related tax obligations as provided under the prevailing laws and regulations still automatically apply.

Is it common to provide for arbitration as a means for dispute resolution in Private M&A transaction documents? Are arbitration awards enforceable in your jurisdiction?

Yes, it is common. Arbitration is often chosen as a means for dispute resolution in Private M&A transaction documents for the reasons of confidentiality and efficiency.

Yes, foreign arbitral awards are enforceable in Cambodia.

As Cambodia is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"), it is possible to enforce a foreign arbitral award in Cambodia. Prior to enforcing a foreign arbitral award, the award must be endorsed by the Cambodian appeal court.

For more information about the arbitration framework in Cambodia, please click here for our Regional Guide to Arbitration Rules and Procedures featured in Rajah & Tann Asia Arbitration Asia, a one-stop arbitration website which spotlights on Asia.

China

Market Entry: Key Legal Considerations

Governing Legislation

- PRC Company Law 2023 revision (w.e.f. 1 July 2024)
- PRC Civil Code (w.e.f. 1 January 2021)
- PRC Foreign Investment Law (w.e.f. 1 January 2020)
- Provisions on the Merger and Acquisitions of Domestic Enterprises by Foreign Investors (w.e.f. 22 June 2009)

Regulating Body

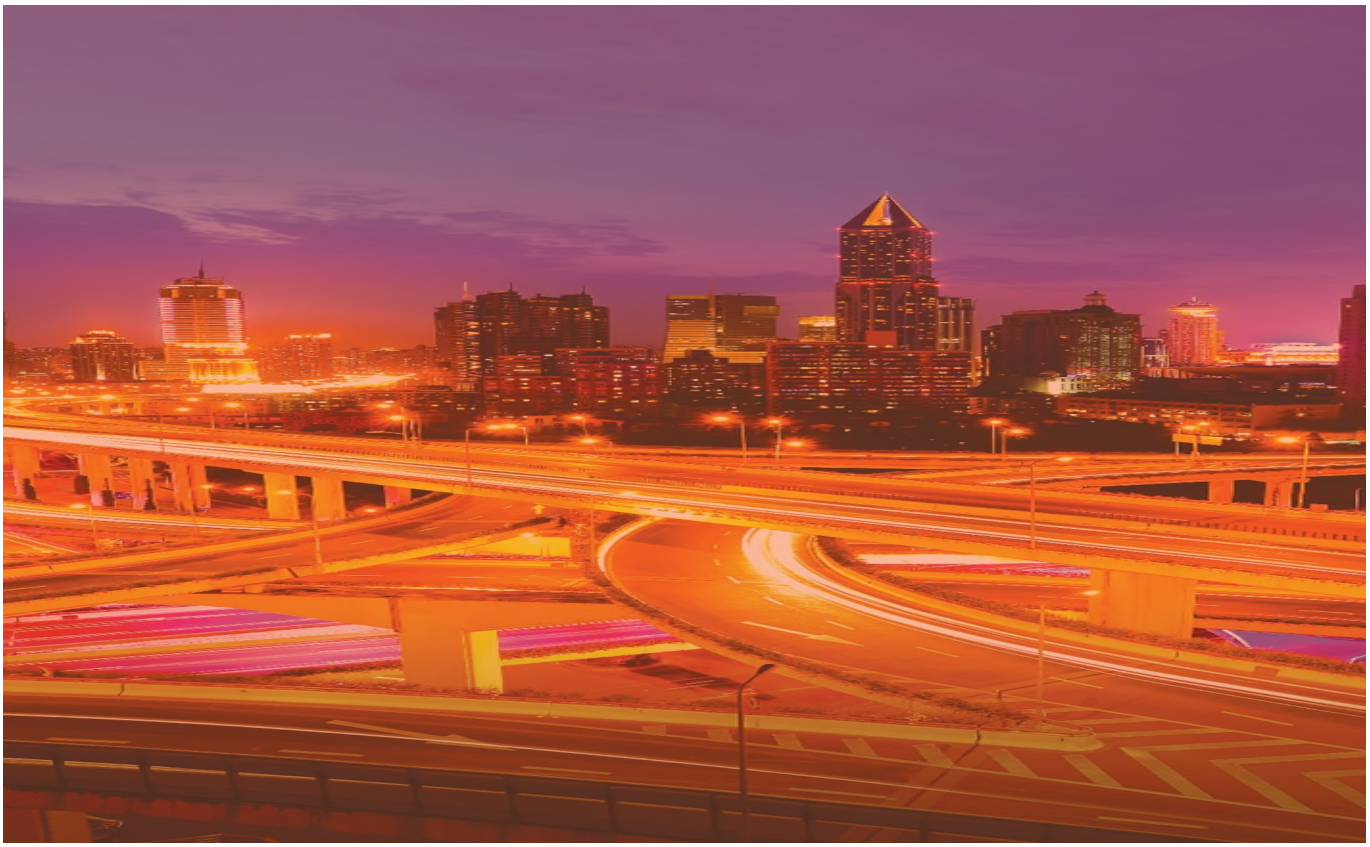
- Ministry of Commerce ("**MOFCOM**")
- State Administration for Market Regulation ("**SAMR**")
- State Administration of Foreign Exchange ("**SAFE**")
- National Development and Reform Commission
- State-owned Assets Supervision and Administration Commission
- Other industry regulatory authorities

Antitrust / Competition Law Issues

- The SAMR is the body in charge of the merger control in China.
- If certain thresholds have been met, the relevant parties shall file with, or obtain the approval of, the SAMR after the transaction documents have been signed but before the completion of the transaction.

ESTABLISHING A COMPANY	
MINIMUM SHARE CAPITAL	• Except for certain industries, no minimum share capital requirement but the registered capital shall be compatible with the business scale of the company. • Based on the new PRC Company Law which came into force on 1 July 2024, all the capital contribution of a limited liability company subscribed by the shareholders must be fully paid up within five years of the establishment date of the company. For a joint stock company, no shares may be offered to others until the shares subscribed for by the promoters are fully paid up.

ESTABLISHING A COMPANY	
	• Existing companies incorporated prior to 30 June 2024 will be given a three-year transition period, starting from 1 July 2024, until 30 June 2027. If an existing limited liability company's remaining contribution period is after 1 July 2032, it must amend its articles of association before 30 June 2027 to reduce the remaining capital contribution period to no later than 30 June 2032. In other words, the existing limited liability companies have a total of eight years from 1 July 2024 to fully pay its registered capital. For a joint stock company incorporated prior to 30 June 2024, its promoters shall pay in full by 30 June 2027 the amount of shares subscribed for by them.
FOREIGN OWNERSHIP RESTRICTION	• The Foreign Investment Law has introduced the pre-establishment national treatment plus negative list system for foreign ownership restrictions. • Generally speaking, foreign ownership restrictions in various sectors are governed by (a) the respective negative lists applied outside and inside the free-trade zones of China; and (b) other PRC laws and regulations.
TIME REQUIRED TO SET UP	Around three to 12 weeks (assuming no industry-specific approval or pre-approval is required).
DIRECTOR REQUIREMENTS	• A private limited liability company usually has a board of directors consisting of more than three members. • A limited liability company that is small in size or has a small number of shareholders may not have a board of directors and may have one director instead. • No requirement as to nationality, subject to certain exceptions in some industries.



FAQs: Private M&A Deals

How are Private M&A deals commonly done in China?

In China[2], Private M&A deals are commonly done by way of (a) share acquisition, which can be in the form of a transfer of existing shares or issuance and subscription for new shares; and (b) business and assets acquisition.

Mergers between two PRC-incorporated companies are also recognised by PRC laws, but less common in practice.

Considering the high tax rate involved in a transfer of business and assets in China, Private M&A deals are usually done by way of share transfer.

What are the regulatory approvals required in a Private M&A deal?

Approvals from the authorities

Cross-border M&A transactions used to be subject to the approval by, or filing with, MOFCOM. Since 1 January 2020, when the PRC Foreign Investment Law came into effect, the SAMR and its local agencies, being the registration authority in China, has now started to review whether the investment is within the negative lists or not during the registration process. Instead, the MOFCOM is now in charge of the foreign investment information reporting system which had been implemented simultaneously along with the Foreign Investment Law. Generally speaking, foreign investment into industries not on the negative lists will not be subject to approval. However, foreign investment into industries on the negative lists will be subject to approval from the industry regulators instead of MOFCOM now.

The National Development and Reform Commission and MOFCOM undertake the responsibility to review national security for foreign investment in sensitive areas or sectors (if necessary and applicable).

To the extent that an M&A transaction triggers merger control filings, SAMR is the authority that approves clearance filed by the affected parties.

Other approvals which are required include (a) approval from industrial regulatory bodies, e.g. the banking and insurance regulatory commission or the health and family planning authority if acquiring companies in those industries; and/or (b) the State-owned Assets Supervision and Administration Commission or its local agency if the target company is a State-owned company.

Registration with the relevant authorities is also required, including registration with SAMR, the tax authority, SAFE (through the foreign exchange designated banks, where applicable), and, where applicable, the customs authority and other relevant authorities.

Approvals from the internal managerial bodies of the parties

Resolutions of shareholders and board of directors adopted in accordance with the articles of association of the target company will be required.

Approvals from other third parties

Prior consent from the relevant counterparty in an agreement to which the target company is a party may be required if relevant change-in-control clauses are included in the agreement.

What are the rights and liabilities that are automatically transferred in a Private M&A deal?

Share transfer

All rights, assets and liabilities of the target entity will be automatically transferred to the buyer in a share acquisition.

Exceptions may apply, e.g. when there is a change-in-control clause in the relevant agreements entered into by the target. Such agreements may be terminated by the counterparty.

[2] "**China**" or "**PRC**" used in this guide refers to the People's Republic of China, excluding Hong Kong Special Administrative Region, Macau Special Administrative Region and Taiwan.

Asset transfer

The rights and liabilities (such as the employees, the contracts, etc.) of the target company will not automatically pass on to the buyer. Generally speaking, the assets and liabilities transferred depend on the parties' contractual arrangement.

What transfer taxes are payable on a share sale and an asset sale?

Share transfer

Stamp duty of 0.05% of the amount recorded on the share transfer agreement shall be paid by each party.

If the seller is a domestic company, the amount of the transferred shares shall be included in the income of the seller and company income tax of 25% will apply to the seller's net income amount.

If the seller is a foreign company, withholding income tax of 20% or 10% (if there is tax treaty between China and the country where the foreign company is incorporated) will be applied to the profit of the share transfer.

Asset transfer

The taxes for asset transfer include stamp duty, and where applicable, value-added tax ("**VAT**") for movable assets, deed tax for immovable assets and VAT for the land and property. Detailed tax rates will depend on several factors such as the types of assets, status of the taxpayer, whether the VAT for the target asset has already been deducted.

An exception will be applied when the final receiver of assets and employees is the same entity during a re-organisation of a company in an M&A procedure in which the company sells all or part of its assets and business (including the transfer of employees) as a whole through a series of transactions. In such a case, the VAT will not apply to the series of transactions in relation to the asset transfer, subject to the review and approval of the relevant tax authorities.

Generally speaking, the relevant tax for asset transfers are much higher than share transfers - especially when transfers of land and/or properties are involved.

What consultation or approval rights do employees have in a Private M&A deal? Are employee contracts automatically transferred in a Private M&A deal?

