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CONTENTS

Facilitating cross-strait investments

C Y Huang, Chairman of the Taiwan Mergers & Acquisitions and Private Equity Council (MAPE) spoke to David Tring about the Council's role in assisting cross-strait investments, the deals they have worked on and outlook for relations

What is the history and mission of the Council?

The Council was founded three and half years ago and its main purpose is to promote general understanding of Taiwan M&A and PE. We also lobby on behalf of members with the regulatory authorities. For example, in 2011 we assisted Kohlberg Kravis Roberts (KKR), when they were trying to take the electronics component manufacturer Yageo private. We lobbied very hard with the government authorities. The Council also interacts with counterpart organisations in mainland China, Hong Kong, Japan and other places.

What is the role of the Council when it comes to cross-strait investments?

We are actively promoting PRC investments into Taiwan. Last year, we published a book on how to invest in Taiwan. The book comprises 57 chapters covering every aspect of investments from regulatory to financial and legal. The Council helps PRC companies find partners for their investments in Taiwan. For example, we worked on a leading deal between an SOE that invested and formed a joint venture (JV) with a Taiwanese company. The JV involved Beijing Enterprise Holdings, which manufactures the popular brand Yanjing Beer. The company came to Taiwan about two years ago and the Council helped them locate the Taiwanese partner AGV, one of the leading food and beverage companies in Taiwan. AGV helps to distribute Yanjing Beer in Taiwan and at the same time Beijing Enterprise also formed a joint venture with AGV's subsidiary in Beijing, producing dairy products.

How has the Investor Protection Agreement changed investments?

The Investor Protection Agreement was signed in August last year and it is a significant step for cross-strait investments. The Agreement provides PRC investors with more confidence to invest in Taiwan. This is one of the reasons we are have seen three leading PRC companies make sizable investments in Taiwan recently. For example, the Foshan Group in Shanghai paid $12 million for a 20% stake in the pineapple pastry company Vigor. China's largest LED manufacturer based in Fujian province, San An, invested $80 million into FOREPI. The A-Share-listed company LUX-SHARE-ICT also invested $15 million into Taiwan's SpeedTech, which makes connectors.

I would not say the increase in investments is a direct result of the Investor Protection Agreement, but it has had the effect of boosting PRC investors' confidence. In the past three years the Taiwanese government has announced three batches of investments, which opened more industries to PRC investment. But the results were pretty minimal. What has happened in the last month or so is quite significant, as leading private sector companies, who are more sizeable, are finally making substantial investments into Taiwan.

What is the outlook for investments?

The trend is definitely that there will be more deals. We are still at the beginning stage for investment. The PRC government is supportive and we are seeing the Taiwan Affairs Office and the Ministry of Commerce urging Taiwan to open-up to investments. The problem is more on the Taiwan side. While Taiwan is welcoming the inflow of capital from the PRC, there are also different voices in Taiwan that are afraid this could be an economic threat. They fear Taiwan will become too dependent or reliant on China. But considering the longer term, it is a non-stop trend when it comes to investment.

What are some of the main issues investors face?

PRC companies do not always understand Taiwan and they do not always have the need to invest in Taiwan. What they are interested in is Taiwan's knowledge, management skills and technology, not the market, because it is too small. However, if Taiwan becomes too restrictive, two things will happen. Firstly, PRC companies will choose to form JVs with Taiwanese companies overseas like in Hong Kong or the Cayman Islands, rather than remitting money into Taiwan. Secondly, PRC companies will poach people from Taiwan. This has negative consequences, because without the expertise and experience of Taiwanese talents, Taiwan's overall value is diminished. One example is last year when TCL's subsidiary CSOT in Shenzhen poached 200 people from Honghai group, owner of Chi Mei Optical, which manufactures LCD panels.

Another issue is that the trade flow is not equal. Taiwanese companies can invest in mainland China with almost no restrictions at all, but PRC companies investing in Taiwan face strict regulations, making investments unbalanced. One of the restrictions, for example, is that PRC banks can only take 5% equity stake in a Taiwan bank. Taiwan should really open up more and we should not be afraid of being controlled by PRC investment. The problem is also that Taiwan only allows PRC enterprises to invest in the outdated industries like textiles, but restricts investments in the emerging industries like LEDs or LCD panels. Taiwan believes these industries are so unique and special that investment should be restricted. It is only when Taiwan gets into trouble that things change. Last year Taiwan was criticised for its LCD panel investment restrictions and government officials are now talking about a relaxation in policy to potentially allow PRC investors to take majority control. But a lot of investors are annoyed – they do not have to invest in Taiwan and when it is so difficult, investors do not want to bother.

What can Taiwan do to attract mainland investment?

There definitely has to be greater opening of the industries and fewer restrictions – this is the major issue. Another thing Taiwan can do and has started, but needs to address more seriously, relates to human capital. Taiwan is facing a so-called brain drain, where Taiwanese talent is moving abroad. But Taiwan has also been discriminating against PRC citizens to work here. However, the government is promoting a free economic zone that would allow PRC citizens to enter and work in Taiwan. It is not just a free trade of money, but also a free trade of people that is needed. Mentality is also a problem. There is still this mentality in Taiwan that anything related with China is taboo. The opposition party talks about the negatives and government officials are afraid of making decisions. This will ultimately hurt Taiwan. The first thing the government will look at with any foreign investment is if there are any Chinese elements within the company. If a Chinese company bought into a US company, even a 5% stake, the Investment Commission will scrutinise the investment and could stop or delay the application. More international companies will have Chinese elements in the future and if Taiwan continues as it has done in the past, the economy will suffer and will not be able to compete with other emerging economies in Asia.

Taiwan M&A: Opportunities and challenges

Simplified procedures and tax policies account for the growing M&A transactions in Taiwan. With high expectations for an increase in PRC capital and proposed amendments to M&A legislation, this trend is bound to continue, but what transaction structures do foreign investors have to comply with?

While recovery from the 2008 financial crisis has been slow, M&A activities in Taiwan have continued to thrive. There have been large-scale M&A transactions involving multinationals and business enterprises, like AIG's sale of its local assets to Nan Shan Life and Mediatek's tender offer for M-Star, which consolidates two major integrated circuit design players in Taiwan. There is also the proposed acquisition of CNS network by Won Won Group, EQT Partners' acquisition of GTV and the sale of the Next Media group, all in relation to the mass media news industry. Foreign investors continue to acquire local companies targeting niche markets. Meanwhile, following the execution of the Economic Cooperation Framework Agreement (ECFA) between Taiwan and the People's Republic of China on June 29 2010, there have been high expectations that more PRC capital would flow into Taiwan for investment and M&A transactions.

Statutory M&A transactions

To conduct M&A transactions in Taiwan, the Mergers and Acquisitions Act provides certain simplified procedures for taking corporate actions and conducting employee transfer. The M&A Act also offers certain tax neutral treatments. The authorities are proposing amendments to the M&A Act to further facilitate M&A transactions in Taiwan. It is anticipated that certain regulatory barriers will be removed after the amendments are enacted. Considering the current version of the M&A Act, to take advantage of the simplified procedures and the relevant tax treatments, the transaction structure must comply with the types of mergers and acquisitions prescribed in the Act.

Mergers

Statutory merger

Special approvals of the board meetings and shareholders meeting of each of the parties participating in a statutory merger are required before the merger can take effect. A cross-border merger between a Taiwan company and a foreign company is permissible as long as, after the acquisition, the surviving company takes the form of a company limited by shares.

Whale-minnow merger

The approval of the surviving company's shareholders is not required if (i) the number of new shares to be issued by the surviving company to the shareholders of the dissolved company in a merger does not exceed 20% of the surviving company's total issued shares; (ii) the amount of cash or the value of the property to be delivered as the merger consideration does not exceed 2% of the surviving company's net worth; and (iii) the dissolved company is not insolvent.

Cash-out merger

In addition to issuing shares as a consideration in a merger transaction, under the M&A Act, a surviving company is allowed to use cash or the combination of shares, cash and other properties as the consideration in a merger.

Short-form merger

The M&A Act allows a parent company and its subsidiary to conduct a short-form merger, under which only the board approvals of the parent and the subsidiary would be required. To be eligible to conduct a short-form merger, the parent needs to hold at least 90% of the outstanding shares in the subsidiary.

Acquisitions

General assumption of rights and obligations

This type of acquisition refers to a transaction in which a company (i) assumes all of the assets of another company (general assumption); (ii) transfers all of its assets to another company (general business transfer); (iii) transfers all or the major parts of the business or assets to another company (Article 185 of the Company Act); or (iv) assumes all of the business or assets of another company that would have a material impact on the company's operation (Article 185 of the Company Act). A special shareholders resolution is also required for the above acquisitions.

Parent-subsidiary acquisition

The second type of acquisition is for a company to transfer its assets or business to any of its 100% owned subsidiaries in exchange for new shares to be issued by the subsidiary to the parent. Another condition for this type of acquisition is that the consolidated financial statements of the parent and subsidiary are available at the time of the acquisition. Only the resolution of the board of directors is required to approve this type of acquisition. This provision also applies to cross-border parent-subsidiary acquisitions.

Share exchange

A company may be acquired by another company or a newly incorporated company (for example a holding company) by exchanging 100% of its shares with the holding company thereby becoming the wholly-owned subsidiary of the holding company. The share exchange of 100% shares does not require the consent of each shareholder and may be approved by a special shareholders resolution of the acquired company. A cross-border share exchange between a Taiwan company and a foreign company is permitted.

Demergers

According to the M&A Act, demerger refers to an activity where a

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company (Demerged Co) transfers part or its entire business unit, which can be operated independently to a newly incorporated, or an existing company (Demerger Co) and the Demerger Co issues new shares to the Demerged Co or the shareholders of the Demerged Co. A demerger requires a special shareholders resolution of the parties participating in the demerger.

