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CONTENTS

All change in M&A 32

The government has published a Bill proposing far-reaching changes to Taiwan's M&A environment. Businesses need to familiarise themselves with the possible changes and follow its progress carefully

Ken-Ying Tseng and Patricia Lin of ***Lee and Li***

The challenges of enforcement 35

Enforcing final civil judgments that have been made in mainland, Hong Kong and Macau courts in Taiwan can be challenging. As cross-strait disputes increase, businesses need to make sure they have the right dispute resolution clauses in place

Martin C K Liu and Edward Y C Liu of ***Chen & Lin***

Improving long-term healthcare 38

Taiwan needs to reform its healthcare system. Europe and Japan have both set examples in the innovative use of private finance, but the government needs to be aware of the risks

Bernice Fan of ***Liang & Partners***

Decoding data protection 42

Taiwan's *Personal Data Protection Act* contains several strict provisions relating to written consent requirements that affect foreign companies, even if they are not registered in the jurisdiction

Ken-Ying Tseng and Rebecca Hsiao of ***Lee and Li***

Time to invest in Taiwan 45

Mainland investors in Taiwan have plenty of opportunities to succeed, as long as they follow a few key guidelines

Ying-Yi Lee and Jakob C T Huang of ***Chen & Lin***

New design patent practice explained 49

Design patents in Taiwan are becoming broader. This has opened up new opportunities for IP owners who want to maximise the protection available to them

Hsiu-Ru Chien and Michael Sun of ***Lee and Li***

Waiting for agreement

C Y Huang, Chairman of the Taiwan Mergers & Acquisitions and Private Equity Council (MAPE), spoke to *China Law and Practice* about the hold up on the Cross-Strait Service Agreement and the effect this is having on deals

What are the proposed changes to M&A Act in Taiwan?

The changes are rather comprehensive covering the interests of both minority and majority shareholders. In particular, there is a clause from the Yageo case. This was a take-private, which the majority and minority shareholder had approved, but was turned down by the regulators for dubious reasons. The main reason was that it was not good for the general social public image. Investors do hope that the government will able to make the rules on delisting clearer and the proposed changes to the Act is one step towards this.

Previously, with a 50% vote you could privatise a company, but now you require two-thirds. However, the majority shareholder will still be allowed to participate in the voting for any major restructuring of the company. There are many other details in the Act, not just covering delisting. For example, the Act introduces more methods for the payment of M&A deals through cash, assets and IP. It is good to see payment mechanisms expanded in the Act. Also, the Act defines merger deals to include spin-offs. Overall, the changes are comprehensive and positive. The key thing is whether the government can implement these changes. The government's final approval or rejection can be a major concern for foreign investors.

Have there been any significant deals this year?

Unfortunately, there seems to have been a slowdown of deals since last year. This is probably because the government is dealing with the Cross-Strait Service Agreement. The Agreement has already been signed, but it needs approval from the Taiwanese legislators. However, the opposition party is making a lot of noise that the Agreement has not been studied properly or communicated effectively to the Taiwanese people. As a result, the schedule has been pushed back and now it looks like the Agreement will not be approved until next year. There were some deals towards the end of 2012, but since then all attention has been on the Service Agreement.

Taiwan is an interesting place for investors, especially considering the IPO market in mainland China

There are several transactions in the pipeline, however. For example, ICBC's investment into Bank SinoPac in Taiwan, which will go ahead once the Agreement has been approved. China also now allows 51% majority control of securities companies for Taiwanese investors. The SinoPac Group through SinoPac Securities announced a joint venture with an investment entity in Xiamen. SinoPac will hold 51% and Xiamen 49%. China has never allowed majority ownership so this preferential status is a big deal for Taiwan. The Cross-Strait Service Agreement has put this on hold though and there were also strong objections from the opposition party.

What is your outlook for investment?

Taiwan is an interesting place for investors, especially considering the IPO market in Mainland China. Investors had looked at Southeast Asia during the IPO freeze on the Mainland, but with the slowdown in the US and the adjustment of stock prices, investments there are not good. This has made Taiwan a safer bet, compared with mainland China and Southeast Asia.

There seem to be political forces in Taiwan that are holding us back. People think that any opening of the Taiwan market will cause mainland China to swallow it up and affect our future. However, this is not what will happen and the government has not been very effective in communicating with the people about this. In addition, the Cross-Strait Service Agreement is incredibly one-sided and in Taiwan's favour, so why it has not gone through is a mystery. Even mainland China is wondering why Taiwan will not agree when it is so beneficial to Taiwan.

All change in M&A

The government has published a Bill proposing far-reaching changes to Taiwan's M&A environment. Businesses need to familiarise themselves with the possible changes and follow its progress carefully

After gaining more than 10 years experience in facilitating and regulating M&A activity in Taiwan by adopting the Mergers and Acquisitions Act, the Taiwanese regulator proposed extensive amendments to the M&A Act in a Bill to the legislative authority in November 2013. The Bill is designed to resolve a number of issues which have arisen while implementing the M&A Act, as well as to further liberalise and facilitate mergers and acquisitions in Taiwan. Once enacted, the Bill would provide more flexibility for the types and structures of M&A in Taiwan, further protect the rights and interests of certain stakeholders, such as minority shareholders, employees, creditors, and apply the same tax benefits to spin-off transactions. When structuring M&A in Taiwan, businesses should monitor the legislative status of the Bill closely in order to take advantage of the relevant benefits and to comply with the new requirements as stipulated under the Bill.

More short-form M&A

To streamline corporate action in respect of M&A transactions, the Bill adds five short-form M&A transaction types that need not be approved at a shareholders' meeting. Instead, a board resolution adopted by a majority of directors present at a board meeting attended by two-thirds or more of the directors (special board resolution) of the participating companies would be sufficient. The newly-added short-form M&A transaction types are:

1. *Mergers between companies under common control:* Where the subsidiaries of the same parent company merge with each other and the parent company holds 90% or more of the outstanding shares in each participating subsidiary, the merger can be approved by the special board resolution of each subsidiary without being further approved by the shareholders' meeting of each subsidiary.
2. *Whale-minnow share exchange:* Where (i) the total number of the new shares to be issued by an acquiring company in a share exchange transaction as the consideration to exchange for the shares in the target company does not exceed 20% of the outstanding voting shares of the acquiring company; and (ii) the cash amount/asset value to be paid out by the acquiring company does not exceed 2% of the net value of the acquiring company, the share exchange may be approved by the special board resolution of the acquiring company, unless otherwise required by the Bill.
3. *Whale-minnow spin-off:* Unless otherwise required by the Bill: (i) where the value of the business to be spun-off by a company will not exceed 2% of its own net value and the company itself will receive all the consideration of the spin-off transaction, the spin-off may be approved by the special board resolution of such a company; and (ii) where the total number of the new shares to be issued by the company assuming the business of another company in a spin-off transaction does not exceed 20% of its own outstanding voting shares and the cash amount/asset value to be paid by such a company does not exceed 2% of the its net value, the spin-off may be approved by the special board resolution of such a company.
4. *Share exchange between parent company and subsidiary:* Where a parent company intends, by means of share exchange, to acquire a subsidiary of which the parent company owns 90% or more of the outstanding shares, this share exchange may be conducted with only a special board resolution of each company.
5. *Spin-off between parent company and subsidiary:* Where a spin-off transaction is to be entered into between a parent company and a subsidiary of which the parent company owns 90% or more of the outstanding shares, with the parent company being the company assuming the business to be spun-off and the subsidiary being the company receiving all of the consideration for the business, such a spin-off transaction may be conducted with only a special board resolution of each company.

> The Bill proposes that in a share exchange or spin-off transaction, the consideration may also be shares, cash, or other assets

Cash-out mechanisms

Under the current M&A Act, cashing out minority shareholders is only permitted when a merger transaction is conducted. Also, in a merger transaction, the consideration can be in various forms, including shares, cash, and other assets. For other types of statutory M&A as stipulated in the M&A Act, such as share exchange or spin-off transactions, the consideration is limited to only newly issued shares. The Bill proposes that in a share exchange or spin-off transaction, the consideration may also be shares, cash, or other assets. This provides flexibility for companies to structure share exchange or spin-off transactions. One possibility is to cash out minority shareholders in a share exchange transaction.

Abstentions

It is explicitly stated in the existing M&A Act that if a company (Company A) intends to merge with another company in which it holds shares (Company B), Company A does not need to abstain from exercising its voting right in the shareholders' meeting of Company B, when the shareholders' meeting of Company B is in the process of voting in the proposed merger. However, for the other

types of statutory transactions, such as a share exchange or a spin-off transaction, the existing M&A Act does not have similar provisions. As such, it has always been questionable as to whether Company A may still vote in the shareholders meeting of Company B, when Company A and Company B are conducting a share exchange or spin-off transaction. In the situation where Company A controls a majority share in Company B, and abstains from voting in a shareholders' meeting that would mean that any proposed M&A will become impossible. This issue will be solved by the Bill. The Bill proposes to explicitly permit a corporate shareholder to vote in the shareholders meeting of another company, when the two companies are conducting share exchange or spin-off transactions.

