



China

Legal Provisions

Compiled by:

WENFEI beijing representative office

Beijing, October 2007

Foreign Direct Investment in China

Foreign investments in the People's Republic of China ("China", "PRC") may be divided into direct investment and other means of investment. The direct investment, which is widely adopted, mainly includes Sino-foreign Equity Joint Ventures ("EJV"), Sino-foreign Cooperative Joint Ventures ("CJV"), Wholly Foreign-Owned Enterprises ("WFOE") and some other vehicles for special purposes. The three are generally also referred to as Foreign Invested Enterprises ("FIE").

Equity Joint Venture

The key distinguishing feature of an EJV is that profits are distributed and risks allocated in proportion to each party's contribution to the registered capital of the limited liability company. In other words, the risk and profit allocation between the JV partners may not deviate from the proportion set out in the original investment. EJVs are established in the legal form of a limited liability company. In general the capital contribution from the foreign party shall not be lower than 25%.

Cooperative Joint Venture

A CJV may either be a "legal person" (PRC terminology) of limited liability, or a non-legal person with unlimited liability in accordance with PRC Civil Law.

The key differentiating features of a CJV compared to a EJV are: a) The parties may allocate profits and losses as they choose rather than in proportion to their respective contributions to the registered capital, b) the foreign party may apply to recover its investment capital during the term of the venture (in some cases before payment of income tax).

The flexibility inherent in the CJV makes it particularly suitable for certain types of investment. The foreign party may apply to recover its investment during the term of the venture with the funds derived from depreciation of fixed assets, amortization of intangible assets, and so on.

Wholly Foreign Owned Enterprises

The advantages of the WFOE limited liability company (i.e. a 100% subsidiary) are obviously the 100% management and financial control over the enterprise. In addition, from a practical point of view, a WFOE may be established faster.

Opting for WFOE finally helps avoid potential disputes with PRC partners.

Comparison between JV and WFOE

The major reason for opting for a JV structure rather than a WFOE is the desire of the foreign party to be active in a restricted industry or business area where a WFOE is not yet (see further below) permitted.

In addition, a JV may have the side advantages that the foreign investor may need to invest less capital and seeks to diversify risks or costs to its PRC JV partner. In addition, certain assets of the PRC partner may be valuable to the foreign investor (land-use rights, equipment, infrastructure, trained staff, marketing or distribution channels, etc.) Further, connections from the PRC partner in securing the approval of misc. licenses, getting preferential government treatment, fending off government and administrative interventions might constitute other reasons.

Based on the WTO commitments, more and more industries will be open for 100% foreign investment (WFOE) in the coming future.

In addition to the above-mentioned three major types of foreign direct investment, foreign investors may, depending on their business objectives or operation scale, and subject to restrictions and more detailed regulations expected in the future, upgrade the EJV to a foreign invested company limited by shares, to be listed in a PRC stock market.

Representative Office

Opening a representative office is sometimes reckoned to be the easiest way to establish a commercial presence. However, such rep offices may only be engaged in liaison, marketing or other non-profit-generating activities. This principle is not observed in case of rep offices of foreign service providers such as foreign law firms, accounting and tax firms, whose rep offices in China do conduct profit-generating activities and are therefore subject to corporate income tax.

Other Types of Market Presence

Other types of market presence in the PRC such as compensation trade, processing and assembling by providing materials may enjoy considerable tax preferential treatment in terms of customs duty and VAT, as the PRC industry policies encourage export. However, finished products can only be exported and may not be sold within China. Sales of those products in the PRC domestic market will disqualify the foreign investor for the above-mentioned tax preferential treatment.

Foreign Invested Holding Company

To create a comprehensive vehicle for various types of investment and centralize service functions in the PRC, foreign investors may also establish foreign invested holding companies in the PRC. The relevant regulations newly modified expand the scope of services that a foreign invested holding company may provide its affiliates in the PRC with, which may help rationalize the organizational structure and improve the efficiency of its investments in the PRC. The modification has also alleviated the restrictions about the investment methods available to the foreign invested holding companies in that it allows such companies to make strategic investment in domestic listed companies.

Developments since China's WTO Accession

Upon China's entry into WTO and in accordance with its WTO commitments, China made significant amendments in laws and regulations and promulgated new regulations related to direct foreign investment, and it continues to open up related restrictions.