Acquisition of listed companies

If the Taiwan target is a listed company, in addition to the above transaction types, the following channels are available:

Tender offer

In Taiwan, a tender offer is available for acquiring listed shares. Pursuant to the Securities and Exchange Act (SEA), a mandatory tender offer bid would be required for an acquisition of 20% or more of the total issued shares of a public company within 50 days.

Market purchase

Trading-hours purchases

It is always an option to purchase shares of a listed company during normal trading hours. The procedure for an investor to do so and the applicable regulatory scheme varies with the qualifications of the investor. Of course, acquiring a listed company through market purchase could increase the cost of the acquisition, as the market price would rise during the market purchase.

Block trade

If the number of shares to be acquired reaches either of the following thresholds, the acquisition of listed shares may be conducted through block trade: 500,000 shares or more of the same listed shares or a stock portfolio involving five or more different listed shares and totalling Ntd15,000,000 ($516,500) or greater. A single trade involving less than 500,000 shares of the same listed shares but with a total trading amount of Ntd15,000,000 or more may also be conducted through the block trade mechanism. However, there is a price restriction for conducting a block trade.

After-hours

In addition to normal on-exchange trades during normal trading hours and block trade, the Taiwan Stock Exchange (TSE) provides other trading alternatives depending on the circumstances of the relevant trades, including bid offerings, fixed-price purchases and public auctions. These alternatives are sometimes utilised by parties who have agreed to the purchase and sale of listed shares at an agreed price to consummate the sale and purchase.

Alternative purchase

Foreign investment approval

A foreign investor is allowed to purchase from a specific foreign shareholder its holdings in a listed company if the Investment Commission has approved both the selling shareholder's original investment in the listed company and the proposed purchase by the incoming foreign investor.

Global depository receipt (GDRs)

A TSE-listed company may, with the prior approval of the relevant competent authorities, sponsor the issuance and sale to foreign investors of GDRs representing the issuer's deposited shares. Foreign investors therefore, may acquire interest in a TSE-listed company through the GDR approach.

European convertible bonds (ECBs)

According to the relevant rules, a TSE-listed company may issue ECBs after the registration with the authorities becomes effective. Beginning from a designated starting date after the bond issuance date until 10 days before the expiration date, the bond holder may request for conversion at any time in accordance with the procedures of conversion set by the issuer. Thus, ECBs may also be a mechanism to acquire a listed company.

Private placement

A TSE-listed company may issue new shares to specific persons as defined under the SEA by way of private placement, which requires the approval of the shareholders at a shareholders' meeting. The total number of subscribers shall not exceed 35. The shares subscribed by way of private placement are subject to the lock-up requirements from one to three years.

Detailed regulations of the private placement, regarding the criteria of investors, the requirement for the shareholders approval of the issuing company and the pricing will apply, which could affect the eligibility for an investor to choose investing through the private placement mechanism.

PRC investment in Taiwan

For a PRC investor to invest and conduct M&A transactions in Taiwan, most of the above channels and approaches would be available. The major difference is that the PRC investment in Taiwan is subject to a positive list prescribed by the Taiwan authorities, which sets forth industrial sector restrictions for certain industries and percentage of shareholding or amount of investment. There are basically two channels for making PRC investments in Taiwan, subject to the industrial sector restrictions and shareholding or investment amount restrictions. For the first channel, a PRC investor may, with the approval of the Investment Commission, acquire private companies or listed companies (for listed companies, the investment shall exceed 10% shareholding). The second channel is qualified domestic institutional investors (QDII) approved in China, may, after registering its status with the Taiwan authorities, acquire listed companies in Taiwan.

In 2012, our firm has handled a number of cases where PRC investors successfully invested in Taiwanese companies. For example, Fosun Group, the largest private investment group in China, made its first investment in Taiwan in November 2012 by subscribing 20% of the total shares of Vigor Kobo, Taiwan's leading food souvenir company. It is understood that this is the first case of equity investments in a Taiwan food company by a mainland enterprise. Through the investment, the parties will build up a strategic partnership assisting Vigor Kobo to expand its new niche business model, which integrates the tourism and food industries as popular and specialty souvenirs among the Chinese community, to different areas of China. Lee and Li represented Fosun Group in the equity investment project.

Another example, as announced in November 2012, is the proposed acquisition by San'an Optoelectronics, a PRC listed company, through its wholly-owned subsidiary of Formosa Epitaxy Incorporation, a Taiwan listed company. The acquisition proposes San'an to subscribe for private placed shares of Formosa Epitaxy.

The main issue to be noted for PRC inbound investment is that if the investor is not a QDII, they can only invest by obtaining an approval from the Investment Commission (the first channel as stated previously). However, a PRC investor that acquires shares through such a channel will not be permitted to conduct secondary market trading for those shares, except under certain limited circumstances. Therefore, such investors can only make investments in Taiwan in the primary market, mainly through the purchase in the private placement by an issuer. The regulations of and restrictions on private placement as mentioned would therefore play a major role in structuring PRC inbound investment and should be observed by PRC investors.

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Lee and Li, Taipei

Sourcing funds through Taiwan IPOs

Since relaxing the restrictions in 2008, Taiwan's capital markets have been inundated with IPOs, but foreign companies need to understand the proper restructuring arrangements before a formal application can be made

Since 2008, the Taiwanese authorities have opened the door welcoming foreign companies to apply for Taiwan initial public offerings (IPOs). There are now almost 45 foreign companies which have listed their shares on either the Taiwan Stock Exchange (TWSE) or the Taiwan GreTai Securities Market (GreTai Market). In addition, hundreds of candidates are in the pipeline. The bourses continuously and warmly welcome all foreign companies to list their shares and source funds through Taiwan IPOs. Among those listed companies and those in the pipeline, the most typical types of the enterprises which sought or are seeking Taiwan IPOs are: (1) the mainland-based operation enterprises which are established by Taiwan businessmen who, despite decades of intense relations between mainland China and Taiwan, crossed over to mainland China and successfully seized business opportunities in such an emerging market and who, would like to either share their success with their homeland people or raise funds from the Taiwan market for further growth; and (2) the foreign enterprises which are established, operated or managed by Chinese (either mainlanders, Taiwanese or other Chinese all over the world) and have close business relations or wish to establish further relations with Taiwan companies and industries.

Although it's now possible for mainland-based enterprises and foreign enterprises which are established by Chinese or other nationals to raise funds from Taiwan IPOs, proper restructuring and arrangements before a formal application through the assistance of underwriters, legal counsels and accountants are prerequisites.

Choosing Taiwan's capital markets

You may wonder why foreign companies seek to raise funds through Taiwan's capital markets, rather than other countries in the Asia-pacific region. Compared with other bourses, like the Hong Kong Stock Exchanges (HKEX) and Singapore Exchange (SGX), there are many advantages that make Taiwan's capital markets competitive.

Higher PE ratios

According to the statistics from the TWSE and the GreTai Market website, except for 2007 and 2010, the PE ratios (stock price/after-tax EPS) of companies listed on either the TWSE or the GreTai Market are higher than those listed on the HKEX and SGX (see figure 1).

Higher turnover ratios

In addition to higher PE Ratios, the statistics also show that the turnover ratios (trading value/market capitalisation) on both the TWSE and the GreTai Market are higher than those of the HKEX or SGX, which proves the active transactions and higher liquidity in Taiwan's capital markets (see figure 2).

Figure 1: Comparison of PE ratios

Year	Taiwan		Hong Kong	Singapore
	TWSE	GreTai		
2005	17.55	27.81	15.57	15.37
2006	18.98	22.77	17.37	13.92
2007	15.31	15.94	22.47	14.74
2008	9.80	11.54	7.26	6.00
2009	110.54	564.48	18.13	26.12
2010	16.04	21.78	16.56	12.36
2011	15.76	17.23	9.68	7.67

Source: TWSE/GreTai Market Website

Figure 2: Comparison of turnover ratios

Year	Taiwan		Hong Kong	Singapore
	TWSE	GreTai		
2005	131.36	262.65	50.30	48.40
2006	142.19	333.34	62.10	58.20
2007	153.28	382.81	94.10	77.60
2008	145.44	238.71	82.57	63.67
2009	178.27	380.61	78.95	67.30
2010	136.74	306.68	57.92	50.01
2011	119.87	223.36	56.25	43.38

Source: TWSE/GreTai Market Website

Costs and sponsorship

Compared to the costs associated to list shares on the HKEX, SGX or on PRC relevant exchanges, the costs associated with Taiwan IPOs, like underwriting, legal and accountant fees, are the most reasonable. In addition, sponsors provide services with responsiveness and good quality, aiming to shorten the process of preparing and successfully listing to the greatest extent possible.

Proximity to mainland China market

Taiwan, having similar culture and language with mainland China and a geographic advantage, is a great place to maintain close relations with the mainland China market. Taiwan is also the most convenient place for companies operating in other jurisdictions to enter into the China market. It is expected that in the post-Economic Cooperation Framework Agreement (ECFA) era, cross-strait cooperation will become closer. Taiwanese entrepreneurs who have successful businesses in mainland China or elsewhere may also find Taiwan's capital markets more attractive as Taiwan is

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Jennifer Wang is a partner of Chen & Lin Attorneys-at-Law. Her expertise covers capital markets, M&A, antitrust and competition, banking and finance, corporate compliance and governance, and other general corporate and commercial transactions. Jennifer has extensive experience in assisting clients during corporate restructuring, overseas and domestic IPOs (including foreign companies' primary listing on the Taiwan Stock Exchange and the GreTai Market) and fund raising. She is also experienced in multinational and domestic M&A transactions with a wide range of merger, share swap, tender offer, stock purchase to asset and business acquisitions. In addition, she helps foreign clients making investments, establishing R&D centres in Taiwan, obtaining government cash grants, setting-up joint ventures and advising on anti-trust compliance. She is an expert at designing, drafting and negotiating various kinds of commercial agreements.