Share transfer

In a share transfer, employees' employment relationship with the target company will remain unchanged and therefore employee contracts will be transferred automatically, unless the buyer wishes to terminate the employment contracts with the employees in the target company.

In China, employees are typically not accorded with consultation or approval rights for M&A deals by way of share transfer.

Asset transfer

In an asset transfer, the employees of the target company/business are not automatically transferred to the buyer.

In such cases, the employment contracts (with the employee's consent) will first be terminated by the seller or transferred through a contractual arrangement by and among the seller, the buyer and the employees. The termination and re-employment must comply with contractual and labour regulation requirements and procedures.

Can an agreement relating to the purchase of shares or assets provide for a foreign governing law? If so, are there any local laws that would still automatically apply to the Private M&A deal?

Share transfer

For target companies which are domestic companies, a 2006 MOFCOM regulation stipulates that the share transfer agreements/capital increase agreements shall be governed by PRC laws.

For target companies which are foreign-invested companies, the parties may agree to use foreign laws as the governing law for the share transfer agreement / capital increase agreement. However, in practice, local approval / company registration authorities in some cities may require such agreements to be governed by PRC laws.

Asset transfer

For movable assets, PRC law does not prohibit the parties from selecting a foreign law as the governing law, provided there is a foreign element involved in such transaction.

For immovable assets, the governing law shall be PRC laws.

Is it common to provide for arbitration as a means for dispute resolution in Private M&A transaction documents? Are arbitration awards enforceable in your jurisdiction?

In cross-border Private M&A transaction documents, it is quite common to provide for arbitration as a means of dispute resolution. However, in a purely domestic Private M&A transaction in China, arbitration may not be as prevalent as in cross-border Private M&A.

Foreign arbitral awards are enforceable in China as China is a party to the New York Convention. However, the enforcement is subject to the New York Convention and PRC laws.

For more information about the arbitration framework in China, please click here for our Regional Guide to Arbitration Rules and Procedures featured in Rajah & Tann Asia Arbitration Asia, a one-stop arbitration website which spotlights on Asia.

Indonesia

Market Entry: Key Legal Considerations

Governing Legislation

- Law No. 40 of 2007 on Limited Liability Companies, as amended by Law No. 6 of 2023 on Stipulation of Government Regulation in lieu of Law No. 2 of 2022 on Job Creation into Law
- Law No. 25 of 2007 on Investment, as amended by Law No. 6 of 2023 on Stipulation of Government Regulation in lieu of Law No. 2 of 2022 on Job Creation into Law
- Government Regulation No. 5 of 2021 on the Organisation of Risk-Based Business Licensing
- Presidential Regulation No. 10 of 2021 on Investment Business Fields, as amended by Presidential Regulation No. 49 of 2021 ("**Positive Investment List**")
- Head of the Indonesian Central Agency of Statistics Regulation No. 2 of 2020 on Indonesian Standard Business Sectors Classification (*Klasifikasi Baku Lapangan Usaha Indonesia* or "**KBLI**")
- Investment Coordinating Board (*Badan Koordinasi Penanaman Modal* or "**BKPM**") Regulation No. 4 of 2021 on Guidelines and Procedures for Risk-Based Business Licensing Services and Investment Facilities ("**BKPM Reg 4/2021**")
- BKPM Regulation No. 5 of 2021 on Guidelines and Procedures for the Supervision of Risk-Based Business Licensing

Regulating Body

- Ministry of Law and Human Rights ("**MOLHR**")
- Other Relevant Ministries (depending on the relevant industry of the company, e.g. Ministry of Health for hospital business, Ministry of Trade for retail companies, Ministry of Energy and Natural Resources for mining companies, etc.)
- BKPM/Online Single Submission Management and Organising Body (*Lembaga Pengelola dan Penyelenggara Online Single Submission*)
- Indonesia Competition Commission (*Komisi Pengawas Persaingan Usaha* or "**KPPU**")

Antitrust / Competition Law Issues

- KPPU has the power to assess any merger, share acquisition, asset acquisition, or consolidation, including foreign-to-foreign M&A. Any M&A that meets certain thresholds and criteria must be notified to KPPU within 30 business days from the date when the transaction becomes legally effective (known as the mandatory post-closing notification).

- Aside from the mandatory post-closing regime, Government Regulation No. 57 of 2010 and KPPU Regulation No. 3 of 2023 adopts a voluntary pre-closing consultation (known as a written consultation) which allows parties to voluntarily submit a consultation on the proposed M&A if the M&A (a) meets the same thresholds and criteria; and/or (b) has possible anticompetitive effect in Indonesia. It is important to note that the obligation to notify the M&A to KPPU remains, even if the parties conduct a voluntary pre-closing consultation.

	ESTABLISHING A COMPANY
MINIMUM SHARE CAPITAL	• Minimum issued and paid-up capital of a foreign direct investment company (*Perusahaan Penanaman Modal Asing* or "**PMA Company**") IDR10 billion. • Submission of an investment plan to BKPM by the PMA Company, which value must be more than IDR10 billion, excluding the value of lands and buildings, for every five-digit KBLI code and every project location (some exemptions are provided under BKPM Reg 4/2021).
FOREIGN OWNERSHIP RESTRICTION	• Foreign ownership restrictions in various sectors are governed by the Positive Investment List and the laws and regulations governing the relevant business sector ("**Sectoral Laws and Regulations**"). • A business is generally 100% open to foreign investment except if it is specifically subject to foreign ownership restrictions under the Positive Investment List and the Sectoral Laws and Regulations. • The Positive Investment List categorises foreign ownership restrictions into three sections, namely: (a) priority business lines, which are business lines that meet certain criteria, making them eligible for fiscal and/or non-fiscal incentives; (b) business lines allocated or requiring partnership with cooperatives and micro, small, medium enterprises; and (c) business lines with specific requirements, generally relating to restrictions on foreign capital, special licensing, and other requirements relevant to the specific business sector.
TIME REQUIRED TO SET UP	Two to three working days for company incorporation (assuming all documentation is in order and there are no technical issues during the submission to the MOLHR system). This timeline excludes the time required to agree on and negotiate the joint venture agreement, as well as to obtain the operational licences of the company in accordance with its business line(s).
DIRECTOR REQUIREMENTS	• At least one director and one commissioner. For licensing purposes and when dealing with government agencies, it is advisable, especially for a PMA company, to have a local director with full authority to act on behalf of the company. This is important because a director is responsible for the day-to-day operation of the company.

ESTABLISHING A COMPANY

- Must be natural persons and an Indonesian must be employed as the director (or in any other position) responsible for managing personnel and/or human resources matters in a company.
- For tax purposes, all companies, including a PMA company, must designate one director to be the person in charge and main contact for tax-related matters and the name of such director shall be informed to the relevant tax office.

FAQs: Private M&A Deals

How are Private M&A deals commonly done in Indonesia?

In Indonesia, Private M&A deals are commonly done by way of (a) share acquisition, which can be in the form of a transfer of existing shares or issuance and subscription for new shares; and (b) business and assets acquisition.

What are the regulatory approvals required in a Private M&A deal?

Approvals from the internal managerial bodies of the parties

Where a sale of shares/business by the seller (in the form of limited liability company) constitutes disposal of more than 50% of the seller's net assets ("**Threshold**"), prior approval of the seller's shareholders in a general meeting of shareholders ("**GMS**") must be obtained.

Furthermore, in the case of an acquisition of shares (where more than 50% of shares are sold and purchased, resulting in a change of control), both the target company and the buyer (if the buyer is an Indonesian entity) are required to obtain prior GMS approval from their respective shareholders.

Additionally, if the seller or buyer is an entity, prior corporate approvals may be required, subject to the provisions of their articles of association. However, in practice, transactions involving those fulfilling the Threshold and acquisition of shares typically require approval from the board of directors and/or the board of commissioners, even if such approval is not explicitly mandated by the company's articles of association, to ensure governance compliance.

Approval from spouse

If the seller is a natural person (and if the person is married and there is no prenuptial agreement), the sale of shares/business must be approved by the spouse.

Approvals from the relevant parties

In the context of share acquisition of a target company, if the share acquisition cause a change of control in the target company, the target company must announce the acquisition plan (a) in writing to its employees and (b) in at least one daily newspaper with national circulation for share acquisition through secondary shares or two daily newspapers for share acquisition through primary shares, not less than 30 calendar days prior to the date of invitation to convene a GMS of the target company (to approve the proposed share acquisition). This is to protect the interests of any third parties (including employees and creditors).

Approvals from the authorities

Companies are no longer required to obtain BKPM's approval for a change of shareholding composition.

Notification to or approval from the MOLHR for the change of shareholding composition is still required, and this notification or request for approval is to be submitted by the notary. The output of submission for the notification or request for approval is the notification receipt or approval which will be issued by the MOLHR to the company.

Certain sectors which are highly regulated, for example banking, mining and financial institutions, require pre-approval from or notification to the relevant government authority for any changes to the shareholding composition in the relevant Indonesian company.

What are the rights and liabilities that are automatically transferred in a Private M&A deal?

The rights and liabilities that may be automatically transferred in Private M&A deals are different depending on the specific type of transaction chosen by the parties in practice.

Share transfer

All rights and liabilities attached to the shares are effectively transferred, which include (but not limited to) rights to receive dividends, rights to attend and vote in a GMS, and liability for the losses incurred by the target company (limited up to the shareholding proportion).

A share transfer will not result in a change of business of the company (unless amended), therefore there is no obligation to update the company's licence.

Business and asset transfer

Usually, the parties will novate the rights and obligations of the seller under contractual arrangement to the purchaser. As such, the rights and liabilities will ordinarily be passed on to the purchaser.

For asset transfers, the licences attached to the asset must be amended, because generally, licences in Indonesia cannot be transferred. Furthermore, depending on the type of asset, there may be asset registration procedures required in the event of a change in ownership (e.g. transfer of land title, change of vehicle ownership, and change of intellectual property certificate ownership).

What transfer taxes are payable on a share sale and an asset sale?

Share transfer of an Indonesian non-listed company

If the seller or shareholder is an Indonesian tax resident, any capital gains received will be taxable, as follows:

1. For a corporate shareholder, the capital gains will be subject to the corporate income tax at 22% from taxable business profit.
2. For an individual shareholder, the capital gains will be subject to the personal income tax with progressive rates ranging from 5% to 35% from taxable income.

If the seller is a non-Indonesian resident, the seller will be subject to 5% withholding tax on the transaction price. The 5% withholding tax payable by the non-resident seller may be exempted under an applicable tax treaty between Indonesia and the country where the non-Indonesian resident seller is domiciled or established.

Asset transfer

If the seller is an Indonesian tax resident, the following are the tax implications on asset transfer:

1. Income tax: Sales of a company's assets (other than land and building) may result in capital gains or losses, calculated as the difference between the sales proceeds and the acquisition cost of the assets. The capital gains are subject to income tax at 22% for corporate sellers or at progressive tax rates ranging from 5% to 35% for individual sellers.
2. Value Added Tax ("**VAT**"): VAT is due on the transfer of VAT-able goods within the Indonesian Customs Area. If the seller is registered as a VAT-able undertaking or *Pengusaha Kena Pajak* and the asset is a VAT-able good, the asset transfer will be subject to 11% VAT (which may be increased to 12% from 1 January 2025). However, asset transfer for the purpose of business merger, consolidation, expansion or acquisition is not subject to VAT.
3. Tax on the transfer of land and/or building
    - Final income tax at 2.5% from transfer value, applicable to the seller or the transferor.
    - Duty on the acquisition of land and building rights (*Bea Perolehan Hak atas Tanah dan Bangunan* or "**BPHTB**") at 5% on transfer value or Tax Object Acquisition Value (*Nilai Jual Objek Pajak* or NJOP), whichever is higher, after deducting non-taxable threshold. BPHTB is applicable to the buyer or the transferee.