The latest "Catalogue for the Guidance of Foreign Investment Industries" encourages foreign investment to flow into target industries, for example, agriculture, resource development, infrastructure construction, and export and high-tech industry. However, the government continues to restrict foreign investment in many industries and industry sectors which are considered strategic.

Within the strategy of development of the West of the PRC, the government has enacted the "Advantageous Industries Catalogue for Foreign Investment in Middle and Western Regions" to implement preferential policies for foreign investment in the Western regions.

Future Tendencies

China declares that it will continue to improve the political and legal environment for foreign investment, and to enhance quality and transparency of all administrative levels. China is further expected to continue to improve its legal system, subject to ongoing reforms.

Industri-wise, more and more emphasis have been laid on the factors about resource efficiency, environment protection and safety production, with a series of relevant laws & regulations and national standards being promulgated to ensure the national industry policy is adhered to.

Responsible Authorities

The Ministry of Commerce (MOFCOM) is the central government authority that examines and approves the establishment of FIEs with foreign contributions exceeding certain amounts, or engaged in certain restricted business areas, or in businesses subject to quotas and specific licenses. The responsible division within MOFCOM is the Foreign Investment Administration.

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CUSTOMS AND FOREIGN TRADE SYSTEM

PRC Customs System

Customs Clearance

The current customs system is based on PRC Custom Law and regulations on the related Import and Export Tariffs, the latter of which is amended annually to provide a detailed and updated list of tariffs.

The PRC customs duty includes Most-Favored-Nation (MFN) duties, duties subject to territorial trade treaties, special preferential duties, common duties and quota duties, which will apply depending on the status of the country in which the imported goods are produced.

Customs clearance must be applied for to the customs within a certain period of time (generally, within 14 days after the declaration of arrival of imported goods in China for import customs clearance and within 24 hours before the arrival of goods to be exported in customs supervision area for export customs clearance). While applying for customs clearance, the applicant shall submit a series of documents including import license (if applicable), commercial invoices, bill of lading, packing list or purchase contracts, certificate of origin and commodity inspection certificate etc.

Processing Trade

Goods imported for processing trade (that after being finished in the PRC will be re-exported) are not subject to custom duties. However, FIEs, which intend to be engaged in processing trade shall handle the procedures of record keeping at the customs and obtain a registration manual for processing trade.

Bonded Zones

In principle, goods shipped into bonded zones are not subject to import customs duty and import VAT, as they are not deemed imported. These import customs duty and VAT will become payable only when they are transported into areas that are within the PRC but outside of the bonded zones. Furthermore, products that are manufactured in the bonded zones are exempt from export duty while being exported. Consequently, bonded zones are used mainly for foreign trade, logistics, warehousing and processing trade.

VAT Refund

FIEs that export its goods manufactured in China can apply for VAT refund on a monthly basis at the respective customs. However, to qualify as a VAT tax payer and VAT refund, local approval authorities in charge of foreign direct investment may set certain requirements for the registered capital of the FIEs. Note that VAT refunds in the PRC can be subject to considerable time-lags.

Future Tendencies

China will continue to reduce its customs duties in line with its WTO commitments. By the beginning of 2005, the general level of tariff of industrial products in China had already decreased to less than 10%. China shall further implement the Agreement on Customs Valuation under the WTO.

Responsible Authorities

The State Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) is responsible for the inspection of imported goods whereas the Customs General Administration is the competent authority for supervision and control over import and export and collection of customs duties and import VAT.

AQSIQ

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PRC FOREIGN TRADE REGIME***Overview and Recent Developments***

The PRC foreign trade regime rests primarily in the PRC Foreign Trade Law, which has been amended in light of the WTO accession. The new Foreign Trade Law has come into effect as of July 1, 2004. In comparison with the former, highly restrictive PRC Foreign Trade Law, the new law contains the following major amendments:

- The scope of foreign trade operators has been broadened to individuals.
- No more administrative approval is required for foreign trade operators engaged in goods or technology import and export. Foreign trade dealers are merely required to register for record keeping.
- Import and export automatic licensing systems are brought into conformity with WTO procedures.
- Trade investigations and trade remedies are provided to achieve a fair foreign trade order.