Jennifer serves clients from a wide range of industries. Some industries of the clients Jennifer has served or is serving include: semiconductor equipment, semiconductor, IC design, other hi-tech, online games, manufacturing, bank, cable TV, entertainment and food and beverage. She serves many leading multinational or domestic companies. Jennifer is named as one of the leading lawyers in the IFLR1000 (2013 edition).

their homeland and Taiwan investors tend to recognise and accept foreign companies established by Taiwanese businessmen.

High-tech companies

In Taiwan, there are complete supply chains of high-tech industries, like semi-conductors, optoelectronics, information services, computer and peripheral equipment, communication and internet, which render Taiwan a unique environment for high-tech companies and the percentile of high-tech companies listed on either the TWSE or the GreTai Market is the highest among all industries. Given that Taiwan is such a platform for high-tech companies to source funds, IPOs and subsequent Secondary Public Offerings (SPOs) would be easier for foreign high-tech companies. Compared to other bourses, where the value of high-tech companies may be under-evaluated, the true value of such companies may be fairly reflected in Taiwan.

Innovative industries

Taking the GreTai Market for example, in recent years, it continuously puts efforts on assisting innovative enterprises, such as biotechnology, pharmaceutical, online games, cultural and creative companies, in listing their companies' shares on the GreTai Market. With such vision and efforts, and as the new clusters are well established in Taiwan, it brings many benefits to foreign companies within such clusters and lets them enjoy growth and performance.

Preparing for IPOs in Taiwan

According to the current unwritten law, an enterprise incorporated under the laws of China (excluding Hong Kong and Macau) is not eligible to be listed in Taiwan. However, the set game rule since 2008 is that mainland enterprises may establish an offshore holding company as the vehicle to apply for a Taiwan IPO (listing entity). Due to this, it is general practice that a restructuring is conducted before applying for a Taiwan IPO.

Until now, almost all of the listing entities are Cayman Islands companies, although neither the TWSE nor the GreTai Market requires so. The historical reason is that the shares of the listed company are required to be on par value of Ntd10 ($0.34) and Cayman Islands law is able to accommodate such need. This restriction was lifted in January 2012. Therefore, it is now more relaxed to choose the listing entity incorporated in any other jurisdiction, par value of the share and its currency. Hence, the need to restructure the group merely for Taiwan IPOs and the cost associated may be reduced. The current structure can even be maintained without restructuring if it fits Taiwan IPOs.

Mainland Chinese and enterprises

The most common question that has been repeatedly asked is whether mainland Chinese, legal entities and organisations of mainland China (mainland Chinese and enterprises) can control the listing entity and what is the view of the Taiwanese authorities if the enterprise is controlled by mainland Chinese and enterprises?

The answers to the above questions are evolving. At the very beginning, even though mainland-based companies can apply for Taiwan IPOs through restructuring, the Taiwan authorities generally took a more favourable position towards a listing entity that is not controlled by mainland Chinese and enterprises. Provided that if a company controlled by mainland Chinese and enterprises would like to list its shares in Taiwan, it may do so through special-case permission granted by the Taiwan Financial Supervisory Commission (FSC). Having any of the following events, among others, shall be deemed as having controlling power over the listing entity: (1) directly or indirectly holding more than 30% of the shares of the listing entity; (2) controlling the majority of the votes pursuant to contracts among investors; (3) controlling the majority of the votes of the directors; (4) having the right to appoint or discharge the majority of directors; or (5) having other controls over the financial, operational, or human resources policies of the company pursuant to law or regulations or contracts.

Even though it is possible to have the shares listed in Taiwan though special-case permission, due to the lack of written rules and criteria for such permission, there is no case in which mainland Chinese and enterprises can officially apply for the special-case permission. Conversely, there are certain ways to avoid being deemed as a company controlled by mainland Chinese and enterprise, like reducing the shareholding percentage, chairperson, or changing the chairperson's nationality to non-PRC.

In August 2012, the FSC amended the Regulations Governing the Offering and Issuance of Securities by Foreign Issuers, which provides clear rules for applying the special case permission. The basic rule is that two conditions must be met in order to obtain permission: (1) shareholding in the listing entity held by Taiwanese enterprises is higher than shareholding held by mainland Chinese and enterprise; and (2) Taiwanese enterprises have effective control over such Company. In addition, the detailed application form, required documents, undertakings to be signed by the applicant and its Taiwanese shareholders, as well as the underwriter opinion form, are now in place.

Further, according to news reports in October 2012, the FSC is studying the possibility to lift the bans on such special-case permission for companies controlled by mainland Chinese and enterprise

宏鑑法律事務所
Chen & Lin Attorneys-at-Law

The A team

Chen & Lin has a team of lawyers having the best service attitude that is the most prominent feature of this law firm so as to qualify ourselves to be an A-Team law firm.
This firm was established in 1992 and becomes one of the top law firms in Taiwan. This can be evidenced by the fact that Chen & Lin is one of the law firms selected by the highest judicial authority of Taiwan to be an institution that intern judge and prosecutor candidates receive their training for the last consecutive 6 years. For your information, only 7 law firms are selected last year.

Currently we have more than 25 lawyers. All of them obtained law degree from prestigious law schools in Taiwan. Some of them even obtained degrees in disciplines other than law. Many of them also have Master of Law degrees from reputable law schools in US or other country.

Areas of Expertise

Chen & Lin has a troop of young practitioners and a team of experienced leaders. With such a composition of lawyers, Chen & Lin is capable of helping clients to navigate in an extremely dynamic environment so as to face the real world in either good times or bad times. The clients Chen & Lin represents are almost corporate entities. Therefore, Chen & Lin's expertise naturally focuses on the concerned areas of corporations.

Please feel free to browse the firm's website (www.chenandlin.com) for the CV of the attorneys that you are interested in knowing more of their background.

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or even to establish so-called "T-Shares", allowing a company incorporated under the Peoples' Republic of China to list its shares in Taiwan. However, no formal law or regulations have been issued. In the future it is possible the restrictions and bans on cross-strait economic activities will be gradually lifted. At the current stage, however, companies should carefully inspect the actual shareholding structure and make proper arrangements before formal filing either via general application or by special-case permission.

Retaining lead underwriters

According to current rules, the foreign issuer shall retain a lead underwriter. The lead underwriter has to issue evaluation reports on matters such as whether the foreign issuer has met the requirements of relevant listing rules. In addition, the foreign issuer shall obtain two recommendation letters for listing from two or more underwriters, one being the lead underwriter.

Further, it is also very important to retain proper legal counsel and accountants. It is advised that the foreign company retain and have those sponsors to participate in the listing project at an early stage, as it is vital to have those experts to inspect the financial, legal and other conditions of the company pursuant to the listing rules and have the company rectify any no-compliance as soon as practicable.

Criteria and application procedure

Except for those special criteria set for mainland China-related issues, other criteria for Taiwan IPOs are similar with those in other countries, like duration, cap size, profitability and shareholding dispersion requirements. It is suggested that interested parties seek underwriter's and legal counsel's advice beforehand.

The application procedure is quite streamlined. Figure 3 is the flowchart for the application of listing on the TWSE or the GreTai Market. It is a prerequisite that before a formal filing, the applicant shall have either been retained by the underwriter or traded its shares on the Emerging Stock Board for no less than six months. After the formal filing, it will usually take four to six months for all approvals and effective registrations.

After the financial crisis in 2008, Asia has become one of the key markets for investments. Especially, the economic cooperation between Taiwan and mainland China after the ECFA becomes closer and Taiwan has a unique platform and strategic position for the mainland China market. We therefore strongly believe foreign companies can benefit from Taiwan's capital markets and prosper.

Jennifer Wang
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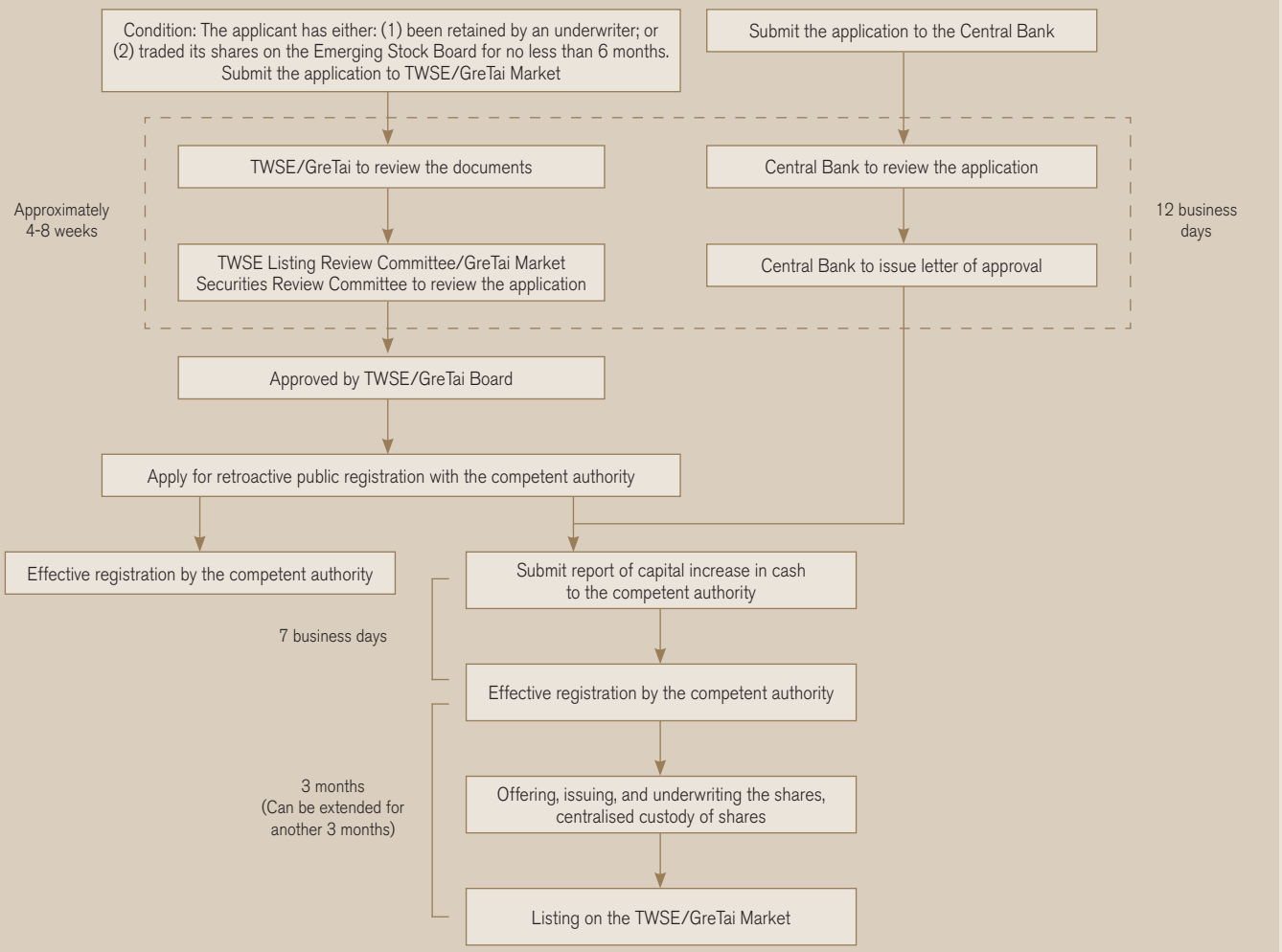
Figure 3: IPO application flowchart



