

DOING BUSINESS IN CHINA



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Introduction

The People's Republic of China (PRC) remains a unique place to do business. As the most populous country on the planet and the world's second largest economy, the opportunities in the PRC are virtually limitless. It is however, vast, diverse and sub-divided into numerous provinces and autonomous regions, each of which has subtle (and at times, not so subtle) differences in cultural and legal traditions and practices. Navigating through the Chinese business scene successfully requires skill, experience, expertise and good advisers.

Although the various regions, cities and zones are under the direct control of the central government, each of the 23 provinces, four municipalities and five autonomous regions also have different by-laws and regulations that need to be followed. These additional measures provide guidance on how national legislation adopted by the National People's Congress (NPC) is effected locally. The State Council (the Chinese cabinet) is also empowered to enact administrative directives and measures, and to implement new rules.

A number of recently introduced free trade zones, such as the one in Shanghai (launched in September 2013), reflect a trialing by the government of a looser regulatory framework and a relaxation of certain controls in order to encourage business and investment into the PRC.

Finally, there are the two long-standing Special Administrative Regions (or SARs) in Hong Kong and Macau, where entirely different systems are allowed to co-exist and practice.

Given the scale and diversity of the PRC, this guide is not intended to be a comprehensive guide and does not deal directly with the free trade zones and SARs. Rather, its objective is to provide a brief introduction for businesses interested in developing commercial interests in the PRC.

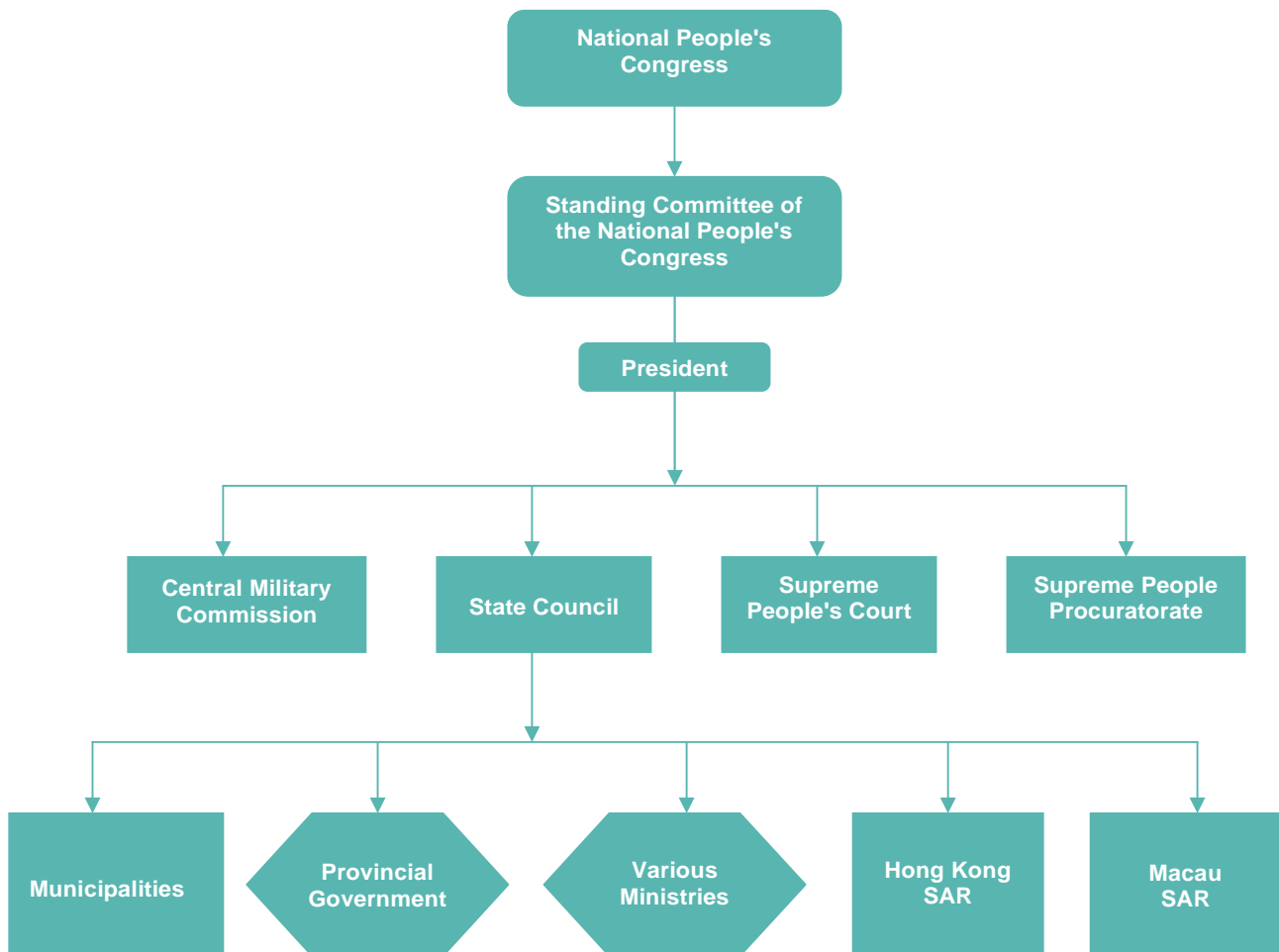
Specific legal guidance and advice should be sought before taking any formal steps to enter this market.

