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Pacific Basin

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I. Australia

A. Insider Trading

In June 1992, the Federal Parliament adopted wide ranging reforms to the insider trading provisions of the Corporations Law. The new provisions prohibit any person who possesses inside information from trading in relevant securities, and there need be no connection between the insider and the company. A person who overhears information and trades on the basis of it could be in breach of the provisions if it can be proved that the person did not reasonably believe the information to be generally available. Controlling shareholders, corporations, and partnerships may also be insiders, the last two categories being deemed to know information that is known or ought reasonably to be known by its officers or partners acting in that capacity.

Monetary penalties have been increased for natural persons from $20,000 to either $100,000 or twice the profit realized, and for a body corporate from $50,000 to $1,000,000. Civil remedies are also available and the court's power to determine appropriate remedies has been increased.

B. Franchising

The report of the Federal Task Force established to examine the practice of franchising in Australia, including the potential for self-regulating the conduct of franchisors and their advisers, has recently become available. The Task Force recommended that a voluntary Code of Practice be drafted and administered by a Franchising Code Administration Council. Some of the features of the proposed Code of Practice are:

(a) a requirement for franchisors and advisers to register annually with the Council and confirm their compliance with the Code of Practice;
(b) the provision by the franchisor of a standard form of disclosure document to prospective franchisees;
(c) a seven-day cooling-off period following the execution of any franchise agreement;
(d) a requirement for prospective franchisees to seek legal advice;
(e) the prohibition of unconscionable conduct by franchisors and franchisees; and
(f) the appointment of conciliators to deal with franchise disputes in an attempt to reduce litigation.

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The Task Force rejected the need for legislation regulating the franchise relationship, its termination, or the division of goodwill arising from it.

II. China

A. Securities Association

The Securities Association of China was formally established on August 28, 1991. The association aims to serve as a bridge between securities institutions and the government, and will assist in the development of China's securities markets through the following measures:

(a) the provision of assistance to government institutions in drawing up securities laws and regulations;

(b) the formulation of short-term and long-term development plans for the securities industry;

(c) the training of qualified securities officials; and

(d) the coordination of and participation in international exchanges in the securities field.

In a related development, the Futures and Options Trading Study Center opened at the Shanghai Academy of Social Sciences on August 13, 1991. The center seeks to promote academic research in futures and options trading and to build relationships with similar organizations overseas.

B. International Commercial Loans

Following their approval by the People's Bank of China (PBOC) on August 1, 1991, the Regulations on the Management of International Commercial Loans by Resident Institutions were promulgated by the State Administration of Exchange Control (SAEC) on September 30, 1991. The regulations permit only approved organizations to transact international commercial loans. Approval must be obtained from the SAEC, the body administering the regulations on behalf of the PBOC.

The two categories of resident institutions permitted to borrow are: (a) financial institutions approved by the SAEC; and (b) industrial and commercial enterprises approved to borrow foreign exchange (approved enterprises).

The regulations define international commercial loans as: (a) borrowings by approved enterprises that fall to be repaid in foreign currency; and (b) borrowings by approved enterprises from foreign banks or Chinese-foreign joint venture banks located inside China that fall to be repaid in foreign currency.

The term "loan" is in turn broadly defined.[1] Loans are classified into short-term loans (less than one year) and medium- and long-term loans (greater than one year).

1. The definition includes compensation trade agreements and international leasing agreements.

Short-term loans must be used to provide working capital for export needs and not for long-term investment projects or fixed assets. The SAEC is responsible for the supervision of foreign exchange debts incurred by way of short-term loans. Limits for total outstanding short-term loans are established annually and regularly reviewed by the SAEC. National financial institutions and regional banks should apply to the SAEC to establish an annual limit for their short-term loans. State-owned enterprises must obtain specific SAEC approval for short-term loans.

Medium- and long-term loans may be used for importing advanced technology and equipment or to obtain foreign exchange in conformity with state policy. The SAEC must approve such loans, and any loan agreement entered into without its approval is void.

Foreign investment enterprises are exempted from the requirements for prior approval of international commercial loans, but must register such loans with the SAEC.

