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NO&T Asia Legal Review 創刊のご案内

長島・大野・常松法律事務所（NO&T）は、日々目まぐるしく移り変わるアジア各国の法実務に関する最新の情報をお届けするべく、今般 NO&T Asia Legal Review（月刊英文ニュースレター）を創刊いたしました。NO&T Asia Legal Review は当事務所の各国アジアオフィスに所属するアジアの弁護士が執筆しており、日本人の皆様だけではなく、貴社内でご勤務されている日本人以外の方にもご購読いただけるよう英文で作成しております。ご関心のある方には是非ご転送いただき、今後直接ご送付できるよう こちら からご登録いただければ幸いです。

Issue of “NO&T Asia Legal Review”

We, Nagashima Ohno & Tsunematsu (“NO&T”), are pleased to inform that we have launched a monthly English newsletter, “NO&T Asia Legal Review”, to share updates on the rapidly changing laws and legal practices in Asian countries. The articles in the NO&T Asia Legal Review are written in English by Asian qualified lawyers, who are working in our Asian offices, not only for the Japanese expatriates but also for non-Japanese speakers who are interested in this kind of legal information. Please kindly forward this NO&T Asia Legal Review to your colleagues and ask them to register here if they are interested to receive this newsletter so that we can directly send it to them hereafter.

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This issue covers the following topics:

India

REGULATIONS ON CROSS-BORDER MERGERS

インドの会社法制上、インド法人が存続会社となる外国法人とインド法人の合併は以前から認められていたが、2017 年 4 月に新たに外国法人が存続会社となる外国法人とインド法人の合併も認められることになった。本稿では、かかるクロスボーダーでの合併を行う際のインド法上の留意点について紹介する。

Background

In April 2017, the provisions of the Indian Companies Act, 2013 relating to cross-border mergers and amalgamations via court approved schemes were notified. While cross-border inbound mergers/amalgamations i.e. a merger of a foreign company with an Indian company where the resultant company is an Indian company was always permitted, it was for the first time that the Companies Act permitted cross-border outbound mergers i.e. an Indian company merging with a foreign company wherein the resultant company is a foreign company. The Reserve Bank of India ("RBI") quickly followed suit and issued draft regulations governing the foreign exchange elements relating to such cross-border mergers.

While one expected things to move along swiftly, it is only after almost a year that, having taken the public comments received on the draft regulations and after considering several other factors, the RBI, on 20 March 2018 finally issued the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 ("Cross Border Regulations"), which are now required to be followed by parties intending to enter into a scheme of merger, amalgamation or arrangement involving an Indian and a foreign company. A scheme of merger, amalgamation or arrangement is required to be approved by the relevant National Company Law Tribunal.

The key provisions of the Cross Border Regulations are as follows:

Outbound Mergers

Acquisition of Securities of a Foreign Company: Acquisition of securities of the resultant foreign company pursuant to an outbound merger will need to be in compliance and within the limits prescribed by India's foreign exchange laws. In accordance with the regulations governing overseas investments, if the total overseas financial commitment of an Indian company exceeds 400% of its net worth or the financial commitment exceeds USD 1 billion (or its equivalent) in a financial year, the prior approval of the RBI is required. Further, a resident individual in India is permitted to acquire or hold securities of the resultant foreign company only to the extent the fair market value of such securities is within the limits prescribed under the Liberalized Remittance Scheme (currently at USD 250,000 per person per financial year).

Office in India: Pursuant to the completion of the outbound merger, any office in India of the resultant foreign company will be deemed to be a branch office of such company and will need to comply with the provisions of the regulations governing the establishment and functioning of branch offices in India (including restrictions on activities that can be undertaken by such office).

Guarantees and Borrowings of Indian Company: The guarantees or outstanding borrowings of the Indian company which become the liabilities of the resultant foreign company shall be repaid as per the scheme approving the merger. A foreign company cannot, however, acquire any liability payable towards a lender in India, in rupees, which is not in conformity with foreign exchange laws which in effect would mean that any such liabilities will need to be brought in compliance with Indian laws or disposed-of prior to the merger becoming effective.

Holding of Assets in India: The resultant foreign company may acquire, hold and transfer any asset in India which a foreign company is permitted to acquire under India's foreign exchange laws. Where the asset or security in India cannot be acquired or held by a foreign company (for e.g. freehold land), the same would need to be sold within a period of 2 years from the date of sanction of the scheme of merger. The foreign company is permitted to repay Indian liabilities from sale proceeds of such assets or securities.

Inbound Mergers

Issuance or Transfer of Securities: Any issuance/transfer of securities to a person resident outside India pursuant to a cross-border merger is required to comply with the pricing guidelines, entry routes, sectoral conditions and reporting requirements as are applicable to foreign investments in India pursuant to the foreign direct investment regulations.

Guarantees and Borrowings of Foreign Company: The Cross Border Regulations provide that any guarantees or outstanding borrowings of the foreign company from overseas sources, which become the borrowings of the Indian company, shall conform, within a period of 2 years from the date of sanction of the scheme, to the norms set out in the foreign exchange regulations of India pertaining to borrowings by Indian companies from overseas lenders (except for end-use requirements). What is interesting and pertinent to note is that no remittance for repayment of such liability can be made during the period of 2 years from the date of sanction of the merger. This is an onerous condition requiring the existing credit facilities with overseas lenders to be in compliance with India's foreign exchange regulations which set out extensive requirements on all-in-cost ceiling, maturity period and security arrangements.