What consultation or approval rights do employees have in a Private M&A deal? Are employee contracts automatically transferred in a Private M&A deal?

The consultation/approval rights employees have in Private M&A deals and the automatic transfer of employee contracts differ depending on the specific type of transaction chosen by the parties in practice.

Share transfer

The contracts of the employees with the target company would still be valid, unless the employees opt to terminate the employment due to change of ownership in the target company resulting from the share acquisition which results in unfavourable changes of their employment terms and conditions.

In this case, the employees may request termination with the statutory termination formula of 0.5x severance pay, 1x long-time service pay and 1x compensation of rights pay as provided under the Indonesian Manpower Law.

The total statutory termination amount will also depend on each employee's years of service.

However, in the event of an acquisition where the employer (target company) terminates the employee(s), the terminated employee(s) will be entitled to a statutory termination formula of 1x severance pay, 1x long-time service pay, and 1x compensation of rights pay.

We set out each classification of the statutory termination formula as follows:

1. Severance pay:

Period of Employment	Severance Payment
Less than 1 year	1 month's salary
1 - < 2 years	2 months' salary
2 - < 3 years	3 months' salary
3 - < 4 years	4 months' salary
4 - < 5 years	5 months' salary
5 - < 6 years	6 months' salary
6 - < 7 years	7 months' salary
7 - < 8 years	8 months' salary
Above 8 years	9 months' salary

2. Long service pay:

Period of Employment	Severance Payment
3 - < 6 years	2 months' salary
6 - < 9 years	3 months' salary
9 - < 12 years	4 months' salary
12 - < 15 years	5 months' salary
15 - < 18 years	6 months' salary
18 - < 21 years	7 months' salary
21 - < 24 years	8 months' salary
Above 24 years	10 months' salary

3. Compensation of rights: The components to be considered when calculating the amount of the compensation of rights pay are as follows:

    - Replacement of unused annual leave.
    - Reimbursement of transportation costs for employees and their families to a new working place for a new employer.
    - Other provisions that are provided and agreed upon in the relevant employment agreement, or collective labour agreement or company regulations.

Asset transfer

In an asset transfer, the employment relationship would typically be transferred by the seller to the purchaser as opposed to the termination of the employment by the seller. However, any transfer of employment is typically limited to employees whose job descriptions are related to the transferred asset (e.g. certified operators, maintenance technicians, etc.). In the event of a transfer, the employees' years of service will be carried forward by the purchaser.

In an asset transfer, the parties may choose to terminate and re-hire the employees instead of transferring. If this happens, the seller will first terminate the employment relationship and provide severance packages before the employees are re-hired by the purchaser.

Merger

In a merger, the contracts of the employees with the surviving entity would still be valid, unless the surviving entity as the employer chooses to terminate the employment.

As for the contracts of the employees with the merging entity, the contracts would still be valid and would typically be novated by the merging entity to the surviving entity, unless the merging entity as the employer chooses to terminate the employment.

Can an agreement relating to the purchase of shares or assets provide for a foreign governing law? If so, are there any local laws that would still automatically apply to the Private M&A deal?

Yes, parties may provide for the agreement to be governed by foreign law. Under Indonesian law, parties to an agreement are free to choose the law which governs their agreement provided that the law chosen has sufficient relationship with the agreement and provided that the choice of law is not contrary to public order in Indonesia. However, please note that while parties are free to choose the governing law of the agreement, if one of the parties is an Indonesian individual or company, then such agreement must also be made and signed in the Indonesian language.

The procedures for the M&A transaction (e.g. procedures for share transfer / subscription for new shares) as provided under the prevailing laws and regulations still automatically apply.

Is it common to provide for arbitration as a means for dispute resolution in Private M&A transaction documents? Are arbitration awards enforceable in your jurisdiction?

Yes, arbitration is often chosen as the preferred dispute resolution method in Private M&A transactions due to its confidentiality, speed of resolution, and flexibility. Additionally, arbitration allows parties to choose arbitrators with relevant expertise, which can make a significant difference in the outcome of complex and technical cases. For these reasons, many companies operating in Indonesia tend to prefer arbitration over court litigation.

Arbitration awards are enforceable in Indonesia, subject to requirements.

Specifically, on foreign arbitration awards, Indonesia is a party to the New York Convention, as evidenced by the enactment of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolutions ("**Law No. 30/1999**"). Law No. 30/1999 provides requirements to enforce such awards:

1. the award is rendered by an arbitration body or an arbitrator in a country which is bilaterally bound to Indonesia or jointly bound with Indonesia by an international convention on the recognition and enforcement of foreign arbitration awards. Its enforcement is based on the principle of reciprocity;
2. the foreign arbitration awards are only limited to awards which, according to the laws of Indonesia, fall within the scope of its commercial law;
3. the foreign arbitration awards do not contravene the public order in Indonesia; and
4. the foreign arbitration award may be enforced in Indonesia after an *exequatur* (writ of execution) has been obtained from the Chairman of the Central Jakarta District Court.

In 2023, the Indonesian Supreme Court enacted Supreme Court Regulation No. 3/2023 on the Procedure for the Appointment of Arbitrators by the Court, Challenge Rights, Examination of Enforcement Applications, and Arbitral Award Annulment ("**Supreme Court Regulation No. 3/2023**").

This regulation clarifies the procedures for enforcing foreign arbitral awards, including a revised definition of "*public order*" from the previous Supreme Court regulation. Additionally, Supreme Court Regulation No. 3/2023 introduces new timelines for the registration and enforcement of foreign arbitral awards. It also clarifies the procedural rules for tribunal-issued attachment orders, the grounds for annulment of arbitration awards, and security seizures, initially mandated under Law No. 30/1999. These changes address the previous uncertainty surrounding the duration of arbitration proceedings and streamline the arbitration processes.

For more information about the arbitration framework in Indonesia, please click here for our Regional Guide to Arbitration Rules and Procedures featured in Rajah & Tann Asia Arbitration Asia, a one-stop arbitration website which spotlights on Asia.

Lao PDR

Market Entry: Key Legal Considerations

Governing Legislation

- Law on Enterprises No. 33/NA dated 29 December 2022
- Law on Investment Promotion No. 14/NA dated 17 November 2016
- Decree on Special Economic Zone No. 188/GOL dated 7 June 2018
- List of Business Activities for Foreign Investors
- Controlled Business List and Concession List

Regulating Body

- Ministry of Industry and Commerce
- Ministry of Planning and Investment
- Special Economic Zone Management Committee

Antitrust / Competition Law Issues

- Law governing competition is set out in Law on Competition No. 60/NA dated 14 July 2015.

ESTABLISHING A COMPANY	
MINIMUM SHARE CAPITAL	• Generally, no minimum registered capital requirement. • Certain businesses in the List of Business Activities for Foreign Investment issued by the Ministry of Industry and Commerce require minimum Lao shareholding and/or minimum registered capital.
FOREIGN OWNERSHIP RESTRICTION	Generally, no foreign ownership restrictions save for certain prescribed industries which are deemed by the Lao government to affect national security, health or traditions, or have a negative impact on the natural environment.
TIME REQUIRED TO SET UP	40 to 60 days from the submission of complete documents.
DIRECTOR REQUIREMENTS	• At least one director. Where the company's assets are greater than LAK50 billion, the minimum requirement is to have at least two directors, and a board of directors must be formed. • Certain industries, for example, banking and insurance, may have different requirements.

FAQs: Private M&A Deals

How are Private M&A deals commonly done in Lao PDR?

In Lao PDR, Private M&A deals are commonly done by way of (a) share transfer; and (b) acquisition of assets.

What are the regulatory approvals required in a Private M&A deal?

If all or any part of the shares of a company or the assets of the company are transferred to another person, the following regulatory approvals are required:

Approvals from the shareholders

If the company sells or transfers all the business of the company, or if there is a sale of a substantial part of the registered share capital of the company to another person, the shareholders of the company must approve the transaction by way of a special resolution.

Approvals from the authorities

The company shall notify the transfer of the shares to the Ministry of Industry and Commerce, unless the company falls within the purview of the Ministry of Planning and Investment.

For a concession business which is governed by a concession agreement entered into between the company and the State, represented by the Ministry of Planning and Investment, transfers of shares in the company must be approved by the Ministry of Planning and Investment, as this is usually a term in the concession agreement.

Prohibition on foreign shareholding

The Announcement No. 1328/MOIC dated 13 July 2015 issued by the Ministry of Industry and Commerce provides a List of Reserved Businesses for Lao citizens or the prohibition on foreign shareholding. The businesses set out in this list may only be undertaken by Lao citizens.

Conditional businesses

The Announcement No. 1327/MOIC dated 13 July 2015 issued by the Ministry of Industry and Commerce provides a List of Business Activities for Foreign Investment which foreign investors can participate in, but may require minimum Lao shareholding or minimum registered capital.

What are the rights and liabilities that are automatically transferred in a Private M&A deal?

Share transfer

If a majority of the shares is transferred, the transferee takes control of the company. All rights and obligations of the company, including rights and obligations under contract, remain with the company.

Asset transfer

Ownership of the asset is transferred, subject to encumbrances unless such encumbrances are discharged prior to completion.

What transfer taxes are payable on a share sale and an asset sale?

The transfer taxes levied on Private M&A deals are different depending on the specific type of transaction chosen by the parties.

Share transfer

2% income tax of total proceeds is payable by the transferor on the share transfer.

Asset transfer

No tax on the transfer of land use rights, buildings, or land with buildings, which have been recorded in the balance sheet of a business unit that pays taxes in accordance with the accounting system.

What consultation or approval rights do employees have in a Private M&A deal? Are employee contracts automatically transferred in a Private M&A deal?

Generally local employment legislation does not provide employees with consultation or approval rights for M&A deals.

However, in the sale of a business, Lao Labour Law (No. 43/NA, 24 December 2013) imposes an obligation on the former employer to give written notice to all employees that will be transferred. In addition, the former and new employers shall determine their respective responsibilities to ensure that the employees' interests are protected under the law.

Can an agreement relating to the purchase of shares or assets provide for a foreign governing law? If so, are there any local laws that would still automatically apply to the Private M&A deal?

Parties to a contract may provide for their rights and obligations thereunder to be governed by foreign laws.

However, in the event the dispute is tried in a Lao court, there is a provision in the Law on Civil Procedure which states that the Law on Civil Procedure shall be used in the proceedings of civil, commercial, family, juvenile, and labour cases relating to Lao nationals, foreigners, aliens, and stateless people who have a dispute arising in the territory of the Lao PDR. This provision extends to disputes between Lao nationals arising outside the territory of the Lao PDR and disputes arising between foreigners who are party to a contract which specifies that the contract is to be governed by the judicial process of the Lao PDR.

