Private M&A 2021

Contributing editors
Will Pearce and Louis L Goldberg
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Contributing editors
Will Pearce and Louis L Goldberg
Davis Polk & Wardwell LLP

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Private M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the Dominican Republic, Georgia, New Zealand, South Korea, Thailand and Zambia.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Pearce and Louis L Goldberg of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

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Getting The Deal Through

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China

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

1 How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

Acquisitions of shares in a company and acquisitions of assets from a company are the two main forms of acquisitions and disposals of privately owned companies in China. Mergers between two companies are also recognised by laws of the People's Republic of China (PRC, for the purpose of this chapter only, excluding Hong Kong, Macao and Taiwan), but are less common in practice.

The process for acquisitions and disposals varies depending on the regulatory requirements involved. For example, transactions involving foreign investors, state-owned entities (SOEs) or certain special industries would be subject to special filings or approvals and would take longer than a normal domestic transaction.

The length of time also varies depending on whether any registrations, filings or approvals from the administrative agencies are required but, in most cases, ranges from 10 to 90 days.

Legal regulation

2 Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

Private acquisitions and disposals are normally governed by the Company Law of the PRC (PRC Company Law) and the Contract Law of the PRC (PRC Contract Law). In addition, foreign investment-related acquisitions are subject to the PRC Foreign Investment Law, the Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, Industry Guidelines on Encouraged Foreign Investment and the Special Administrative Measures (Negative List) for Foreign Investment Access. Transactions related to state-owned assets or entities are also subject to SOE-related laws and regulations. Furthermore, acquisitions that meet certain monetary thresholds may be subject to merger control notification and review pursuant to the Anti-Monopoly Law of the PRC.

On 28 May 2020, China's national legislature, the PRC National People's Congress, adopted the Civil Code of the PRC (PRC Civil Code), which will take effect as of 1 January 2021. Upon the effectiveness of the PRC Civil Code, PRC Contract Law will be replaced and abolished, while the provisions of PRC Contract Law will be integrated into the PRC Civil Code with certain changes and supplements.

The acquisition of shares in a company, a business or assets must be governed by Chinese law as long as the target company or the owner of the target business is registered in China.

Legal title

3 What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

As prescribed by the PRC Company Law, the legal title to shares in a company entitles the shareholder to the rights of receiving the profits, participating in important decision-making, electing the management of the company, among others. The legal title to shares in a company is prescribed by law and cannot be negotiated by a buyer, although shareholders may sometimes make bespoke arrangements with respect to the exercise of some of the shareholder's rights.

The legal title to an asset includes the rights to possess, use, benefit from and dispose of the asset. Depending on the commercial arrangement between the parties, these rights may be exercised and transferred separately.

Under certain circumstances, the equity of a company can be transferred automatically by operation of law. One example of this is that, pursuant to the PRC Company Law, except as otherwise provided in the company's articles of association, the lawful successor of a deceased natural person shareholder of a company may succeed the shareholder's rights. Also, under certain circumstances, the courts have the lawful power to force the transfer of certain shares in a company.

There are distinctions between legal and beneficial title. A party registered as the shareholder of a company is deemed the legal owner of the shares registered under its name, but it may be holding such shares for the interest and benefit of the beneficial owner pursuant to certain arrangements between the legal owner and the beneficial owner. However, the private arrangement between the legal owner and the beneficial owner with respect to the title of the shares cannot be used against bona fide third parties including creditors.

Multiple sellers

4 Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

Typically, every shareholder must agree to sell for the buyer to acquire all shares, and no minority shareholder can be squeezed out by the buyer without such minority shareholder's consent. Nevertheless, shareholders in the company may agree in advance to a drag-along provision or a squeeze-out mechanism in the articles of association or shareholder agreement, which will then apply according to its term in the case of a disposal of the company.

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There is not a statutory process to squeeze out minority shareholders under the PRC Company Law. Arguably, buyers can take advantage of a merger process, which requires the approval of shareholders that hold at least two-thirds of the entire equity interest of each merging entity, to impose cash consideration on minority shareholders. That has an effect of squeezing out such minority shareholders. The buyer and the surviving company may face the risk of being sued by minority shareholders who desire to stay as well as the uncertainty of the court rulings given the law is unclear in this respect.