For further information on the Hong Kong Special Administrative Region of the PRC, please see our related guide on Doing Business in Hong Kong.

Political and Judicial Structure

State power in the PRC is divided between the Communist Party, the State and the People's Liberation Army. Although, officially, an extra-legal entity, it should always be kept in mind that the Communist Party pervades every level of government.

The National People's Congress (NPC) is the highest organ of state power in the PRC, charged with enacting laws, overseeing state organisation and supervising the implementation of the current Constitution, which was first adopted in 1982 and last amended in 2004. The President of the PRC stands as the Head of State, but remains subordinate to the NPC. In practice, the NPC's powers are exercised on a day to day basis by the Standing Committee of the NPC. These bodies are supported by a network of various other state ministries and other entities, including the State Council which is the highest executive body of the Chinese Government. The chain of command between these various organisations is illustrated in the diagram below.



Legal system

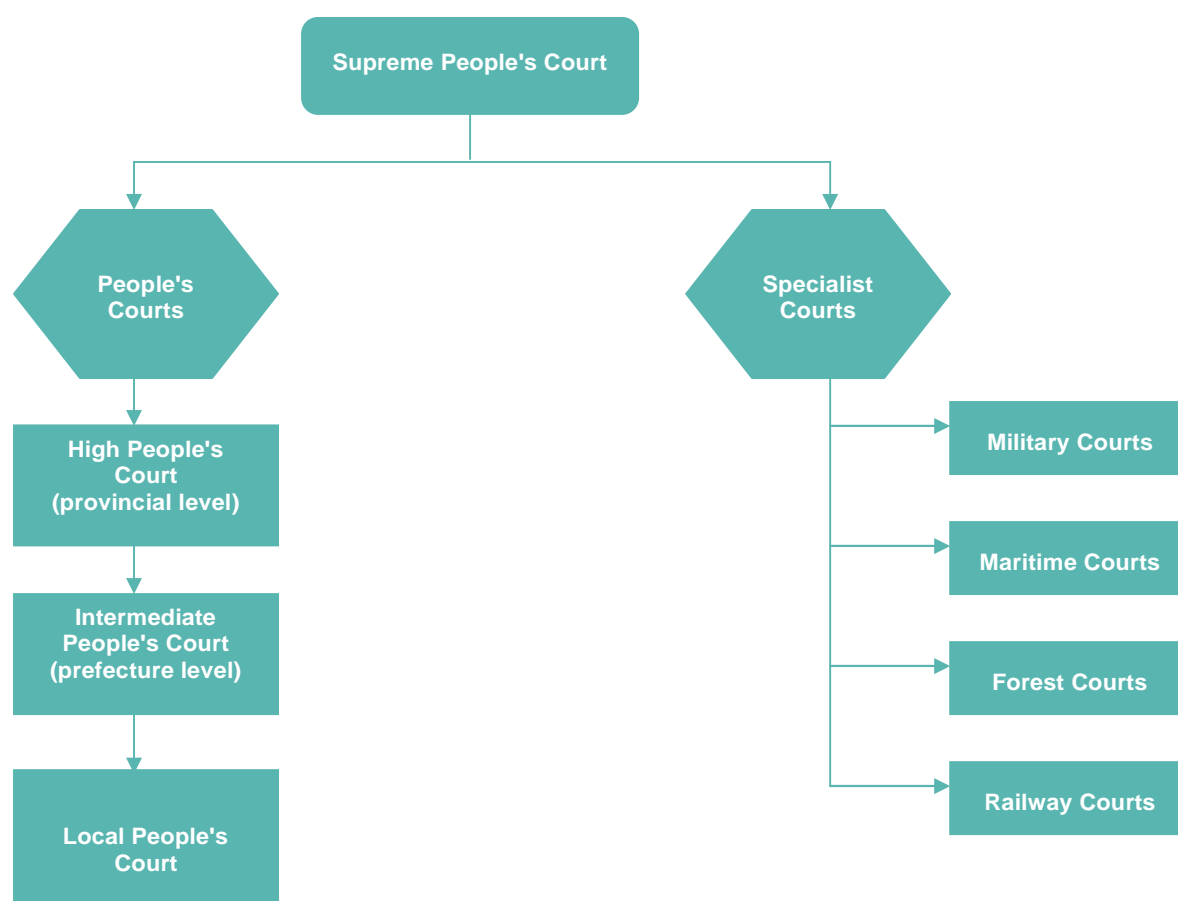
Under the Constitution, the NPC and the Standing Committee are empowered to exercise the legislative power of the State. The NPC is able to amend the Constitution and enact civil and criminal law. The Standing Committee can exercise this function on behalf of the NPC, apart from a number of specific laws (and the Constitution itself) which must be enacted or amended by the NPC.