C. New Customs Tariff

In accordance with China's intentions to resume GATT membership, new customs tariffs regulations based on the Harmonized Commodity Description and Coding System have been implemented to simplify the categories of commodity and the range of duties. The new regulations will significantly reduce tariffs for a number of products, including foods, raw materials, agricultural insecticides, machinery, and machinery parts.

D. Intellectual Property

1. *Copyright Law*

Implementing Regulations for the Copyright Law of China became effective on June 1, 1991. Most foreign works will remain unprotected until China accedes to the Berne Convention. The regulations adopt the Berne Convention principles relating to country of origin and to first publication of foreign works.[2]

The Implementing Regulations confer various powers upon the National Copyright Administration (NCA). These include the power to review infringements involving foreign persons. The monetary penalties that may be imposed by the NCA, or local copyright departments, range from RMB100 to RMB100,000.

2. *Software Protection*

Regulations for the Protection of Computer Software (software regulations) became effective October 1, 1991. The software regulations parallel the copy-

2. The definition of publication includes distribution to the public, which in turn includes the supply of copies or reproductions.

right law by extending protection to foreign works first published in China or created by nationals of treaty countries.

The software regulations grant an initial term of protection of twenty-five years from the date of first publication.[3] Prior to the expiration of the initial term, the owner of software may apply to the registration authority to extend the term of protection for another twenty-five years. Like the copyright law, the software regulations limit the duration of licensing contracts to ten years.

The software regulations vest a Software Copyright Administration Department with responsibility for handling software copyright disputes and power to impose sanctions or fines on wrongdoers. They also refer to a separate department[4] that will be responsible for the registration of software and for disputes relating thereto.

E. Income Tax

The Income Tax Law Concerning Foreign Investment Enterprises and Foreign Enterprises commenced operation on July 1, 1991, and on June 30, 1991, the State Council promulgated detailed Implementing Rules for their administration. Some of the main provisions of the rules are highlighted below:

(a) A foreign company may be deemed to have a taxable establishment in China by the presence of a "business agent" that:
   (i) habitually negotiates purchasing matters, concludes purchase contracts, and purchases commodities in the name of the foreign company;
   (ii) has concluded an agency agreement with the foreign company and habitually stores and delivers products to other parties in the name of the foreign company; or
   (iii) has authority to conclude sales contracts or to accept orders in the name of the foreign company.

   This provision significantly increases the risk of taxation of foreign companies selling into China.

(b) The rules restate earlier incentive legislation reducing the withholding tax rate on royalties from 20 percent to 10 percent with respect to advanced technology in certain fields of industry.

(c) The tax authorities may designate as withholding tax agents Chinese payers of fees for construction projects or consultancy, management, or training services.

(d) Detailed provisions restate the tax incentives available in special economic zones, economic and technical development zones, industrial development zones, and the Pudong New Area in Shanghai.

3. Only software first published in China after October 1, 1991, may be registered under the software regulations.

4. This is termed the Software Registration Administrative Department.

(e) The exemptions available to foreign investment enterprises and foreign investors in them have been simplified;
(f) The rules clarify tax administration and payment procedures.

III. Hong Kong

A. Bill of Rights

Hong Kong recently enacted its first human rights legislation following much debate as to its application and scope. The Bill of Rights Ordinance came into force on June 8, 1991, and incorporates many provisions of the International Covenant on Civil and Political Rights.

The Bill of Rights Ordinance has a number of interesting features:
(a) All preexisting legislation must now be construed in a manner consistent with the Ordinance.
(b) The Ordinance applies only to the government, to public authorities, and to persons acting on their behalf.
(c) No specific tribunal or commission has been set up to enforce the Ordinance. The courts are given general jurisdiction to deal with breaches of the Ordinance in conjunction with other matters.

The Ordinance is likely to be relevant in the fields of taxation, licensing, employment, immigration, and similar matters where individual rights are at issue.

B. The Companies (Amendment) Ordinance 1991

The Companies (Amendment) Ordinance 1991, which was originally enacted in July 1991, commenced operation on September 1, 1991. The three areas principally affected by the Ordinance are:

1. *Financial Assistance*

New provisions regulate the provision of financial assistance by a company in connection with the acquisition of its own shares. Previously, the Companies Ordinance rendered unlawful any financial assistance in connection with the purchase of any shares in the company. There were some limited exceptions. The relevant provisions of the new Ordinance (which is based on existing English legislation) both expand the prohibition on financial assistance to acquisitions of shares (as opposed to purchases) and at the same time introduce a broader range of exceptions to the general prohibition. The new Ordinance also introduces a facility for companies to give financial assistance provided they observe certain technical requirements designed to prevent impairment to the capital of the company.