Exclusion of assets or liabilities

5 | Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

A buyer can generally choose which assets or liabilities it wishes to acquire in a transaction that is structured as a business or asset sale, and there are no assets or liabilities that cannot be excluded from the transaction by agreement between the parties, unless such exclusion is for illegal purpose such as fraud or illegal avoidance of debt or violation of public policies. The transfer of assets or liabilities may require customary third-party consents, such as consents of creditors as provided for in the agreements with those creditors.

Consents

6 | Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

Depending on the specific circumstance of the transaction, different regulatory restrictions may apply on the transfer of shares in a company, a business or assets. For example, foreign investments in certain industries are restricted or prohibited in China, and therefore a transfer of equity interest in a company that falls within the prohibited or restricted industries to foreign investors may be prohibited or require a special permit. Transfer of equity interests, business or assets owned by a SOE is also subject to special requirements pertinent to state-owned asset regulations, including that a mandatory evaluation may need to be performed, the sale may need to be conducted in a public manner via a qualified equity exchange or a consent from the state-owned asset regulator may need to be obtained, as the case may be. In addition, in certain regulated industries such as the financial and telecommunication industries, the approval of the industry regulator may also be required.

In addition, acquisitions of businesses or assets are also subject to anti-monopoly review as provided for in the Anti-Monopoly Law when the prescribed thresholds are met. In the case of an acquisition by foreign investors of a controlling stake in a company that falls into certain industries that are pertinent to national security, the transaction needs to undergo a national security review. Finally, as a general matter, under PRC laws, transactions that damage the social public interest will be invalid.

7 | Are any other third-party consents commonly required?

The PRC Company Law provides for a default consent right and a right of first refusal of the non-selling shareholders when one or more shareholders intend to sell their stake, but the shareholders may also agree otherwise in the articles of association. In addition, consents of creditors may also be needed pursuant to the agreements with the relevant creditors. Furthermore, transfers of assets that are subject to security interests typically require the consent of the holder of the security interests.

Regulatory filings

8 | Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

A registration needs to be made with the competent State Administration for Market Regulation to reflect the change in shareholder following an acquisition of shares as well as any change in registered capital, legal representative or the composition of the board resulting from the acquisition. Certain assets, such as real property and certain intellectual property rights, are required to be registered in China, and a registration needs to be completed following a transfer of these assets. Registration or official fees payable are nominal, but stamp duties may be payable.

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

9 | In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

In addition to external lawyers, parties may also appoint financial advisers and accountants to assist with a transaction. Financial advisers will provide strategic and valuation advice, and accountants will assist with accounting matters, financial and tax diligence and tax structuring. A fairness opinion is rarely rendered by financial advisers. Parties usually obtain an asset appraisal report from an appraisal firm in transactions involving state-owned assets or entities.

Terms of engagement letters of professional advisers typically include scope of work, fees and expenses, confidentiality, conflicts of interest, governing law and dispute resolutions. Key man clauses might be included depending on the preferences and negotiations of the parties.

Duty of good faith

10 | Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

Article 42 of the PRC Contract Law (or article 500 of the PRC Civil Code) provides that a party should indemnify the other party for losses caused by acts that violate the principles of honesty and trustworthiness during the course of negotiating and entering into a contract. Specifically, when negotiating and concluding a contract, one should not make false assertions or misstatements, or deliberately conceal material facts relevant to the conclusion of the contract. In addition, one should also keep confidential commercial secrets of the other party learned during the course of negotiation of a contract, regardless of whether a contract is concluded or not.

The PRC Company Law imposes a general duty of loyalty and duty of care to the company on its directors, supervisors and management personnel.

Documentation

11 | What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

During the preliminary stage of negotiation, documentations for acquisition of shares, business and assets typically include:

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- a confidentiality or non-disclosure agreement; and
- a term sheet of memorandum of understanding setting forth the proposed key terms of the transaction, which in most circumstances are non-binding, apart from certain specific clauses such as confidentiality, exclusivity (if there is one) and dispute resolution clauses.

At the conclusion of the negotiation, definitive transaction documents will be executed that typically include:

- a share purchase agreement or asset and business purchase agreement;
- revised articles of association and shareholders' agreement;
- transitional service agreements that the transaction may require;
- an IP transfer agreement; and
- a real estate transfer agreement in association with the acquisition of shares, businesses and assets.

Compared with a share purchase agreement, an asset or business purchase agreement tends to include more detailed provisions defining the scope of the assets and liabilities that are to be transferred to the buyer and mechanisms for the transfer and delivery of different types of assets and liabilities.

12 | Are there formalities for executing documents? Are digital signatures enforceable?