While FIEs in China seeking to acquire export and import rights used to be subject to considerably high requirements with regard to capital contributions and previous business records by the foreign investors, the newly promulgated ***Regulations on Foreign Investment in Commercial Areas*** has substantially lowered the threshold for foreign invested enterprises to obtain import and export rights, as registered capital of such foreign invested commercial enterprises now only needs to meet the minimum requirements set forth in the PRC Company Law. Nonetheless, the procedures for establishment of such foreign invested commercial enterprises currently still entail further clarification, and which are expected soon.

Future Tendencies

The new Foreign Trade Law provides a legal framework that will entail future amendments. The State Council and the administrative agencies will promulgate implementing rules and regulations and amend the existing ones. Understanding those imple-

menting rules and regulations will be necessary to take advantage of the deregulated trade regime and the related business opportunities in the near future.

Responsible Authority

The Ministry of Commerce (MOFCOM) is the state organ in charge of administration of foreign trade. The responsible division at MOFCOM is Department of Foreign Trade. (MOFCOM contact information see above)

TAXATION

Major PRC taxes affecting foreign investors

Value Added Tax ("VAT")

VAT currently applies to all individuals and enterprises engaged in supplying goods or rendering specified services or in importing goods (not services). Provision of services that are not covered by VAT may be subject to Business Tax (see below).

The standard VAT rate is 17%, except in relation to agricultural supplies, water, gas and central heating where a lower rate of 13% applies. VAT rate for small-sized enterprises ranges from 4% to 6%, however, the taxation basis is the entire transaction amount.

Business Tax

Business Tax is a local tax on business activities, including services not covered by VAT, the transfer of immovable property as well as intangible property within China. The rates of tax vary from 3% to 8%, except for the entertainment business where rates may be as high as 20%. No credit is allowed of VAT against Business Tax. A Business Tax of 5% will also be imposed on rep offices of foreign enterprises in certain industries such as law firms, accounting firms and tax consulting firms and cost-plus basis rep offices etc.

Foreign Enterprise Income Tax

Prior to 1 January 2008, Foreign Invested Enterprises (FIE) and domestic enterprises are taxed under two different regimes. FIEs and foreign enterprises are subject to the foreign enterprise income tax, the rate of which is lower than the respective rates for domestic enterprises. However, the new Chinese Enterprise Income Law unifies the two different regimes, and the Income Tax Law of the People's Republic of China on Enterprises with Foreign Investment and Foreign Enterprises will be abolished as of 1 January 2008.

The newly unified tax rate of enterprise income is generally 25%, small enterprises with less profit enjoy a rate of 20%, and high-tech enterprises encouraged by the State enjoy a preferential rate of 15%.

Enterprise income tax adopts the classical system whereby profits distributed by a company in the form of dividends will then also be subject to individual income tax in the hands of individual shareholders.

Income derived in the PRC (e.g. dividend, interests or royalties) by a foreign company with domicile outside the PRC may be subject to Enterprise Income Tax. Reductions may apply in case of bilateral treaties (from 20% to 5% or 10%).

Individual Income Tax

There is no system of personal deductions, though a standard monthly deduction is allowed for some income (such as employment income) and specified deductions may be made for some types of income. Each individual is considered to be a separate taxable person, and there is no aggregation of the income of, or joint taxation of, spouses.

Income is taxed at different rates depending on the nature of the income. Whereas wage income, business income, and management fees are subject to progressive taxation, some other types of income such as remuneration for professional services and rent, royalties, interest and dividends are taxed at a flat rate.

With regard to the employment income, residents of the countries or regions having concluded bilateral treaties with China will generally only be taxed in China for China-related income, as long as they stay in China for less than 183 days and the income is not paid by a PE of a foreign enterprise in China.

Main Other Taxes

Consumption tax, agriculture tax, stamp duty, deed tax, land appreciation tax, urban property tax, vehicle and vessel use tax, slaughter tax, tax on tonnages of ships, vehicle purchase tax and resource tax.

Tax Incentives for Foreign Direct Investment

Some main criteria for FIEs to enjoy tax incentives are as follows:

- Only designated industries are eligible for tax incentives, e.g. production-oriented, advanced technology-oriented or export-oriented, etc.
- The location in which the enterprise is established (or going to be established) is relevant. There are different special zones where reduced tax rates may apply.
- The operating period of the enterprise must be considered (e.g. more than 10 years for production-oriented enterprises to enjoy tax holidays).
- Local governments may require the investment to reach a certain amount.