Is it common to provide for arbitration as a means for dispute resolution in Private M&A transaction documents? Are arbitration awards enforceable in your jurisdiction?

Generally, foreign investors prefer to settle any disputes by way of arbitration.

Lao PDR is a party to the New York Convention. Hence, it is generally assumed that arbitration awards issued in countries that are also parties to the New York Convention will be enforceable under the Law on Resolution of Economic Disputes (No. 51/NA, 22 June 2018).

However, it is pertinent to note that the Lao National Assembly has not yet ratified the New York Convention. The cabinet of the Prime Minister issued Notification No. 2454 regarding the Application of New York Convention (1958) on the Recognition and Enforcement of Foreign Arbitral Awards, 24 August 1998, which states that the New York Convention is in force in the Lao PDR as of 15 September 1998. While unclear under Lao PDR law whether such a simple statement constitutes an implementing instrument, the Law on the Resolution of Economic Disputes provides that the Lao PDR acknowledges and enforces the arbitral awards of foreign or international economic dispute resolution organisations.

For more information about the arbitration framework in Lao PDR, please click here for our Regional Guide to Arbitration Rules and Procedures featured in Rajah & Tann Asia Arbitration Asia, a one-stop arbitration website which spotlights on Asia.

Malaysia

Market Entry: Key Legal Considerations

Governing Legislation

- Companies Act 2016
- Labuan Companies Act 1990
- Limited Liability Partnerships Act 2012

Regulating Body

- Companies Commission of Malaysia
- Labuan Financial Services Authority

Antitrust / Competition Law Issues

- Malaysian competition law does not have an economy-wide merger control regime. While there is currently no economy-wide merger control regime yet, the Malaysia Competition Commission has proposed amendments to the Competition Act 2010 which would incorporate an economy-wide merger control regime.
- However, there are merger controls within the telecommunications and aviation sectors. Antitrust clearances from the Malaysian Communications and Multimedia Commission or the Malaysian Aviation Commission may be necessary if the M&A transaction triggers merger control filings.

ESTABLISHING A COMPANY	
MINIMUM SHARE CAPITAL	• Generally, no minimum share capital requirement but at least one subscriber is required for incorporation. • Minimum share capital requirements may apply to certain regulated sectors or industries.
FOREIGN OWNERSHIP RESTRICTION	Generally, no foreign ownership restrictions save for certain regulated industries such as financial services, broadcasting, telecommunications, electricity, oil and gas, and logistics industries.
TIME REQUIRED TO SET UP	Two to three working days (assuming all documentation is in order).
DIRECTOR REQUIREMENTS	• At least one director for a private company and at least two directors for a public company, who ordinarily reside in Malaysia by having a principal place of residence in Malaysia. • Director must be a natural person who is at least 18 years old.

FAQs: Private M&A Deals

How are Private M&A deals commonly done in Malaysia?

In Malaysia, Private M&A deals are commonly done by way of the following methods.

Share sale

Generally, a share sale is the more common form of a Private M&A transaction in Malaysia as there is no disruption to the business.

However, in a share sale, the acquirer will generally inherit all the assets and liabilities owned by the target company.

Asset sale

The advantage of an asset sale is that the acquirer may pick and choose the assets (or liabilities) they wish to acquire, as compared to the share sale approach.

One of the disadvantages of an asset sale is that every asset and liability will have to be individually sold to the acquirer, a process which may be subject to third party approvals, or which takes time and/or may cost more in terms of stamp duty payable on the instrument of transfer for the relevant asset.

Malaysia also has prescriptive employment laws that seek to safeguard the continued employment of employees under the Employment Act 1955 whose wages are RM4,000/month or below or those who are engaged in manual labour ("**EA Employees**") in an asset sale where a change occurs in the ownership of a business (or part thereof) for the purposes of which EA employees are employed.

What are the regulatory approvals required in a Private M&A deal?

Approvals from the authorities

While there is currently no economy-wide merger control regime in Malaysia, the Malaysia Competition Commission has proposed amendments to the Competition Act 2010 which would incorporate an economy-wide merger control regime. Generally, a regulator's approval is not required to be obtained in a Private M&A deal, except for:

Regulated sectors

When the target to be acquired operates in a regulated sector, regulatory approval is required. For instance, an acquisition of a company in the financial services sector is subject to Bank Negara Malaysia's approval. Separately, the prior approval of the Economic Planning Unit may be required as a matter of public policy for a person to acquire shares in a company that has the majority of its assets in real property and the acquisition will result in a change of control of the company by Bumiputera interests or government agencies.

Another instance, antitrust clearances from the Malaysian Communications and Multimedia Commission or the Malaysian Aviation Commission may be necessary if the M&A transactions result or may be expected to result in a substantial lessening of competition in the communications or aviation services markets.

Licences requiring regulator's approval

The target may have been issued with a licence which requires the target to obtain a regulator's approval before a change in its shareholders is permitted, failing which the licence issued could be revoked, e.g. telecommunication licences.

Some asset sales

In an asset sale, the type of regulatory approvals required would depend on the specific asset sold. For example, the prior approval of the State Authority may be required for foreigners to acquire any real property. Separately, the prior approval of the Economic Planning Unit may be required as a matter of public policy for a person to acquire real property if Bumiputera interests or government agency ownership of the real property would be reduced by the acquisition.

Additionally, since most regulatory licences issued are generally non-transferable, an acquirer via an asset sale would have to apply for new licences from the relevant

authorities before it may carry on any regulated business activities.

What are the rights and liabilities that are automatically transferred in a Private M&A deal?

Share sale

In a share sale, the acquirer will acquire shares in the target company to be acquired. All the assets and liabilities of the target remain the same post-acquisition, unless hived off pre-completion.

Asset sale

In an asset sale, only the assets and liabilities which the acquirer has elected to acquire will be transferred, so there is no automatic transfer of all assets and liabilities of that business.

For example, if a debt is not transferred to the acquirer in an asset sale, the right to collect the debt remains with the seller of the business.

The seller of a business must also ensure that EA Employees of the business are offered employment with the acquirer on terms no less favourable than their existing terms failing which the seller must pay termination benefits to those employees.

What transfer taxes are payable on a share sale and an asset sale?

Stamp duty is payable on an instrument of transfer as follows:

Share sale

In a share sale, stamp duty is payable on the instrument of transfer at the rate of 0.3% on whichever is the higher of (a) consideration/purchase price; and (b) net tangible assets, as adjudicated by the Stamp Office.

Real property gains tax ("**RPGT**") is also payable on a disposal of the shares of a company classified as a "*real property company*". The tax rates range between 5% and 30% depending on the length of the duration the asset has been acquired before the disposal.

Disposal of unlisted shares in companies incorporated in Malaysia, beginning from 1 March 2024, will attract capital gains tax. Capital gains are taxed at 10% of gains and for shares acquired prior to 1 January 2024, there is also the option to pay 2% on the gross proceeds from the disposal as the alternative rate of tax. Individuals disposing of their shares are exempted from capital gains tax.

Asset sale

In respect of an asset sale, stamp duty is payable on an instrument of transfer. As such, any transaction which requires an instrument to effect the transaction will be subject to stamp duty and the rate of stamp duty payable would depend on the nature of the instrument.

In relation to real property, RPGT is payable on a disposal of real property. The tax rates range between 5% and 30% depending on the length of the duration the asset has been acquired before the disposal.

What consultation or approval rights do employees have in a Private M&A deal? Are employee contracts automatically transferred in a Private M&A deal?

Generally, Malaysian employment laws do not provide employees with consultation or approval rights for M&A deals unless specifically provided for in the employees' terms of employment whether by way of a collective agreement or otherwise.

The movement of employment contracts is different depending on the specific type of transaction chosen by the parties.

Share sale

In a share sale, from the perspective of employees of a target company, their employer, and the terms of their employment contracts, remain the same.

Asset sale

In an asset sale, the employees of the business are not automatically transferred to the acquirer.

The employment contracts of such employees must first be terminated by the seller and the acquirer (if it/he

wishes) needs to re-employ them under new contracts of employment. In the case of EA employees, where a change occurs in the ownership of a business (or part thereof) for the purposes of which such employees are employed, if the new owner of the business does not offer to continue to employ such employees under terms and conditions of employment that are not less favourable than those under which the employees were employed before the change occurs, the employment of such employees is deemed to have been terminated and the seller of the business must pay termination benefits to those employees.

The termination and re-employment must comply with legislative and contractual requirements and procedures, failing which the seller may be liable to pay statutory compensation and/or damages.

Can an agreement relating to the purchase of shares or assets provide for a foreign governing law? If so, are there any local laws that would still automatically apply to the Private M&A deal?

Yes, parties can provide for the agreement to be governed by foreign law.

Malaysian law recognises freedom to contract including freedom of choice of governing law. This, however, is not absolute and is subject to exceptions, including whether a foreign law is chosen with the intention of circumventing or contracting out of statutory requirements, or is held to be against public policy, in which case Malaysian law will still apply.

However, as a foreign governing law merely affects the interpretation of a contract, the parties must still comply with all the other aspects of Malaysian law.

For example, the transfer of ownership of shares in a Malaysian company will be subject to Malaysian laws. In this regard, if stamp duty is payable on a share transfer form, this will need to be complied with, failing which the share transfer cannot be lawfully registered until and unless the duty and any applicable penalties are paid.

If a regulator's approval is required for the acquisition under Malaysian law, this will still need to be obtained.

Is it common to provide for arbitration as a means for dispute resolution in Private M&A transaction documents? Are arbitration awards enforceable in your jurisdiction?

Yes, it is fairly common for sophisticated transactions (especially where foreign institutional investors are involved) to provide for arbitration as a means for dispute resolution.

Yes, since Malaysia is a party to the New York Convention, arbitration awards issued in countries that are also parties to the New York Convention will be enforceable in Malaysia.

For more information about the arbitration framework in Malaysia, please click here for our Regional Guide to Arbitration Rules and Procedures featured in Rajah & Tann Asia Arbitration Asia, a one-stop arbitration website which spotlights on Asia.

Myanmar

Market Entry: Key Legal Considerations

Governing Legislation

- Myanmar Companies Law 2017
- Special Company Act 1950
- State-Owned Economic Enterprises Law 1989
- Myanmar Investment Law 2016
- Special Economic Zone Law 2014

Regulating Body

- Directorate of Investment and Company Administration
- Myanmar Investment Commission
- Special Economic Zone Management Committees

Antitrust / Competition Law Issues

- The key legislation relating to antitrust / competition in Myanmar is the Myanmar Competition Law 2017 ("**MCL**") and the Myanmar Competition Rules ("**MCR**"). The MCL mainly covers and prohibits four substantive areas namely (a) acts restraining competition; (b) market monopolization; (c) unfair competition; and (d) collaboration among businesses (i.e. merger control).
- However, the MCL and MCR do not set out specific procedures for notification or approval relating to M&A transactions.
- Merger control rules may be prescribed in sector-specific regulations. For example, the Competition Rules for Telecommunication (2015) include the merger control regulations for the telecommunications sector.