Formalities of executing documents

A PRC company may execute documents by affixing its corporate seal through internal authorisation procedures, having the documents signed or affixed with the fingerprint by the legal representative or authorised representative of the company, or both. In practice, it is recommended that both the corporate seal and signature or fingerprint of the legal representative or authorised representative are affixed to the documents. A natural person may execute documents using a genuine signature or fingerprint, or both.

There is no legal requirement for the process of executing a document to be notarised by a notary public, but sometimes the parties may choose to do so to reinforce the evidential effect of the signed documents.

Enforceability of digital signatures

According to the Electronic Signature Law of the PRC, reliable digital signatures are enforceable and have the same legal effect as handwritten signatures or seals. Digital signatures can be relied upon as long as the data for the digital signature is controlled solely by the signatory and any alteration to the digital signature or the signed document is traceable.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

13 | What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

Due diligence on the target company or assets usually includes legal due diligence conducted by lawyers and financial due diligence conducted by accountants. In some cases, separate tax due diligence and business due diligence are also performed. Where the circumstances warrant it, a background check on the key personnel of the target company may also be commissioned. Legal due diligence typically covers corporate history, assets, licences and permits, employment, tax, foreign exchange issues, environmental issues, compliance, litigation and administrative penalties of the target company. Most of the time, a due diligence report is prepared by the buyer's advisers, and sellers typically do not provide due diligence reports to prospective buyers.

Liability for statements

14 | Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

A seller is subject to the principles of honesty and trustworthiness during the course of negotiating and entering into a contract. Specifically, when negotiating and concluding a contract, one should not make false assertions or misstatements, or deliberately conceal material facts relevant to the conclusion of the contract. A breach in this regard may result in the contract being revoked. Such liability cannot be excluded by agreement between the parties.

In addition, according to the PRC Contract Law and the upcoming PRC Civil Code, clauses that exempt a party from liabilities arising from such party's wilful misconduct or gross negligence shall have no legal effect.

Publicly available information

15 | What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

The State Administration for Market Regulation operates the National Information and Credit of Enterprise System, which publishes general information of all PRC companies such as their registered address, registered capital, legal representative and business scope. It is usually the first source that a potential buyer or its advisers will look to when obtaining preliminary information on a target company that it intends to purchase. Certain other governmental agencies also operate systems that publish relevant information of companies that they are mandated to regulate and monitor, which can also be utilised by buyers for due diligence purposes. For example, information about the intellectual property of a company, such as trademarks, patents, copyrights and domain names, can be obtained in the trademark, patent and domain name registration systems operated by the relevant regulatory authorities. Where a party operates a business by way of franchise, relevant information with respect to the franchise arrangement will be filed with and disclosed on a designated system operated by the Ministry of Commerce. Pursuant to the regulation promulgated by the Supreme People's Court of PRC, all branches of the People's Court are obligated to publish all effective judgments and judicial decisions on their respective websites, unless laws and regulations provide otherwise.

Buyers should be cautioned that information on these publicly available sources may not be up to date, and they should cross-check such information against the due diligence materials provided by the sellers or target company.

Impact of deemed or actual knowledge

16 | What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

A buyer's knowledge of defects in the target assets or business typically has the effect of precluding the buyer from claiming damages arising from such defects, especially if the knowledge comes from the seller's proactive disclosure, unless at the time of signing of the contract the buyer was not aware of the fact that the defects could substantially impair the basic function of the target assets.

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PRICING, CONSIDERATION AND FINANCING

Determing pricing

17 | How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Pricing is customarily determined by an appraisal or valuation and is also heavily negotiated between the parties. When a stae-owned enterprise is involved, an appraisal by a qualified appraisal firm needs to be conducted, the result of which needs to be filed with the competent state-owned asset regulator, and the pricing should not deviate more than 10 per cent from the appraised value unless a special approval is obtained. Usually, closing accounts are used, while a locked-box structure is seen much less often.

Form of consideration

18 | What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Cash is the most common form of consideration. Shares are sometimes used in domestic acquisitions, especially shares in a listed company (although this quite often triggers special approval requirements from the securities regulator). Cross-border share swaps need to satisfy certain requirements and are also subject to MOFCOM approval, which has been difficult to obtain. Although not very common in practice, sellers sometimes provide financial assistance to the buyer for the purchase price in the form of deferred payment, entrustment loan, etc.