Existing shareholders and employees

The Bill proposes that in the event that a surviving company issues new shares for a merger, or a parent company issues new shares for its subsidiary's merger with another company, the provisions provided in the Company Act and Securities and Exchange Act regarding the pre-emptive rights of employees and existing shareholders to subscribe to the new shares, or the obligation to allocate a certain ratio of the new shares for public offering shall not apply.

Raising the delisting threshold

Considering the need to protect the shareholders of a listed company, in the event that the listed company becomes delisted or dissolved as a result of a merger or acquisition transaction and the surviving or acquiring company is not a listed company, the threshold of the shareholders resolution of the listed company to be delisted or dissolved to approve the merger or acquisition transaction will be raised to require the affirmative votes of the shareholders who represent two-thirds or more of the total outstanding shares issued by such a company. This means that the delisting threshold will be increased once the Proposed Amendment is enacted. Nonetheless, it is still not as rigid as in other jurisdictions such as Hong Kong.

Reporting obligations

Although an M&A resolution adopted by an interested director would not be necessarily detrimental to the shareholders' rights, the fairness and reasonableness of such a resolution will inevitably be questioned. The Bill proposes that when a director has a personal interest in an M&A resolution, such an interested director is obliged to explain to the board meeting and shareholders' meeting the essential aspects of such personal interest and the reasons of his support or opposition to the proposed M&A transaction.

Special committees

The Bill proposes that a special committee be set up by a public reporting company (if there is an audit committee, the same function shall be performed by the audit committee) to deliberate the fairness and reasonableness of an M&A transaction. During the deliberation of the special committee/audit committee, independent experts shall be appointed to provide opinions regarding the reasonableness of the consideration in the proposed M&A transaction. The conclusion of deliberation shall be submitted to the board meeting and shareholders' meeting. The formation and operation of the special committee, the qualification of the members of the special committee, and the determination of independence and appointment of the independent experts, will be stipulated by the authorities regulating public companies in due course.

Protection for minority shareholders

According to the Bill, when objecting shareholders have exercised their appraisal rights to request a company to buy back their shares in connection with an M&A transaction but have failed to reach an agreement on the buy-back price with the company, the company shall pay the amount it considers fair to the shareholders before filing a motion with the court for a ruling on the amount of the purchase price of the shares by an application listing all of the objecting shareholders who disagree on the price as counterparties. It was hoped that such a proposed amendment may improve the imperfections of current procedures such as the long process it takes to exercise the appraisal right to request a company to buy back the shares, the high transaction costs to shareholders and the price discrepancies between the rulings of the courts.

Shareholders information rights

According to the Bill, a merger agreement, share exchange agreement, split plan, content of a merger or acquisition resolution adopted in a board meeting, deliberation conclusion of the special committee and opinion of independent experts shall be sent

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Ken-Ying Tseng, head of Lee and Li's M&A practice group (non-financial sector), specialises in M&A, corporate governance, e-commerce, broadcasting, telecommunications, and personal data protection and privacy law. She received an LLM from Harvard Law School after obtaining an LLM and an LLB from National Taiwan University. Having advised both sellers and buyers on various forms of merger and acquisition, she is experienced in resolving both legal and commercial issues. The major transactions that she has handled in recent years include, among others, the sale of China Times group, the merger of Taimall (the first shopping mall in Taiwan) and GIC and Eaton's tender offer for Phonixtec Power.

Ken-Ying was recognised as a Leading Lawyer in the M&A field by *Asialaw* in 2013 and 2014, and by *IFLR 1000* in 2014. Ken-Ying also heads the Personal Data Protection practice group of Lee and Li.

Patricia Lin
Senior counselor
Lee and Li

Patricia Lin's practice focuses on banking, securities, capital market, international corporate finance, financings (including syndicated financing, structured financing and aircraft/ship financing) and M&A. Patricia has assisted in many international capital markets transactions, including the issuance of global depositary receipts, American depositary receipts, Taiwan Depository Receipts, Euro-convertible bonds, Euro-exchangeable bonds and straight bonds.

Patricia is also an expert in M&A transactions in both general industries and highly regulated industries (such as financial industries and telecom industries). She has advised several local banks/financial holding companies/securities firms and foreign private equity funds/investors in connection with the proposed acquisition between the acquirer and local financial holding companies and banks (such as Cosmos Bank being invested in by GE Capital, Soros's investment in Taishin Financial Holding and Morgan Stanley's investment in Chinatrust Financial Holding). She also advised the Taiwan telecom company in the first investment from a mainland China company (China Mobile) and advised Forepi in the first PRC investment (San'an) and strategic alliance in the LED industry.

to the shareholders along with the shareholders' meeting notice or to inform the shareholders of such information after the resolution has been adopted at the board meeting.

Protection of creditors

The impact on the creditors of companies conducting an acquisition transaction would be similar to that which arises in a merger or spin-off transaction. The Bill proposes to grant the creditors the right to access information and raise objections to an acquisition transaction.

Protection of employees

The Bill proposes that the remaining amount in the labour pension fund special account allocated by a company transferring all of its employees subject to the retirement benefit plan under the Labour Standards Act to another company in an acquisition or spin-off transaction, regardless of whether the amount has reached the threshold triggering suspension of allocation, shall be transferred to the labour pension fund special account of the surviving/acquiring company after the transaction. The Bill also proposes to remove the current provision which deprives an employee of his/her right to request severance pay if the employee has accepted continuous employment after the transaction but later refuses to stay on for personal reasons before the effective date of an M&A transaction.

Tax benefits

In the Bill, the types of consideration for a spin-off transaction would be the same as that which is required for an acquisition. As such, for the sake of implementing fair taxation, the tax treatment for a spin-off transaction should also be the same as that which is provided for an acquisition:

1. In order for a company to enjoy transaction tax (stamp tax, deed tax, securities transaction tax, business tax, and land value increment tax) exemption or deferral under a spin-off transaction, an existing or a newly-incorporated company, which acquires business operations as a result of a spin-off transaction, must issue new shares with voting rights as the consideration and such shares must be at a value not less than 65% of the total consideration.
2. In order for a company to enjoy corporate tax exemption under a spin-off transaction, the consideration paid shall be shares with voting rights from an existing or a newly incorporated company and such shares must be at a value not less than 80% of the total consideration, and the company receiving this share consideration must consequently transfer all the acquired shares to its shareholders.

In addition, by virtue of the amendment to the Income Tax Act, from January 1 2009 a company's losses can be carried forward for 10 years. In conformity with the Income Tax Act, in a merger or a spin-off transaction, losses can be carried over from each party to the merger or spin-off transaction in proportion to the percentage of shares that the party holds in the newly-incorporated or surviving company through the merger or the spin-off transaction for 10 years.

The challenges of enforcement

Enforcing final civil judgments that have been made in mainland, Hong Kong and Macau courts in Taiwan can be challenging. As cross-strait disputes increase, businesses need to make sure they have the right dispute resolution clauses in place

One of the most momentous breaking points in Taiwan's political history came when the Taiwan government first lifted its ban on visiting relatives in China in 1987. Since that time it has been inevitable that Taiwan and China would become more closely-connected in all aspects. In recent years, cross-strait commerce has played an important role for businesses both from Taiwan and China. To nobody's surprise, the deeper the connection becomes, the more disputes arise; especially when the parties involved come from different jurisdictions, which can cause a dispute to be much more complicated.

Dispute resolution mechanisms have been heavily discussed in law reviews and journals; however, this alone does not help remove businessmen's common concern: after the parties have their dispute resolved by a court, what comes next and how can they get their money back? This enquiry leads to the critical question: how to enforce a judgment? Enforcing a judgment in the jurisdiction where it was made regularly does not cause many legal problems, but businessmen in the region need to know how a China (including Hong Kong and Macau) final civil judgment can be enforced in Taiwan.

Recognition

It is common practice around the world, and also in Taiwan, that to enforce a foreign final civil judgment that judgment would need to be recognised by a local court first before filing for enforcement. However, due to the special political circumstances in Taiwan, with respect to the recognition and enforcement of judgments made in China, Hong Kong and Macau, there are different sets of procedures, separated from ordinary foreign final civil judgments. Nevertheless, once the judgment is recognised, in general, it can be enforced in Taiwan.

