

ASIAN LEGAL TRENDS

Some members of Advoc-Asia have prepared short briefing notes giving a snapshot of developments in their own countries up to May 2011. The Asia chapter plans to update the notes annually.

We hope you will find the notes interesting. If you need more information about any of the topics, please contact the Advoc member whose name appears at the bottom of the relevant note.

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AUSTRALIA

Government

An election for the Commonwealth government was held in 2010. It resulted in a minority Labor government dependent upon the Green party and some independents to pass legislation in the lower house of parliament. The Labor party and the Green party together have sufficient numbers to pass legislation in the Senate. Three of the six State governments are centre left and the other three State governments are centre right.

Foreign Investment

The Commonwealth government recently discouraged a merger between the Singapore Stock Exchange and the Australian Stock Exchange. Apart from this, its usual policy is to welcome foreign investment subject to qualifications that are updated from time to time, depending on the economic climate.

Environment

Government policy continues to be to encourage the development of renewable energy resources and to limit carbon emissions. The Commonwealth government has announced that it will introduce a tax on carbon dioxide emissions. The tax will take effect from 1 July 2012. Details of the tax have not been finalised but it is generally supposed that the tax will be between \$20 and \$30 per tonne of carbon equivalent.

Governments are gradually increasing the environmental standards required for building in Australia.

Intellectual Property

In March 2011 the Commonwealth government released the draft Intellectual Property Laws Amendment (Raising the Bar) Bill 2011. The legislation provides for free access to patented inventions for research and regulatory activities. There is currently no patent infringement exemption in Australia for these activities except with respect to pharmaceuticals in limited circumstances.

It has also been announced that a single patent examination process will be initiated under which patent applications for the same invention will be examined by a single Australian or New Zealand examiner.

The Full Federal Court has upheld a decision that copyright does not subsist in Telstra's White and Yellow Pages telephone directories on the basis that, amongst other things, no human author was identifiable. Australia does not have a specific database protection regime to protect computer generated databases. We expect government will be lobbied to introduce legislation similar to the EU Database Directive.

In a separate case the Full Federal Court found that internet service provider iiNet Limited was not liable for authorising copyright infringement by its subscribers. An application for leave to appeal to the High Court on this decision is expected to be heard in August 2011.

Personal Property Securities Law

The new Personal Property Securities Register is expected to come into effect in October 2011. The new regime is based on Canadian and New Zealand laws.

Competition and Consumer Law

The Commonwealth government has demonstrated a desire to regulate the more damaging aspects of anti-competitive behaviour. The Australian Consumer Law came into full effect from 1 January 2011 and the Commonwealth government has said that it will devote more resources to enforcing consumer rights.

Migration

Government continues to struggle with the politics of the admission of refugees into the country. There is generally a bipartisan agreement on allowing large numbers of skilled migrants into the country each year. The political problem revolves around applications by those seeking refugee status who arrive in the country by boat.

Tax Arrangements

The federal government encourages foreign investment in Australia through favourable taxation treatment of profits derived outside Australia. The government proposes to introduce a new tax on mineral resources such as coal and iron ore. The details of the tax have not been finalised. It is suggested that, if the resources tax is introduced, the corporate rate of taxation would be reduced from 30% to 29% and there would be some reduction in the lower levels of personal taxation.

National Legal Profession Reform

Following a period of consultation by the Coalition of Australian Governments in mid-2010, national laws and rules were drafted for the regulation of legal practitioners on a national level. Whereas currently, legal practitioners must abide by the laws and rules of the State or Territory in which they practise, the reform, when enacted into law, will impose a uniform set of laws and rules for all Australian legal practitioners.

Proponents of the national legal profession reform consider the reform appropriate in light of legal practise in Australia increasingly requiring practitioners to practise outside of the State or Territory in which they are based. However, the reform is by no means uncontroversial, with the Attorneys-General of Western Australia and South Australia staunchly opposing it, citing transition costs and loss of State sovereignty as major drawbacks of the reform. The Chief Justice of Victoria has also criticised the reform on the ground that the proposed structure and composition of the bodies regulating the legal profession may cause the profession to lose its independence from the executive government.

Current at May 2011.

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HONG KONG

Government: The governance of Hong Kong as a Special Administrative Region of China is provided under the Basic Law. Hong Kong enjoys a high degree of autonomy as safeguarded in the Basic Law. The next election of the Chief Executive and the Legislative Council will be held in 2012.