There is no overriding statutory obligation to pay multiple sellers the same consideration. However, the PRC Company Law provides that the same type of shares in a company limited by shares issued at the same time should be of the same price. Although this requirement does not apply to shares in a limited liability company, or to the transfer of shares that are already issued and outstanding, it may be difficult to justify different prices received by multiple sellers in the same transaction from a fairness point of view, which could give rise to obstacles when the target company later wishes to seek a public offering and listing in the domestic securities market. When assessing taxes payable on the transaction, tax authorities also have the discretion to adjust the value of the target shares or assets.

Earn-outs, deposits and escrows

19 | Are earn-outs, deposits and escrows used?

Yes, earn-outs, deposits and escrows are all used, but they are not common. Earn-outs are generally not available for foreign buyers who are required to pay the full purchase price within a statutory period of time. Escrows are often used in association with price payments such as deposits, prepayments and holdbacks.

Financing

20 | How are acquisitions financed? How is assurance provided that financing will be available?

Acquisitions are mostly financed through buyers' own funds. Bank acquisition loans are available to buyers who have a relatively strong balance sheet or are able to provide satisfactory security (rarely target assets or equity). Buyers also obtain financing from non-bank financial intermediaries, the 'shadow banking' system, in the form of entrustment loans or mezzanine financing.

If bank loan or third-party financing is used, sellers generally require proof of internal approval of the financing by the bank or third party and execution of definitive agreements relating to the financing. A bank's or third party's commitment letter may be acceptable depending on the creditability of the financing source and whether sellers have other protections (eg, a termination fee arrangement).

Limitations on financing structure

21 | Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

A bank acquisition loan cannot exceed 60 per cent of the transaction value. Non-financial institutions usually provide loans through banks in the form of entrustment loans as the loans provided by them for non-operating purposes may not be protected by the courts.

Sellers are not restricted from giving financial assistance to buyers. Note that in transactions where foreign buyers acquire shares or assets of domestic companies, 60 per cent of the purchase price must be paid within six months, and the remaining amount within one year after the State Administration for Market Regulation amendment registration is completed.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

22 | Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Acquisitions in China are usually subject to regulatory approvals or filings. Other customary closing conditions include accuracy of warranties, compliance with pre-closing obligations, third-party consents and no occurrence of material adverse effects.

A buyer may also seek to include conditions that are case-specific. Buyers may require sellers to resolve issues identified in the due diligence process before closing.

23 | What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

Buyers and sellers are normally subject to a general obligation to use their reasonable best efforts to procure the closing of transactions or cause the satisfaction of closing conditions. Sellers may give more specific covenants in relation to conditions in their control. Parties' obligations to obtain antitrust approval vary in different contexts. If the buyer acquires control or decisive influence over the target company, the buyer is normally obliged to submit antitrust application and use reasonable efforts to obtain the approval; otherwise, the buyer and the seller are jointly obligated to obtain the antitrust approval. Such obligation to obtain antitrust approval is usually not subject to a best effort obligation.

Pre-closing covenants

24 | Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

Pre-closing covenants are normally agreed by parties. Sellers are usually required to operate the target company in the ordinary course of business. Negative covenants are also common. Sellers need to obtain buyers' consent for matters such as a change of share capital,

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amendments to the articles of association, dividend and other distributions, major investments and disposals of assets.

Very often, the performance of pre-closing covenants is included as a closing condition, subject to a materiality standard. Buyers may also seek monetary damages or terminate the transaction in the case of a material breach that is not cured within a specified period of time.

Termination rights

25 Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Parties typically have contractual and statutory termination rights. Typical termination triggers include closing failing to occur by a longstop date; a material breach by the counterparty; and a force majeure event.

26 Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Break-up fees and reverse break-up fees are sometimes used in acquisition transactions. Break-up fees are usually limited to a seller's refusal to close the transaction. Reverse break-up fees are typically triggered by failure to make timely price payments.

Such fees are usually in the form of liquidated damages. Any liquidated damage that exceeds the actual losses by 30 per cent may not be supported by the courts.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

27 Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

A seller typically gives representations and warranties to a buyer in an acquisition transaction. There are no legal distinctions between representations and warranties.

Typical representations and warranties of sellers include the authority of the sellers to enter into the transaction and legal title to the shares. Management sellers or sellers who control the target company also make representations on the operations of the target company, including compliance with applicable laws, financial statements, licences and permits, legal proceedings and taxes. Sometimes buyers request a representation regarding the accuracy and authenticity of the due diligence materials provided to the buyers for the purpose of the transaction.