The key piece of legislation here is Article 74, Paragraph 2 of *Act Governing Relations between the People of the Taiwan Area and the Mainland Area*: "where any ruling or judgment, or award recognised by a court's ruling as referred to in the preceding paragraph requires performance, it may serve as a writ of Enforcement".

China

According to Article 74, Paragraph 1 of Act Governing Relations between the People of the Taiwan Area and the Mainland Area (Cross-Strait Act), the primary substantial criterion for a Taiwan court to decide whether to recognise a China final civil judgment is: such judgment must never be contrary to the public order or good morals of the Taiwan Area. Based on the principal of reciprocity, Taiwanese courts tend to recognise a China final civil judgment unless there is a fundamental violation of Taiwan imperative law, public order or good morals. Apart from the above, Article 68 of *Enforcement Rules for the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area* further provides some procedural requirements. A China final civil judgment shall be notarised in China first and be authenticated later by Straits Exchange Foundation before it can be recognised by a Taiwan court.

The prerequisite for the application of Article 74 of the Cross-Strait Act was fulfilled when China enacted laws including *Provisions of Supreme People's Court on the People's Courts' Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region* in 1998 and its *Supplement Provisions* in 2009, providing Taiwan final judgment can be recognised and enforced in China.

Although it is not abnormal for Taiwan courts to recognise China final civil judgments, controversy still arises because Article 74, Paragraph 2 of the Cross-Strait Act did not clearly stipulate to what extent a China final civil judgment can be recognised – is it only enforceable or does it have the same effect as a Taiwan final judgment? The Taiwan Supreme Court had ruled in its 96-Tai-Shang-Zi-2531 civil judgment that a China final civil judgment can be enforced after recognition but does not have the same effect as a

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Martin C K Liu joined Chen & Lin in January 2009. He excels in constitutional law, administrative law, constitutional litigation, administrative remedy, Securities and Exchange Act, Consumer Protection Act, tax disputes, insurance disputes, government procurement disputes, labour issues and disputes, cable television, teachers' appeal, state compensation and other general civil and criminal litigation.

Martin graduated from the Department of Law of National Taiwan University in 1997 and obtained the degree of Master of Law at National Chengchi University in 2005. He passed the Taiwan Bar Examination in 2001. Before joining Chen & Lin, he practiced with Concord International Law Firm and Yao-Nan Joint Law Firm. He also worked as an assistant to Justices of the Constitutional Court from 2005 to 2008 so he is quite familiar with the procedure of petition for the interpretation of the Constitution and the uniform interpretation of laws or orders.

Edward Y C Liu
Associate
Chen & Lin

Joining Chen & Lin in November 2008, Edward Y C Liu is an attorney specialising in corporate law, M&A, securities exchange law, litigation and general consulting. Edward graduated from National Taiwan University in 2002. In 2005, he passed the bar examination in Taiwan and worked as an intern associate in Baker & McKenzie, Taipei. During the period, Edward worked on litigation, M&A transactions and public offering filing procedures. After the internship, Edward pursued his studies in New York University School of Law, majoring in corporate law, where he obtained his master degree in 2008. In the same year, Edward passed the New York State Bar Examination.

After joining Chen & Lin, Edward has focused on dispute resolution, including litigation, arbitration and mediation

Taiwan final civil judgment. This will cause problems for creditors seeking enforcement in Taiwan as their Taiwanese debtors can file a lawsuit in Taiwan challenging the subject matter again. This Supreme Court civil judgment has been intensively criticised in Taiwan by scholars, but until Article 74 of the Cross-Strait Act is amended or the Taiwan Supreme Court changes its opinion, there is a risk for creditors enforcing a China final civil judgment in Taiwan. To ease this uncertainty, for a transaction between a China company and a Taiwan company, choosing Taiwan as the venue for dispute resolution may be a practical approach in the event that the Taiwanese company is expected to be named as defendant, for a Taiwan judgment can be enforced in Taiwan, without doubt, once it is final.

A China final civil judgment shall be notarised in China first and be authenticated later by the Straits Exchange Foundation before it can be recognised by a Taiwan court

Hong Kong and Macau

Unlike the Cross-Strait Act, Article 42, Paragraph 1 of Laws and Regulations Regarding Hong Kong and Macau Affairs directly stipulates that "in determining the conditions for the validity, jurisdiction, and enforceability of civil judgments made in Hong Kong or Macau, Article 402 of the *Code of Civil Procedure* and Article 4-1 of the *Compulsory Enforcement Law* shall apply *mutatis mutandis*". Accordingly, a final civil judgment made in Hong Kong or Macau shall be treated in the same way as a so-called foreign final civil judgment, i.e. those judgments made outside Taiwan (except China). Pursuant to Article 402, paragraph 1 of Taiwan Code of Civil Procedure final civil judgments made in Hong Kong or Macau will be automatically deemed to have the same effect as Taiwan final civil judgments, as long as the following negative requirements are not met: (1) the foreign court lacks jurisdiction pursuant to Taiwan laws; (2) a default judgment is rendered against the losing defendant, except in the case where the notice or summons of the initiation of action had been legally served in a reasonable time in the foreign country or had been served through judicial assistance provided under Taiwan laws; (3) the performance ordered by this judgment or its litigation procedure is contrary to Taiwan public policy or morals; and (4) there exists no mutual recognition between the foreign country and Taiwan. Filing for recognition under Article 4-1 of the *Compulsory Enforcement Law* is only for the procedural purpose of enforcement but not a requirement to ascertain the judgment's validity.

Enforcement

Once a Taiwan court recognises a final civil judgment made in China, Hong Kong or Macau, the party seeking for its execution can then submit its application for compulsory enforcement with a Taiwan court where its Taiwanese debtor locates or has assets.

During enforcement, a Taiwanese debtor might file petition against its creditor pursuant to Article 14 of the *Compulsory Enforcement Law*. As explained above, a judgment made in Hong Kong or Macau has the same effect as another foreign final civil judgment, so the petition can only be raised based on reasons that occur after the judgment is final pursuant to Article 14, Paragraph 1 of the

Compulsory Enforcement Law; but for a judgment made in China, the Taiwanese debtor can file a petition based on the reasons that occur even before the recognition is ruled by the Taiwan court, which means the debtor may have to argue the subject matter all over again, pursuant to Article 14, Paragraph 2 of the Law. This inconsistency does cause problems and there is no legitimate legal reasoning in support of such differentiation.

Minimising risk

Generally speaking, Taiwanese courts tend to recognise and to enforce foreign final civil judgments out of international courtesy and reciprocity. However, due to historical and political reasons, Taiwan legislators enacted a different set of rules dealing with the recognition and enforcement of a China final civil judgment, which has created difficulties for a party seeking recognition and enforcement of a China final civil judgment in Taiwan. Given that relations between China and Taiwan have become closer since the Economic Cooperation Framework Agreement was concluded, cross-strait disputes are bound to increase. Businesses involved in cross-strait-transactions should take this issue into consideration when negotiating agreements and decide on a more appropriate venue for dispute resolution, by resorting to local professional advice, so that the legal risk can be minimised.

Filing for recognition under Article 4-1 of the *Compulsory Enforcement Law* is only for the procedural purpose of enforcement but not a requirement to ascertain the judgment's validity

Improving long-term healthcare

Taiwan needs to reform its healthcare system. Europe and Japan have both set examples in the innovative use of private finance, but the government needs to be aware of the risks

Taiwan's early welfare policies were based on an informal social support system. The legal system played only a supplemental role. Since 1990, Taiwan society has seen gradual economic development and has evolved into a mature modern democracy. To establish a system of social welfare programmes for long-term care, the Taiwan government has been propagating related policies for approximately 10 years. The government has passed various acts for disadvantaged social groups including: *People with Disabilities Rights Protection Act*, the *Senior Citizens Welfare Act*, and the *Nursing Staff Act*. Several long-term care related policies have been proposed that are directed mainly at low-middle to low-income families or solitary senior citizens. They are: *Enhance Elderly Services and Care Act, 1998-2007, 3-Year Program of Elderly Long-Term Care, 1998, New Era Health Care Program, 2001-2005, Pioneer Project of Construction of Long-Term Care Project, 2000-2003* and *Provide Nursing Service and Its Industry Development Plan, 2002-2007*.

From the end of 2007, the Taiwanese government started to promote what it called the 10-Year Long-Term Care Programme plan, and extended the scope of the application of services to the elderly with middle class income (50-year-olds with disabilities, 55-year-old aboriginals, and 65 year-old men and women). These programmes focus mainly on providing home nursing services, home healthcare, physical therapy at home and in the community, the purchase and lease of assistive device services, home accessible environmental improvements, nourishing meals for the elderly, respite care services, transportation services, and long-term care facility services. With long-term health care insurance being insufficient, the Taiwan government needs to establish a long-term care service network and enact a Long-Term Care Services Act in order to encourage development in those resource insufficient areas and integrate the National Health Insurance into the long-term care programmes.