Tax incentives are mainly available for corporate income tax (two-year tax holiday followed by three years of 50% deduction starting from the first profit-making year), import duty and VAT (imported equipments of qualified FIEs within the range of their total investment may be exempted) and business tax (might be exempted for high-technology-related services). For the enterprises established prior to 1 January 2008 and enjoying tax incentives according to current policies and rules, the new Enterprise Income Law allows a transition period of five years so that the tax rate for such enterprises will gradually be in line with the new law. The State Council still holds the right to offer additional beneficial policies in some specific cases.

In addition, FIEs also enjoys refunding of VAT if they purchase domestic equipment, i.e. an FIE can apply for the refunding of the VAT contained in the selling price of the domestic equipment it buys, subject to the purchased equipment are used for investment categorized as “encouraged projects” according to “Catalogue for the Guidance of Foreign Investment Industries” and “Advantageous Industries Catalogue for Foreign Investment in Middle and Western Regions”.

Tax Authorities

The State Administration of Taxation (SAT) is the Ministry of Finance's department which implements the tax law. It is situated in Beijing and has many branch offices throughout the country. In addition to local SATs, there are local tax authorities responsible for collecting and managing local taxes.

With regard to the major tax categories, SAT is primarily responsible for the levy of corporate income tax, VAT and consumption tax whereas local tax administrations are mainly responsible for the levy of business tax and individual income tax. However, for the sake of efficiency, they may also collect each other's taxes upon mutual request.

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CAPITAL MARKETS

Overview

Since their opening over 10 years ago, China's capital markets are now best described as emerging. The WTO also opened the door to foreign participation in China's capital markets. A number of new regulations issued since 2002 have made it possible for foreign firms to establish joint-venture fund management companies as well as securities companies. In addition, a Qualified Foreign Institutional Investor (QFII) scheme was introduced to permit major foreign financial institutions to invest directly in the domestic bond and equities markets. There is a general assumption in the market that China will continue to liberalize its capital markets.

Fund Management Companies

Current regulations limit foreign participation in fund management companies to a maximum investment of 33 percent. The regulations, however, permit this stake to increase to 49 percent in 2007, but make no provision for further increases. Despite this limitation, several joint-venture fund management companies have already been established in the expectation that, over time, foreign partners will be able to assume majority control.

Securities Companies

Regulations limit foreign participation in the domestic securities industry to joint ventures, with a maximum foreign shareholding of 33 percent. Although foreign joint-venture securities companies are permitted to underwrite RMB-denominated so-called "A shares", there is no provision for when brokerage licenses will be made available.

Qualified Foreign Institutional Investors (QFII)

In December 2002, QFII regulations were enacted, allowing foreign institutions to invest in the domestic stock and bond markets. As of June 30, 2006, the applications of 36 QFII have been approved, with the total quota amounting to USD7.15 billion.

The Measures on the Administration of Domestic Securities Investment by Qualified Foreign Institutional Investors (QFII) came into force as of October 2006. The Measures provide a better circumstance for QFII investing into Chinese market, and therefore be propitious to QFII to actively participate into reform and development of Chinese capital market. The Measures are also in favor of dispersing financial risks.

Tradable Shares and Non-tradable Shares

There used to be the partition on China's securities market between tradable shares and non-tradable shares. State-owned shares – which usually account for the majority shares in a listed company, were not tradable unless approved by the authorities. Such partition was largely eliminated during the reform starting from September 2005, and as a result of such reform all shares become tradable (subject to a certain locking period) and will be quoted with the same price. Such change obviously would make foreign acquisition much easier than before.

For those listed companies that have already obtained FIE certificates, the foreign shareholders shall keep their shareholdings not lower than 25% even after the expiry of the locking period in order to qualify the companies for tax privileges.

Foreign Strategic Investments to Listed Companies

As per the Administrative Measures for Foreign Strategic Investment to Listed Companies of 31st December, 2005, a foreign investor may, by way of subscribing to private placement of A shares or entering a share transfer agreement with other shareholders, make strategic investment to a listed company. Private placement of A shares is of more innovative sense in that foreigners in general had no access to A shares and has an edge over other alternatives in that the listed company and its public shareholders may benefit from the capital increase.

Acquisition of domestic enterprises and FIEs

The **Provisions on Acquisition of Domestic Enterprises by Foreign Investors** which came into effect on September 8th, 2006 defined the approaches and procedures to acquire the equity or assets of domestic enterprises. All equity acquisitions are subject to the review by Ministry of Commerce (MOFCOM). The Provision for the first time explicitly allows for payment of consideration through stock swaps in acquisition.