The State Council represents the highest authority of state executive power, and is empowered to enact administrative rules and regulations consistent with, and complementary to, the laws passed by the NPC. The State Council can also propose bills to the NPC or the Standing Committee.

In the PRC, there are four levels of judicial courts (in addition to specialist courts empowered with the judicial functions) which are the central Supreme People's Court, the provincial High People's Court, municipal Intermediate People's Courts and the Local People's Courts. The judiciary is accountable to the NPC and the Standing Committee and is subject to the supervision of the NPC. The judiciary does not determine the validity of laws and regulations in the PRC.

The Chinese jurisprudence and legal system follow the civil law tradition to some extent. Previous court decisions do not constitute binding precedents, despite the fact that, in practice, they will guide future judges when adjudicating cases. Furthermore, interpretations published from time to time by the Supreme People's Court on the application of national laws are viewed as having the force of law.

The central legal structure detailed above is replicated at the local level, where provincial and municipal legislatures enact by-laws, directives and regulations, which must not conflict with existing national laws.



Foreign Investment Policy

The PRC has been the largest recipient of foreign direct investment of all the developing countries since 1993, and overtook the US as the world's top recipient of foreign direct investment in 2003. Much of this investment comes from Germany, Hong Kong, Japan, Singapore, South Korea, Taiwan, the United Kingdom and the USA.

The Foreign Investment Industrial Guidance Catalogue (2011) (Investment Guidance) explains the foreign investment policy details, industries and activities. It divides foreign investment into 3 categories:

- ▶ Encouraged
- ▶ Restricted
- ▶ Prohibited

Where a particular sector is not mentioned in the Investment Guidance, generally speaking, foreign investment is deemed to be permitted. The Foreign Investment Guiding Manual (2008) which sets out the requirements and procedures for foreign investment in the commercial sector, should also be consulted prior to making investment decisions in the PRC.

One of the most important ministerial directives to note is the Administrative Measures Governing Foreign Investment in Commercial Sectors (Administrative Measures). It permits foreign investors to invest in commercial sectors e.g. commission agency services, wholeselling, retailing or franchising businesses. Under Article 3 of the Administrative Measures, such investment is termed as foreign invested commercial enterprises (FICE). The significance of the Administrative Measures directive is that it requires a much lower capital threshold, and that the geographical restrictions on the locations of establishing FICEs in the retail sector were removed in 11 December 2004. This directive also allows small and medium sized enterprises to enter the PRC market.

The government has relaxed certain restrictions on foreign investments in recent years, implementing a number of World Trade Organisation (WTO) commitments. The Closer Economic Partnership Arrangements (CEPA) with Hong Kong and Macau are also reflective of the easing of such restrictions. In addition, to attract foreign investment and know-how to upgrade Chinese infrastructure, the government has introduced tariff exemptions on importing equipment for projects within a number of industries including: energy, agriculture, transport, and raw materials sectors. It has also promulgated a number of benefits and incentives directed at overseas investors in a number of industries, including tech and business process outsourcing enterprises. There remain, however, certain restrictions on foreign currency exchange in the PRC. Remittance of funds out of the PRC is subject to monitoring and approval by the State Administration of Foreign Exchange (SAFE). In the absence of proof that income tax has been paid, remitting profits out of the PRC by an enterprise can prove problematic.

Types of investment vehicles

The principal forms through which a foreign business may operate in the PRC are:

- ▶ Wholly foreign-owned enterprise (**WFOE**)
- ▶ Foreign-invested commercial enterprise (**FICE**)¹
- ▶ Representative office
- ▶ Equity joint venture (**EJV**) and
- ▶ Cooperative joint venture (**CJV**)

¹ FICE is permitted to set up wholly owned enterprises by foreign investors in some sectors under the Administrative Measures.

Wholly foreign-owned enterprises (WFOE)

Wholly foreign-owned enterprises (better known as WFOEs) are the generally preferred business vehicle for foreign investors in the PRC. Established under the Law of the PRC on Wholly Foreign-Owned Enterprises and the corresponding detailed implementation rules issued by the relevant governmental instrumentalities, a WFOE generally takes the form of a limited liability company, although it can exist in other formats with appropriate approvals.