Sometimes specific indemnities are sought by buyers to address due diligence issues. Specific indemnities typically cover under-payment of social security premiums, failure to obtain any necessary business qualification, specific non-compliance and such like.

Limitations on liability

28 What are the customary limitations on a seller's liability under a sale and purchase agreement?

Clauses relating to liabilities for a breach of contract in a sale and purchase agreement are often very general, providing that either party may seek for damages if the other party breaches the contract. Sophisticated sellers sometimes negotiate specific limitations to liabilities. Such limitations include caps, baskets and deductibles. Caps may range from a small portion of the purchase price to 100 per cent of the purchase price. Buyers may be required to bring a claim for damages within a short period of time. Sellers may request a survival period for their representations and warranties.

While parties may agree on indemnity or damages clauses, such clauses are subject to various statutory limitations on damages that are available to the non-breaching party. As a general principle, only actual losses suffered are recoverable under the PRC Contract Law/PRC Civil Code. The damages available to buyers are also subject to the contract law principles of foreseeability, mitigation and contributory negligence.

Transaction insurance

29 Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Transaction insurance is rarely used in China. Chinese insurance companies seldom provide such transaction insurance to transaction parties.

Post-closing covenants

30 Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Post-closing covenants are relatively common. Sometimes regulatory filings (eg, registration of share transfers with the local State Administration for Market Regulation) are made post-closing covenants. Typical post-closing covenants also include non-compete and non-solicitation obligations imposed on sellers. Such obligations in a business sale context are usually upheld in courts. Buyers may have post-closing obligations to retain employees and maintain certain levels of compensation for a specified period of time.

TAX

Transfer taxes

31 Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Generally, stamp duty is payable by both buyers and sellers upon execution or delivery of the legal documents within the PRC. Even if the documents are not signed within the PRC, if such documents have legal force in the PRC and are protected by the PRC laws, the parties should still pay stamp duty when bringing the documents into the PRC. Normally the stamp duty rate is 0.03 per cent on the purchase or sale value of goods and 0.05 per cent on the value of transferred title of certain properties (including shares) for each party. Besides, deed tax at rates from 3 to 5 per cent should be paid by transferees for acquiring buildings and state-owned lands within the territory of the PRC. Reductions or exemptions from stamp duty and deed tax may be available under certain circumstances.

Corporate and other taxes

32 Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Income tax

Non-resident enterprises or individuals disposing of shares or assets in the PRC are subject to income taxes on chargeable gains arising. A 10 per cent enterprise income tax rate applies to non-PRC-resident enterprises provided that they do not have any office or establishment within the PRC, or although they have such office or establishment in

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the PRC but relevant income is not effectively connected with such office or establishment (tax treaties may provide exemptions in certain cases). A 20 per cent individual income tax rate applies to non-PRC-resident individuals, unless exempted by relevant tax treaties. Payers shall withhold income taxes for such non-resident enterprises and individuals.

In addition, a 25 per cent enterprise income tax rate applies to non-PRC resident enterprises that have offices or establishments within the PRC on their worldwide income effectively connected with such offices or establishments.

Land appreciation tax

Enterprises or individuals transferring real estate, including transferring state-owned land-use rights and buildings on such land, are subject to land appreciation tax at rates ranging from 30 to 60 per cent on the appreciation amount, subject to exemptions or reductions upon satisfying certain criteria.

Value added tax and surcharges

Enterprises and individuals disposing of goods or assets may be subject to value added tax (VAT) and local surcharges (surcharges are calculated based on the actually paid amount of VAT, including city construction and maintenance tax (at rates of 1, 5 or 7 per cent), an education expense surcharge (at a rate of 3 per cent) and a local education expense surcharge (at a rate of 2 per cent). Generally, a transfer of non-publicly-traded shares is not subject to VAT and local surcharges.

VAT rates vary depending on a complex set of factors (including the nature of the taxpayers, the nature of the taxable business activities). The highest VAT rate is 13 per cent. Reductions and exemptions from VAT may be applicable under certain circumstances.

Sellers' agents in the PRC or buyers shall withhold VAT and local surcharges for non-resident enterprises (if the enterprises do not have an office or establishment in the PRC) and non-resident individuals.

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

33 Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

When a buyer acquires the shares in a target company, the labour relationship between the employees and the target company does not automatically change because the employer is still the target company and the acquisition will change only the shareholding structure of the target company. If there is a merger between two companies, the employees will be automatically transferred to the company that survives after the merger.