ESTABLISHING A COMPANY	
MINIMUM SHARE CAPITAL	No minimum share capital, but at least one share must be issued, excluding companies / investments established under Special Economic Zone Law 2014 where the minimum paid-up capital varies from US$300,000 to US$10 million.
FOREIGN OWNERSHIP RESTRICTION	• Certain prescribed industries are reserved for the government under the State-Owned Economic Enterprises Law and no foreign ownership is allowed, but exceptions are available for joint ventures with the government in these industries and sectors. This is further

ESTABLISHING A COMPANY	
	reiterated under the Myanmar Investment Commission Notification 15/2017 which provides for investment activities allowed to be carried out only by the government. • Under the Myanmar Investment Law, there are three further categories of investment activities: (a) investment activities where foreign investment is wholly prohibited; (b) investment activities permitted only with joint venture with Myanmar nationals or any Myanmar national-owned entity; and (c) investment activities permitted to be carried out with the approval of the relevant ministries. • Generally, save for the above, there are no foreign ownership restrictions. However, foreign ownership restrictions may be administered as a matter of policy.
TIME REQUIRED TO SET UP	Three to five days from the date of complete filing.
DIRECTOR REQUIREMENTS	• Public companies: At least three directors and one of them must be a Myanmar citizen who is ordinarily resident in Myanmar. • Private companies: At least one director who is ordinarily resident in Myanmar.

FAQs: Private M&A Deals

How are Private M&A deals commonly done in Myanmar?

In Myanmar, Private M&A deals are commonly done by way of (a) share purchase; and (b) asset purchase.

Asset purchase may be preferable where there are issues with transferring shares to a foreigner. Such issues may arise where the target company is a local Myanmar company and its shares are not allowed to be transferred to foreigners due to the foreign ownership restrictions for companies envisaged above, or where the target company owns land (as foreigners are not allowed to own land under the Transfer of Immoveable Property Act).

What are the regulatory approvals required in a Private M&A deal?

Approvals from the authorities

Depending on the business undertaken by the targets, sector-specific approvals may be required. For instance, for companies undertaking mining, approval from the Ministry of Mines may be required.

Share transfer

Myanmar Investment Commission's approval is required for any transfer of majority shares of investors in companies holding permits or approvals issued by the Myanmar Investment Commission.

For all share transfers, an application must be made to register the share transfer with the Directorate of Investment and Company Administration by filing a form on the electronic corporate registry called Myanmar Companies Online ("**MyCO**"). Changes in shareholding are also required to be notified by making the necessary filings on MyCO within 21 days of the transfer.

Asset transfer

The regulatory applications and approvals required for the transfer of assets are dependent on the assets in question. For example, transfer of registered vehicles will require a name change of the vehicle owner book with the Ministry of Transport and Communications.

Myanmar Investment Commission's approval is required for any transfer of more than 50% of the assets owned by the investor holding permits or approvals issued by the Myanmar Investment Commission.

Approval from the Myanmar Competition Commission and competition issues

The Myanmar Competition Law was introduced in February 2015, under which the Competition Commission's approval is required to be obtained in some cases. The Myanmar Competition Commission was established on 31 October 2018 and is chaired by the Union Minister for the Ministry of Commerce.

Under the Myanmar Competition Law, "*mergers of businesses*" or "*joint ventures or acquisitions*" which create excessive market dominance or have the intention of reducing competition are prohibited. There is currently no guidance in respect of how "*excessive market dominance*" or "*reducing competition*" will be determined under the Myanmar Competition Law, and as such, any merger or acquisition should undertake some degree of assessment prior to completion.

In certain industries like the telecommunications sector, the Ministry of Transport and Communications ("**MoTC**") specifically issued sector-specific competition rules, i.e. the Competition Rules for the Telecommunications Sector issued on 23 December 2013. The MoTC imposes strict sector-specific merger thresholds for companies that hold telecommunication licences. For example, you may all be aware of the big four mobile network operators in Myanmar. Such entities are prohibited from merging/collaborating with each other under the Telecommunication Licensing Rules and Competition Rules. Other telecommunication service businesses (such as Network Facility Service Licensees) are also prevented from holding more than 10% ownership interest (directly and indirectly) in more than one licence-holder. For any change of control of such licence-holders, an approval from the Post and Telecommunications Department, MoTC, is required.

What are the rights and liabilities that are automatically transferred in a Private M&A deal?

The rights and liabilities that may be automatically transferred in Private M&A deals are different depending on the specific type of transaction chosen by the parties in practice.

Share transfer

In an acquisition through a share transfer, all the assets, liabilities and obligations of the target entity will automatically be acquired.

However, third party consents are required for contracts subject to change of ownership restrictions. Relevant government approvals may also be required if the target entity holds certain licences or permits.

Asset transfer

In an acquisition through an asset transfer, only the assets and liabilities which the buyer agrees to obtain, and which are identified are acquired. Third party consents are required for contracts containing no-assignment prohibitions.

What transfer taxes are payable on a share sale and an asset sale?

Share transfer

Stamp duty of 0.1% of the value of the shares being transferred is payable.

Capital gains tax of 10% is payable where the total value of the capital assets disposed of within one year exceeds MMK10 million. This does not apply to transfers of capital assets in respect of oil and gas companies, where tax rates ranging from 40% to 50% apply instead.

Asset transfer

For lease agreements between one and three years, stamp duty of 0.5% of the average annual value of rent is payable. For lease agreements exceeding three years, the stamp duty rate is reduced from 3% to 2% (on the average annual value of rent). Furthermore, lease premium paid in addition to the annual lease rental is also subject to 2% stamp duty on the total value of the premium.

All values of immovable property transfers are subject to stamp duty of 2%, plus an additional 2% if the immovable property is located in Yangon, Nay Pyi Taw or Mandalay.

Capital gains tax mentioned above for share transfers is also applicable for asset transfers.

What consultation or approval rights do employees have in a Private M&A deal? Are employee contracts automatically transferred in a Private M&A deal?

Generally, local employment legislation does not provide employees with consultation or approval rights for M&A deals.

The automatic transfer of employment contracts is different depending on the specific type of transaction chosen by the parties in practice. Accordingly:

Share transfer

For share transfers, employee contracts will remain with the target, unless there are terms in the contract to the contrary.

Asset transfer

For asset transfers, employees' consents are required for transferring their employment contracts to a new entity. If an employee does not consent to being employed by the new employer, a severance payment of between one month’s pay and 13 months' pay will need to be made to them for termination of employment, depending on the length of employment.

Can an agreement relating to the purchase of shares or assets provide for a foreign governing law? If so, are there any local laws that would still automatically apply to the Private M&A deal?

Yes, the parties may provide for the agreement to be governed by foreign laws.

Notwithstanding the choice of foreign governing law, the following local Myanmar laws will still be applicable:

1. State Owned Economic Enterprises Law, under which certain activities are reserved for the State or may be undertaken only through joint ventures with government-owned entities.
2. Myanmar Investment Law 2016 and Myanmar Companies Law 2017, which contain foreign ownership restrictions.
3. Transfer of Immovable Property Restriction Act 1987, which prohibits foreign ownership of land and property.
4. Myanmar Stamp Act and Law Amending the Stamp Act, which prescribe the stamp duty payable on transfers of assets (as described above).
5. Union Tax Law 2019, which prescribes the capital gains tax payable (as described above).

Apart from the above, other laws specific to the sector in which a business operates may also be applicable.

Is it common to provide for arbitration as a means for dispute resolution in Private M&A transaction documents? Are arbitration awards enforceable in your jurisdiction?

Yes, it is common practice for parties to include an arbitration clause as a means for dispute relation in Private M&A transaction documents. Myanmar has already set up a domestic arbitral institution, namely the Myanmar Arbitration Centre, which not only conducts arbitration, but is also responsible for selecting, training, and certifying industry experts and legal practitioners to become arbitrators.

Myanmar's Arbitration Law 2016 covers both arbitration proceedings in Myanmar and the enforcement of domestic and foreign arbitral awards in Myanmar. As Myanmar has acceded to the New York Convention in 2013, Myanmar's Arbitration Law provides procedures to recognise and enforce foreign arbitral awards made in member countries. On 19 January 2021, the Union Supreme Court issued Notification No. 42/2021 on the Authentication and Certification Procedure for Domestic Awards and Arbitration Agreements.

For more information about the arbitration framework in Myanmar, please click here for our Regional Guide to Arbitration Rules and Procedures featured in Rajah & Tann Asia Arbitration Asia, a one-stop arbitration website which spotlights on Asia.

Philippines

Market Entry: Key Legal Considerations

Governing Legislation

- Revised Corporation Code of the Philippines
- Foreign Investments Act of 1991
- Omnibus Investments Code of 1987
- Special Economic Zone Act of 1995
- Special laws governing specific industries

Regulating Body

- Securities and Exchange Commission ("**SEC**")
- Department of Trade and Industry (Board of Investments)
- Philippine Economic Zone Authority
- Industry-specific regulators, such as banks and insurance companies

Antitrust / Competition Law Issues

- The Philippine Competition Act ("**PCA**"; Republic Act No. 10667) penalises anticompetitive agreements, abuses of dominance, and prohibited mergers and acquisitions.
- Mergers or acquisitions (including joint ventures) which meet the size-of-party, value-of-transaction, and other thresholds set by the Philippine Competition Commission ("**PCC**") are subject to compulsory notification to the PCC and cannot be completed until approved by the PCC.
- Where the PCC is not notified of a merger or acquisition that is subject to compulsory notification to the PCC, the merger or acquisition is considered void and may expose the contracting parties to the PCC's financial penalties.

ESTABLISHING A COMPANY	
MINIMUM SHARE CAPITAL	• No minimum share capital, but at least one share must be issued. At least one class of shares must have complete voting rights. • A corporation with foreign equity exceeding 40% and which is considered a domestic market enterprise[3] must have a minimum paid-up capital of US$200,000 or, if certain conditions are met, US$100,000. An export enterprise, even with more than 40% foreign equity, is generally not subject to a minimum paid-up capital.[4] However, special laws governing specific industries may require higher capitalisation levels.
FOREIGN OWNERSHIP RESTRICTION	Entities may be up to 100% foreign owned unless engaged in activities or industries where the law imposes foreign ownership restrictions, such as mass media (0% foreign equity), advertising (up to 30% foreign equity), and public utilities and landholding (both up to 40% foreign equity).
TIME REQUIRED TO SET UP	In general, the SEC incorporation process can take four to five weeks from submission of complete documents. After SEC incorporation, a company has to obtain certain licences and permits for its operations.
DIRECTOR REQUIREMENTS	• At least one (for one-person corporations) but not more than 15, with no residency requirement. • If a company is subject to foreign ownership restrictions, in general, foreign directors shall be allowed in proportion to their allowable participation or share in the capital of the company. • Independent directors constituting 20% of the board are required of companies vested with public interest such as public companies (which include public listed companies), banks, insurance companies and other financial intermediaries.

[3] A "*domestic market enterprise*" means "*an enterprise which produces goods for sale, renders service, or otherwise engages in any business in the Philippines*." See Implementing Rules and Regulations of the Foreign Investment Act of 1991, as amended, s1(k).

[4] An "*export enterprise*" means "*an enterprise wherein a manufacturer, processor or service (including tourism) enterprise exports sixty percent (60%) or more of its output, or wherein a trader purchases products domestically and exports 60% or more of such purchases.*" See *id.* s1(g).

FAQs: Private M&A Deals

How are Private M&A deals commonly done in the Philippines?

Share transfers

Share transfers are a common method of doing a Private M&A deal in the Philippines, due to their relative ease of implementation.