The WFOE is an attractive option for foreign investors, allowing them to retain all of the equity and control of the entity. However, the process for establishing one can be both lengthy and costly, with approval required from the Ministry of Commerce (MOFCOM) or its local counterpart, and, in some sectors, prior approval is also required from industry-specific regulators such as China Banking Regulatory Commission (CBRC) and China Insurance Regulatory Commission (CIRC). Furthermore, WFOEs are prohibited from operating in certain industries, including publishing, broadcasting and public utilities which are deemed as sensitive sectors by the PRC government and have not yet been opened up for foreign investors.

Foreign-invested commercial enterprises (FICE)

As discussed previously, a FICE is a popular variation of the WFOE that can engage in a range of activities, including distribution throughout wholesale, retail and franchise systems and opening and operating branches. However, FICEs are restricted to one particular sector – for instance, a food retailer could not branch out into selling clothing products.

Representative offices

Representative offices are one of the easiest and cheapest forms of business entity which can be used to establish a presence in the PRC, as there are fewer regulations to follow and no capital requirements. It, therefore, represents a lower-risk option for foreign investors.

However, representative offices are not considered as separate legal entities under the PRC law and cannot be used to generate any revenue or sales, or enter into any contracts. They are restricted to "non-direct business operations" such as market research, business development and rendering services on behalf of a Head Office. In practice, many representative offices operate beyond their powers and scope of operation, running the risk of receiving penalties through the local branches of the State Administration of Industry and Commerce (AIC).

Joint ventures

Equity joint ventures (EJV)

An equity joint venture is a company i.e. a separate legal entity with limited liability in which the partners share profits, losses and, generally speaking, management responsibility in accordance with their respective capital contribution ratios. EJVs are principally regulated by the Law of the PRC on Chinese-Foreign Equity Joint Ventures (EJV Law) and the corresponding implementing regulations issued by the relevant PRC governmental instrumentalities, although there is also a wealth of supplementary legislation and directives governing particular aspects and issues in existence and operation. They are also affected by certain provisions of the Company Law of the PRC (Company Laws).

Depending on the circumstances and size of the proposed venture, the underlying joint venture contract must be approved by the National Development and Reform Commission (NDRC), MOFCOM or its local counterpart. Obtaining approval from those government instrumentalities for setting up equity joint ventures can be a protracted and multifaceted process. In certain industries, it takes over 12 months. Once the approval to establish an EJV is given, the EJV must be registered with the local bureau of the AIC within one month in order to obtain a business licence. 30 days after this business licence is issued, the joint venture must also register with the local tax authorities.

For such an EJV to enjoy the status as a foreign-invested enterprise, foreign investors must provide at least 25% of the overall capital contribution, although, with the exception of a handful of specific industries, there is no upper limit on the foreign party's contribution.

Cooperative joint ventures (CJV)

A cooperative joint venture is a more flexible investment vehicle. It is governed principally by the Law of the PRC on Chinese-Foreign Cooperative Joint Ventures (CJV Law). Such joint ventures can either be a purely cooperative, contractual relationship between the parties or an independent legal entity in which the parties' liabilities can, generally, be limited to their respective capital contribution. Crucially, in a CJV, unlike an EJV, the parties may agree on how the profits are distributed between them in accordance with the CJV contract, without being strictly tied in to their respective capital contribution ratios. Another benefit is that the investors are able to make a wider range of contributions than the strict equity investments permitted in respect of EJVs (although whether specific forms of assistance will be counted as joint venture contributions varies considerably).

CJVs must be authorised in a similar manner as EJVs, usually through MOFCOM or its local counterpart. They must also obtain a business licence and register with the tax authorities in much the same way as an EJV would do.

Employment

Employment law in the PRC is principally governed by the Labour Contract Law of the PRC (Labour Contract Law) which came into effect on 1 January 2008. This law focuses on the welfare of employees and strictly regulates the ability to terminate employees' employment contracts, with a particular emphasis on promoting long-term or open end contracts.

The Labour Contract Law requires employers, including FICEs, to enter into an individual written contract with each of their respective employees. Initially, such a contract can be entered into for a fixed or open term, although employers are only able to sign or renew an individual employment contract for two fixed terms before having to execute an open term contract with that employee.

Hiring and firing staff

Hiring

WFOEs, FICEs and joint ventures are able to employ staff directly from the local workforce, although, given the difficulties associated with doing so and the lack of local knowledge, agencies or local joint venture partners are often relied upon to assist with staff recruitment.

Representative offices, however, are not permitted to employ their staff directly. Instead, they must enter into a contractual relationship with an authorised labour agency e.g. the Foreign Enterprise Service Corporation or China International Intellectech Corporation, through which the agency employs the staff and secondes them to the representative office. Although there is no employment contract issued, many representative offices do, nonetheless, enter into separate agreements with the staff to specify the terms of their employment such as remuneration, duties and confidentiality and other obligations.