The acquisition of an existing FIE is also subject to review by MOFCOM or its authorized branches.

Future Tendencies

The state authorities constantly follow a policy of opening the capital market though they maintain many restrictions considered to be crucial for a sound development in this area. A recently published circular of the CSRC calls on domestic listed companies to reveal information actively which could be interesting for FIEs direct investment in these companies. Listed companies are asked to create an account of their business activities that can attract attention of FIEs and promote a better mutual understanding. In doing so listed companies are supposed to regard especially the needs of small and middle sized investors.

China is currently realizing a share structure reform of state owned enterprises for the purpose of allowing shares to float on the market. But the state will hold a controlling position as shareholder in such enterprises considered to be of crucial interest for the national economic development. Furthermore there was a law released in 2005 regulating management buy outs of small and middle sized current state owned enterprises for the first time. There in is stipulated that in the future managers of these en-

terprises shall stand a fair competition with private bidders. But big state owned enterprises remain excluded from management buy outs.

Governing authorities

China Securities Regulatory Commission (CSRC) is the dominating regulatory body over China's capital market. A recently published draft for the 2nd revision of the securities law envisions to give more rights to the CSRC in order to supervise the capital market but also limits its power to guarantee a fair and lawful use of its rights.

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Foreign Invested Banks

1. Overview

China published its updated Administrative Regulations for Foreign Invested Banks on 11th November, 2006 in order to carry out all its commitments made upon its WTO accession. As of 11th December, 2006, foreign invested banks will enjoy *national treatment* in offering their services in China.

2. Legal Forms of Foreign Invested Banks

The following choices are available for a foreign bank in establishing business presence in China: 1) representative offices; 2) branch banks; 3) wholly foreign owned subsidiary banks; and 4) joint ventures with Chinese banks.

A representative office, though limited mainly to liaison purpose, is important for any foreign banks that newly enter in China's market, because 2 years' presence of such a representative office is the prerequisite for any foreign bank to apply for the opening of any operational branches/subsidiaries in China.

Branch banks and subsidiary banks both have the access to the full range of services like local banks. However, subsidiary banks (incorporated entities) are more encouraged than branch banks (unincorporated) in that branch banks cannot offer RMB services to Chinese natural person customers - except receiving deposits each with a value of no less than RMB 1 million (roughly USD 125 k). A subsidiary bank is required to be capitalized with no less than RMB 1 billion like any other Chinese banks. The fourth alternative is a joint venture with local banks, which now are usually implemented by acquiring shares in some Chinese bank and is preferable in that the existing networks can be utilized. However, such acquisition by foreign banks is subject to the ceiling of 20% shares in one single Chinese bank.

3. Approval Procedures

The establishment of any of the aforesaid business presences has to be first approved by CBRC, the supervisory authority over the banking sector in China.

A two-stage process is imposed by CBRC on any application for opening branch banks and subsidiary banks in China. The Establishment Application shall be first filed and CBRC will decide whether it approves or not within 6 months. Upon physical establishment, the bank should file its Operation Application and CBRC will decide whether to give operation license or not within 2 months.

4. Governing Authorities

China Banking Regulatory Commission (CBRC) is the dominating regulatory body over China's banking sector.

CBRC

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FOREIGN EXCHANGE

Overview

PRC authorities removed most restrictions on foreign exchanges under current account in the year 1997 so that PRC individuals and enterprises can easily purchase and make payment in foreign currencies whenever necessary. However, restrictions under capital account remain to a large extent as they were. Borrowing money from overseas is subject to the strict official examination and approval.

Foreign investors, however, are treated somehow differently. The profits derived from their investments in China (i.e. FIEs), after due taxation, can be freely changed into foreign currencies and remitted abroad. Foreign currencies brought in by foreigners can either be kept by themselves or be sold to or deposited with designated banks. Since July 21 2005 the RMB is no longer pegged to the US Dollar but is free to float according to market supply and demand. From that time the People's Bank of China announces the closing price for each foreign currency traded against the RMB at the end of each working day. This price will be the central parity for trading on the following working day. The RMB is allowed to float to the US Dollar within a band of 0.3 % around the central parity published by the People's Bank of China and shall be adjusted in relation to a basket of major foreign currencies.