Table one: Taiwan's long-term care Acts

List of Departments	Act Name	Authority Government
Social Affairs	Senior Citizens Welfare Act People with Disabilities Rights Protection Act	Ministry of the Interior
Sanitation	Nursing Staff Act Mental Health Law National Health Insurance Medical Service Law	Health Bureau
Repatriation	ROC Veterans Assistance Act	Repatriation Commission

The problems

Care services are provided by related government departments and non-profit organisations, but their poor efficiency and service quality have often been criticised. Below are the main issues encountered:

1. Administrative confusion

The social services system is afflicted with interference and with conflicting competitive-cooperative relationships, which need immediate attention. Responsibility for the following acts and laws resides in different administrative departments and agencies (see table one).

2. Insufficient resources for long-term care

Except for fully equipped long-term care services developed in government owned facilities, home-based care and community-based care cases have a severe resources problem. For example in 2010, 27,800 people used home-based care. This is 5,783 more individuals than in 2009 or a 26% increase over the previous year. Up until May 2011, only 69 community-based day care facilities had been established. This included 12 Dementia Day Care Centres (Ministry of the Interior, 2011). This amount is far below the 10-year policy schedule goal, namely one long-term care facility for each county/city/district.

Care services are provided by related government departments and non-profit organisations, but their poor efficiency and service quality have often been criticised

Not only are there limited resources, but there is also an uneven distribution in remote mountainous areas and on the various islands. The goal to have these facilities established and operational by 2011 was missed.

3. Uneven quality in the private sector

Even though the number of private facilities is sufficient, the quality is not uniform and varies so considerably that it arouses mistrust and suspicion. It is indeed impossible to predict the kind of care that will be received from one facility to another.

The situation will only deteriorate with the aging wartime baby boomers. More facilities will be needed with more than basic service items. How to create people-oriented services that are diversified, life-fulfilling and dignified is the true challenge for these facilities.

環宇法律事務所
LIANG & PARTNERS LAW OFFICES

Liang & Partners was founded in 1979 by Kit Kai Tien Liang, Esq. in Taipei, Taiwan. With our outstanding team work services and elite professional personnel, we have become a law firm with unmatched diversity through our efforts during the past 35 years. We have professional service teams for financial securities, industry investment and development, public infrastructure and land development, high-tech industry, civil/criminal litigation and arbitration, offshore investment and trust, Mainland China investment services etc.

We currently have more than 25 local attorneys, professional legal staff and foreign consultant attorneys. Including its professional secretaries, administrative staff and the financial consultants, the firm is composed of more than 40 professional personnel making us one of the most diversified law firms in Taiwan.

We are well-experienced in the private participation of infrastructure projects and in assisting in the bidding on behalf of private companies for general infrastructure construction projects. We have participated in more than 200 major government construction projects, including invitations to tender, the evaluation of tenders, the award of contracts, contract negotiations and the execution and management of contracts. Our services have been integral to the Yamay Recreation World Development Project, the Taiwan North-South High Speed Rail Project, the Dapeng Bay National Scenic Area Business Invitation Project, the National Museum of the Marine Biology & Aquarium Business Invitation Project, the Beitou Cable-Car Project, the sewage and drainage BOT project, the Kaohsiung Arena and Taipei Dome Complex BOT Project, the County/City Government Incinerator Business Invitation Project and the student dormitory BOT projects for national universities.

We have been awarded the “Golden Thumb Award” by the Public Construction Commission, Executive Yuan of R.O.C. for more than 10 projects. We were the first law firm in Taiwan being awarded this honor.

Frank Kung
Managing partner
Liang & Partners

In the area of construction, Frank Kung has represented contractors and owners in nearly 300 cases of construction arbitration, litigation and mediation affairs, including construction disputes regarding Highway No 1, No 3 and No 5, the Xyue Shan Tunnel and the Fourth Nuclear Power Plant. He also provides contractors, investors and companies with legal opinions on the prevention of construction disputes and on compensation issues. Frank has acted as a legal consultant on BOT projects between government and private institutions for nearly 14 years and has participated in many projects, such as the THSR, Taiwan Taoyuan International Airport, Kaohsiung Arena and Penghu Entertainment Resort Centre.

He is a doctoral candidate at the China University of Political Science and Law and received his LLM (1994) and LLB (1991) from the National Taiwan University. He is the chairman of the construction law committee of the Taipei Bar Association and the director for the Taiwan Construction Law Association.

Bernice Fan
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Bernice Fan is the chief senior consultant and head of the public construction department at Liang & Partners Law Office. Bernice advises on all aspects of long term care PFI projects, public construction projects, such as the High Speed Rail, national museums, cultural and educational facilities of national universities, Mass Rapid Transit and tourism and recreational industries. Bernice is the legal consultant for the Bureau of High Speed Rail, MOTC for business invitation, construction and operation of High Speed Rail BOT projects, for the Government Invitation for Private Participation in Airport MRT Project, for the Dapeng Bay National Scenic Area BOT Project and for the Kaohsiung E-City BOT.

She holds a LLB from Fu Jen Catholic University and an EMBA in Knowledge Management from National Taiwan University. She is also an adjunct lecturer of commercial law at National Taiwan University.

4. Lack of manpower

Long-term care is a labour intensive service and with the increasing demand for services more trained nursing staff needs to be involved. There were 18,991 nurses in 2009. It is estimated that there will be between 48,569 and 64,300 in 2015, with 29,578 to 45,309 under a training programme.

However, with salaries below average, a relatively low social status and competition from lower-paid foreign labourers, it is difficult to keep a stable employment number and rate in the nursing industry. If this problem remains, long-term care policies will eventually become moot and there will be much more reliance on foreign nursing staff.

5. Problems with local government

There are several important differences among counties/cities in the implementation and operation of 10-year long-term care programmes. These differences are key to identifying the underlying reasons for the failure in both their implementation and operation and must be understood so that past errors are not repeated.

Using private finance

In view of Taiwan's rapidly aging society, there is a growing demand in the senior services industry. Social welfare resources and mainstream industry attitudes towards this expanding industry are lagging far behind and restricting needed development.

In order to comply with global privatisation, the Taiwanese authorities have aggressively introduced public resources to the process.

In addition to expanding social welfare on a vastly accelerated scale, the Ministry of the Interior, as dictated by the Executive Yuan, will actively assist all county/city regional administrations, through Private Financing Initiatives (PFI), employing a Value for Money analysis, in the development of state-owned Senior Citizens' Welfare Facilities.

The authorities have completed a Private Finance Initiative principle for future organisers to follow as public-private partnerships continue to receive attention. A PFI project for long-term care has recently been initiated in Pingtung county and Kinmen.

The different models

The concept of the private finance initiative (PFI) originated and was developed in the United Kingdom and was shortly after adopted by the Japanese and Korean governments. At present both Britain and Japan have the most sophisticated and successful PFI projects.

The private finance initiative concept is simply one whereby a private or non-government entity invests in public facilities and provides qualified services, while the government remunerates the private entity.

To promote private entities to participate in public welfare activities and public works projects, such as sewage systems and social welfare facilities, governments may provide inducements to encourage these private institutions to participate in PFI projects. The combination of the public and private sectors ensures more efficient and economical implementation and operation.

This also applies to build, operate and transfer (BOT) projects, which began in 1994 with the Statute for Encouragement of Private Participation in Transportation Infrastructure Projects. BOT projects have non-governmental institutions establishing and operating public works on government-owned land. However, the BOT projects are limited to transportation infrastructures.

Since the year 2000 when the Act for Promotion of Private Participation in Infrastructure Projects was enacted, the government in Taiwan has expanded the scale of public works in which non-government institutions could invest. These now include non-profit entities, transportation, cultural undertakings, social worker welfare facilities and commercial recreation business facilities.

The implementation of the Farmland and Financing Act added more flexibly, providing preferential financing, tax exemptions, and making guidelines for public/private obligations and rights.

The next stage

The Taiwan government has been encouraging private enterprises to become involved in the long-term care services industry, utilising the UK model and experience. Having been involved in hundreds of BOT projects, we have the following insights and suggestions.

The introduction of care services into market mechanisms can elevate service efficiency and flexibility and allow expansion on a much larger scale and provide a larger variety of service. For example, Britain's Community Care Act amendments and revisions

induced the establishment of short-time resident foster homes and promoted the increase of other related care services. Germany introduced a long-term care insurance system and competition among many of the small-class companies also motivated six major official welfare organisations to raise quality and efficiency. The main building blocks that need to be put in place are:

- Establishing a financial resource to provide available funding. Stable and institutional sources of funding are a vital condition for private investment.
- Japan's and Germany's long-term care insurance provides for various care item refunds. This expands market scale and gives growing space to private sectors.
- At present, global managed care service financing resources policies can cope with insurance fees, bonuses, taxation, and personal accounts.