Asset transfers

Asset transfers may be preferred in instances where, among other concerns, there is a need to manage liabilities, such as contingent tax liabilities, of the target company.

Joint ventures

Joint ventures may be formed by at least two parties who agree to jointly control a common enterprise. The joint venture may be unincorporated or through an incorporated company. If the latter, the joint venture may be undertaken by forming a new company or acquiring shares in an existing company.

What are the regulatory approvals required in a Private M&A deal?

Approvals from the authorities

In general, the need for regulatory approval for a Private M&A deal depends on factors such as whether:

1. the target company or any of the contracting parties is subject to an industry-specific regulator whose approval may be required for, e.g., changes in control or certain investments. Examples are banks, insurance companies, and certain public utilities;
2. the PCC thresholds for mandatory notification of mergers are met. As mentioned, if such thresholds are met, PCC approval is necessary before the deal may be completed;
3. the target company's capital structure or corporate charter (articles of incorporation and bylaws) will be amended pursuant to the deal. In that case, SEC approval for such amendments will be necessary;
4. the joint venture company will be incorporated. In that case, SEC approval for the incorporation will be necessary; and
5. the target company or any of the contracting parties is under liquidation or similar proceedings. In that case, the approval of the court where the proceedings are pending may be necessary.

Share transfer

In a share transfer, a clearance (called a Certificate Authorising Registration) from the tax authorities is required before the transfer can be recorded and registered in the corporation's books and new stock certificates issued to the transferee. However, at least the beneficial ownership of the shares transferred is normally transferred upon the execution of the conveyance document.

Asset transfer

In an asset transfer involving land, a clearance (called a Certificate Authorising Registration) from the tax authorities is required before the transfer can be registered with the relevant Register of Deeds and new title issued to the transferee. However, at least the beneficial ownership of the land transferred is normally transferred upon the execution of the conveyance document.

Approvals from the parties' internal managerial body

Unless otherwise provided by a special law, or in the target company's or a contracting party's articles of incorporation or bylaws, a share transfer or asset transfer usually requires only the approval of the contracting parties' respective board of directors. Stockholder approval is typically not necessary. Instances where stockholder approval may be necessary for a merger or acquisition include a sale or other transfer of all or substantially all of the assets of a corporation. In that case, stockholders representing at least two-thirds of the outstanding capital stock of the seller-corporation must approve the deal. Amendments to the articles of

incorporation or bylaws (which may be necessary for a deal) also require stockholder approval.

Approvals from the relevant parties

In an asset transfer which involves the transfer or sale of all or substantially all of the assets of a corporation, the Bulk Sales Law may apply. This may require, among others, the seller's delivery of a detailed inventory of the assets to be transferred to the purchaser, notice of the sale to its creditors, payment of debts to creditors proportionately or waiver of payment by the creditors, and registration of the deal with the Department of Trade and Industry.

What are the rights and liabilities that are automatically transferred in a Private M&A deal?

The rights and liabilities that may be automatically transferred in Private M&A deals generally depend on the type of transaction involved.

Share transfer

In a share transfer, the transferee generally does not become liable for the obligations of the corporate enterprise under the doctrine of separate juridical personality, unless the transferee assumes the obligations through contract or there is ground to discard the separate juridical personality of the corporation (such as fraud).

Asset transfer

In an asset transfer, the transferee is generally not liable for the debts and liabilities of the transferor, except where the transferee expressly or impliedly agrees to assume such obligations, or the Philippine Supreme Court decisions on business enterprise transfers apply.

What transfer taxes are payable on a share sale and an asset sale?

The transfer taxes payable on Private M&A deals generally depend on the type of transaction involved.

Share transfers

The usual taxes due on a sale of shares not listed nor traded in the stock exchange are capital gains tax equivalent to 15% of the seller's net capital gains and documentary stamp tax of PHP1.50 on each PHP200 of the par value of such shares. The seller is responsible for the capital gains tax while the parties can agree if one or both of them will be responsible for the documentary stamp tax. Tax treaty relief for the capital gains tax may be possible depending mainly on the seller's nationality.

Asset transfer

The usual taxes due on an asset sale are regular income taxes, value added taxes, and local business taxes. The seller is generally responsible for these taxes. Documentary stamp tax may also be due depending mainly on the nature of the asset transferred.

What consultation or approval rights do employees have in a Private M&A deal? Are employee contracts automatically transferred in a Private M&A deal?

Unless contractually granted (such as in a collective bargaining agreement with the employer), employees generally have no consultation or approval rights in a Private M&A deal.

There is no automatic transfer of employee contracts in a Private M&A deal, including in an asset transfer. An employee must consent to his or her transfer to a new employer.

In a share transfer, only the target company-employer's shareholders / control would change. The relationship between the target company-employer and its employees generally does not change.

Can an agreement relating to the purchase of shares or assets provide for a foreign governing law? If so, are there any local laws that would still automatically apply to the Private M&A deal?

Yes, the parties may provide for their agreement to be governed by foreign law. Parties are generally free to come to an agreement and stipulate what law should govern their contractual rights and duties in the absence of prohibitive law or public policy providing otherwise.

However, there is a risk that courts will apply local Philippine law when the chosen foreign law has no or very limited connection with the transaction or the contracting parties.

Is it common to provide for arbitration as a means for dispute resolution in Private M&A transaction documents? Are arbitration awards enforceable in your jurisdiction?

Arbitration as a means for dispute resolution of a Private M&A transaction is fairly common in the Philippines, especially if there is a foreign party involved. The usual international arbitration bodies for that purpose are the Singapore International Arbitration Centre and the International Chamber of Commerce. On the other hand, the primary local Philippine arbitration body is the Philippine Dispute Resolution Center, Inc.

Philippine law recognises and enforces both domestic and foreign arbitral awards. In general, there are limited grounds to contest them. A domestic arbitral award shall be enforced when confirmed by the proper Philippine court.

The Philippines is a party to the New York Convention. A party to a foreign arbitration may enforce a foreign arbitral award by filing a petition in the proper Philippine court.

A Philippine court may, upon grounds of comity and reciprocity, recognise and enforce a foreign arbitral award made in a country that is not a signatory to the New York Convention as if it were an award under that convention, when such country extends comity and reciprocity to awards made in the Philippines.

For more information about the arbitration framework in the Philippines, please click here for our Regional Guide to Arbitration Rules and Procedures featured in Rajah & Tann Asia Arbitration Asia, a one-stop arbitration website which spotlights on Asia.

Singapore

Market Entry: Key Legal Considerations

Governing Legislation

- Companies Act
- Business Names Registration Act 2014
- Limited Liability Partnerships Act
- Limited Partnerships Act
- Partnership Act
- Competition Act

Regulating Body

- Accounting and Corporate Regulatory Authority
- Economic Development Board
- Competition and Consumer Commission of Singapore
- Other industry-specific licensing authorities depending on the nature of the business conducted, including but not limited to the Monetary Authority of Singapore (MAS), Info-communications Media Development Authority (IMDA), Health Sciences Authority (HSA), Singapore Food Agency (SFA), Energy Market Authority (EMA), Hotels Licensing Board (HLB), Land Transport Authority (LTA), National Environment Agency (NEA), Singapore Medical Council (SMC), Legal Services Regulatory Authority (LSRA)

Antitrust / Competition Law Issues

- The M&A should be notified to the Competition and Consumer Commission of Singapore ("**CCCS**") if it is expected to result in a substantial lessening of competition in Singapore ("**SLC**"). While notification to CCCS is voluntary, CCCS has a merger monitoring unit which studies transactions which may not have been notified and may, as appropriate, investigate transactions which it is of the view have resulted or would result in a SLC.
- Further, CCCS may impose financial penalties on the parties and/or direct divestiture if it concludes that a SLC has or is likely to occur. Separately, when notifying an M&A, parties should highlight in the notification, any agreements, arrangements or provisions which are "*directly related and necessary to the implementation of the merger*" (e.g. non-compete clauses of a limited duration). Such ancillary restrictions will be reviewed by CCCS together with the M&A and will be covered by the non-opposition decision issued by CCCS.

ESTABLISHING A COMPANY	
MINIMUM SHARE CAPITAL	No minimum share capital, but at least one share must be issued.
FOREIGN OWNERSHIP RESTRICTION	• Generally, no foreign ownership or investment restrictions in most industries • However, the Significant Investments Review Act 2024 ("**SIRA**") which came into force on 28 March 2024, sets out an investment management regime that applies to both local and foreign investors for entities that are critical to Singapore's national security interests. The list of entities designated under SIRA ("**Designated Entities**") is available on the website of the Office of Significant Investments Review. The approval of the Minister for Trade and Industry will be required by a buyer before becoming a 12%, 25% or 50% controller, an indirect controller, or acquiring as a going concern (parts of) the business or undertaking of the Designated Entity. Sellers who intend to sell their stakes in the Designated Entity which would result in them ceasing to be a 50% or 75% controller must also seek the approval of the Minister for Trade and Industry. • SIRA complements the existing regime for certain prescribed sectors generally perceived to be critical to national interests, i.e. banking, finance, insurance, domestic news media, broadcasting, and most recently the Transport Sector (Critical Firms) Bill 2024 which was passed in Parliament on 8 May 2024.
TIME REQUIRED TO SET UP	One to three days (assuming all documentation is in order and no regulatory approvals are required).
DIRECTOR REQUIREMENTS	At least one director who is ordinarily resident in Singapore.

FAQs: Private M&A Deals

How are Private M&A deals commonly done in Singapore?

In Singapore, Private M&A deals are commonly done in the form of a share acquisition or an asset sale and purchase. The decision to make a share or asset purchase is usually influenced by factors such as the characterisation of gains as either revenue or capital, the amount of stamp duty payable on asset purchases and share purchases and the complexity of the deals involving the transfer of assets.

Private M&A deals are largely unregulated by statutory laws and parties are free to dictate the terms and conditions in the sales or purchases and they are mainly driven by commercial considerations. Nevertheless, Private M&A deals in Singapore share similar basic features and components with deals in other jurisdictions.

What are the regulatory approvals required in a Private M&A deal?

Approvals from the authorities

In general, no regulatory approval is required in a Private M&A deal.

Targets that are Designated Entities under the SIRA, or in certain industries that are regulated, such as insurance, banking, finance and mass media, may be subject to share ownership restrictions or approvals from governmental authorities.

In addition, antitrust clearance from the CCCS is strongly recommended if the merger or acquisition would, or is expected to, result in a substantial lessening of competition within a particular market for goods or services in Singapore.

Approvals from the internal managerial bodies of the parties

The sale of businesses or shares requires the prior approval of the company's board of directors and/or its shareholders.

Approvals from the relevant parties

Prior consent of existing customers, suppliers, lenders, partners or landlords may be required to ensure minimal disruption to the business.

What are the rights and liabilities that are automatically transferred in a Private M&A deal?

The rights and liabilities that may be automatically transferred in Private M&A deals are different depending on the specific type of transaction chosen by the parties in practice.

Share transfer

For share transfers, an acquirer automatically acquires all the rights, assets and liabilities of the target entity.

The acquirer should however note that certain regulatory licences and/or contracts of the target entity may contain change-in-control clauses which may automatically invalidate or terminate the licence or contract depending on the specific clause in question.