Responsible Authority

State Administration of Foreign Exchanges (SAFE) is responsible for the supervision and regulation of foreign exchange related affairs.

SAFE

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Future Tendencies

The recent promulgation of the ***Anti-Money-Laundering Law*** indicates the government's stand to attack money laundering and safeguard its foreign exchange order. The definition of the "money-laundering" mentioned hereto shall mainly include illegal drug trafficking, organized crime, terrorist crimes, smuggling, corruption, bribe taking, violating financial management regulations and financial fraud. Such definition is much expanded than before.

According to the Law, all financial and non-financial institutions incorporated within the territory of China shall be responsible for establishing necessary procedures and systems to attack money-laundering. The Law also stipulates that the information such as

commercial secrets gained from movements of attacking money-laundering shall be used only for legal investigation and litigation.

An anti-money-laundering information center shall be established as per the requirements of the Law, and the responsibilities of such center shall be receiving and analyzing the suspicious trading and trading with big amounts.

Where new financial institutions or new branches of existing financial institutions are established, the internal system of anti-money-laundering should be completed. Actual and effective identity information of clients shall be recorded.

As for individual foreign exchange, according to the Detailed Rules for Implementing the Measures for the Administration on Individual Foreign Exchange, the total annual amount shall be the value equivalent to USD 50,000 for each person every year, and the SAFE may make adjustments on the total annual amount in light of the position of payment balance.

The foreign exchange purchased by an individual may be remitted abroad, deposited into his or her foreign exchange savings accounts or carried out of the territory of China in line with the related provisions. Personal foreign exchange income and expenditure under the current account may be divided into business foreign exchange income and expenditure and non-business foreign exchange income and expenditure.

INTELLECTUAL PROPERTY RIGHTS

Overview

Foreign investors are often concerned about the protection of their intellectual property rights (IP rights) in China. In connection with China's accession into WTO in 2001, all three laws regarding trademark, patent and copyright have been amended to bring China's protection of IP rights more in line with the WTO rules. A set of implementation rules and legal interpretations have also been promulgated to strengthen the protection in this area.

Trademarks

By virtue of a series of international conventions, of which China is a signing party, trademarks from the other signing parties of these conventions enjoy the same protection as PRC trademark in the PRC. A foreign trademark applicant from a signing country of the Paris Convention has the priority right to file for trademark protection in the PRC within six months after its filing proper application in its home country. A foreign trademark from a signing country of the Madrid Treaty can extend the protection of its IP rights to China by means of an international registration in Geneva.

Applications for trademark registration by foreign entities must be made to the Trademark Office of the State Administration for Industry and Commerce (SAIC) through one of the officially designated trademark agents authorized to deal with PRC trademark application. A registration is valid for 10 years and may be renewed.

Trademark applications can be lodged for both goods and services. Trademark license agreements shall be registered at the Trademark Office of the respective SAIC upon its signing.

Recently, new procedures for protecting well-known trademarks have been promulgated. However, the procedures provided therein seem to be laborious. Furthermore, the new provisions only grant the status with respect to a specific infringement (the automatic protection of five years against same and similar trademarks of similar products and two years against similar trademarks of dissimilar products have been

abolished with the old provisions). More clarifications need to be made to enable foreign investors to effectively avail themselves of the new procedures.

Patents

Patents in the PRC include invention patents, utility models and design patents. To apply for a patent, foreigners and foreign companies without a permanent residence in the PRC have to involve a licensed patent agent appointed by the Patent Administration Office of the State Council ("Patent Office").

Patent applications are governed by the first-to-file principle. Since China is a member of the Paris Convention, for an application for an invention or utility model patent filed in another country that is a member of the Convention within 12 months prior to the filing of an application in China, the priority date will be deemed to be the prior filing date in the other country. For design patents the prior application must be made within 6 months of the application in China.

The term of protection of patents for invention is twenty years, subject to an annual fee, whereas the terms of protection for utility models and designs is ten years.

Patent-related contracts (e.g. license agreements) shall be registered at the respective Patent Offices within three months after its entering into force. Such contracts involving foreign parties must be registered through above-mentioned agents.

Copyrights and Software

Work produced by foreign persons which is published first in China is protected by copyright. If the work is first published outside China, copyright protection is granted only under bilateral or multilateral agreements.