Taiwan has promoted long-term care for years and has gathered suggestions from all sectors of the community regarding how to coordinate sets of measures with the National Health Insurance and the National Pension Insurance. This shows the community attaches great importance to the policy.

At present both Britain and Japan have the most sophisticated and successful PFI projects

Promoting competitiveness

The UK government used several different methods at the same time to increase efficiency, which included:

- cutting down the budget to local governments, which disengages them from providing care service independently, and pushes them to support the BOT/PFI policies;
- encouraging volunteer departments to get involved by increasing budget subsidies;
- adding inducements to non-governmental corporations and giving full-refunds to those who choose non-government run nursing houses/senior centres;
- reducing the market competitiveness of government-run service facilities, which means no allowances will be rewarded.

The above methods are all for raising private companies' market competitiveness.

Taiwan should also adjust its policies to varying conditions. For the past few years, the authorities all have committed themselves to assisting non-government entities in handling care services' establishment and facilities, and transforming foreign labour manpower agencies to be locally stationed. As such, the authorities have shown their desire to stimulate competition in the industry.

Encouraging public-private collaboration

In order to enhance the evaluation mechanism and induce local government to collaborate with private care service companies, the UK government has used two main methods.

First, to control the local government's financing resources, the UK government applied the so-called "85% Act" on the subsidy to local government. This means that local government should have 85% of the subsidy applied to supporting private care service-related companies.

Second, the UK government has performed evaluations on ranking the social services made by local governments since May 2002, and passed the best value evaluation policy in April 2000. This helps to supervise local governments in putting the central government's goal into action and in reaching the estimated cost-effectiveness.

Above all, the aim is to induce local governments to collaborate with the central government's policies, to encourage private enterprises to run care services and also to avoid the previous local government's failures in the execution of policy.

Concerns

However, with these non-governmental run limitations, several issues of concern may occur.

As an example, there were quite a lot of problems with bad care service in the 1970s and 1980s in the US due to costs being cut to attain a marginal profit.

Additionally, opportunistic business practices led many to provide only selective service items with high profit margins and they failed to provide other items which had smaller profit margins. This eventually had a cream-skimming effect of only providing services to higher-income individuals and to those who could afford the services to the exclusion of lower-income individuals.

To avoid this problem, the Taiwan government has adopted legal and systematic methods to control the service quality and guarantee the users' rights, including setting up service standards, a third party supervision system, and an appeal system.

Additionally, balancing resources between facility and service-at-home, and adjusting service content according to users' actual needs are both areas where private companies should concentrate their efforts.

Bernice Fan, Liang & Partners

Decoding data protection

Taiwan's *Personal Data Protection Act* contains several strict provisions relating to written consent requirements that affect foreign companies, even if they are not registered in the jurisdiction

In Taiwan, the collection, processing, and use of personal data by certain regulated entities had, in the past, been subject to the *Computer-processed Personal Data Protection Act* (CPDPA) passed by the legislature and its Enforcement Rules promulgated by the Ministry of Justice (MOJ). On April 27 2010, the legislature passed a bill to amend and rename the CPDPA as the *Personal Data Protection Act* (PDPA). The PDPA and the MOJ's amended Enforcement Rules took effect on October 1 2012 and apply to any person (including any government agency, individual and/or legal entity) that collects, processes or uses personal data in Taiwan. The companies that are subject to the PDPA include those incorporated or registered in Taiwan (including any foreign company which has established a branch office in Taiwan). In addition, any foreign company that collects, processes, or uses an individual's personal data within Taiwan is subject to the PDPA, regardless of whether this foreign company is registered in Taiwan.

Written consent requirements

The PDPA sets out different statutory grounds for legitimate collection, processing and use of personal data. A data subject's written consent is one of the statutory grounds. The written consent requirement can be dispensed with if (i) the collection and processing are specifically permitted by law; (ii) the company and the data subject have entered into or are negotiating a contract; (iii) the data is already in the public domain due to disclosure by the data subject or in a legitimate manner; (vi) the collection and processing are for public interest; or (v) the data has been collected from a source accessible to the company, unless the interest of the data subject takes priority over that of the company.

In addition, a company may use personal data for the specific and lawful purposes for which the personal data has been collected. A company may not use personal data for any other purpose, unless it has obtained the data subject's written consent. The written consent requirement can be dispensed with if (i) such use is specifically permitted by law; (ii) it is to further public interest; (iii) it is to prevent any injury or damage to human life, body, freedom or property; or (iv) it is to prevent any third person's material right or interest from being prejudiced.

Formalities

The CPDPA does not prescribe formalities for the granting of written consent. In the past, a company may even rely on a data subject's deemed consent if it notifies the data subject in writing that it will collect, process or use their personal data for any specific purpose, and the data subject does not object to such collection, processing or use within a reasonable period of time specified in the notification.

Unlike the requirements under the CPDPA, the written consent required under the PDPA is an express and informed consent. In addition, the written consent to the use of personal data for a new purpose should be given separately. A contractual clause in a contract does not constitute the written consent required even if the contract is signed by the data subject. Only a written consent given by a data subject under the following circumstances will be considered a valid consent.

Direct collection

If a company collects personal data directly from a data subject based on their written consent, the company must first notify the data subject of the following information: (i) the company's identity; (ii) the purpose(s) for which the data subject's personal data is collected; (iii) the type of personal data to be collected; (iv) the term, place, and method of use and the people who may use the personal data; (v) the data subject's rights to (a) access his/her personal data to check and review it, (b) have a copy of the personal data, (c) supplement or revise the personal data, (d) demand the company to cease its collection, processing or use of the personal data, and (e) demand the company to delete the personal data; and (vi) consequences of the data subject's failure to provide the required personal data. If a company does not fulfil the aforementioned

If a company does not fulfil the notification requirement before it obtains a data subject's written consent, it is possible that such written consent will not be considered valid later on

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Lee and Li

Ken-Ying Tseng formed and leads the Personal Data Protection Practice Group at Lee and Li. Since the *Personal Data Protection Act* was amended in 2010, she has been frequently invited to deliver speeches on the compliance of new *Personal Data Protection Act* both in Taiwan and overseas and has published numerous articles in local and international publications. She constantly advises clients, mostly multinational companies, on the areas of personal data protection, privacy, data security, cross-border data transfer, telemarketing/e-marketing, sweepstakes, online gaming, and electronic signatures, as well as other e-commerce or internet related matters. Ken-Ying has been nominated as an internet, e-commerce and data protection expert by *Who'sWhoLegal* since 2012. She is also the leader of Lee and Li's Mergers and Acquisitions Practice Group (non-financial sector). She was named a Leading M&A Lawyer by *Asialaw* in 2013 and 2014 and a Leading Lawyer by *IFLR 1000* in 2014.

Rebecca Hsiao
Associate partner
Lee and Li

Rebecca Hsiao is a key member of the Personal Data Protection Practice Group at Lee and Li and practises in the areas of privacy and consumer protection, antitrust and competition law, mergers and acquisitions, securities, and corporate and investment laws. She has constantly advised clients on the compliance of the personal data protection law and delivered speeches on this topic to various government and non-government clients.

notification requirement before it obtains a data subject's written consent, this written consent will not be considered valid.

A company is exempt from the above-mentioned notification requirement if (i) it is specifically permitted by law; (ii) the collection is necessary for the performance of job duties provided by law or fulfilment of legal obligations; (iii) notification will prejudice a third party's material interest; or (iv) the data subject already has this information.

Indirect collection

In principle, if a company collects personal data of a data subject indirectly from a third party or other sources based on any of the grounds other than the data subject's written consent, it may inform the data subject of the source of the data and the information stated above in (i) to (v) when it uses such personal data to contact the data subject for the first time. However, if a company collects personal data of a data subject indirectly from a third party based on the data subject's written consent, the company would need to explore a method to fulfil the above notification requirements at the time when the data subject grants the written consent. The local practice is still evolving in this regard. If a company does not fulfil the notification requirement before it obtains a data subject's written consent, it is possible that such written consent will not be considered valid later on.

A company is exempt from the above-mentioned notification requirement if (i) any of the above exemption situations stated in 2.1. exists, (ii) the data subject has disclosed such information by himself/herself or when the information has been publicised legally; or (iii) the notification may not be provided to the data subject or his legal representative.