Taiwan: The gateway to investments in greater China

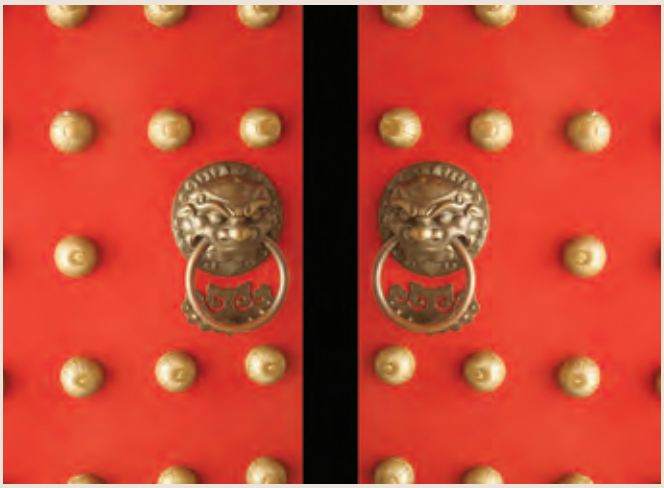
Private equity and venture capital investors are seeing Taiwan as the key to entering the PRC, but PE firms have encountered difficulties with tender offers, calling for a more transparent review process and regulatory scheme

In the past ten years, Taiwan enterprises or enterprises run by Taiwanese have been seen as great jump boards to the China market and have attracted abundant investments by foreign private equity and venture capital. While some PE firms searched for companies with strong cash flow, some saw opportunity in the industries that may have better growth potential in China, such as the consumer or financial industries. Venture capitals are attracted by the high concentration of start-ups with high-calibre talent in the high-tech industry in Taiwan. As a result, in the cable-TV sector, all of the three largest Multiple Service Operators (MSOs) in Taiwan were once controlled by foreign PE firms. This was until the Carlyle Group sold its interests in one of the MSOs to a local enterprise in 2011. In the financial sector, PE firms acquired majority or minority stakes in Taiwan banks, including TPG, Long-reach Group, Carlyle Group, GE Capital and SAC Private Capital Group.

Tsar & Tsai Law Firm is honoured to be able to participate in this booming area of private equity and venture capital investment in Taiwan. The firm represented clients to acquire controlling interest over local targets, including the largest MSO in the cable-TV sector in Taiwan, En-Tie Bank and to invest as a strategic partner with minority stakes, like Taishin Financial Holding Company. The Firm also advises clients in disposition of stakes by ways of stock market exit or private placement, where the clients wish to realise their gain.

Recently, foreign PE firms encountered some regulatory hurdles in their investment through tender offers in Taiwan listed companies. Notably, in KKR's proposed acquisition of Yageo, a Taiwan listed electronic component manufacturer, the Taiwanese government blocked a plan jointly proposed by KKR and the Chairman of Yageo, to acquire 100% of Yageo and then to take Yageo private. One of the reasons for the block, as published by the competent authority, is that the acquirers did not give sufficient explanation as to the protection of existing investors and shareholders and the lack independent assessment or opinion on the offer price before the target's board made the recommendation to the shareholders. In addition, the regulator also expressed concerns about the leveraged investment plan proposed by the acquirers. Many commentators tend to believe that the regulators are reluctant to approve any critical delisting cases, even though such proposed cases meet legal requirements. The case caused concern to the investors and there is a call for a more transparent review process and regulatory scheme.

The Yageo case has caused the Taiwan regulator to pass a new amendment to the Tender Offer Rules in order to tighten the regulation on the tender offer price and information disclosure.



Tender offer filing

Under the Securities and Exchange Law (SEL) and the Tender Offer Rules promulgated by the Financial and Supervisory Commission (FSC), subject to limited exceptions, a person or entity intending to launch a tender offer to purchase the shares of a public company is required to file a report to the Securities and Futures Commission (SFC), with a copy to target company and make a public announcement of the offer. The SEL and the Tender Offer Rules also provide a mandatory tender offer requirement that, except for limited exemptions provided by the SEL, a person or entity, acting alone or with others, intending to acquire 20% or more of the shares in a Taiwan public company within 50 days must do so by way of a tender offer. Violators of this mandatory requirement will be subject to criminal liability. In order to avoid information leaks prior to the launch of the tender offer, normally such filing and announcement will be made on the same day.

One of the major documents required for filing is the tender offer circular, which contains, among others, the terms and conditions of the offer, the information regarding the Offeror (business operation and financial condition), the target's share trading record by the Offeror (including its affiliates and related persons) in the past two years, related risk factors of the tender, expert fairness opinion on the offer price and the Offeror's future plans for Target. The share purchase agreement or share trading record between the Offeror and the Target over the past two years shall be disclosed in the tender offer circular.

If the FSC finds any violation of law or regulations in the filing and announcement, they have the authority to order the Offeror to amend the tender offer filing and to make a new filing and announcement. This protects the public interest.

Price and terms

The SEL requires the Offeror to tender the offer at the same terms and conditions and if the Offeror violates this requirement, it would be liable to the sellers for the difference between the highest price and the relevant offer price. Since the tender offer is an off-stock-exchange transaction, the buyer has the freedom to set the purchase price without relating it to the current market price of the Target. In addition, under the tender offer regulations, it is permissible for the purchaser to make its offer conditional upon the success of acquiring a certain minimum number of shares.

The SEL prohibits the Offeror, including its affiliates and related persons, to buy any shares of the target company during the period between the date of filing and the date when the tender offer ends. If the Offeror violates this prohibition, it would be liable to all of the sellers for the shortfall between the offer price and the purchase price paid in other trades.

Offer period

The tender offer period cannot be less than 10 days or more than 50 days, which may be extended for a period of up to 30 days upon approval by the FSC if there is a competing offer or other legitimate reason. Once the tender offer is launched, the Offeror is not allowed to shorten the offer period even if the conditions are satisfied earlier.

Under the SEL, once the Offeror has initiated a tender offer, it may not suspend the tender offer except in certain limited situations specially provided in the Tender Offer Rules or otherwise approved by the FSC.

In the event where the Offeror fails to acquire the proposed number of shares within the offer period, or the FSC suspends the offer, the Offeror may not, within one year, carry out a public tender offer on the same target company, unless it has legitimate reasons and has obtained approval from the FSC.

Target's response

After the launch of the tender offer, the Target's board of the directors and a review committee, formed of at least three independent directors or members nominated by the board, if there are not sufficient independent directors, are required to review the tender offer and make a recommendation to the shareholders within seven days after receipt of the offer documents from the Offeror. The board is required to file such recommendation with the FSC and make a public announcement through the Taiwan Stock Exchange Market Observation Post System (MOPS).

Reporting for completion

Within two days after the tender offer period ends, the Offeror must file a report to the FSC and make a public announcement regarding the implementation status of the offer. This should include whether the condition's precedent are met, the number of shares to be purchased and the closing procedure. In Taiwan, settlement of the offer will normally occur within five to seven business days after the tender offer period ends.

Regulatory reviews

Investment approval

Foreign investments (excluding PRC investments, which are subject to a separate set of investment regulations) are generally subject to the Statute for Investments by Foreign Nationals. A Foreign Investment Approval (FIA) issued by the Investment Commission (IC) of the Ministry of Economic Affairs (MOEA) is a prerequisite for foreign investment.

Foreign investors may invest in most business sectors except for those on the Negative List. The List specifies certain prohibited industries, where no foreign investment is permitted and restricted industries, where special permits or licences from the competent authorities are required.

For PRC investments, the Regulations Governing Investments by PRC Persons (PRC Investment Regulations) shall apply. According to the PRC Investment Regulations, a PRC Person may invest in certain industries identified on the List of Permitted Industries as promulgated by the MOEA periodically. Article 3 of the Investment Regulations defines the term "PRC Person" as a PRC citizen, PRC entity or a corporate entity incorporated in a third jurisdiction (non-PRC jurisdiction) and controlled by a PRC citizen or a PRC entity.