Asset transfer

For asset transfers, the rights and liabilities of a target entity will not automatically pass on to the acquirer unless the acquirer opts to assume such rights or liabilities. Otherwise, the rights and liabilities will remain with the target entity.

What transfer taxes are payable on a share sale and an asset sale?

Share transfer

For a share transfer, stamp duty is payable on each instrument of transfer at the rate of 0.2% on the higher of (a) the purchase price; and (b) the net asset value of such shares.

There are additional taxes payable for an acquisition of shares in property-holding entities that own primarily

residential properties in Singapore with exemptions available in certain scenarios.

Asset transfer

Stamp duty is only payable on the transfer of shares (as above) and buyer stamp duty is payable for the acquisition of real property at the rate of approximately 3% on the higher of (a) the purchase price; and (b) the current market value of the property. There is a seller stamp duty applicable for the sale of industrial and residential properties if sold within a holding period and additional buyer stamp duty for residential property depending on the profile of the buyer. Such seller stamp duty and additional buyer stamp duty will be computed based on the higher of (a) the purchase price; and (b) the current market value of the property.

What consultation or approval rights do employees have in a Private M&A deal? Are employee contracts automatically transferred in a Private M&A deal?

In Singapore, employees are typically not accorded with consultation or approval rights for M&A deals. However, collective agreements with trade unions may sometimes require employers to consult the respective trade unions (or bodies) prior to the sale of shares or assets.

In a Private M&A deal involving the transfer of a business or part thereof, the employment contracts of all employees who are covered under the Singapore Employment Act ("**Employment Act**") will be automatically transferred to the acquirer or new employer. The Employment Act extends to all employees, including all persons employed in managerial or executive positions, with the exception of seamen, domestic workers, government employees or any class of persons whom the Minister for Manpower declares not to be employees under the Employment Act. The foregoing does not apply to a sale of assets on a piecemeal basis.

Under Section 18A of the Employment Act, the transferor company (i.e. the target entity) is obliged to notify and engage the employees (and their unions, if any) in consultations on the transfer of their employment to the acquirer or new employer as soon as it is reasonable and before the transfer takes place. Section 18A also provides that there will be an automatic transfer, with no break, in the continuity of employment, and on the same terms and conditions enjoyed by the employee prior to the sale unless the employee and the acquirer or new employer agree otherwise.

Can an agreement relating to the purchase of shares or assets provide for a foreign governing law? If so, are there any local laws that would still automatically apply to the Private M&A deal?

Yes, the parties may provide for the agreement to be governed by a foreign law. However, certain provisions and statutory requirements may not be circumvented with the choice of a foreign law.

One example is the transfer of employees under Section 18A of the Employment Act. An asset transfer involving the transfer of the assets or employees of the target entity will still have to be in compliance with Singapore laws despite the choice of foreign law.

Is it common to provide for arbitration as a means for dispute resolution in Private M&A transaction documents? Are arbitration awards enforceable in your jurisdiction?

Arbitration as a means for dispute resolution in Private M&A transaction documents is common in Singapore, particularly when a transaction involves parties in different jurisdictions, or when maintaining confidentiality of disputes is a key concern for the principals.

Arbitral awards are also enforceable in Singapore. Enforcement of international arbitral awards in Singapore is provided for in the International Arbitration Act, which gives effect to the New York Convention.

International arbitral awards made in Singapore and outside Singapore may, by leave of the Singapore High Court, have the same effect as judgments of Singapore courts unless, among other things, they are deemed contrary to the public policy of Singapore.

For more information about the arbitration framework in Singapore, please click here for our Regional Guide to Arbitration Rules and Procedures featured in Rajah & Tann Asia Arbitration Asia, a one-stop arbitration website which spotlights on Asia.

Thailand

Market Entry: Key Legal Considerations

Governing Legislation

- Civil and Commercial Code
- Public Limited Companies Act B.E. 2535
- Foreign Business Act B.E. 2542
- Investment Promotion Act B.E. 2520
- Securities and Exchange Act B.E. 2535

Regulating Body

- Ministry of Commerce
- Board of Investment
- Foreign Business Committee
- Securities and Exchange Commission

Antitrust / Competition Law Issues

- The Trade Competition Act regulates anticompetitive practices in mergers, amalgamations or acquisitions of shares / assets.
- The Trade Competition Commission ("**TCC**") enforces the competition law in all sectors.

ESTABLISHING A COMPANY	
MINIMUM SHARE CAPITAL	• At least two shareholders holding one share each, with minimum par value of THB5. • Any registration of initial capital exceeding THB5 million, or increase of registered capital to an amount exceeding THB5 million, will require additional compliance. • Minimum capital requirement for a foreigner to operate business in Thailand is THB2 million per business. If the business falls within the lists annexed to the Foreign Business Act B.E. 2542, the minimum capital requirement is THB3 million.
FOREIGN OWNERSHIP RESTRICTION	Generally, no foreign ownership restrictions save for three prescribed categories of restricted activities under the Foreign Business Act B.E. 2542 (a) wholly prohibited activities (no foreign ownership allowed); (b)

ESTABLISHING A COMPANY	
	activities permitted with approval from the Cabinet and licence from the Ministry of Commerce and are at least 40% Thai-owned (may be reduced to 25% under special approval from the relevant government authorities) and two-fifths of directors must be Thai nationals; and (c) activities permitted with licence from the Ministry of Commerce (Director General) and approval from the Foreign Business Committee.
TIME REQUIRED TO SET UP	Three to 11 days approximately and depending on the required registered capital and whether promoters and shareholders reside in Thailand. An application for a foreign business licence from the Ministry of Commerce or a BOI certificate from Thailand Board of Investment (for a foreign majority- / wholly-owned company) will take approximately 90 to 120 days.
DIRECTOR REQUIREMENTS	• At least one director for a private limited company with no requirement as to nationality or residency. • There are more stringent requirements for a public limited company.

FAQs: Private M&A Deals

How are Private M&A deals commonly done in Thailand?

There are generally three types of Private M&A deals in Thailand, namely, an amalgamation, a share acquisition and an asset acquisition, but the most common way to acquire a private limited company is by way of a share acquisition or an asset acquisition.

What are the regulatory approvals required in a Private M&A deal?

Approvals from the authorities

In general, there is no requirement to obtain governmental approval for a Private M&A deal, except for an entire business transfer ("**EBT**") which must receive an approval from the Thai Revenue Department prior to completing the transfer so as to be entitled to tax exemptions.

Approval from the Trade Competition Commission

The Trade Competition Act B.E. 2560 (2017) and implementing Notifications on merger control set out certain regulatory requirements where a merger satisfies the specified thresholds.

Post-merger notification

A post-merger notification is required when a business operator engages in a merger that may cause substantial reduction of competition in a particular market and must notify the Trade Competition Commission ("**Commission**") of the merger within seven days.

A "*substantial reduction of competition*" is defined by the Commission as a merger which has (a) a sales revenue of THB1,000 million or more; and (b) does not meet the requirements of having a "*monopoly*" or being a business operator with "*market dominance*" in the market, as discussed below. This sales revenue includes the sales revenue of all the business operators which are related in terms of policy or commanding power.

Pre-merger approval

A pre-merger approval is required where the merger may result in a "*monopoly*" or a business operator with *"market dominance*".

For the merged company to hold a "*monopoly*" on the market, it must have the power to fix the price and quantity of its goods or services independently and have a sales volume of THB1,000 million or more.

The threshold for a business operator to have "*market dominance*" is more complex, requiring either: (a) a business operator having a market share of 50% or more and having sales volume of THB1,000 million or more in the preceding year; or (b) the first three business operators in a market of any goods or services having an aggregate market share of 75% or more and each having sales volume of THB1,000 million or more in the preceding year. However, this "*market dominance*" threshold will not apply to a business operator having a market share in the preceding year of lower than 10%.

What are the rights and liabilities that are automatically transferred in a Private M&A deal?

The rights and liabilities that may be automatically transferred in Private M&A deals are different depending on the specific type of transaction chosen by the parties in practice.

Share transfer

In the case of a share transfer, all rights and liabilities of the target company are automatically transferred to the purchaser.

Asset transfer

In the case of an asset transfer, the purchaser would not assume the liabilities of the target company (except in the case of an EBT, where certain liabilities would be transferred). It is noteworthy that criminal liabilities will not be transferred to a purchaser.

What transfer taxes are payable on a share sale and an asset sale?

The transfer taxes payable on Private M&A deals are different depending on the specific type of transaction chosen by the parties in practice.

Share transfer

The taxes applicable to a share transfer are corporate income tax, withholding tax, and stamp duty.

Asset transfer

The taxes applicable to an asset transfer are corporate income tax, specific business tax (applicable to sale of real estate only), VAT, withholding tax, and stamp duty.

However, there are exemptions in certain circumstances, for example, the Thai Revenue Department currently grants a tax exemption in the form of specific business tax, including stamp duty and VAT for an EBT.

What consultation or approval rights do employees have in a Private M&A deal? Are employee contracts automatically transferred in a Private M&A deal?

The transfer of employee contracts is different depending on the specific type of transaction chosen by the parties in practice.

Share transfer

A share transfer causes a change in the shareholding structure of the target company, without having an impact on the target company's employees. In general, therefore, there would be no requirement to obtain the employees' approval for the share acquisition because the employer remains the same.

There is a small chance that the employees may argue that there is a change of employer on the basis that there is a change of control. Therefore, it is recommended that the employees be informed of the change of control in writing.

Asset transfer

In the case of an asset transfer, the transfer of employment would not occur automatically. An asset transfer would affect the employment relationship between the transferor and its employees in that there would be a change of employer. As a result, the employees' prior written consent must be obtained for the transfer of their employment to be valid and effective.

Can an agreement relating to the purchase of shares or assets provide for a foreign governing law? If so, are there any local laws that would still automatically apply to the Private M&A deal?

Yes, the parties may provide for the agreement to be governed by foreign law. Under the Act on Conflict of Laws 1938, the parties to an agreement are free to choose the governing law of their agreement. The choice of a foreign law to govern the terms of an agreement is enforceable in Thailand to the extent that the provisions of foreign law are not contrary to Thai public policy.

The party seeking to rely upon a foreign law would be required to prove the existence of that foreign law to the satisfaction of the court and that the foreign law provisions being relied upon are not contrary to Thai public policy. Thai public policy is a wide and undefined term, giving the courts substantial discretion when deciding on the issue.

Commercial terms in an agreement are not generally deemed to be contrary to Thai public policy, except where they are clearly contrary to Thai law, for example, a provision in an agreement which allows a creditor to charge compound interest immediately upon default.

However, Thai law would apply to matters relating to the form of the transaction as required by relevant laws, for example, the requirement for the registration of transfer of land, and the requirement for a transfer of shares to be evidenced by a signed written instrument and entry in the share register book of the company.

Is it common to provide for arbitration as a means for dispute resolution in Private M&A transaction documents? Are arbitration awards enforceable in your jurisdiction?

In practice, if one of the parties is a foreigner or foreign entity, then arbitration is commonly used to resolve the dispute between the parties. In Thailand, there are three arbitration institutes, namely, the International Court of Arbitration which operates under the auspices of the International Chamber of Commerce (ICC), the Thailand Arbitration Center (THAC) which offers arbitration and mediation services for cross-border disputes, and the Thai Arbitration Institute (TAI) established locally in Thailand to promote and develop arbitration as a dispute settlement mechanism for civil and commercial matters.