2. *Redemption of Shares*

New provisions regulate the purchase or redemption by a company of its own shares. The legislation introduces a facility for Hong Kong companies to purchase their own shares and makes amendments to the manner in which redeemable preference shares may be redeemed. Again, this legislation is based on existing English legislation.

3. *Company Distributions*

New provisions based also on the English model regulate company distributions. Section 79B(1) provides that distributions may now only be made out of profits available for that purpose. These are defined as accumulated realized profits, so far as not already utilized by distribution or capitalization, less accumulated realized losses so far as not previously written-off in a reduction or reorganization of capital. Subject to certain exceptions, unrealized profits are not distributable. Accumulated losses must also be taken into account in calculating realized profits.

Determination of whether profits are available for distribution is to be made by reference to the accounts of the company. The rules relating to which accounts may be relied on are more technical for listed companies than private companies. The Companies (Amendment) Ordinance applies to all distributions of a company's assets to its members, whether in cash or otherwise, except distribution by way of: (a) a bonus issue of shares; (b) the redemption or purchase of a company's own shares out of capital or unrealized profits; (c) the reduction of share capital by reducing members' liabilities for unpaid shares; and (d) a distribution of assets to members on winding up.

The existence of "distributable profits" therefore depends upon the realization of a profit according to proper accounting principles, based on the company's last annual accounts, which should represent a "true and fair view" of the company's position. Making an unlawful distribution will render members liable to repay to the company the amount received pursuant to section 79M of the Companies (Amendment) Ordinance.

C. Disclosure of Shares

The Securities (Disclosure of Interests) Ordinance, originally enacted in 1988, commenced operation on September 1, 1991. Upon commencement shareholders in, and directors and chief executives of, a listed company in Hong Kong became subject to strict disclosure requirements. The essential features of the new requirements are outlined below:

(a) Any person who acquires an interest in 10 percent or more of the voting share capital of a listed company must disclose that fact to the Stock Exchange and the listed company. Thereafter, any increase or decrease in the holding that would result in the percentage level of the holding moving up or down to the next whole percentage number will also require disclosure, as would any decrease below 10 percent.

(b) All directors (including shadow directors) and chief executives of a listed company will be under an obligation to disclose to the Stock Exchange and the listed company all their interests in any shares and debentures in that listed company and any associated corporations. All changes in their holdings must also be disclosed.

(c) The definitions of "interests" are broad, although not the same for substantial shareholders and directors. As such, many people could have an interest in the same shares and would therefore be obliged to disclose their respective interests.

(d) The Ordinance specifies short time periods (essentially five days) within which notification of the interest must be made.

(e) Notification must be received by the Stock Exchange before being received by the listed company. A listed company that is, or is the holding company of, an authorized financial institution must upon receipt convey the notification to the Commissioner of Banking.

(f) The Ordinance will apply to all companies listed on the Hong Kong Stock Exchange irrespective of whether they are incorporated in Hong Kong.

(g) There are penal provisions for failure to make the requisite disclosures or for making them incorrectly.

(h) The Ordinance also gives the company and the financial secretary extensive powers to investigate ownership of shares in listed companies.

D. Insider Dealing

The Securities (Insider Dealing) Ordinance came into force on September 1, 1991. Before the introduction of this Ordinance the Securities Ordinance regulated insider dealing and the Insider Dealing Tribunal (IDT) investigated the conduct of insider dealing. While the IDT had extensive investigative powers, it could not impose financial or other penalties. The IDT could only rebuke a person found to have committed insider dealing.

1. *Main Provisions*

The Securities (Insider Dealing) Ordinance will increase the power of the IDT and the penalties it may impose.

Insider dealing is committed when a person misuses "relevant information" in a manner proscribed by the Ordinance. "Relevant information" is defined to mean "specific information about (the relevant) corporation which is not generally known . . . but which would if it were generally known . . . be likely to materially affect the price of those securities."