Foreign Investment: In general, there is minimal restriction on foreign investment and there are no foreign exchange control policies.

Environment: Environmental protection is a major policy area of the Government. However, a lot still has to be done. Our firm publishes Urban Planning and Environmental Law Quarterly. For more information, please see our website: www.fredkan.com.

Intellectual Property: Hong Kong has a strong intellectual property protection regime. In particular, trade mark registration is relatively straightforward and may be granted in 6 to 9 months.

Competition Law: Competition Bill was gazetted by the Government on 2 July 2010. The Bill prohibits anti-competitive conduct in three main areas. The First Conduct Rule prohibits agreements, concerted practices and decisions with the object or effect to prevent, restrict or distort competition. The Second Conduct Rule prohibits abuse of a substantial degree of market power. The Merger Rule prohibits telecommunications carrier licensees from carrying out a merger that has or is likely to have the effect of substantially lessening competition. The Bill is still under review by the Bills Committee in the Legislative Council. There is no confirmed date on the enactment of the Bill.

Immigration: Hong Kong adopts a comparatively open immigration policy. Foreign nationals of about 170 countries and territories are allowed visa-free visits to Hong Kong. Moreover, the Immigration Department operates several schemes for qualified individuals to apply for employment visa, e.g. Immigration Arrangements for Non-local Graduates, General Employment Policy, and Admission Scheme for Mainland Talents and Professionals, etc.

Tax Arrangements: Hong Kong has a simple tax system with low tax rates. Profits tax rates are 16.5% for corporations and 15% for unincorporated businesses. Only profits which have a Hong Kong source (i.e. arising in or derived from Hong Kong from the trade, profession or business) are taxable. Profits sourced elsewhere are not subject to profits tax. No capital gain tax. No dividend tax. Double tax relief is available for many countries.

Current at 13 May 2011

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MACAU SPECIAL ADMINISTRATIVE REGION OF PEOPLE'S REPUBLIC OF CHINA

Following its own name, Macau is a Special Administrative Region of People's Republic of China with its own legal system, which is independent from the mainland system.

The major income of the Macau economy arises from the gaming sector. But the gaming industry is not only gambling. The new casinos are now integrated in resorts, offering besides the casinos, excellent hotels, restaurants, business centres, shopping arcades/malls, theatres, sports events, amongst others. As result of such strategy, millions of tourists every year visit Macau. Today the tourism, hospitality and gaming related sectors collectively represent approximately 50% of the GDP.

In regard to the policy of investments, the Government of Macau SAR welcomes all foreigners to invest in Macau. Most of the foreign investments are through the incorporation of companies, which may have a broad range scope of business, from activities related to the gaming industry to real estate.

The rules for the incorporation of a company are very simple and swift. Either single persons or companies may be shareholders, and the minimum share capital is MOP\$25,000.00 (twenty five thousand patacas, which is equivalent approximately to US\$3,200.00), although there are some activities or types of companies that require a higher share capital.

The most common types of companies are: (i) limited by *quotas* (composed by a minimum of 2 shareholders, whose liability are limited to the share capital of the company. Each quota shall have the minimum nominal value of MOP\$1,000.00, equivalent approximately to US\$125.00; (ii) limited by shares (the shareholders acquire shares of the company and are liable for their share proportion. The minimum share capital of this type of companies is MOP\$1,000,000.00, equivalent approximately to US\$125,000.00. This type of company requires a minimum of three shareholders; and (iii) sole shareholder company (with one share only, and shall follow the regulation applicable to the *quotas* companies).

With regard to the tax regime, it must be said that the regime is simple and quite fair to investors. To the net profit arising from any commercial or industrial business and obtained by single or corporate entities, the rates range from 3% to 12% (on income over \$300,000.00, approximately US\$37,500.00). The professional tax regime is also attractive. For an annual income over MOP120,000.00 (approximately US\$15,000.00) the variation is from a 7% to a 12% maximum rate.

Also attractive in Macau are the offshore companies. There are four (4) types of offshore companies: offshore financial institutions, offshore commercial service companies, offshore trust management companies and offshore auxiliary companies. The offshore companies can only operate with non-Macau currency and their activities are directed to non- Macau market and their customers cannot be Macau residents.