Use for other purposes

If a company uses the personal data for any other purpose, it must first obtain the data subject's separate written consent. The company must first notify the data subject of the following information: (i) the other purpose(s), (ii) the scope of the use for the other purpose(s), and (iii) how the data subject's rights and/or interests will be affected if he/she chooses not to give his/her consent. If a company prepares a written consent for a data subject to sign in a document that contains other contents, the above-mentioned notification information must be stated in an appropriate place in the document so that the data subject may easily become aware of such information before he/she confirms and consents to the same in writing.

Written consent for marketing

If a company and a data subject (e.g., its client) entered into or are negotiating a contract, the company would anticipate that it may use the data subject's personal data for future marketing purposes. However, the scope of such marketing is unclear. The MOJ (the authorities in charge of establishing the Enforcement Rules to the PDPA, which define and clarify, among others, terms under the PDPA) has taken a very narrow view on the scope of such marketing, ruling that the products and services that a company promotes for its client should be reasonably related to the contract.

For example, a hotel may collect and process its clients' personal data, when they check in or make online booking registrations, for the purposes of providing room services and fulfilling the hotel's other contractual obligations. The hotel may use the clients' personal data for such purposes, for example, to provide room services. However, according to the MOJ, if the hotel then uses such personal data for analytical or marketing purposes, it will be deemed to be using the personal data for other purposes, and thus must first obtain the clients' written consent. The MOJ emphasised that such a written consent must be an informed written consent. In other words, the hotel must notify its customers of the additional marketing purposes, as well as the other notification items as stated above. Also, based on the PDPA and its Enforcement Rules, such a written consent must be a separate written consent. Given the MOJ ruling, any business in a similar situation has to abide by the additional written consent requirement before it uses its customers' data for promotional campaigns or marketing purposes.

Once a data subject expresses their objection to the marketing, the company must immediately cease to use their personal data for marketing purposes

A power supply company in Taiwan sent advertisements of third parties' products and/or services to its clients when issuing electricity bills to them. The power supply company believed that its inclusion of the advertisements in its electricity bills complies with the requirements under the PDPA because it had notified the clients that the conducting of registered businesses (including general advertising services) is one of the purposes for which it collects

and processes the clients' personal data. However, according to the MOJ, the power supply company's inclusion of the advertisements of third parties' products and/or services in its electricity bills to its clients based on their power supply contracts does not meet a reasonable expectation of privacy and should not be permitted. The power supply company's inclusion of such third parties' advertisements in its electricity bills to its clients constitutes the use of the clients' personal data for a new purpose other than those for which the clients' personal data had been collected. Hence, the power supply company should have obtained the clients' written consent.

Even if a company has obtained a data subject's written consent for marketing purposes, the data subject still has the right to object to the company's use of their personal data for marketing purpose at any time. Furthermore, when a company contacts a data subject for marketing purposes for the first time, the company must provide the means for the data subject to express their objection and the company must bear any costs or expenses incurred. Once a data subject expresses their objection to the marketing, the company must immediately cease to use their personal data for marketing purposes.

Sharing of personal data

In principle, a company may not share personal data with any third parties for the third parties' marketing purposes or their own benefit, unless the data subject concerned has given written consent. Likewise, a company may not share personal data with its affiliates for the affiliates' marketing purposes or their own benefit, unless the data subject concerned has given written consent.

In a merger, demerger, or assets acquisition transaction conducted in accordance with the *Mergers and Acquisitions Act*, a company may disclose to and provide the acquirer or buyer with the personal data of the data subjects with whom the company has entered into contracts, if the contacts are included in the assets to be transferred by the company to the acquirer or buyer. According to the MOJ, while a company (the seller) may collect, process, and use the personal data based on its contractual relationship with the data subjects, the acquirer or buyer may continue to do the same after the contracts are assigned to it. In these circumstances, the data subjects' written consent is not required.

If a company has legal grounds to collect, process, and use personal data, it may do so by itself or engage a third-party service provider to do the same on its behalf. From the perspective of the PDPA, the service provider will be deemed an agent commissioned by the company and thus its collection, processing, and use of the personal data will be deemed as that of the company. According to the MOJ, a company does not have to obtain a data subject's written consent in order for the company to legitimately outsource the processing and use of the data subject's personal data to a service provider. However, the company must supervise the service provider to ensure that the latter has appropriate security measures in place and acts in full compliance with the legal requirements as if the company is processing and using the personal data by itself.

Time to invest in Taiwan

Mainland investors in Taiwan have plenty of opportunities to succeed, as long as they follow a few key guidelines

After the ban was lifted in 2009, Chinese investment in Taiwan has been steadily growing, both in volume and number. The Cross-Strait Agreement on Trade in Services (Service Trade Agreement) signed on June 21 2013 further broadens the scope available to mainland investors. We believe that entering the Service Trade Agreement has significance well beyond the political posturing generally expected for the two sides' respective domestic audiences, especially taking into account the forthcoming negotiation of trade in goods and the message that further deregulation will be implemented afterwards, which together reinforce our view that mainland investors should move now (if they have not already) to add exposure to this structurally changing economy.

In the first few years since the opening up, most of the mainland investment was quite straightforward, with many mainland investors setting up Taiwan branches or subsidiaries. Recently, in particular in 2013, the records have shown that more investments were conducted by way of acquisition or strategic alliance and the industries involved are no longer limited to trading or general services. For example, in July 2013 the transaction of TPV's acquisition of 9% stake in Chilin, a member of Chimei group and a significant backlight maker, using shares purchased from the existing controlling shareholder was approved; in August 2013, the private placement of Formosa Epitaxy to San'an Optoelectronics, under which San'an Optoelectronics will acquire a 19.9% stake in Formosa Epitaxy, a leading player in the LED industry, was approved; in October 2013, the transaction of Xiaomi's acquisition of all the shares of a Taiwan company to conduct accessories distribution and maintenance and repair services was also approved with certain conditions. As of October 2013, the volume of mainland investment applications has increased 118.43% , compared with the same time last year.

How to invest

It should be noted that mainland investment in Taiwan is still subject to scrutiny and prior approval is necessary. Careful planning and a thorough survey of current regulatory status is necessary.

Authorised by the Act Governing Relations between the People of the Taiwan Area and the Mainland Area, mainland investment is scrutinised by the Investment Commission, Ministry of Economic Affairs (MOEAIC). Investors are required to comply with the Regulations Governing the Permission of Investment by Nationals in Mainland Area (the *Mainlander Investment Regulation*) and apply for investment approvals before implementing their investment plans.

Chinese Investment: What counts?

Two kinds of investment patterns are categorised as mainland investment under the *Mainlander Investment Regulation*: direct investment and indirect investment.

Direct investment refers to the investment made by mainland individuals, entities, groups or institutions (the mainland investor). Indirect investment refers to the investment made by a third area company. According to the *Mainlander Investment Regulation*, a company is a third area company when (1) it is a foreign enterprise incorporated in the jurisdiction other than the mainland and (2) the mainland investor directly or indirectly holds the shares issued by the enterprise exceeding 30%, or has the controlling power over this enterprise.

According to MOEAIC's interpretation, the 30% shareholding should be calculated on the basis of the total capital contribution or the sum of the issued and outstanding shares of the common stock and preferred stock, excluding stock options, call options, bonds or other instruments that can convert into shares of common stock of the Third Area Company, and if the Third Area Company intending to invest in Taiwan or any company named in the shareholding structure of this Third Area Company is a company listed on a foreign stock exchange or traded over-the-counter, the percentage of the shareholding or the total capital contribution should be calculated by the number of shares listed in the roster of shareholders as of a specific record date as determined after the latest close period.

A mainland investment is permitted only when all of the target company's business falls within the positive list

A company is deemed to have controlling power if it (1) has control over the majority of the votes pursuant to an agreement with other investors; (2) has control over the financial, operational, and/or human resources policies pursuant to the law or regulations or contractual commitments; (3) has the right to appoint or discharge a majority of the directors on the board (or its equivalent organisation), which has control over the company's operations; (4) has control over the majority of the votes of the directors on the board (or its equivalent organisation), which has control over the company's operation; or (5) has other controlling power as defined under the Statements of Financials Accounting Standards No 5 and No 7 published by the Accounting Research and Development Foundation.

MOEAIC's supervision is continuous, i.e. the *Mainlander Investment Regulation* applies every time when the control or the shareholding of a foreign company changes. Therefore, for example, if a foreign company which makes investment in Taiwan is poised to be acquired by a mainland investor, this mainland investor is required to obtain investment approval before closing the deal.

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Ying-Yi Lee specialises in corporate and securities-related laws. She advises on a wide range of corporate transactions, including mergers and acquisitions, divestitures, leveraged buy-outs, tender offers, taking private, joint ventures, equity investments and complex restructuring transactions. She has represented sellers and buyers in domestic and cross-border deals and has advised clients including private equity institutions and investors. Her extensive experience includes the structuring of leveraged buy-outs and the multiple steps of acquisitions and the related corporate governance and shareholder issues.