Expatriate staff of representative offices are generally employed by the foreign parent company in line with employment contracts governed by foreign law.

Probationary periods of up to six months are permitted in employment contracts, except for agency or contingency workers who can be hired only for temporary or auxiliary positions.

Firing

Employers in the PRC are only permitted to unilaterally terminate an employee's contract of employment in limited circumstances, as specified by the relevant laws and regulations. Such circumstances include, for example, the expiry of their employment contract, the revelation of (or concealment of) criminal convictions, or where the employee is proven to be unqualified for the role.

Generally, when termination is permitted, the employer must give the employee 30 days' prior notice, although monetary payment in lieu of notice is allowed. Severance payments are also usually required, generally calculated at the level of one month's wages for each year of service.

Representative offices must terminate the employment of their staff through their engaged labour agency.

Trade unions

Under the Trade Union Law of the PRC, companies in the PRC are required to support their employees to set up a trade union. They are also required to fund the activities and costs of the union up to the amount of 2% of their company's total salary costs.

There are a number of obligations on companies to notify and engage with trade unions before taking actions that may affect their employees. There are also strong pressures on companies to accede to collective bargaining. If a company receives a written request for collective bargaining from its trade union or an elected employee representative, the management cannot refuse to engage in discussions with such a representative without a justifiable reason.

Visas and residence for foreign employees

Any entity in the PRC which employs foreign workers must obtain an Employment Licence from the local Labour Bureau.

Foreign expatriates looking to work in the PRC are required to have a work visa. These can be obtained from any Chinese embassy or consulate, or (if in the PRC) the local Public Security Bureau (PSB). Then the individual must apply for a foreign resident permit with the local Public Security Bureau within 30 days of their arrival in the country.

Registered representatives of a representative office need to apply to the local AIC for a Working Card whilst non-registered foreign employees will need to apply to the local Labour Bureau for an employment permit.

All international assignees must have an Employment Permit from the local Labour Bureau, as well as a health certificate from the local International Travel and Health Care Centre.

Taxation

The tax system in the PRC is complicated, multifaceted and regional. Therefore, what follows here is a high level overview of the various taxes and treatments. Specific local advice is imperative for any foreign entity investing in the region and should be sought early in any transaction.

The key governmental bodies responsible for the tax law in the PRC are:

- ▶ The NPC, which enacts the PRC's tax laws
- ▶ The State Council, which promulgates supplementary and provisional regulations
- ▶ The Ministry of Finance, which develops tax legislation in line with the prevailing economic policy
- ▶ The State Administration of Taxation, which publishes Tax Circulars interpreting and applying tax laws and regulations
- ▶ Various local bodies.

The PRC has signed bilateral tax treaties with around 90 countries, helping corporates and individuals to avoid double taxation while helping to prevent tax evasion.

Enterprise income tax

The Enterprise Income Tax Law (EIT Law) came into effect on 1 January 2008 and the corporate income tax rate for both domestic and foreign enterprises has been the same rate of 25% since then. Businesses that previously enjoyed special tax rates of 15% in certain regions saw staged increases in their tax rates to 25% by 2013. The EIT Law also provides for a flat 10% withholding tax rate for dividends, interest, royalties, rentals, capital gains and other income derived by non-resident enterprises from sources in the PRC.

The EIT Law provides for a variety of tax incentives for companies, including foreign enterprises, that satisfy particular criteria. Although these are narrower than those which existed under previous tax laws, reduced tax rates still apply for qualified hi-tech enterprises, advanced services enterprises and companies operating in particular sectors, including agriculture, energy, infrastructure and environmental protection. Several categories of income are also tax free, including those received by recognised charities and dividends paid between qualified tax resident enterprises. The EIT Law also strengthened the anti-avoidance rules and the powers of the tax authorities, including introducing a clamp down on indirect transfers.

Enterprises incorporated in the PRC are automatically tax resident enterprises, as are foreign enterprises whose effective management is based in the PRC. Tax resident enterprises are subject to corporate income tax on their worldwide income, while a non-tax resident enterprise which nonetheless has an establishment or place of business in the PRC is subject to corporate income tax on the income derived by the establishment or place of business.

Individual income tax

The basic rules governing taxation in the PRC are laid down in the Individual Income Tax Law of the PRC, as well as in the accompanying implementation regulations.

Individuals domiciled in the PRC, or those who have resided in the PRC for one year or more, are required to pay income tax on their worldwide income. Individuals who are not domiciled in the PRC and who have resided there for less than one year (but more than 90 days in the calendar year) are subject to individual income tax only on their PRC-sourced income. This income tax is imposed on employment income at progressive rates from 5% to 45% and on capital gains, central income, interest, dividends and royalties at a flat rate of 20%. Individuals earning over RMB 120,000 per year must complete an annual income tax return.