The offshore companies are exempted from income tax, industrial tax and stamp duties. Moreover, most of the investment projects are an open door for obtaining the authorisation to reside in Macau for its managers and specialised technicians. In order to operate in Macau the offshore companies must be authorized by the relevant authority and must pay a set-up and a semi-annual operating fee.

Macau 12th May 2011.

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MALAYSIA

Malaysian New Competition Act 2010

The Malaysian Competition Act 2010 had been passed and gazetted in June 2010. It will come into force on 1 January 2012. The Act will apply to all commercial activities undertaken within Malaysia and those outside Malaysia that affects competition in the Malaysian market. It is divided into 2 main prohibitions: (i) Anti competitive agreement (ii) Abuse of Dominant Position. It aims to promote economic development through the prohibition of anti-competitive practices. A Competition Commission will also be established to oversee the implementation of the Act.

Malaysian Trade Marks and Patents Act

The Malaysian Trade Marks Act and Patents Act as well as their respective regulations have been amended on 15 February 2011. One of the major changes is the increase of official fees payable to the Malaysian Intellectual Property Office (MyIPO). This is the first fee increase in more than 13 years for trade marks and 15 years for patents in Malaysia. Another major change is a formal provision for requesting expedition of examination of both trade marks and patents.

The objective of the amendments is to increase protection for IP Owners and increase efficiency to the registration process.

For more information on the subject matter, kindly contact our Ms Cindy Goh (cindy@cheangariff.com / +603-26910803)

NEW ZEALAND

Government: The current Government is right of centre and its positive economic policies resulted in economic growth being achieved again in New Zealand in September 2009 after 5 quarters of economic contraction. The next election is set for 2011.

Foreign Investment: New Zealand continues to welcome and encourage foreign investment. Approval is required from the Overseas Investment Office where any of the following are acquired:

- 25% or more ownership of a New Zealand company where the value of the acquired securities exceeds NZ\$100 million;
- property used in carrying on a business in New Zealand where the consideration exceeds NZ\$100 million;
- certain types of land deemed “sensitive land”.

Changes are proposed to make foreign investment easier and to allow faster Overseas Investment Office approval.

Environment: New Zealand currently has an Emissions Trading Scheme in place which covers the forestry, transport fuels, electricity production, industrial processes, synthetic gases, agriculture and waste sectors. The Scheme will strengthen New Zealand’s “clean green” brand which is fundamental to the New Zealand economy. The Government has proposed mining in low-value conservation areas to boost regional economies.

Intellectual Property: Internet piracy and illegal file sharing are being addressed in New Zealand through a copyright bill currently before parliament which proposes a new regime aimed at deterring such activities. New Zealand recently hosted the eighth round of negotiations in relation to the Anti-Counterfeiting Trade Agreement, the goal of which is to combat the global trade of counterfeit goods and pirated copyright-protected works by establishing common standards for intellectual property rights enforcement among signatory states. Other participants include the US, Australia, Canada, the EU, Japan, South Korea, Mexico and Switzerland.

Competition Law: The Government is currently considering the introduction of criminal sanctions (including imprisonment) for those undertaking significant cartel activities to bring New Zealand in line with countries such as Australia and the US.

Financial Service Providers: Financial service providers are now required to be registered in New Zealand and also to be members of a dispute resolution scheme. A “financial service provider” is widely defined.

Migration: The Government’s new Migrant Investment Policy makes New Zealand more attractive to “investor migrants” who can make significant financial contributions to The New Zealand economy. The two categories of “migrant investor” under the new Policy are based on the requirement to invest NZ\$10 million or NZ\$1.5 million in New Zealand.

Tax: The Government recently announced that the corporate tax rate is to be dropped to 28% (from 30%) effective 2011 in a bid to make New Zealand more attractive for investment. The Government will also allow dividends issued after the new corporate rate takes effect to be imputed at the existing 30% rate if corporate tax has been paid at 30%. Limited partnerships were recently introduced in New Zealand and for income tax purposes they are taxed as “flow-through” entities permitting the flow-through of tax losses to partners.

Current at 27 July 2010.

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SRI LANKA

Government: The Government of Sri Lanka is considered progressive, and very much left of centre. At the last Presidential Elections, the incumbent President was re-elected, by a convincing majority. In the Parliamentary Elections, that followed soon thereafter, his party has been given an over-whelming majority of members sitting in Parliament. Right now the President and his Government are very strong and have popular support. Coupled with the fact that the opposition is in disarray, a change of government is not likely in the foreseeable future.