It is advisable that you consult a legal counsel in the earliest possible stage if you plan to invest in Taiwan. The full Negative List

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Partner
Tsar & Tsai

Ms. Janice Lin is a partner with Tsar & Tsai Law Firm. Janice specialises in joint ventures, mergers and acquisitions, as well as capital markets, loan and project financing transactions.

Janice has been involved in a wide range of transactions acting for multi-national corporations in cross-border joint ventures, mergers and acquisitions, with many of these deals the first of their kind in Taiwan. Janice is frequently praised by clients for her practical approach and ability to solve problems ahead of time. Janice is listed as a leading lawyer in the field of corporate and M&A by independent publications such as *Chambers Asia - Asia's Leading Lawyers* 2011 and 2012.

Admitted: Taiwan and New York
Education: National Taiwan University (LL.B); Harvard Law School (LL.M.)
Languages: Mandarin Chinese and English

Tim Chou
Associate Partner
Tsar & Tsai

Mr. Tim Chou is an associate partner with Tsar & Tsai Law Firm. Tim joined the firm in 2006 and specialises in competition laws, mergers and acquisitions, labour law and dispute resolution.

Prior to joining the firm, Tim served as an official with the Taiwan Fair Trade Commission. He was responsible for monopoly, concerted actions, merger control and other vertical or horizontal restraints. Since joining the firm, Tim regularly advises multi-national and domestic clients on various competition law issues. He has successfully represented clients by defending them in antitrust investigations. He has also successfully represented clients to obtain approvals from the Fair Trade Commission.

Tim has extensive transaction experience in cross-border joint ventures, mergers and acquisitions and relevant transactions. His M&A experience spreads across a wide range of industry sectors, including the financial sector, media, telecommunications, energy, software, electronics and manufacturing.

Admitted: Taiwan
Education: National Taiwan University School of Law (LL.B. 1996); Georgetown University Law Center (LL.M 2006)
Languages: Mandarin, English and Taiwanese Hokkien

applicable for general foreign investors and the List of Permitted Industries applicable for PRC investments can be found on the MOEA website.

Merger filing

Merger control rules can have a material impact on transactions, but usually substantial competition concerns are not raised. However, the significance of merger control rules is sometimes underestimated and it can be important to the timing of transactions. Failure to assess the merger control implication early on can delay closing of the transaction by the parties. An early and careful assessment would limit the adverse impact of such issues on the transactions.

Pursuant to the Taiwan Fair Trade Act (TFTA), two questions need to be answered to determine merger filing in Taiwan:

1) Is the transaction defined as a business combination under the TFTA? The definitions include:
   (a) merger;
   (b) where an enterprise holds or acquires more than one-third of voting shares or equity interests in another enterprise;
   (c) where an enterprise acquires or leases from another enterprise the whole or the major part of the business or properties of such other enterprise;
   (d) where an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter's business; or
   (e) where an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise.

2) Are any notification thresholds met? The thresholds include:
   (a) as a result of the business combination, any of the enterprises will have an aggregate market share of one-third or more in a relevant product market;
   (b) one of the enterprises has one-forth the market share or more in a relevant product market; or
   (c) sales revenue of one of the enterprises in the preceding fiscal year exceeds Ntd10 billion ($340 million) and the other enterprise exceeds Ntd1 billion (Ntd20 billion and Ntd1 billion for financial institutions).

Some specific issues are critical for private equity transactions. Identifying the relevant entities subject to merger control is an example. A private equity group usually has several levels of entities and a complicated group structure. To determine which level of entity or vehicle is required for filing with the antitrust regulator, sometimes it is necessary to analyse the particular structure and the management arrangement of the private equity.

Janice Lin and Tim Chou
Tsar & Tsai, Taipei

Dismissing employees in Taiwan

The Labour Standards Act sets out the minimum standards for terminating employees in Taiwan. With such rigid legislation, how can employees ensure they are complying with the Act?

In Taiwan, the Labour Standards Act (LSA) protects all employees. The protection provided by the LSA are compulsory and cannot be diminished or eliminated by an agreement between the employer and employees, although the employer is entitled to offer better terms than required by the LSA. The LSA requirements are essentially the minimum standards.

According to the Act, an employer cannot terminate an employment contract unilaterally unless any of the statutory reasons provided in Article 11 or Article 12 exists.

The statutory reasons for termination provided by Article 12 of the LSA include:

(1) At the time of entering into the employment agreement, the employee made a false or misleading representation that is likely to cause harm to the employer;
(2) The employee commits a violent act or an act of gross insult against the employer, the family members or agents of the employer or fellow employees;
(3) The employee has been sentenced to imprisonment by a confirmed judgment, unless the employee otherwise receives a suspended sentence or a decree to make payment of a fine in lieu of imprisonment;
(4) The employee commits a material breach of the employment agreement or a serious violation of work rules;
(5) The employee intentionally damages machinery, tool, raw material, product or other property of the employer; or intentionally discloses any technological or confidential business information of the employer, thereby causing harm to the employer; or
(6) The employee is, without justifiable reason, absent from work for three consecutive days, or six days in a month.

The statutory reasons for termination provided by Article 11 of the LSA are:

(1) Where the employer's business is suspended or transferred to a third party;
(2) Where the employer suffers an operating losses or business contraction;
(3) Where force majeure necessitates business suspension for more than one month;
(4) Where a change in business nature requires a reduction in the number of employees and the employee cannot be assigned to another proper position; or
(5) Where an employee is confirmed to be incompetent in his or her job duties.

The employer may unilaterally decide whether to terminate an employee who meets any of the statutory reasons provided by Article 11 or 12. No negotiation with, or consent from, the employee is required. However, for the termination of an employment contract pursuant to items 1, 2 and 4 to 6 of Article 12, the employer is required to serve a termination notice, either orally or in writing, within 30 days after becoming aware of the particular situation.

Compensation and prior notice

To terminate an employment contract according to Article 12, the employer is not required to provide severance pay or serve prior notice. To terminate an employment contract according to Article 11, the employer is required to provide severance pay and serve prior notice.

The minimum period of the prior notice is determined as follows:

(1) 10 days for an employee who has served the employer for more than three months but less than one year;
(2) 20 days for an employee who has served the employer for more than one year but less than three years;
(3) 30 days for an employee who has served the employer for more than three years.

> **If a company's business revenue shrinks over several years, it may assert that it has suffered business contraction although it still remains profitable**
>
> T C Chiang, Lee and Li

However, the employer is allowed to pay an amount equivalent to the salary of the above notice period in lieu of giving notice.

According to the LSA, the severance pay to the terminated employee should be calculated as one average monthly salary for each full year of service. Fractional period of service should be paid on a pro-rata basis, but any fraction of one month shall be deemed one month. The average monthly salary is calculated by dividing by six the total amount of six months salary preceding the date of termination (including all regular payments, like overtime pay). An employer is obligated to provide the severance pay within 30 days of the termination date.

The Labour Pension Act (LPA), which took effect on July 1 2005, provides a new pension scheme compulsorily applicable to employees hired after July 1 2005. Those employed before June 30 2005 were given the option to apply the new pension scheme provided by the LPA by June 30 2010. Under the new pension scheme, a different formula is implemented for calculation of severance pay: half the average monthly salary for each full year of service, up to a maximum of six months average salary. Any

T C Chiang
Partner
Lee and Li

T C Chiang, a Partner of Lee and Li, has worked for Lee and Li for more than 20 years. At the beginning, he mainly handled civil and criminal litigations, but with the accumulation of relevant experience, he now focuses on the disputes related to intellectual property, labour issues and medical and pharmaceutical matters. These include patent, trademark and copyright and infringement, trade secret protection, drafting of employment contracts and work rules, termination of employment contracts (including resignation, dismissal, lay-off, mass redundancy and transfer of employment), union issues, ethical rules of pharmaceutical companies, clinical trials, NHI reimbursement price issues and medical disputes. T C provides consultancy services to advertisement agencies on the Copyright Act, Fair Trade Act and Personal Data Protection Act.

What is unique about T C is that he can fully understand the client's need and structure the strategy from their perspective. Therefore, he has earned the clients' trust over the years. Known for his good oral and literal communication skills, he frequently speaks at seminars and writes articles to share his legal knowledge and experience.

Jason C Y Lee
Senior Attorney
Lee and Li

Jason graduated from the Economic and Financial Law Section, Department of Law, National Taiwan University and obtained his LLM degrees both from the School of Law, National Taiwan University and University of Southern California.

Jason not only specialises in the fields of corporate law, labour law, communication and media law, real estate law, civil law, and consumer protection law, but also has outstanding performance in handling civil and criminal litigation cases.

fractional period of service should be paid on a pro-rata basis. An employee who was hired before June 30 2005 and chose the new pension scheme of the LPA would still be entitled to severance pay for work performed before June 30 2005, calculated and paid according to the LSA.

Compensation for unused annual leave

According to the LSA, an employee who continues to work for the same employer for a certain period of time shall be granted special annual leave on the following basis:

(1) Seven days for service of more than one year but less than three years.
(2) 10 days for service of more than three years but less than five years.
(3) 14 days for service of more than five years but less than 10 years.
(4) One additional day for each year of service over 10 years up to a maximum of 30 days.

If the employee is dismissed according to Article 11 of the LSA and has not taken all their annual leave before the termination day, the employer is required to compensate them for the unused leave in cash on the basis of his or her salary. However, if the employee is terminated according to Article 12 of the Act, the employer is not required to provide compensation for unused leave.

Redundancy

Redundancy is not necessarily a valid reason for dismissing employees. Only when redundancy is caused by suspension of the employer's business or transfer to a third party, operating losses or business contraction, is an employer entitled to terminate its employees according to Article 11 of the LSA.