For expatriates, the following forms of income may be exempt from income tax:

- ▶ a portion of employment income
- ▶ housing (where it is paid for by employers)
- ▶ home-leave travel expenses
- ▶ relocation or moving costs
- ▶ children's local educational costs
- ▶ overseas mandatory insurance payments which are made by the employer and
- ▶ reimbursement for subsistence and laundry costs as well as business-related expenses.

Subject to the practice of the local tax authorities, expatriates who are liable for individual income tax in the PRC may be required to register with the local tax bureau.

Turnover taxes

Value added tax (VAT)

The sale of goods, and the provision of certain services, within the PRC is generally subject to VAT at a rate of either 13% or 17% (although certain small businesses are subject to a lower rate of 3%). VAT is also levied on the import of goods into the PRC unless the imports are specifically exempted under special rules. Exporters of goods from the PRC may be entitled to a refund of input VAT incurred on the exported goods. VAT is borne by the final consumer as the tax is charged at each stage of the production or provision of goods and services, with each supplier receiving credit for the relevant VAT paid.

Enterprises that make sales taxable for VAT purposes in the PRC should voluntarily register for VAT with the local tax authority. VAT is usually accounted for on a quarterly or monthly basis.

Business tax

All enterprises and individuals that provide taxable services or transfer immovable or intangible property in the PRC are subject to business tax at a rate between 3% and 5%. Entertainment services are, however, taxed at between 5% and 20%. Business tax is applied regardless of whether the services are rendered onshore or offshore. Business tax is not a creditable tax and is generally levied on the gross income. There is no credit mechanism for business tax; it may, therefore, lead to double taxation.

Enterprises that provide services or sell intangible assets or properties within the scope of business tax should voluntarily register for it with the local tax authority.

Consumption tax

Consumption taxes are levied on the production, processing and importation of certain luxury or unhealthy goods. The tax rates vary from 1% to 45% for different categories of goods. Items subject to consumption tax include tobacco, alcoholic drinks, cosmetics, fireworks, refined oil, motorcars and motorcycles, golf equipment, luxury watches and yachts.

Taxable consumer goods exported by taxpayers are exempted from consumption tax. Consumption tax is not recoverable but is deductible as expenses for income tax purposes.

Dispute Resolution

According to the 2013 World Bank 'Doing Business' survey, the PRC was ranked 19th out of 185 world economies for "ease of enforcing commercial contracts". However, the court system is affected by delays and still subordinate to, and influenced by, the government and the Communist Party. Therefore, foreign investors in the PRC are generally advised to pursue arbitration or mediation as their preferred mode of dispute resolution.

Litigation

As described on page three of this guide, there are four levels of courts in the PRC: the Supreme People's Court, the High People's Courts, the Intermediate People's Court and the Local People's Court. The majority of cases involving a foreign party are likely to fall under the jurisdiction of the Intermediate People's Court and are usually heard by a panel of three judges. The language of the courts is Chinese, although translation or interpretation may be provided if requested, and at the expense of the parties. During the course of the litigation, the judges will generally take steps to try and mediate the difference between the parties.

The PRC court system, generally speaking, allows for decisions to be appealed only once in most cases; the second instance judgment is final and binding upon the parties immediately. However, in some circumstances, litigants may appeal to higher courts against a judgment or a ruling derived from the retrial.

It is essential that parties engaging in litigation in the PRC are aware of the underlying loyalty of the judiciary to the government in general, and the Communist Party in particular. When political or sensitive cases come before the courts, significant pressure will be brought to bear on the court to deliver a favourable decision to the litigant party affiliated with the ruling party. However, as far as most commercial disputes are concerned, the judiciary will generally adjudicate the disputes in a reasonably fair manner, based on the commercial merits.

Since 2006, there has been a formal agreement between Hong Kong and Mainland China, the "Arrangement on Reciprocal Enforcement of Judgments in Civil and Commercial Matters", under which they both agreed to recognise and enforce judgements made in each others courts.

Arbitration

Commercial arbitration is often the preferred mode of dispute resolution for foreign parties in the PRC. This is primarily due to the fact that the PRC is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and arbitral awards obtained in the PRC may be enforced in more than 140 countries worldwide. There are a vast number of arbitration institutions across the PRC with certain regions, such as Shanghai, having a large number of alternatives.

In the PRC, arbitration is regulated by the Arbitration Law, the PRC Civil Procedure Law and the New York Convention. Decisions and procedures are also affected and influenced by various judicial interpretations issued by the Supreme People's Court. Individual arbitration centres also adopt their own rules, although the China International Economic and Trade Arbitration Commission's rules (CIETAC Rules) remain the most influential and well respected.