Employees are also not automatically transferred when a buyer acquires a business or assets from the target company. In the event that the buyer would like to retain certain employees from the target company as a part of a transaction, such employees should terminate their employment contract with the target company and enter into a new employment contract with the buyer, and such employees' consent must be obtained prior to such transfer of employment relation.

Notification and consultation of employees

34 Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

Generally, there are no obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets. However, in a business or assets acquisition transaction, if the buyer would like to acquire certain employees of the target company as a part of this transaction, such employees' consent must be obtained prior to the transfer of the labour relationships.

Buyers should pay special attention to labour issues when acquiring equity interests in a state-owned entity (SOE) or SOE assets. If an acquisition of shares in a SOE results in a restructuring of the SOE (that is, the nature of the SOE changes its legal form into a company, or the target SOE is no longer 100 per cent owned or controlled by the state), the target SOE is obligated to consult with its employees or employee representatives in connection with such acquisition. If an acquisition of shares, a business or assets involves a settlement for the SOE's employees (such as layoffs or a transfer of employment relationships), an employee settlement plan must be approved by the employees or their representatives' meeting of the target SOE.

Transfer of pensions and benefits

35 Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

Contributions to the housing fund and social insurance funds are mandatory under PRC law. The social insurance funds include pensions, medical insurance, work-related injury insurance, unemployment insurance and maternity insurance. Both the housing fund and social insurance funds are contributed to by the employee and the employer respectively at prescribed ratios.

When there is an acquisition of shares of a company, the social insurance and housing funds will not be changed as the employer will not be changed, and no filing needs to be made and no consent needs to be obtained. When there is an acquisition of a business or assets, where the buyer will acquire certain employees from the target company, filings with the competent government authorities shall be made for the transfer of the social insurance and housing funds as the employer will change.

Other non-mandatory pensions and benefits such as commercial insurance that are voluntarily contributed by the target company may not be transferred automatically with the employees. Whether employees will enjoy the same benefits is a decision to be made by the new employer.

UPDATE AND TRENDS

Key developments

36 What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

Foreign Investment Law

On 15 March 2019, the PRC National People's Congress, adopted the PRC Foreign Investment Law, a landmark legislation that brings fundamental changes to the PRC foreign investment regulation regime, including private M&A involving foreign investors. The PRC Foreign Investment Law has taken effect as of 1 January 2020, replacing the existing foreign investment regulation regime, including the Sino-foreign Equity Joint Venture Enterprise Law, the Foreign Owned Enterprise Law and the Sino-foreign Cooperation Joint Venture Enterprise Law. The PRC Foreign Investment Law provides for national treatment, certain foreign investment protection measures to foreign investors, dedicating to achieve a stronger protection and a better business environment for foreign investment in China. Under the new law, the legal forms of foreign invested enterprises need to conform with the requirements of the PRC Company Law.

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PRC Civil Code

The PRC Civil Code has been adopted by the PRC National People's Congress and will become effective on 1 January 2021. Upon its effectiveness, a number of fundamental civil law statutes of the PRC (including the PRC Contract Law, the PRC Property Law, the General Provisions of the PRC Civil Law and the General Principles of the PRC Civil Law) will be abolished and replaced, while their provisions will be integrated into the PRC Civil Code with certain changes and supplements. The adoption of the PRC Civil Code is commonly perceived as a major milestone of recent PRC legislation and a step forward in advancing a more systematised and modernised civil legal system of China.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In response to the financial and business distress caused by the covid-19 epidemic, China's central and local governments have issued a set of business support policies and financial assistance measures, including preferential financing policies, tax reliefs and exemptions, phased reduction and exemption of social insurance premiums and housing fund contributions, and policies and reforms encouraging the export and foreign investments. Local governments also introduced optimised and simplified administrative procedures to facilitate the reopening of business. In addition, the Supreme People's Court of PRC has promulgated a set of guiding opinions on issues in civil disputes involving the covid-19 epidemic, including a guideline on the application of force majeure rules.

Although there is no single formula to manage the uncertainties and market volatility brought by such unprecedented epidemic, for businesses operating in this highly challenging environment, it is advisable to closely monitor the covid-19 situation and its impact globally, make sensible adjustments to the workplace and workforce following the guidance of local regulators, and exploit the supporting policies offered by the government and regulatory agencies.

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