Other than the above three arbitration institutes, the parties to the agreement may use other foreign arbitration institutes such as Singapore and Hong Kong. Thailand is a party to the New York Convention and as a result, a final arbitral award issued in a country that is a party to the New York Convention would generally be enforceable in Thailand.

In terms of the enforcement process of the arbitral award, an application must be filed to the competent court within three years from the day that the award is enforceable. After the application has been accepted by the court, a copy of the documents will be delivered to the defendant. With limited legal ground, the defendant is able to file an objection against a cross-enforcement application. Thereafter, the hearings will take place, and the court will render a judgment regarding the enforcement of the award.

Under the Arbitration Act, it also sets forth certain legal grounds that the court can decide to set aside an arbitral award if the court views that:

1. the award deals with a dispute not capable of settlement by arbitration under the law; or
2. the recognition or enforcement of the award would be contrary to public policy.

It is noteworthy that the enforcement process would take at least eight to 12 months before the Court of First Instance renders its order on the matter.

For more information about the arbitration framework in Thailand, please click here for our Regional Guide to Arbitration Rules and Procedures featured in Rajah & Tann Asia Arbitration Asia, a one-stop arbitration website which spotlights on Asia.

Vietnam

Market Entry: Key Legal Considerations

Governing Legislation

- Law on Enterprises No. 59/2020/QH14 and its related implementing regulations
- Law on Investment No. 61/2020/QH14 and its related implementing regulations
- Law on Securities No. 54/2019/QH14 and its related implementing regulations
- Law on Competition No. 23/2018/QH14 and its related implementing regulations

Regulating Body

- Ministry of Planning and Investment - Provincial level Department of Planning and Investment (as the business registration authority and as an investment registration authority)
- Provincial level People's Committee - Management Board of industrial parks, export processing zones, high-tech zones and economic zones (as an investment registration authority)
- Vietnam Competition Commission (as an agency of the Ministry of Industry and Trade)
- Other authorities involved in appraising or supervising investment projects and enterprises of investors (e.g. sectoral authorities)

Antitrust / Competition Law Issues

- Enterprises engaging in an "*economic concentration*" (which includes certain merger, consolidation, acquisition and joint venture transactions) that reaches the notification threshold will need to file a notification dossier to the Vietnam Competition Commission before conducting the economic concentration.
- Notification thresholds are determined based on assets, turnover, combined market share and transaction value.

ESTABLISHING A COMPANY	
MINIMUM SHARE CAPITAL	No minimum capital requirements, except for certain sectors.
FOREIGN OWNERSHIP RESTRICTION	• 100% foreign ownership generally permitted, except for certain prescribed sectors such as telecommunications, civil aviation, publishing and news media industries. • For certain sectors, foreign investors must meet market access conditions set out in specialised legislation, for example, obtaining additional approvals or licences from sectoral state authorities.
TIME REQUIRED TO SET UP	• To set up a domestic company, three working days to obtain the Enterprise Registration Certificate. • To set up a foreign-invested company (assuming it does not engage in business sectors or projects that require investment policy approvals of the National Assembly, Prime Minister, or provincial People's Committees), around 18 days (15 days to obtain the Investment Registration Certificate and three working days to obtain the Enterprise Registration Certificate). • Timelines above are counted from the date of submitting a valid application dossier and subject to satisfaction of all licensing conditions. Timelines may be prolonged in practice due to (among others) time needed for assessment by the state authorities, requests for amendments to the application dossiers and/or workloads of the state authorities.
DIRECTOR REQUIREMENTS	• A company may have more than one legal representative (which may be the director or other position), and at least one legal representative must reside in Vietnam. • Depending on the type of company, a company can have a board of management, members' council or president. Board members do not need to be Vietnamese, but they must meet certain criteria to hold managerial positions in a company (e.g. qualifications or experience, subject to the company's business).

FAQs: Private M&A Deals

How are Private M&A deals commonly done in Vietnam?

In Vietnam, Private M&A deals are commonly done by way of:

Share/capital contribution transfer

The transfer depends on the enterprise form of the target company to be acquired by the investor. If the target company is a joint stock company, the deal will be done by way of share transfer. If the company is a limited liability company, the deal will be done by way of capital contribution transfer (or as named under Vietnamese law, capital contribution assignment).

Asset transfer

An asset transfer can be done when the investor does not want to inherit the rights and obligations of the target company, but just to obtain its assets and/or the business.

Merger

A company ("**Target Company**") transfers all lawful assets, rights, obligations and interests to another company which survives the merger ("**Surviving Company**"), and then the existence of the Target Company is terminated.

Consolidation

Two or more companies are consolidated into a new one and the existence of the former companies are terminated.

Division/separation

The transferor company may divide shareholders / members, rights and obligations, and assets of the company to establish two new companies or more (the transferee companies).

Upon the completion of the division, the existence of the transferor company shall be terminated.

A transferor company may be partially divided by transferring part of its existing assets, rights, obligations, shareholders/members to establish one or some new companies without terminating the existence of the transferor company.

After the division or separation, the shares of the Target Company will be transferred to the investor.

What are the regulatory approvals required in a Private M&A deal?

Subject to the nature of the transaction, the regulatory approvals required in a Private M&A deal are generally as follows:

Acquisition / subscription approvals

For the transfer of shares or capital contribution to foreign investors, the acquisition/subscription approvals of the competent licensing authority shall be obtained as an in-principle approval of the competent authority for foreign investors to invest in the target company by way of acquisition/subscription of shares or capital contribution in the following cases:

1. the acquisition/subscription of shares or capital contribution results in an increase in foreign investor ownership in the Target Company engaging in business activities which are subject to "*conditions for market approach applicable to foreign investors*";
2. the acquisition/subscription of shares or capital contribution results in (a) increasing foreign investor ownership from 50%, or below 50%, to more than 50%; or (b) increasing the ownership ratio of foreign investors who already owned more than 50% to a higher ratio; and
3. the acquisition / subscription of shares or capital contribution in the Target Company having land use right certificates of land lots located on islands, coastal or border communes, wards or towns or in other areas which affect national defence and security.

For transfer of real estate assets, an in-principle approval of a competent licensing authority must be obtained as the approval for the transferring of the rights to

implementation of the real estate project (project transfer approval).

Amendment of existing registration

For the transfer of shares or capital contribution to foreign investors, the amendment of incorporation licences (Enterprise Registration Certificate and Investment Registration Certificate) and/or notification on the change of shareholding ownership to reflect the change of shareholders should be obtained from / submitted to the competent licensing authority.

For the transfer of real estate assets, the parties must register for the amend land use rights certificate to reflect the change of property ownership as the result of the project transfer.

For the transfer of other assets which are required to register ownership, the amendment of ownership registration licence/certificate to reflect the change of owner is required.

What are the rights and liabilities that are automatically transferred in a Private M&A deal?

The rights and liabilities that may be automatically transferred in Private M&A deals are different depending on the specific type of transaction chosen by the parties in practice.

Share/capital contribution transfer

All rights and liabilities of the selling party over the sold shares / capital contribution shall be automatically transferred to the purchasing party accordingly. This means that the purchasing party shall take over all interests and bear all debts arising from the transacting shares/capital contribution.

Asset transfer

The buyer / investor shall have all rights and interests (as the owner of the assets) over the sold assets transferred automatically from the seller to the buyer.

Merger

All rights and liabilities of the Target Company shall be automatically transferred to the Surviving Company, including the rights and liabilities over the capital, the assets, the employees, the business, etc.

Consolidation

All rights and liabilities of the consolidating companies shall be automatically transferred to the consolidated company including the rights and liabilities over the capital, the assets, the employees, the business, etc.

Division/separation

For division of a company, the new companies after division must be jointly liable for unpaid debts, labour contracts and other property obligations of the company being divided.

For separation of a company, the company being separated and the separate company must be jointly liable for unpaid debts, labour contracts and other property obligations of the company being separated.

What transfer taxes are payable on a share sale and an asset sale?

The applicable taxes in Private M&A deals are different depending on the specific type of transaction chosen by the parties, the legal person status of the seller, the tax residency of the seller, the enterprise form of the target company, and the type of assets.

Share/capital contribution transfer

Capital gains or income tax of (a) 20% of the gain (the difference between the transaction consideration and the investment cost); or (b) 0.1% on the sale proceeds.

Asset transfer

The asset transfer can be subject to income tax, value added tax, and registration fees.

What consultation or approval rights do employees have in a Private M&A deal? Are employee contracts automatically transferred in a Private M&A deal?

No employees' consultation or approval is required in a Private M&A deal. However, in the case of a merger or consolidation, the company must inform their employees about such transaction within 15 days after the internal approval of the same.

In a merger or consolidation deal, the merged or consolidated company shall automatically inherit the employee contracts. However, the new employer has the following rights:

1. to amend and/or supplement the labour contracts; and
2. if the new employer decides not to re-employ all employees, to assign to some employees part-time jobs and/or to terminate the labour contracts of some employees under a plan of employment, which is prepared after consultation with the representative of the employees.

In an asset acquisition deal, the buyer shall not inherit the employee contracts. The seller has the responsibility to implement a plan of employment after consultation with the representative of the employees.

Can an agreement relating to the purchase of shares or assets provide for a foreign governing law? If so, are there any local laws that would still automatically apply to the Private M&A deal?

Yes. In principle, in a purchase agreement of shares or assets involving a foreign party, the parties are entitled to choose a foreign law as the governing law of their transaction.

However, if the purchase transaction involves a real property, the governing law of the transaction must be the law of the country where the subject real property is located.

Is it common to provide for arbitration as a means for dispute resolution in Private M&A transaction documents? Are arbitration awards enforceable in your jurisdiction?

It is common to provide for arbitration as a means for dispute resolution in transaction documents for Private M&A. However, one notable exception is transactions for the transfer/purchase of real estate property, where parties often opt to resolve disputes through the Vietnamese courts because such disputes may not be arbitrable.

Domestic commercial arbitration awards can be enforced under the Law on Enforcement of Civil Judgments. Accordingly, an arbitration award shall be voluntarily performed by a judgment debtor within 30 days from the date when the judgment debtor has duly received or been informed of the arbitration award. Otherwise, the judgment creditor shall be entitled to request the Civil Judgment Enforcement Management Agencies for a coercion of enforcement of such an arbitration award upon the procedures set forth by laws.

Foreign arbitral awards can be enforceable in Vietnam subject to the recognition of the competent court of Vietnam. Since Vietnam is a party to the New York Convention, the recognition and enforcement of such awards in Vietnam must comply with the New York Convention and conform concurrently to the conditions and procedures stated in the Vietnam Civil Proceedings Code. However, in cases of foreign arbitral awards made in countries which are not members of the New York Convention, the recognition and enforcement of such arbitral awards shall be governed under bilateral agreements on judicial cooperation between Vietnam and such countries (if any) or under the reciprocity principle.

As long as a foreign arbitral award is recognised by a Vietnamese court, it shall be enforced in the same manner as a domestic award.

For more information about the arbitration framework in Vietnam, please click here for our Regional Guide to Arbitration Rules and Procedures featured in Rajah & Tann Asia Arbitration Asia, a one-stop arbitration website which spotlights on Asia.

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