Under the PRC Civil Procedure Law, the Arbitration Law and the CIETAC Rules, domestic and foreign-related arbitration cases are subject to different administrative procedures and judicial supervision. The CIETAC Rules, effective as of 1 May 2005, have been amended to bring them much more in line with international practice, including allowing parties to select arbitrators outside of CIETAC's panel. One key point to note, however, is that the Chinese Arbitration Law requires valid arbitration agreements to expressly refer to an "arbitration commission" with the result that ad hoc arbitration is not permitted in the PRC. In addition, foreign arbitration instructions are unable to operate in the PRC, since they do not constitute "arbitration commissions" in this context.

Foreign arbitral awards can be enforced in the PRC through the New York Convention. However, domestic and foreign-related awards rendered in an international arbitration by an arbitral tribunal with its seat in the PRC, are governed by the Arbitration Law. It should be noted that, in the context of foreign-related arbitral awards, unlike domestic awards, the courts will only examine the procedural aspects rather than the substantive issues, when considering enforcement.

Under the Civil Procedure Law, there is a statutory limitation of two years for the enforcement of arbitral awards in the PRC.

Mediation

The consent of the parties is required to mediate disputes in the PRC; mediation cannot be imposed on them by the courts. Mediators have no power to render a decision without the agreement being reached by the parties. There are three broad types of mediation in the PRC namely, court or judicial mediation, arbitration mediation and administrative mediation.

As a matter of practice, judges will often take steps to promote mediation between the parties, essentially supervising and encouraging settlement. Any agreement reached and issued by the court in a court mediation process is binding on the parties and enforceable as a judicial judgment.

An arbitral tribunal is also entitled to conduct mediation with the consent of the parties. If the parties do reach a settlement, they can request that the arbitral tribunal makes a consent award in accordance with the settlement agreement which will be binding upon the parties.

Administrative mediation is conducted with the involvement of administrative authorities such as the government, the public security authority or the marriage registration authority.

Competition

The NPC issued the Anti-Monopoly Law of the PRC (AML) on 30 August 2007, which came into force on 1 August 2008. It is the PRC's first comprehensive competition law, applying to almost all sectors of the economy and aiming to prevent monopolies, restrictive agreements and abuse of dominant market positions while also endeavouring to establish a regime of merger control.

Agreements which violate the AML are automatically void. Fines of up to 10% of the total turnover in the preceding years can also be imposed on offenders and any illegal income can be confiscated.

Merger control

Under the AML, all concentrations – a broad term which includes mergers, acquisitions and most joint ventures – have to notify the MOFCOM and seek its approval prior to closing the deal provided that:

- ▶ The total worldwide turnover in the previous accounting year of all undertakings involved in the concentration exceeds RMB 10bn, and at least two of such undertakings each has a turnover of more than RMB 400m within the PRC in the previous accounting year; or
- ▶ The total turnover in the PRC during the previous accounting year of all undertakings involved in the concentration exceeds RMB 2bn, and at least two of such undertakings, each of which has a turnover of more than RMB 400 million within the PRC in the previous accounting year

Specific higher thresholds exist for banks, insurance companies and other financial institutions, while intra-group transactions are expressly exempted from such filing obligations. The MOFCOM has the power to request a merger filing, either before or after the closing of a transaction, even if the thresholds are not reached, if it believes that there could be a significant negative impact on competition as a result of the transaction.

The MOFCOM has 30 days to conduct a preliminary review of the information supplied on a transaction, although this can be extended by up to 150 days. As a precaution, it is imperative that such approvals are sought early in a transaction. Following this period, the MOFCOM can either prohibit the concentration completely, or alternatively, impose conditions on it.

Concentrations which take place outside of the PRC but restrict or eliminate competition in the Chinese domestic market will still be covered by the AML.

Failure to make a merger filing may result in fines of up to RMB 500,000.

Monopoly agreements

Monopoly agreements are defined in the AML as being "agreements, decisions or other concerted behaviour that eliminate or restrict competition" within the PRC. The AML can, however, also capture monopoly agreements which are concluded outside the PRC but which have the effect of "eliminating or restricting competition" in the domestic market of the PRC.

The following horizontal agreements between competitors are prohibited:

- ▶ Agreements to fix or change the price of goods
- ▶ Agreed restrictions on the quantity of goods produced or sold
- ▶ Market sharing
- ▶ Restrictions on the purchase of new technology or equipment
- ▶ Restrictions on the development of new technology or new products
- ▶ Collective refusals to deal.

The AML also prevents suppliers from imposing fixed or minimum resale prices on its customers.

Parties are exempt from these prohibitions, provided that they are able to demonstrate that:

- ▶ The agreements would not seriously restrict competition in the relevant market
- ▶ Consumers will, in fact, derive benefits from these agreements, and
- ▶ One of a list of the specified objectives is met, including technological advancement, improved product quality or increases in efficiency.

However, parties are expected to assess whether they fall within these exemptions as there is no formal mechanism through which they may obtain advance clearance.