Furthermore, and unlike Switzerland, copyrights can be registered in China and a corresponding certificate of copyrights can be obtained. The same applies for computer soft-wares. The advantage of such registration is that once a dispute arises or escalates into litigation, the registered copyrights and computer soft-wares are strong evidences for IP rights that could be effectively applied during the litigations.

For something to qualify as a work, it must be a physical reproduction of an intellectual creation in tangible form and it must have originality. Foreign computer software enjoy protection as literary works and do not need to be registered.

The term of protection for copyrights is usually the author's life plus fifty years. The term of protection for computer soft-wares is fifty years starting from the end of the year in which the programme was first published.

Since May 2005 a liability of internet content providers for violation of copyrights by users is stipulated by law. Owners of copyrights can claim providers to remove such content violating lawful rights of the owner. Providers who refuse to do so or know about unlawful content will be charged for fines.

The responsible authority for copyrights-related issues is the State Copyright Administration.

Competent Authorities

SAIC (Trademarks)

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Patent Office

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LAND USE RIGHTS

Overview

In China, the ownership of land belongs to either the state or collectives (of farmers). The law prohibits the transfer of the ownership of land between individuals or entities, except that the state according to certain rules and procedures expropriates (subject to adequate compensation to farmers) collective-owned land.

However, the right to use land (LUR) is transferable. Investors may acquire LURs either by applying for such right directly from the government (LUR Assignment) upon payment of assignment price, or purchase the right from a non-governmental entity (LUR Transfer). Both Assignment and Transfer are on a paid basis, which are the main and most usual way to acquire LURs. Free LURs are granted (LUR Allocation) in some exceptional cases, such as building of government offices, hospitals, military facilities and other infrastructure and public welfare facilities.

The term of Assignment LUR lasts from 30-70 years. Most industrial land has a 50 year validity.

Future Tendencies

In August 2006, State Council promulgated the **Policy to Tighten the Control over Land**. According to this policy, the assignment of all industrial purpose land must be subject to public sales such as bidding, auction or listing on LUR market. And the assignment price must not be below Bottom Price of that certain area which is fixed according to certain formulation.

The reiteration by the State Council of strengthening the administration of LUR assignment procedures and local Bottom Prices indicates the central government's determination to ensure that the LURs are assigned in an adequately paid way instead of in a *de facto* free way as quite a lot of local government has been practicing.

The *Provisional Regulations of the People's Republic of China on Land Use Tax in Cities and Towns* (the "Regulations") have been revised in 2006 on 31 December 2006. These Regulations are formulated to rationalize the use of land in cities and towns, to regulate the income differential on land, to improve efficiency of land using and to strengthen land management. Units ("*danwei*") and individuals which use land within the boundaries of cities, counties, towns and industrial and mining districts shall be the obligatory tax payers against the land used within cities and towns and shall pay land use tax in accordance with provisions of these Regulations. The term of "Units ("*danwei*")" herein shall also refer to foreign invested enterprises and foreign

enterprises. Calculation of land use tax shall be based on the actual area of land used by the taxpayer and shall be levied in accordance with the stipulated tax rate.

According to the Circular of the Ministry of Land and Resources Regarding the Promulgation and Implementation of the State Criterion on Minimum Assignment Price of Industry Use Land, the land of the whole country has been classified into 15 categories, from Class I to Class XV, and the minimum assignment price of Class I land is RMB 840 per square meter, and the minimum assignment price of Class XV land is RMB 60 per square meter.

Governing authority

The related governing authority is the Ministry of Land and Resources

Ministry of Land and Resources

No. 64, Funeidajie, Xicheng District,
Beijing, 100812

Tel: +86 10 6655 8001

Web: <http://www.mlr.gov.cn>

LABOR & SOCIAL SECURITY

Representative Offices

The employment of PRC nationals by a representative office of foreign company must be arranged through a government-designated labor service companies (such as FESCO). The rep office will enter into a service contract with the service company and the service company will provide PRC employees to work for the office. Thus, the representative office only has a contractual relationship with the service company and not with the PRC staff. A supplementary contract may however be entered into by and between the foreign company and the PRC employee in order to regulate certain specific items such as salary amount, vacation, confidentiality, non-competition clauses and so on.

FIE recruitment

In principle, FIEs may recruit any PRC individual directly without going through a service company. FIE must conclude an individual labour contract with each employee.