Insider dealing will be committed where a person connected with a corporation, who is in possession of information that he or she knows is relevant information, deals in securities or counsels or procures another person to deal in securities of the corporation.

The term "persons connected with a corporation" is broadly defined and includes directors, employees, substantial shareholders,[5] or those persons who are in a professional or business relationship and have access to the relevant information. In addition, the Ordinance applies to the recipients of that information.

2. *Exemptions*

The Ordinance contains various exemptions from prohibited insider dealing, including acquiring qualification shares and bona fide underwriting. An offense is not committed if the other party to the transaction is or ought reasonably to have been aware of the information and the transaction was not recorded on the Stock Exchange or required to be notified to it. Also, no infraction occurs if the dealer can establish that he or she entered into the transaction without a view to making a profit (or avoiding a loss).

3. *IDT Powers*

The Ordinance also sets out the constitution and powers of the new IDT. If it appears to the financial secretary that a person is guilty of insider dealing, the matter can be referred to the IDT. The IDT has wide powers of investigation and it is a criminal offense for a person to fail to attend the IDT without reasonable excuse, or to fail to furnish answers truthfully and fully or produce certain documents.

The IDT can order that a person who has committed an insider dealing offense:

(a) be prohibited from being a director or manager of a listed company or any specified company for a period of five years;

(b) pay the government any profit or gain realized or loss avoided as a result of insider dealing; or

(c) pay a penalty not exceeding three times the amount of any such profit or gain or loss avoided.

While the IDT does not have the power to compel actual payment, a person contravening its order may be liable to pay a fine of up to HK$1,000,000 as well as imprisonment for up to two years.

If the insider dealer is also a registered person (for example, a dealer or investment adviser) under the Securities Ordinance, he or she will be deemed to be guilty of misconduct under that Ordinance and liable to revocation or suspension of his or her registration or reprimand by the Securities and Futures Commission.

IV. Indonesia

A. New Regulation on Foreign Shareholdings

The Investment Coordinating Board has issued an amendment that offers some flexibility to foreign investors in national companies and foreign investment companies.

5. Persons who control over 10 percent of the company's issued share capital.

1. *National Companies*

Foreign capital participation in a national company[6] is permitted so long as it complies with the following provisions:

(a) the field of business to be carried out by the national company must not be prohibited under the List of Closed Business Sectors;[7]

(b) the purpose of such foreign capital participation should be to increase the capital of the company;

(c) the number of shares owned by nationals must not be less than 20 percent,[8] and should be increased to 51 percent within fifteen years following approval by the Investment Coordinating Board; and

(d) for companies located in a Bonded Zone,[9] shareholdings of nationals must not be less than 5 percent.

2. *Foreign Investment Companies*

Foreign capital ownership in a PMA company[10] is required to comply with the following provisions:

(a) ownership of foreign shares in a PMA company may be increased to 80 percent maximum;

(b) national share ownership in the PMA company should be restored to 51 percent within fifteen years of its formation; and

(c) changes in foreign share ownership will require the approval of the Investment Coordinating Board.

V. Japan

A. Japanese Commercial Code

The recently revised Japanese Commercial Code has simplified the procedures for incorporation of companies. The major procedural changes introduced by the code are summarized below.

1. *Subscriptions in Kind*

Before the enactment of the code, a court-appointed inspector had to examine the suitability of every contribution in kind. Accordingly, the company was required to request the court to appoint an inspector to conduct an examination of the asset's suitability as a contribution in kind.

The code allows exceptions to the strict requirements of inspection for three types of contributions:

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6. This term refers to companies initially required to be 51 percent owned by Indonesian nationals.

7. Sectors in which foreign capital investment is prohibited by the Investment Coordinating Board.

8. Consequently, the maximum foreign participation is 80 percent.

9. A zone in which bonded imports are permitted.

10. The term denotes an approved joint venture company with partly foreign share ownership.

(a) Real estate—where a lawyer has attested to the suitability of the value of the contribution, based on the separate valuation of a real estate appraiser. According to a recent directive from the Ministry of Justice, both the lawyer and the appraiser must be qualified in Japan. Therefore, contributions of this nature will generally be limited to real estate located in Japan.
(b) Listed securities—where the value of the securities does not exceed the listed price on the Stock Exchange.
(c) "Low value assets"—where the value of the assets to be contributed does not exceed either 20 percent of the capital of the company or 5,000,000 yen.