Ying-Yi's experience also spans a wide variety of securities law matters and she has assisted companies in numerous securities transactions, including issuance of depositary receipts, overseas convertible bonds and IPOs. Ying-Yi studied at New York University Law School and earned her LLM degree in 2003. Ying-Yi is now admitted to practise in Taipei.

Jakob C T Huang
Associate
Chen & Lin

Jakob C T Huang joined Chen & Lin in August 2008. He left for the LLM program at Penn Law and returned to the law firm in January 2013. Before going to the US, Jakob handled litigation for Chen & Lin in various fields. At Penn Law, he studied corporate, securities regulations, M&A and white collar crime. He also completed a certificate programme at the Wharton School. With the arrangement of Chen & Lin, Jakob went to White & Case for training, and exposure to the US practice of patent and antitrust litigation. He is now working as a member of transaction team in Chen & Lin, handling cross-border M&A, IPOs and banking & finance transactions.

In addition to obtaining the Taiwan lawyer licence, Jakob passed the bar exams in New York State and PRC. He is a native Mandarin speaker and proficient in English, German and Japanese.

Also, any change in the mainland investor's shareholding in or control over a third area company will trigger that mainland investor's obligation to report this change.

Investment categories: What to invest?

The Mainland Investor Rule provides a positive list with respect to the items allowed to be invested by mainland investors. There are 408 items in the list, including 204 categories of manufacturing, 161 service industries and 43 items of public facilities that are open to investment from the mainland.

A mainland investment is permitted only when all of the target company's business falls within the positive list. In other words, a mainland investor is unable to invest in a company as long as such company has any business item that is not included in the positive list.

In addition, MOEAIC imposes further restrictions, such as ceiling percentage shareholding, minimum investment amount or the scope of investment, on some of the investment categories. Also, the investment application for some specific sensitive industries is reviewed on a case-by-case basis and the applicant may not hold controlling power (the same definition mentioned above applies) in the target company. It is important for the Mainland Investor to check the details of the positive list before starting the evaluation of an investment plan.

The *Mainlander Investment Regulation* does not differentiate investment in a public company from a private company, so the same standard of review applies when it comes to the investment in a Taiwan listed company. However, if the invested target is a listed company and the mainland investor is a Qualified Domestic Institutional Investor (QDII), this investor is able to acquire the target company's shares from the public market without obtaining investment approval. For non-QDIIs, they are still required to go through the application procedure to obtain investment approval in order to acquire the shares of a Taiwan listing company, under which the amount of shares acquired shall be no less than 10% of the total outstanding shares of the invested listing company, according to the Mainlander Investment Regulation.

Mainland M&A activities in Taiwan

The *Mainlander Investment Regulation* also applies to the mainland M&A activities in Taiwan, so investment approval is required if the mainland investor wants to acquire or merge with a Taiwan company.

Under the *Taiwan Mergers and Acquisitions Act*, there are four main types of M&A available under the Mergers and Acquisitions Act. These are: (1) a merger, under which the transacting companies consolidate into one entity and the surviving company(ies) assume all the rights and obligations of the desisting company(ies), (2) asset or business acquisition, under which the acquirer purchases and acquires all or substantially all of the business or assets of the target, (3) share swap, under which 100% of the shares of the target are transferred to the acquirer in exchange for the shares newly issued by the acquirer, and (4) spin-off (demerger), under which the target transfers part or its entire business unit which can be operated independently of the acquirer and in return for which the acquirer issues new shares to the target or to the shareholders of the target. The Taiwan government has recently finalised proposed amendments to *Mergers and Acquisitions Act* and will submit the proposal to the legislators. Among other proposed changes, the key differences include an increase of types of deal and form of consideration and introduction of certain minority shareholders protection mechanisms. For example, the form of consideration for share swap and spin-off is no longer limited to shares newly issued and may include cash and other assets.

The deal structure and the form of consideration play a significant role when it comes to the application for investment approval.

To apply for investment approval, the applicant is required to comply with several procedural rules in addition to the substantive requirements

In the case of merger, share swap and spin-off, MOEAIC requires that the acquirer shall be either an operating company (instead of a paper or a holding company) or a multinational corporation. Under MOEAIC's definition, the operating company is a company that is in actual operation, i.e. it is a company that actively manufactures and/or sells commodities or provides services. The word "actively" refers to continuous operation for at least one year and ownership

of substantial fixed assets (such as offices, plants, and machinery equipment), establishment of local business offices, and hiring of local full-time employees; the multinational corporation is a company that has subsidiaries or branches in two or more countries or regions (excluding Taiwan, mainland China, Hong Kong and Macau) that engage in substantial operations.

For example, if a mainland investor plans to set up a Cayman vehicle to acquire a Taiwanese company by issuing new shares in exchange for 100% of the shares of that Taiwan company, such a deal structure would not be blessed by MOEAIC because the Cayman vehicle is neither an operating company nor a multinational corporation (see figure one). However, this application would pass scrutiny if the consideration is cash instead of the Cayman company's new shares (figure two).

M&A checklist

1. Choose the proper investing entity

The selection of investing entity may, among other things, affect tax status. Taiwan has tax treaties with several countries, which provide favourable dividend withholding tax rates and could be taken into account while deciding the investing entity.

2. Check the positive list

As mentioned above, the scope of investment open to mainland investors is limited to the categories included in the positive list and further restrictions are imposed on certain categories. Mainland investors are advised to check the positive list before making any investment decision.

Using a Cayman vehicle to acquire a Taiwanese company

FIGURE ONE

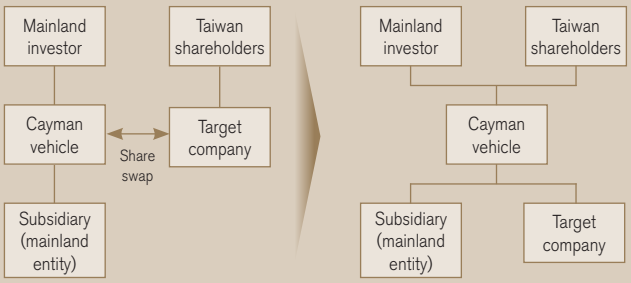
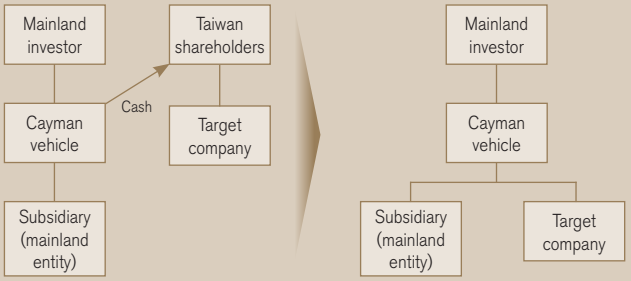


FIGURE TWO



3. Set up the investment structure carefully

The current *Mainlander Investment Regulation* sets out various measures to make investment in Taiwan, from setting up branches to doing M&A deals. Investors should choose the measure that makes economic sense to them. However, they should also be well-informed about the regulatory hurdles under Taiwan law and choose a plausible investment structure carefully to avoid breaking a deal.

4. Prepare for the application forms

To apply for investment approval, the applicant is required to comply with several procedural rules in addition to the substantive requirements. For example, a power of attorney (POA) is required to file the application, so in the event that the applicant is a legal person, it must retain an agent to handle its application; however, though not recommended, if the applicant is a natural person and intends to submit the application in person during the period of his/her stay in Taiwan, the requirement for the submission of the POA can be waived, provided that the applicant visits the MOEAIC during working hours and brings their identification certificate and signs the application form in person.

5. Seek professional advice

To ensure an investment plan is plausible, mainland investors are advised to seek professional advice, including lawyers and accountants, in advance. This will help them to obtain the maximum commercial benefit within the legal boundaries.

Even if the story of Taiwan's openness and deregulation of cross-strait investment restrictions is nothing new, that does not mean that investors have missed the opportunity. Quite the contrary, we see forces that should help support investment opportunities over the coming years. We also believe investors have ample means to take advantage of this opportunity and receive substantial rewards.

New design patent practice explained

Design patents in Taiwan are becoming broader. This has opened up new opportunities for IP owners who want to maximise the protection available to them

Significant changes have been made to design patent practice in Taiwan since January 1 2013. In particular, partial designs can now be protected, and protection by associated design patent has been replaced by derivative design patent. Furthermore, icons and graphical user interfaces (GUI) have become patentable subject matter, and a set of designs can be included in a single design application.