The Act does not define operating losses or business contraction. According to Supreme Court precedents, business contraction means an obvious decrease in the production or sales amount of the original business, and the operating losses shall be decided from the financial report or the balance sheet. If a company's business revenue shrinks over several years, it may assert that it has suffered business contraction although it still remains profitable. To maintain profitability, the company is allowed to reduce its operation costs by laying-off employees.

The basis for statutory termination because of a change in nature to the business requiring "a reduction in the number of employees" where "the employee cannot be assigned to other proper positions" is very limited in scope. Restructure or reorganisation of a company would not be deemed a change in business nature unless based on a justifiable and reasonable need of its business operation. For example, the reorganisation is owing to the business discontinuing its manufacturing function. Even if such restrictive criteria are met, they may not be considered valid grounds for termination, unless there is reasonable need to reduce the number of employees and no other suitable jobs or positions are available. The company should first try to transfer any redundant employees to another job or position internally. If more on-the-job training or education courses are required for the new job or position, the employer is responsible for providing it, unless the training or education courses would cause material inconvenience and becomes an obstacle to the employer. Moreover, if the company has other similar divisions, which are operating normally or are expanding in a way that would require more employees, the courts would deem that there was no reasonable need for the company to lay off the employees.

In general, moving certain functions to other affiliates or outsourcing to a third party is not considered a change in nature of the business. Since affiliates are different legal entities, any position of other affiliates would not be deemed as a position of the employer, and transfer of employees to an affiliate would require employee consent. The existence or lack of suitable jobs or positions available to employees would be examined based on the employment positions and capacity of the employer, rather than its affiliates.

Incompetence

The employer is allowed to review and assess the performance of employees and demand improvement because of poor performance or failure to achieve designated targets. When devising performance targets, the employer cannot discriminate against employees on grounds such as race, class, language, belief, religion, political membership, ethnic origin, place of birth, gender, sexual orientation, age, marital status, appearance, disability, and past labour union membership.

When the employer identifies employees with poor performance, they may demand improvement and can collect evidence supporting the employee's incompetence. It is suggested that the employer have the employees undergo a performance improvement plan, which

will list all the criteria for evaluating their performance. The local courts hold the view that if the employee fails to accomplish tasks or achieve performance targets owing to deficiency in professional capability, academic qualification, skills, physical capacity, or mental state, he or she can be deemed incompetent. The courts also hold that if the employee is found to have repeatedly neglected to carry out his or her duties, they can be deemed incompetent.

Restructure or reorganisation of a company would not be deemed a change in business nature unless based on a justifiable and reasonable need of its business operation.

Jason C Y Lee, Lee and Li

Termination as a last resort

It is the court's general view that the employer cannot claim another legal basis than what was cited in the termination notice to support the legality of the termination when challenged by the terminated employee. Whether the termination is justified for statutory reasons is subject to the court's review of the relevant facts, in the event of litigation initiated by the terminated employees. Judges of the labour courts tend to hold a pro-employee outlook. To protect the interests of workers, the general principle adopted by the local courts is that termination should be a last resort. The courts usually apply a high threshold in determining whether there was any justifiable reason for terminating an employee. Hence, the issue of whether the employer had valid grounds to terminate employees would be subject to the court's review on a case-by-case basis. The terminated employees may file lawsuits against the employer for reinstating their employment with the employer and claiming salary accrued before they are reinstated on the grounds of wrongful termination.

In the case where no statutory cause provided in Article 11 or 12 of the LSA exists, or to simply avoid court consideration of wrongful termination altogether, the employer may try to terminate employees by mutual consent. The employer may offer compensation in exchange for an employee agreement to terminate employment. In this regard, the employer may consider offering a lump-sum compensation offer equivalent to the aggregate of statutory severance pay, payment in lieu of advance notice, and compensation for unused leave, which the employees would be eligible for if terminated.

T C Chiang and Jason C Y Lee
Lee and Li, Taipei

Amended Patent Act brings key changes

Many of the amendments bring Taiwan's Patent Act in line with international practices and significantly improves patent enforcement rights

After lengthy negotiation, Congress passed the amendment to the Taiwan Patent Act on November 29 2011. After three readings, the Act seeks to enhance Taiwan's economic and industrial competiveness, promote development of important local technologies and enhance the quality of patent examination. The amended Act is a complete overhaul of the current Act, with 108 out of 159 provisions revised, 36 provisions added and 15 provisions removed. Together with the corresponding measures and implementing rules, the amendment was promulgated and became effective on January 1 2013.

Definitions

In order to avoid any misunderstandings and the inconsistent use of the term "creation" in the previous Act, the amended Act includes inventions, utility models and designs under the term. In addition, the Chinese title for design patent has been modified to comply with international practices. For clarification on the inconsistent definitions of "practice" and "use", the term "practice" is added to the amended Act. The term now includes to manufacture, offer for sale, sale, use or import for the above-mentioned purposes.

Innovation

In the previous Patent Act, except for prior disclosure made for research or experimental purposes, at an exhibition held or recognised by the Taiwan Government, or made against the patent applicant's will, any other form of prior disclosure should affect innovation. The prior disclosure exceptions may enjoy a six month grace period. The prior disclosure "publication made based on the personal will of the applicant" will also become another exception for enjoying the six month grace period. There is no further limitation set on the disclosure form of publication, either in printed or electronic format. The grace period will no longer only apply to novelty requirements, as exceptions may further apply to the inventive requirement of inventions and utility models and the creativeness requirement of designs.

Abstracts and assignment

Prior to the amendment, a specification contains the claim and an abstract. By incorporating international general practices into the amended Act, the claim and abstract shall be separate documents from the specification. An abstract shall no longer be taken into account for the purpose of determining the sufficiency of the disclosure and the patentability of the claimed invention. Further, the requirement for submitting an assignment during the patent application process has been abolished.

Applications with foreign-language specifications

Under the previous Act, a patent applicant can initially file a patent application with a foreign-language patent specification and claim to obtain a filing date, as long as the applicant submits a Chinese-language patent specification and claim within the specified deadline. However, if the content of the Chinese-language patent specification and claim later supplemented are different from the originally filed foreign-language application, the filing would be delayed to the date of when the Chinese-language patent specification and claim were submitted. If there is any mistranslation in the Chinese-language patent specification and claim, the patent applicant may apply for an amendment when the application is still pending. In addition, a correction after the application has been granted, in accordance with the Patent Act, and any such amendment or correction shall not cause substantive change, such as introducing new matter, to the original disclosure as compared with the supplemental Chinese-language patent specification and claim. The amendment or correction procedure does not really clarify the issues with translation errors.

The amendment of a foreign-language patent specification and claim is no longer allowed. There will be a notable new procedure for amending or correcting translation errors, but for amendments or corrections of translation errors, they cannot go beyond the disclosure scope of the specification, claims and drawings of the Chinese-language version submitted at the time of patent filing. An amendment or correction of translation errors beyond the initial disclosure scope of the foreign-language specification, claims and drawings originally submitted, is prohibited.

Utility model patent

A noteworthy amendment for utility model and invention is the allowance that the same applicant can file an invention patent and a utility model patent application for the same creation on the same date. After the Patent Authority determines the invention patent is acceptable, the applicant has the right to select one patent within a specified time limit. If the invention patent application is selected, the utility model patent shall be deemed non-existent *ab initio*, upon the applicant's indication of their decision to retain the invention patent. Moreover, for the situations where the utility model patent right has automatically extinguished or been invalidated before the invention patent application is granted, the examination of the invention patent application will be discontinued and no patent will be issued. The amendment further specifies the correction of a utility model application, if manifestly exceeds the scope of claim disclosed in the original specification, claim or drawings initially filed, no patent will be granted.

Design patents

In order to make design patents in Taiwan more compatible internationally, the amended Act puts in place three new patentable subject matters. Design patent protection is also expanded to partial designs, computer-generated icons, designs and graphical user interface (GUI) designs. As the derived design regime is introduced, the associated design patent regime will be abolished. Under the amended

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Mr. Cliff (S.H.) Wong is a senior attorney in the Taipei Office of Chen & Lin Attorneys-at-Law. Before practicing law, he worked at Macronix Int'l (a semiconductor company, based in Hsinchu) as a R&D and IP Project Manager for several years. Prior to joining Chen & Lin Attorneys-at-law, he was an associate at Baker & McKenzie's Taipei office. Cliff has assisted his domestic and foreign clients in many patent infringement litigations. He has also drafted specifications and patent applications in Taiwan, China and the US. In 2009, as China opened the door to Taiwanese to take the bar examination, he passed the National Judicial Examination of the PRC. For the time being, Cliff is the only practicing Taiwanese patent attorney, who has passed the bar examination in both Taiwan and China.

Cliff graduated from National Taiwan University (B.S. in Physics, M.S. in Electrical Engineering) and Law School of Soochow University (LL.M). He was a PhD student at Tokyo University, under a scholarship sponsored by Matsushita (Panasonic). Currently, he is a Ph.D. Candidate at the Graduate Institute of Electronic Engineering, National Taiwan University.

Act, the applicant who has filed applications seeking a patent for similar designs, each must designate one from among them as the original design with the others as derived designs. As the patent right in one derived design is independent from that of another, all of the derived patent's rights will be equally protected. They may also be enforced separately with each derived patent retaining a scope of similarity. However, a derivative design patent shall expire simultaneously when the original design patent expires.

For situations where two or more articles belong to the same class under the International Industrial Design Classification and such articles are sold together or used as a set, one design patent application can be filed to cover all the designs applying to the article. However, for patent rights enforcement, neither the design patent nor the articles which are considered as whole for patentable subject matter may be separated or divided.