2. *Postincorporation Asset Acquisitions*

The code establishes a requirement for a court inspector to examine any assets to be acquired by a company within two years of incorporation, where the consideration paid for such assets is 5 percent or more of the company's capital. The inspector's report must be presented by the directors at the general shareholders' meeting prior to its authorization of the contract. Where no inspector's report has been made, the agreement for the acquisition is invalid. The above provisions also apply to preincorporation asset acquisition contracts subsequently ratified by the company. It seems that the intention is to prevent undervalued asset transfers to newly incorporated companies.

B. Registration of Service Marks

A new registration system for service marks came into effect in April 1992. The new system will operate on a first-to-file basis irrespective of actual use of the mark. Registration will give the trademark owner, or the owner's licensees, the exclusive right to "use" the service mark in respect of the service designated and to restrain the use of that mark by unauthorized third parties. "Use" is defined by analogy to trademark use, and includes affixing the mark to goods that are used in connection with the provision of the service, or using such marked goods in the provision of the service.

Applications will be examined for possible conflict with earlier registrations and then published for opposition. Unless an application is delayed or defeated by third-party opposition motions, registration will be granted three months after publication.

VI. Philippines

A. Foreign Exchange Controls

The Philippine Monetary Board has approved new policy guidelines for liberalizing existing foreign exchange restrictions, which became effective on

January 2, 1992. Some of the noteworthy changes to the foreign exchange regulations are:

(a) All types of investment will be allowed full repatriation and remittance privileges. The repatriation or remittance may be serviced directly by authorized agent banks provided the investments have been registered with the Central Bank.
(b) Mandatory surrender of foreign exchange will now be limited to specified resident firms that obtain foreign exchange in their normal course of business (for example, hotels and restaurants).
(c) The importation of foreign currency into the country by both residents and nonresidents will be freely permitted.
(d) Philippine exporters, previously allowed to keep only 2 percent of foreign exchange receipts in foreign currency, will now be able to retain up to 40 percent.

A revised manual of foreign exchange regulations, embodying all the new guidelines, will soon be released by the Central Bank.

VII. Singapore

A. Incentives for Research and Development

The Singapore Government recently announced the introduction of the National Technology Plan (NTP) to foster more research and development (R&D) activities in Singapore. The National Science and Technology Board (NSTB) administers the NTP.

The NSTB recommended the following incentives for companies that undertake approved R&D expenditure and activities in Singapore:

(a) an additional two years of pioneer status[11] be made available for companies undertaking approved R&D activities instead of the present maximum period of ten years;
(b) a two-year period of postpioneer status at the concessionary tax rate of 10 percent;
(c) a more liberal double deduction for R&D expenses;
(d) an additional two years at the concessionary tax rate of 10 percent to be made available for corporations establishing an operational headquarters that undertakes approved R&D[12] (presently, the maximum period is ten years);

11. Pioneer status in respect of approved investment activities currently results in 100 percent tax exemption during the relevant period (ten years or other period specified in the grant).

12. Multinational corporations that locate their operational headquarters for the region in Singapore, and conduct substantial operations in Singapore from them, can qualify for this incentive. Dividends paid by qualifying companies are also tax-exempt during the period.

(e) a three-year writing down allowance of 33 percent each year for expenditure incurred in acquiring approved know-how or patent rights, instead of the current five-year allowance;
(f) extending the existing 50 percent investment allowance for all capital expenditure incurred for approved R&D activities, instead of limiting expenditure to productive equipment or new technology;
(g) extending the "enterprise expansion" incentive scheme to R&D activities with a minimum amount of S$1 million capital expenditure for R&D, instead of the present requirement of S$10 million capital expenditure; and
(h) provision for companies to create a 20 percent tax exempt R&D reserve.