Partial design

Under the new patent practice, a design patent application can focus on either a complete or partial design. Under previous patent law, a patented design had to consist of configurations, patterns and colours or combinations thereof of a complete article. In other words, if the patented design embodied in a complete article contained multiple features of which some were novel and others were conventional while a counterfeit only copied the novel features (but not all the features) of the design, such counterfeiting might not fall within the scope of the design patent. To prevent infringers from evading liability by using the above strategy, the concept of "partial design," which allows for focusing only on a design's novel feature(s), has been added to the new patent practice as a patentable design.

Expressing a partial design in drawings

Under the new design patent practice, solid lines are typically used to illustrate claimed portions of an article, and phantom or broken lines are used for the unclaimed portions of the article. Alternatively, colouring certain areas of an article with grey scale or translucency can be used to indicate the unclaimed portions of the article. Furthermore, a statement such as "the unclaimed portion is illustrated in broken lines" should be included in the design description section of the specification.

It is required that the drawings or photographs contain a sufficient number of views to clearly and sufficiently disclose the claimed partial design so that persons skilled in the art can understand the claimed design and be enabled to practice the same. Those views of an article that do not show the claimed partial design can be omitted.

Partial designs can be classified as (1) a component of an article (see the base of the indication light as shown below in figure A); (2) a partial feature of an article (see the surface patterns on the running shoe as shown below in figure B and the contours of a remote control as shown below in figure C); and (3) multiple components/features of an article (see portions of a desk lamp as shown below in figure D and portions of a package as shown below in figure E). In cases containing multiple components/features of an article as shown in figures D and E, even though there is more than one component/feature, they should be considered as a whole, and treated as a single design. The two or more components/features of such a design cannot be separately enforced.

Interpreting a claimed partial design

The scope of a partial design is based on the claimed portion (in solid lines) shown in the drawings. The unclaimed portion (in broken lines) can be used to interpret the article that embodies the partial design or the relationship between the environment surrounding the claimed portion and the claimed portion itself. The specification of a design patent application can be referenced for interpreting the partial design if necessary.

Derivative design patents

It is required when applying for a design patent that an application be filed for each separate new design. Therefore, including more than one specific design/embodiment in a single design application is not allowed. Based on the first-to-file principle, when there are two or more identical or similar design applications independently filed, only the first application can be allowed. For two or more similar designs owned by the same person, a design patent application can be filed to cover one of the designs, and derivative design patent applications can be filed to cover the rest. Such an arrangement is an exception to the first-to-file principle.

The *Patent Infringement Assessment Guidelines* issued by the Intellectual Property Office in 2004 provide that the scope of a design patent covers any design that is the same as or similar to the design shown in the design patent. Therefore, if two designs are the same or similar, their patent rights overlap and one of them (if they are filed on different dates, the latter) is prohibited from being patented according to the first-to-file principle. If the same or similar design patents are owned by the same applicant, this is called double patenting. A derivative design by its definition is similar to the original design. Thus, the derivative design patent system, as an exception to the first-to-file principle, seems to solve the double patenting problem of design patents. It is well understood that double patenting is prohibited so as to prevent the same applicant from prolonging the term of the same exclusive patent right from an earlier filed patent application. Therefore, under the new patent practice the

Partial designs

Figure A

Figure B

Figure C

Figure D

Figure E

term of a derivative design patent expires when its original design patent expires.

An independent right

The patent right of a derivative design patent can be enforced independently from other related design patents, and the derivative design patent has its own scope of similarity (protection). The scopes of similarity of the original design patent and the derivative design patent should overlap in their shared core design concept. Accordingly, a derivative design patent is independent from, but expires on the same date as, its original design patent. The same person cannot file a derivative design patent application in which the design is similar to that in another related design patent application but dissimilar to that in the original design patent application. The rationale here is to avoid unreasonably extending the original design patent's scope of similarity.

Furthermore, the filing date of a derivative design patent application cannot be earlier than that of the original design patent application. A derivative design patent application also cannot be filed after issuance of the original patent application. In other words, a derivative design patent application shall be filed while the original patent application is pending. A design patent application can be converted into a derivative design patent application and vice versa. The filing date of the converted patent application is the same as that of the design application before the conversion.

Different types of derivative designs

As mentioned above, for similar designs, one can be designated as an original design and the others as derivative designs. The term "similar designs" means: (1) similar designs embodied in the same article (see figures F and G below in which the two stoves differ only in their number of components); (2) identical designs embodied in similar articles (see figures H and I below in which the same design (handle) is respectively embodied in a spoon and a fork); and (3) similar designs embodied in similar articles.

Derivative designs

Figure F

Figure G

Figure H

Figure I

Dealing with priority documents

Under the new patent practice, to meet the one-embodiment requirement, if a priority document (such as a US priority document) contains multiple embodiments, the applicant for the corresponding Taiwan patent applications needs to decide whether to file one embodiment as the original and the rest as derivative design patent applications of the original, or to file separate independent design patent applications for each embodiment at the beginning. Alternatively, the applicant can wait until an office action has been received to respond (i.e. by designating one embodiment as the parent and filing divisional applications covering the rest, or by choosing one as the original and converting the rest to derivative design patent applications).

Although such decisions should be made case-by-case, it is generally advisable to initially file an original and derivative design patent application unless meeting the six-month priority claim requirement is important and there is insufficient time to arrange for such derivative design patent applications. Since a derivative design, like a regular design, has its own scope of similarity, there is no advantage in initially filing separate regular design patent applications for each embodiment. The terms of the separately filed design patent applications will be the same as those of the original and the derivative design applications. Furthermore, if the applicant chooses to file separate regular design patent applications, the examiner may issue an office action (responding to which would incur additional costs) requiring one design patent application to be designated as the original and the rest to be converted into derivative design patent applications if the examiner considers the designs insufficiently distinctive from each other.

Icons and graphical user interfaces

Computer-generated icons and graphical user interfaces (GUI) applied to an article are patentable subject matter under the new

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Michael is a counselor in the patent department of Lee and Li. He focuses his practice on patent law, with a particular emphasis on patent infringement assessment, patent validity assessments and design patents. Michael has many years of experience in patent litigation support, patent invalidation/cancellation actions, administrative suits and patent prosecutions in both China and Taiwan. He also drafts Chinese and English patent specifications, prepares responses to office actions and conducts patent searches. Michael was admitted to the bar in New York and Massachusetts in 2005. He has also been a patent attorney (agent) in Taiwan and in China since 1998 and 2012, respectively, and recently passed the Chinese bar exam in 2013. Michael periodically publishes patent law-related articles in both English and Chinese in respected local journals such as the *Taiwan Intellectual Property Right Journal*, *Science & Technology Law Review* and *National Science, Taiwan Patent Attorneys Journal* and *Technology Law Symposium*.

Computer-generated icons and graphical user interfaces

Figure J

Figure K

Figure L

Figure M

patent practice. Icons and GUI are a type of graphic interface that allows users to interact with electronic devices through a display or screen. Unlike traditional patentable design subject matter in which a design is permanently embodied in an article, icons and GUI appear only when the concerned electronic devices are powered on. The term "computer-generated icons" usually refers to a single graphic unit (see figures J and K above), while GUI usually refers to a complete view composed of a plurality of graphic units and a background image (see figures L and M above).

Icons and GUI can be expressed in a static or dynamic form (changeable graphic image design). The latter means that during usage, the appearance of the design varies. For example, when the user moves the cursor to pass through or clicks on an icon or GUI, the appearances vary. For icons or a GUI expressed in a dynamic form, two or more views showing the icons/GUI before and after the change, and/or the key view(s) showing the progresses of the change are required. The sequences of the views showing the dynamic form also need to be indicated in the design description section of the specification. The different views showing different statuses of the icons or GUI should be considered as a whole, and together represent a single design. They cannot be enforced separately.

Design applications involving icons or a GUI can be given titles such as "Icons of screen" or "GUI of display" or, more specifically, "Icons of cell phone" or "GUI of ATM". However, the terms "icons" or "GUI" themselves cannot serve as the title of such an application because they would be considered too vague to reflect the claimed design.

A set of designs

Two or more articles under the same classification and which are customarily sold or used in a set can be filed in a single design application. The term "classification" refers to the main classification of an article's Locarno International Classification. A set of designs is considered as a whole, and each individual design cannot be separately enforced.

Examples of articles that are customarily sold in a set include a tea set (comprising tea cups, a tea pot and a tea tray), a tableware set (comprising knives, forks and spoons), and a hand tool set (comprising drills, wrenches and screwdrivers). Examples of articles that are customarily used in a set include: a jewellery set (comprising finger rings, necklaces, and earrings), a stationery set (comprising pencils, erasers, rulers and a pencil box), and a stereo set (comprising an audio player, speakers and an amplifier).