Invalidation actions

The amended Act includes some noteworthy changes to invalidation procedures as well. Since the validity of a patent is a private dispute, which the patent authority should leave to the invalidation petitioner and the patentee, *ex officio* invalidation by the Patent Authority is abolished. However, the Act still empowers the Patent Authority to review the invalidation action, especially when they discover reasons and evidence supporting the revocation. In this instance, the Patent Authority may, *ex officio*, review the reasons and evidence which are raised within the scope of the invalidation statement, but not submitted by the invalidation petitioner. When more than one request for invalidation has been lodged for the same patent, the Authority may combine the requests for examining and decision making purposes.

When filing an invalidation action, the petitioner must submit an "invalidation statement." Once filed, the statement should not be altered or any items added, but it can be narrowed, so the demands of the request must clearly identify the target claims of the challenged patent. The Patent Authority shall examine an invalidation action without further notice if the supplement of reasons or evidence by the invalidation petitioner is probably going to delay the examination or if the fact and evidence submitted are sufficiently clear.

According to the amended Act, for the situation that a patent covers two or more claims, a petition for an invalidation action can be filed against a part of the claims of the said patent. In other words, it is possible to challenge a portion of the claims in a patent and the Patent Authority may separately invalidate the challenged claim. Partially challenged claims may stand in part and be denied in part based on a claim-by-claim examination of the grounds for the invalidation action. The Patent Authority will also reason its decision for invalidations on a claim-by-claim basis.

Regarding to the res judicata in invalidation procedures, in addition to the case that where another invalidation petition filed based on the same fact and the same evidence has been dismissed through examination, any person shall not be allowed to file a separate invalidation petition against the same patent based by virtue of the same fact and the same evidence. The Amended Act further states that where new evidence is submitted with the Intellectual Property Office, pursuant to Article 33 of the Intellectual Property Case Adjudication Law, and such new evidence is considered groundless upon examination of the Court.

Infringement and damages

The amended Act specifically sets forth that the damages for patent infringement, where the infringer's subjective intent or infringement out of negligence, shall be a conditional requirement. While for the remedy of removal of infringement, prevention of anticipated infringement threat or possibility for infringement shall be irrelevant whether subjective elements of a patent infringement act are involved or not.

In the previous Patent Act, in cases of intentional infringement, the patentee may claim "a maximum triple damage award for wilful infringement." This provision saw much criticism from legal scholars, because generally Taiwan does not allow punitive damage awards in private actions, limiting recovery to compensatory damages. The amended Act repeals triple damages for wilful infringement, complying with the legal principle that "civil compensation is aimed to make up the damage actually suffered." The provision that "the patentee may claim separately for damages at a reasonable amount in cases where the business reputation of the patentee has been downgraded or injured as a result of the infringement" is also removed.

The Act includes a new option to calculate damages through "royalty payment amounts receivable in cases of patent licensing." In other words, the patentee may choose to calculate the damages based on the amount of royalties usually collected by licensing the patent.

Taiwan has made impressive legislative strides and developed a solid apparatus for the protection of patent rights in the amended Act. This is despite animals, plants and essential biological processes for the production of animals or plants still not being patentable. From preliminary issues to patent applications and enforcement of patent rights, the Act and corresponding regulations will change many aspects of patent administration in Taiwan.

There is no doubt these changes will improve patent protection and prosecution efficiency, bringing them in line with international practices. These efforts will pay off in the near future and are welcomed by patent applicants.

Cliff Wong
Chen & Lin, Taipei

宏鑑法律事務所
Chen & Lin Attorneys-at-Law

Industry Experiences

Chen & Lin has a very wide range of industry experience that is extremely practical via active participation in the market for at least the last two decades. Instead of merely processing a case, Chen & Lin is good at identifying the kind of solution that meets the needs and wants of the client. After obtaining the mandate from the client, Chen & Lin is sufficiently skillful in lawyering activities to attain the goal set forth by the client within the boundary of law and industry practices.

The industries that Chen & Lin has experiences include but not limited to the followings:

- Accounting
- Airline
- Apparel & Accessories
- Automobile
- Banking
- Biotechnology
- Broadcasting
- Cement
- Chemical
- Computer
- Consulting
- Consumer Products
- Cosmetics
- Defense
- Department Stores
- Education
- Electronics/Optoelectronics
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How to comply with Personal Information Protection Act

Taiwan's Personal Information Protection Act has left many companies unaware of their obligations to protect employee's personal information and how to establish their own personal information management system

Two years after the promulgation of the Personal Information Protection Act (PIPA), it finally came into force on October 1 2012. However, many companies have still not grasped the relevant provisions of the Act. There are many key requirements which companies are failing to meet in order to comply with the PIPA.

Personal information

Personal information encompasses name, birth date, ID number, passport number, personal characteristics, finger prints, marital status, family background, educational background, occupation, medical information, medical history, DNA, sexual activity, health examination, criminal record, contact information, financial status, social activities and any information capable of being used directly or indirectly to identify a person. In particular, information like medical history, DNA, sexual activity, health examination and criminal record are considered specific personal information. In principle, unless otherwise provided as exceptions, companies are prohibited from collecting, processing and using specific personal information.

Considering general personal information, collection, processing and use, are only permitted if the criteria of specific purpose, compliance with statutory requirements and compliance with the notice obligation are satisfied.

Personal information requirements

For companies, the most important thing is to plan and design internal and external operation processes that comply with the criteria under the PIPA, so that they can legally collect, process and use general personal information.

To understand the scope of specific purpose, companies may refer to the types of specific purposes and personal information subject to the PIPA as announced by the Ministry of Justice on October 1 2012. Companies should select the purposes carefully. In particular, companies should pay extra attention when choosing the following types of specific purposes: 002 Human Resources Management; 069 Contract, Quasi-Contract or Other Legal Matter; and 181 Engaging in Other Business Activities Complying with the Company Registration or Articles of Incorporation.

As to the so-called statutory requirements, companies should analyse and review whether the following requirements are met when companies collected and processed personal information in the past: Was it explicitly provided by law? Did the company have any contractual or quasi-contractual relationship with the concerned person? Was the personal information disclosed by the concerned person or otherwise legally disclosed? Was the personal information collected and processed by academic and research institutions for compiling statistics or for academic research based on public interests and that such information was processed by the provider or collector in such way that the concerned person cannot be identified? Did the company obtain the written consent of the concerned person? Was the personal information related to public interests? Was the personal information obtained from a publicly accessible source, unless the reason why the concerned person does not allow such information to be processed and used is based on a greater interest that is worth protecting?

Consequently, in designing and planning personal information management policies, companies need to take into consideration these statutory requirements to ensure that the collection, processing and use of personal information complies with the law. Companies should also think about whether the personal information collected can only be used within the specific purposes and, in the event where it is necessary to use the personal information collected outside of the specific purposes, how to make the proper determinations and what are the measures to be taken accordingly.

Finally, in respect to the compliance with the notice obligation, according to the Enforcement Rules of the PIPA, companies may carry out the notice obligation orally or in writing, by telephone, text message, email, facsimile, electronic document or other method that would allow the concerned person to know or should have know about the notice. Companies should assess the method by which they choose to comply with the notice obligation so as not to cause any annoyances to the concerned person or to overly increase the cost of operation. Regardless of the method adopted by companies, in order to comply with the law, companies would still need to inform the concerned person regarding the name of the entity, the purpose of collection, the type of personal information collected, the period, area, subject and method of use, the rights of the concerned person, and the impact on the rights of the concerned person for not providing his or her personal information.

Establishing internal processes

When implementing personal information management processes, companies should first conduct an overall inventory check on the personal information. This should include information related to internal personnel and external clients that the company currently holds. This will enable them to understand the contents of the personal information retained

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within the companies and to further assess whether such information falls within the category of general information or specific information and whether such information was collected directly or indirectly. This overall check would serve as the basis for establishing a personal information management process.

In practice, companies quite often over-collect information, which causes them to retain much personal information that has never been used. It is suggested that companies discard personal information that is worthless, so as to reduce the burden of the subsequent personal information management and the risks of information leakage.

In terms of internal management within companies, they should confirm the key steps in respect to the internal operation processes, using such steps as the basis for the personal information management. For example: (i) establishing guidelines for personal information management; (ii) guidelines for the collection, processing and use of personal information, (iii) guidelines for personal information inquiries, (iv) procedure governing personal information leakage and; (v) guidelines for maintaining personal information protection for the employees to comply with.

Implementing measures

When companies seek to implement personal information management schemes, they often are not sure where to begin. Therefore, in order to implement the personal information management process, companies should first establish an executive group consisting of persons from the business department, human resources department, information department and legal department, as to conduct preliminary planning for the future implementation of the personal information management process.

Then, with the assistance from information security consultants and legal professionals, companies should conduct an overall inventory on the personal information. This gives a clear idea of the actual practice of personal information collection, processing and use within the companies. It also defines the individual processes and establishes the basis for management process planning. In the event where the companies have limited resources, it can use the pareto principle and invest 80% of its resources in the personal information protection process that presents the highest risks for companies.

Furthermore, companies can start by conducting small-scale information safety evaluations, legal evaluations and impact analysis on departments. With this opportunity, companies can train the employees that execute the personal information management within the companies. They can also use this opportunity to understand the risks that they may potentially face with personal information management and when the time is right, companies can conduct large-scale or full-scale personal information management implementations based on actual circumstances.

Lastly, companies can also consider obtaining the third party certifications for the aforementioned personal information management process. For example, the commonly seen ISO27001or BS10012 can be a method for companies to prove that they are not intentional or negligent in case of future disputes. Of course, obtaining such certifications would increase the costs and would be subject to companies' decision based on their available budget.

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Resolving cross-strait investment disputes

The Cross-Strait Investment Agreement provides investors with greater confidence, but Taiwan and China need to work on enforcement rules to ensure dispute resolution mechanisms function

Economic and trade activities between Taiwan and China were once a one-way affair, with investment going exclusively from Taiwan to China. But in recent years, Chinese capital has infused Taiwan, exploiting local investment opportunities. Investment between the two is expected to become even more frequent and the dollar amounts even higher. While the geographic proximity of Taiwan and China, and the shared heritage and spoken language, are conducive to cross-strait commerce, the differences in the legal regimes and political ideologies continue to hinder growth. Therefore, choosing a dispute resolution mechanism that is acceptable to both sides, with results recognised on the other side of the Taiwan Strait, is a major concern when investors evaluate the investment and legal risks.