VIII. Taiwan

A. Withholding Tax on Royalties

Article 4(21) of the Income Tax Law provides that certain royalties and fees received by foreign entities may be exempt from Taiwan income tax. An amendment to the rules that govern the availability of this exemption was passed in July 1991, the main provisions of which are as follows:

1. *Patents*

Royalties received for the license of a patent registered in Taiwan will be exempt from income tax in Taiwan if the license is approved by the Ministry of Economic Affairs.

2. *Trademarks*

Royalties received for the license of a trademark or service mark registered in Taiwan will be exempt from income tax in Taiwan only if: the license is associated with a license of patent or know-how for the manufacture of products (or the provision of services) that bear the licensed mark; the patent or know-how license is approved by the Ministry of Economic Affairs; and the trademark or service mark license is approved by the National Bureau of Standards.

3. *Know-how*

Royalties received for the license of know-how granted to a company limited by shares and engaging in any of the high-tech industries or key scientific industries[13] will be exempt from Taiwan income tax if the license was approved by the Ministry of Economic Affairs or its designated agent under the Statute for

13. These include telecommunications, consumer electronics, aviation, chemical, medical, and other advanced technology industries.

Technical Cooperation. For this purpose, "know-how" includes information on plant construction, manufacturing technology, and product design.

4. *Technical Service Fees*

Fees received for rendering production method, manufacturing process design, basic or detailed engineering design, and equipment design before the commencement of production in connection with any of the high-tech or key scientific industries will be exempt from Taiwan income tax if approval was given by the Ministry of Economic Affairs or its designated agent.

IX. Thailand

A. New Value Added Tax

Value Added Tax (VAT) became effective in Thailand on January 1, 1992, with the enactment of the Value Added Tax Act (1991). The new VAT is a consumption tax on goods and services at each stage of production and distribution. It will replace the current Thai business tax, a complicated sales tax operating mainly at the manufacturing level.

1. *The General Scheme*

VAT will be imposed on all producers and sellers of goods and services in Thailand or importers or exporters of goods operating in Thailand. VAT will automatically cover such persons unless they are specifically exempted.

VAT will be charged at a rate of 7 percent, with the exception of a zero rate for exported goods and services. Under the Act, exporters will be entitled to a full rebate of VAT paid on their exempt inputs.

VAT will be calculated on the amount stated in a sales invoice. Accordingly, the original tax invoice will be evidence of input VAT to be claimed as a deduction. Each VAT payer will be required to issue tax invoices to customers and keep copies. Invoices must contain a description of the nature and value of the goods or services rendered, the value of the transaction, and the VAT due. VAT payers will be required to maintain three different books of account: an output book, an input book, and an inventory control book. The party responsible for paying VAT is the party issuing the invoice in any given transaction.

2. *Exemptions*

The Act provides for certain sales and services to be exempt from VAT. Businesses that are engaged in exempt transactions cannot, however, claim any credit for input tax in the distribution stage, but may deduct such payments from monthly payments of VAT. Included in the categories of businesses exempt from VAT are: (a) small enterprises with annual sales of less than 60,000 Baht; (b) businesses producing food or agricultural products other than for export;

(c) educational, health care, and transportation services; and (d) religious and charitable organizations.

Expenditure on a range of permitted capital goods will be fully deductible from monthly VAT payments. Goods purchased for export will be subject to a rebate of input VAT.

3. *Filing and Penalties*

VAT payers are required to file monthly tax returns and submit monthly remittances of VAT due to the Revenue Department on or before the fifteenth day of the following month. If in any month a payer has an input tax that exceeds the output tax, the difference can be claimed as a refund from the Revenue Department.

The Act provides for a range of penalties for noncompliance and evasion in the form of surcharges, fines, or imprisonment, depending on the nature and severity of the offense. The Act provides for criminal punishment in the form of fines (ranging from 2,000 to 200,000 Baht), imprisonment (ranging from three months to seven years), or both fines and imprisonment.

4. *Specific Business Tax*

There are five categories of businesses that are not subject to VAT, but will be subject to a Specific Business Tax from January 1, 1992. This tax will be imposed on gross receipts at a rate that is similar to the existing business tax and will vary according to the nature of the service provided. The Specific Business Tax will be levied at a rate of 3 percent on banking, 2.5 to 3 percent on insurance businesses, 2.5 percent on pawn brokerage, 3 percent on the sale of immovable property, and 0.1 percent on the trading of securities.