Employment of Expatriate Staff

Every foreigner who plans to work in China is required by to first obtain a Foreigner Work Permit Certificate, Work Visa, Work Certificate, and Residence Permit.

Welfare and social insurances

The mandatory social security to be subscribed for PRC employees are (1) pension; (2) unemployment insurance; (3) medical insurance; (4) occupational insurance (5) birth insurance and (6) housing fund, which should be borne by both employer and employee respectively at certain percentage.

Labor dispute resolution

Labor disputes may be settled by mediation, arbitration, or by court proceedings. The request for arbitration shall be made within 60 days from when the labor dispute arises. An arbitration award must be made within 60 days from the date of receipt of the application. Parties unsatisfied with the award may bring a lawsuit to a people's court within 15 days from the date of receipt of the written award.

Labor Contract

The Chinese Labor Contract Law will come into force as of 1 January 2008. According to this new law, the establishment of employment relationship between enterprises, individual economic organizations, non-enterprise private entities and other entities and the workers thereof, as well as the conclusion, performance, alteration, discharge or termination of labor contracts therebetween shall be governed by this Law.

Labor contracts are classified into labor contracts with a fixed period, labor contracts without a fixed period and labor contracts with a period to complete the prescribed work.

Where the term of a labor contract is above three months but less than one year, the probation period thereof shall not be more than one month. Where the term of a labor contract is above one year but less than three years, the probation period thereof shall be less than two months. With respect to a labor contract with a fixed period of above three years or without a fixed period, the probation term thereof shall not be in excess of six months.

With respect to any worker that is in violation of this Law because of discharge of the labor contract, or is in violation of relevant stipulations of the labor contract concerning the confidentiality obligation or limitation of competition, he shall bear the liability for compensation if any loss occurs to the employer.

The personnel under limitation of competition shall be limited to senior managers, senior technicians and other personnel who have the obligation to keep secrets in the entity. The range, geographical scope and time limit for limitation of competition shall be stipulated by the employer and the worker. After the discharge or termination of a labor contract, the period of limitation of competition for any of the persons referred to in the preceding paragraph to work for any other employer producing or engaging in products of the same category or conducting business of the same category as this employer shall not be more than two years.

Governing authority

The related governing authority is the Ministry of Labor and Social Security.

Ministry of Labor and Social Security

No. 12 Hepinglizhongjie, Dongcheng District,

Beijing, 100716

Tel: +86 10 8420 1114

Web: <http://www.molss.gov.cn>

PROPERTY RIGHTS

In general, the alteration, transfer and extinguishment of the property rights of movables are subject to and take effect upon the delivery of the property; the change of property rights of immovables is subject to registration with relevant authorities to be effective. Natural resources owned by the state are not subject to registration. Property rights determined by court judgments etc. and the acquisition of property rights

out of succession and factual conducts take effects from the time of the judgment, succession or conduct.

1. Ownership

Three types of ownership, namely: state ownership, collective ownership and private ownership are provided. For specific properties, only state can enjoy their ownership. Those properties include: urban land, minerals, rivers, maritime areas, etc. Except for object of ownership, the Property Law has not differentiated protections to state ownership, collective ownership and private ownership. The Distinguishable Ownership of Building (also named as "Ownership of Apartment House"), neighborhood relation, joint ownership and special regulations about the acquisition of ownership are also provided for in this volume.

2. Usufructuary Rights

Usufructuary Rights governing relations in the utilization of properties and the major types of which being: land use rights, water-intaking right, exploration rights, mining rights, fishery rights, contracted land management right, easement. Although the Law admits both movables and immovables as the object of usufructuary rights, all the explicitly established usufructuary rights are related to immovable property.

3. Property Rights for Security

Three types of Real Rights for Security are provided for, namely: mortgage, pledge and lien. The object of mortgage can be either movables or the immovable and the institution of a mortgage does not require the delivery of the property; the object of pledge can be either movable or certain types of rights (such as bills, bonds, equity interests, intellectual properties, receivables), and the institution of a pledge is subject to the delivery of the object or the corresponding pledge registration; the object of lien can only be movables, and the possession of the property by the lienor is indispensable for the right.

4. Possession

The fact of possession, whether authorized or unauthorized, is offered protection by the Property Law. The possessor is entitled to remedies such as the right to claim the restitution of the property or the elimination of obstacle or danger to the property when his possession of the property is prevented in some way, and the right to claim for damages incurred by such prevention.

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