Abuse of a dominant market position

A "dominant market position" is defined in the AML as a position which allows one or more undertakings:

- ▶ To control the price or quantity of goods in a relevant market
- ▶ To otherwise affect conditions of a transaction, or
- ▶ To hinder the entry of other undertakings into the relevant market

There is a rebuttable presumption that an undertaking occupies a dominant market position when one, two or three undertakings achieve a combined market share of 50%, 66.6% or 75% respectively. However, an undertaking will be likely to be able to rebut this presumption if it occupies less than 10% of the relevant market itself.

If a dominant market position exists, the undertakings are prohibited from abusing such position. Behaviour that is likely to constitute abuse of dominant market positions include:

- ▶ Selling or purchasing goods at unfairly high or low prices respectively
- ▶ Selling goods below cost without a legitimate reason
- ▶ Refusing to deal with another party without a legitimate reason
- ▶ Forcing another party to trade exclusively with them without a legitimate reason, and
- ▶ Imposing unreasonable conditions or discriminatory prices or practices on transactions or parties

Intellectual Property

The PRC has something of a reputation as a hotbed of intellectual property rights infringement. However, as a member of the World Trade Organisation (WTO), the PRC is a contracting party to all the WTO's major intellectual property conventions. Largely as a result of this membership, intellectual property protection in the PRC has improved significantly in recent years.

Patents

The Patent Law of the PRC (Patent Law) permits various "Invention Creations"— including inventions, utility models and designs – to be patented provided they are novel, inventive and useful. Inventions can be patented for a period of 20 years from the date of the filing of the application at the State Intellectual Property Office (SIPO); for utility model and design patents the relevant term is 10 years. Patents cannot, however, be granted for scientific discoveries, thought processes, methods of diagnosing or treating diseases, animal and plant varieties and substances obtained by means of nuclear transformation.

Registered patents are assignable, although, all such assignments should be registered with the SIPO.

If an Invention Creation is created by an employee carrying out his or her work duties or making use of the employer's material resources, the right to apply for the patent lies with the employer.

Trademarks

Registered trademarks – including trademarks, service marks, collective marks and certification marks – must be approved and registered with the Trademark Office of the AIC (Trademark Office). Such trademarks must not be generic in nature, lack distinctive features or have direct reference to the physical characteristics of the goods they represent.

A correctly registered trademark will be valid for a period of 10 years from the date the registration is approved. This period can be extended for an additional ten years by filing a renewal application within six months of the original term's expiration.

In the PRC, the person who files for a trademark first will have the exclusive right to it. If approved, details of the planned trademark registration will be published in the PRC Trademark Gazette for three months to allow for any objections to be raised. If no such objections are entered, the trademark will proceed to registration. Assignments of all trademarks must go through a similar registration and publicity process.

Copyright

The Copyright Law of the PRC, last substantially amended soon after the turn of the century, governs the registration and protection of copyrights in the PRC (Copyright Law). The revisions brought the PRC more in line with international practice. The PRC is also a signatory to both the Berne Convention and the Universal Copyright Convention, the two principal multilateral copyright conventions.

The Copyright Law protects rights of, amongst others, publication, authorship, alteration, integrity, reproduction, distribution, rental, exhibition, performance, adaptation, and translation. The rights of authorship, alteration and integrity have an unlimited duration, while all other rights are protected for a term of the life of the author plus 50 years after the author's death, rounded down to the nearest 31 December. The Copyright Law protects published and unpublished works of Chinese citizens, legal entities, foreign nationals and stateless persons.

The National Copyright Administration, a subordinated agency of the State Council, discharges its responsibility for the administration of copyrights across the PRC. However, locally, copyrights are administered by local Copyright Administration Departments of the local People's Government. Registration is not a precondition to copyright enforcement, although it may be helpful in evidencing ownership in enforcement actions.

The Criminal Code provides for criminal penalties for copyright infringement. The Copyright Law is also supplemented by the internet copyright measures which set out takedown procedures to facilitate effective administration of copyright enforcement on the internet.

Trade secrets

Although there is no strict intellectual property law governing the use of trade secrets, rules dealing with this area exist through the Anti-Unfair Competition Law of the PRC. This law protects trade secrets, defining it as "technical and operational information which is not known to the public, which is capable of bringing economic benefits to the owner of rights, which has practical applicability and which the owner of rights has taken measures to keep secret." Crucially, the "public" in this case captures competitors within the PRC rather than the general public or individuals or businesses outside of the PRC.

Taking action against breaches of this law is not straight forward as there is a high burden of proof on the complainant. However, if this burden is discharged, there are several options open to the aggrieved party including suing the offending party in court, seeking an injunction through the court, or requesting enforcement by the AIC. Trade Secret offences can also give rise to criminal liability.

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