Foreign Investment: The appropriate signals have been sent out and Investors particularly from India, Middle East, and China are pumping their funds in to various projects which are being encouraged particularly in the hitherto under-developed areas as well as the War-ravaged North and East. These Investments are not confined to infrastructure development. The Stock Exchange has in its history never witnessed such a boom.

For the first time in History the all Share Price Index of the Colombo Stock Exchange closed above the 5000 mark on 28 July 2010. The Stock Market is up 48% so far this year.

Environment: A separate Ministry has been set up. A great effort is being made to preserve the Environment. Offenders are being prosecuted. Various statutes and regulations are being strictly enforced.

Tax Arrangements: The Government continues to encourage Foreign Investments through Tax Holidays and various benefits offered to Investors.

Intellectual Property: The Office of Director General of Intellectual Property has been re-vamped. The filing and processing of Applications have been streamlined. An effort is being made to minimize delays.

Current at 29 July 2010.

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THAILAND

Government: Following the year of political turmoil in 2010 which witnessed, among others, violent street protests by the redshirt movement supporters, Thai Prime Minister, Abhisit Vejjajiva, recently announced that the House of Representatives had been dissolved, paving the way for the general election on 3 July 2011. The current Democrat Party-led coalition government will become a caretaker government until the newly elected government is in place. Pheu Thai Party, the main opposition party under the auspices of former prime minister, Thaksin Shinawatra, had officially selected Mr. Thaksin's sister, Yingluck Shinawatra, to lead the party in the upcoming election. If elected, she will become the first female prime minister in history of Thailand.

Foreign Investment Restrictions: The Board of Investment of Thailand ("BOI") approved an eight-year exemption from corporate income tax for existing expansion projects at Map Ta Phut District that upgrade their technology to reduce air pollution. This will replace the existing three-year tax holiday. A similar privilege is also being offered to new investment projects that apply modern technology to contain air pollution levels and ensure a low impact on the environment.

Intellectual Property: Thailand became the 142nd contracting state of the Patent Cooperation Treaty on 24 December 2009. In 2010, the Department of Intellectual Property ("DIP"), Ministry of Commerce has decided to study the advantages and disadvantages of the Hague Agreement concerning the International Registration of Industrial Designs specifically the Geneva Act 1999.

Apisith & Alliance Ltd. was earlier appointed by the DIP to carry out the legal research to evaluate and recommend on the advantages and disadvantages for Thailand in joining the Hague Agreement.

Tax: Under the latest Regional Operating Headquarters ("ROH") Regulations, the withholding tax for income tax of an individual foreigner working for a ROH with expertise or management level status is reduced to 15 percent of income for 8 consecutive years of employment in Thailand. In case the withholding income tax of such foreigner is lower than 15 percent, the foreigner is entitled not to take such income into the computation of his personal income tax provided that the foreigner allows the payer of the income to withhold income tax at the rate of 15 percent of such income.

Labor/Employment: On 17 January 2011, the Act on Safety, Health and Environment in Work Performance B.E. 2554 (the "Act") was promulgated to expand the section concerning safety, health and the environment that was repealed in the amendment to the Labor Protection Act (No. 4) B.E. 2554. This Act will become effective on 18 July 2011. The crux of the Act is a broader definition as to what constitutes an employer or employee, various employer's obligations such as providing relevant training and designating an employee as a safety officer, and a requirement to establish a Safety, Health and Environment in Work Performance Fund.

In addition, the Outworker Protection Act B.E. 2553 was promulgated on 16 November 2010. It became effective on 16 May 2011. The Act seeks to protect the rights of employees who work from or at home.

Environment: Thailand plans to have its first environmental tax law which is now under the consideration of the Thai Cabinet. The environment tax intends to tax major polluters, mostly targeting industries that pollute the air and waterways.

International Trade Policy: Thailand and Chile announced their intentions to initiate Free Trade Agreement ("FTA") negotiations in November 2010. It is expected that the first FTA negotiation round between Thailand and Chile will take place around the middle of 2011.

Under the Thailand – Chile FTA, it is expected that the trade volume between Thailand and Chile will rise remarkably. Thai pick-up trucks, rice and natural rubber destined for Chile is predicted to

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noticeably increase after the FTA comes into effect, while considerable concurrent growth in Chilean bronze and wine exported to Thailand is also estimated.

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