On June 29 2010, the Economic Cooperation Framework Agreement (ECFA) was signed by the governments of China and Taiwan. The ECFA was conceived to reduce tariffs and the commercial barriers between the two sides, which also opened the door to negotiation mechanisms to resolve disputes between Chinese and Taiwanese parties.

Two years later, on August 9 2012, the Straits Exchange Foundation (SEF) and the Association for Relations Across the Taiwan Straits (ARATS) signed the Cross-Strait Cooperation Agreement on Protection and Promotion of Investments (Cross-Strait Investment Agreement). The signing of the Cross-Strait Investment Agreement signifies that Taiwan and China have moved beyond unilateral enactment and administration of investment protection laws to jointly establish investment protection measures agreeable to both sides.

The Cross-Strait Investment Agreement provides many dispute resolution mechanisms for disputes between private investors and government agencies (P to G) and between private parties (P to P).

Recognition in China and Taiwan

The Chinese have a long-established preference for out-of-court settlement of disputes. Of the various alternatives to civil litigation, or alternative dispute resolution mechanisms (ADR), arbitration is one of the most conventional yet modern means for resolving civil and commercial disputes. The disruption to the world economy in the last decade and the ensuing disputes has underscored the need for a modern and transparent resolution mechanism. Against such background, arbitration has emerged as the preferred means to resolve cross-border business disputes owing to its efficiency, flexibility and party autonomy.

Mediation shares many features with arbitration, like efficiency, cost-effectiveness and confidentiality. Arbitration and mediation proceedings are conducted by professionals with relevant expertise and no government intervention. Both methods seek to neutralise disputes amicably, which is preferred by conflict-averse Asians. The benefits offered by mediation and arbitration make them more ideal options than litigation to defuse cross-border commercial disputes.

PRC recognition of Taiwan arbitral awards

In principle, Chinese courts recognise arbitral awards rendered by Taiwanese arbitration institutions. Of the Chinese laws and rulings governing recognition of Taiwanese arbitral awards, the *PRC Law on the Protection of the Investments of Taiwanese Compatriots* (中华人民共和国台湾同胞投资保护法) and the Supreme People's Court, *Provisions on the Recognition of Relevant Civil Court Judgments of Taiwan by People's Courts* (最高人民法院关于人民法院认可台湾地区有关法院民事判决的规定) are the most important. The principle behind these laws is that arbitral awards rendered by arbitration institutions in Taiwan should be recognised unless the reasons for rejection in Article 9 of the Supreme People's Court Ruling are applicable. An award rendered by ad hoc arbitration in Taiwan may not be recognised by PRC courts, because according to Paragraph 2, Article 16 and Article 18 of the *PRC Arbitration Law* (中华人民共和国仲裁法), an arbitration agreement shall be deemed invalid if the arbitration institution is not specified in the agreement.

Taiwanese recognition of PRC arbitral awards

Under Paragraph 1, Article 74 of the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area (the Act Governing Cross-Strait People's Relations), to the extent that an irrevocable civil ruling, judgment or arbitral award rendered in China is not contrary to the public order or good morals of Taiwan, an application may be filed with a court for a ruling to recognise the ruling, judgment or arbitral award. Paragraph 2 addresses enforceability, which indicates that where any civil ruling, judgment or arbitral award recognised by a court's ruling

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demands performance, it may serve as a court order of execution. Paragraph 3 of the same article addresses reciprocity, which indicates that Paragraphs 1 and 2 should not apply until an application may be filed with a court in China for a ruling to recognise the ruling, judgment or arbitral award, or when it may serve as a court order of execution in China.

PRC recognition of mediation settlement agreements

According to a PRC Supreme People's Court ruling issued in 1999, a mediation settlement agreement reached by a Taiwan court shall have the same effect as a Taiwanese civil court judgment. However, a mediation settlement agreement issued or confirmed by a private institution in Taiwan will not be recognised by the People's Courts in China.

Taiwanese recognition of mediation settlement agreements

Article 74 Taiwan's Act Governing Cross-Strait People's Relations, reads: "To the extent that an irrevocable civil decree or judgment, or arbitral award rendered in the mainland area is not contrary to the public order or good morals of Taiwan, an application may be filed with a court for a ruling to recognise it." The Act does not address recognition of mediation settlement agreements reached by PRC courts. According to a Judicial Yuan Secretary General's interpretation, the civil decree or judgment under Article 74 of the Act Governing Cross-Strait People's Relations should not include civil mediation decisions. Furthermore, a Ministry of Justice interpretation confirmed that civil mediation decisions are outside the purview of Article 74 of the Act Governing Cross-Strait People's Relations.

Dispute resolution mechanisms

The Cross-Strait Investment Agreement is a bilateral investment agreement (BIA) between China and Taiwan. Among others, it provides various dispute resolution options to resolve P to P and P to G disputes, though it is not common to stipulate resolution mechanisms for P to P disputes in a BIA.

Definition of investment

Investment is broadly defined in the Cross-Strait Investment Agreement, covering real property, personal property, rights derived from contracts, licence rights, guarantees of any kind, debenture bonds and loans, and revenues and expected revenues from investment. Basically, all investment activities would fall under this definition. The Agreement does not apply to public procurement contracts.

Definition of investor

Likewise, an investor is comprehensively defined in the Cross-Strait Investment Agreement, which refers to individuals, enterprises, companies, trusts, outlets, partnerships, and any entities owned or controlled by an investor. Most importantly, Chinese and Taiwanese companies that invest in the other side of the Taiwan Strait through an entity situated in a jurisdiction other than China or Taiwan are also covered under the definition, thus are protected by the Agreement.

P to G dispute resolution

For disputes between a private party and a government agency, the Cross-Strait Investment Agreement prescribes five dispute resolution mechanisms:

1. Negotiation: when the government agency has rendered a decision against the private party, the private party may request negotiation with the government agency.
2. Coordination: private parties may turn to the agency superior to the government agency in the jurisdiction where the dispute has occurred.
3. Conciliation: conciliation is conducted by the investment taskforce designated by the governments of Taiwan and China to resolve an investment dispute. The goal is to have high-level government agencies involved speed up the resolution process. The rule governing government assistance are being drafted at the moment.
4. Administrative remedies or judicial proceedings: These are the traditional remedies for dispute settlement. If investors have already filed an administrative appeal or launched litigation, they cannot submit the same dispute for mediation.
5. Mediation: Unprecedentedly, the Cross-Strait Investment Agreement stipulates that for disputes over the amount of compensation provided by the government party, the private party can turn to an institution designated by the governments of Taiwan and China for mediation. The two governments are currently discussing the institutions to be designated. In the future, if the investment of an entity of Taiwan or China is expropriated by the government of the other side and the amount of the compensation is in dispute, the entity can request a designated institution to conduct mediation. The Agreement also requires that every six months, the designated institutions report to the Cross-Strait Economic Cooperation Committee on how disputes have been managed. This report mechanism is expected to deter the local governments' intervention in mediation.

As previously stated, the courts of Taiwan and China do not recognise a mediation settlement agreement reached before private institutions of the other side. This disadvantage may discourage parties from choosing mediation to resolve disputes. Nonetheless, since one party to the mediation for resolving P to G disputes

under the Cross-Strait Investment Agreement will be the government of Taiwan or China, the risk that the counterparty will breach the mediation settlement agreement is not high.

P to P dispute resolution

Paragraph 1, Article 14 of the Cross-Strait Investment Agreement reads: "The contracting parties may stipulate the methods and commercial dispute settlement methods in accordance with relevant laws and regulations and the principle of party autonomy." Such provision is an affirmation of people's rights to select dispute resolution mechanisms. Consequently, parties are free to choose mediation or arbitration to resolve their disputes.

Under Paragraph 4, Article 14 of the Agreement, if the parties choose arbitration as the dispute resolution mechanism, they may choose to submit the disputes to an arbitration institution in Taiwan or China and determine the seat of arbitration. Though this provision simply reflects the basic principle of arbitration - party autonomy, it affords the investors in Taiwan and China a fairer and more efficient way to resolve investment disputes with their counterparties.

The plain meaning of Paragraph 4, Article 14 suggests that the parties may designate a Taiwanese arbitration institution such as the Chinese Arbitration Association, whose base is in Taipei, to conduct the arbitration proceeding in Beijing or wherever as agreed to by the parties, including a place other than Taiwan or China. This is an unprecedented arrangement, since previously it was questionable whether an arbitration institution in Taiwan may administer arbitration cases in China.

PRC courts had divergent opinions on whether they should recognise and enforce the arbitration awards administered by foreign arbitration institutions but rendered in China, such as ICC awards rendered in China. Commentators once argued that PRC laws do not allow foreign arbitration institutions to conduct arbitration in China, though one ICC award has been recognised by a PRC court.

In addition, Paragraph 4, Article 14 provides that the parties may determine the seat of arbitration and does not require that the seat must be within China. This is also a breakthrough.

Increasing confidence

The Cross-Strait Investment Agreement was conceived to offer more options and flexibility in terms of resolution mechanisms for P to P and P to G disputes. Nonetheless, how and whether such options can be enforced remain to be seen. The governments of Taiwan and China need to hammer out the enforcement rules for the agreement to ensure the newly agreed dispute resolution mechanisms function properly. If the agreement is allowed to fulfil its promise, investors on both sides of the Taiwan Strait will be able to act with greater confidence, reap substantial returns on their investments and benefit from a dispute resolution decision that is recognised on the other side of the Taiwan Strait.

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