Holding Assets Overseas: The Indian company may acquire, hold and transfer any asset outside India as permitted under India's foreign exchange laws. If the asset or security outside India is not permitted to be acquired or held by the Indian company, such asset or security will need to be sold within a period of 2 years from the date the merger becomes effective and proceeds must be repatriated to India.

RBI Approval

Cross-border mergers that meet the requirements set out in the Cross Border Regulations and foreign exchange laws are deemed to have been approved by the RBI. The compliance of the conditions has to be self-certified by the managing director, whole-time director or company secretary of the foreign company as well as the Indian company involved in such merger and the certificate has to be filed with the National Company Law Tribunal along with the merger scheme. In case any condition cannot be satisfied or is not fulfilled, express approval of the RBI would be required.

Conclusion

While the introduction of the Cross Border Regulations provides a new route to companies to enter into outbound mergers through a court approved scheme, some of the conditions to be satisfied, such as non-repayment of liabilities owed to overseas lenders for 2 years or restrictions on the assumption of liabilities by the foreign resultant company in case of an outbound merger, appear to be quite cumbersome to follow in practice. Also, only time will tell whether parties will opt for such court approved cross border mergers, as opposed to traditional modes of acquisitions, investments and joint ventures, especially given the complexities involved.

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Indonesia

GOVERNMENT MOVES TO LOOSEN EXPATRIATE PERMIT

インドネシアで外国人が就労ビザを取得するのは煩雑で時間を要する手続であるが、2018 年 3 月に制定された大統領令に基づき、この就労ビザの手続が大幅に緩和されることとなった。実際の施行は 6 月下旬であるが、本稿ではこの大統領令に基づく主要な改正点を紹介する。

Background

As part of President Joko Widodo's administration's efforts to attract foreign investors to Indonesia, the Government has taken an initiative to simplify the licensing requirement for Indonesian companies to employ expatriates. On 29 March 2018, the Government has issued the Presidential Regulation No.20 of 2008 on Utilization of Expatriates (**PR 20/2018**), which will come into force on 29 June 2018.

The PR 20/2018 revokes the Presidential Regulation No.72 of 2014 on the Utilization of Expatriate and the Implementation of Education and Training for Co-workers (**PR 72/2014**). All implementing regulations of PR 72/2014, however, will remain valid to the extent that they are not contrary with the provision of PR 20/2018.

Major changes

There are several major changes in the PR 20/2018 which will become effective from 29 June 2018, which should be taken into consideration by companies seeking to employ expatriates:

Dual position for expatriates: Unlike the provision under the Minister of Manpower (**MoM**) Regulation No.16 of 2015 (as last amended by MoM Regulation No.35 of 2015) on Procedures on Utilization of Expatriates (**Regulation 16/2015**) which prohibits a company to employ an expatriate who is currently employed by another company, the PR 20/2018 provides exemption to companies in certain specified businesses to employ an expatriate who is currently employed by other company (**Dual Position**), provided that the employment must be in the same position. In this regard, the employment period for such employee shall refer to the employment period with the first employer.

Even though the Dual Position arrangement is only limited for certain positions and business sectors which will be further regulated by Regulation of MoM, this is music to investors' ears especially to those who have more than 1 (one) subsidiaries in Indonesia as they may be permitted to arrange one expatriate to work in more than 1 (one) subsidiaries for efficiency.

IMTA (*Izin Mempekerjakan Tenaga Kerja Asing*/Permit to Employ Expatriate) is no longer required: Previously a company was required to obtain IMTA for each expatriate after it had obtained the approval for RPTKA (*Rencana Penggunaan Tenaga Kerja Asing*/Expatriate Utilization Plan). Generally, a company at the first place will determine certain number and positions of expatriates it wishes to employ, and submit this proposal to the manpower office in order to obtain the approval (**RPTKA approval**). Based on such RPTKA Approval, the company will start to hire expatriates for the approved position and subsequently complete the registration process for each expatriate by obtaining the IMTA. The IMTA was the basis for the expatriates to apply for limited stay visa.

In order to streamline the procedures, the Government through PR 20/2018 has set out that IMTA is no longer required. Therefore, it is sufficient for a company to obtain RPTKA approval to employ expatriates, which based on this new regulation will be issued within 2 (two) working days after the submission date. Moreover, considering IMTA is no longer required, we are of the view that it is also sufficient for expatriates to submit the RPTKA Approval to apply for limited stay visa.

Please note that PR 20/2018 also provides that RPTKA approval is not required for certain positions such as a shareholder who holds a position as a member of Board of Directors or Board of Commissioners at the employer.

Validity of RPTKA approval: Under PR 72/2014 and Regulation 16/2015, RPTKA approval is valid for a maximum of 5 (five) years and can be extended for another 5 (five) years by considering conditions of the domestic labor market. However, PR 20/2018 stipulates that RPTKA will remain valid for such period as the employer requests for in its application to employ the expatriate. Therefore, it is possible for a company to employ expatriates for more than 5 (five) years.

Emergency and urgent work: PR 20/2018 exempts the requirement to obtain prior RPTKA approval to employ expatriates in the event of emergency and urgent work. In this case, the company is required to submit the application for RPTKA approval by no later than 2 (two) working days after such expatriate commences work in Indonesia. While PR 20/2018 is silent on the definition or type of emergency and urgent work, one may refer to Regulation 16/2015 as the implementing regulation which is in effect at this time. Pursuant to this regulation, emergency and urgent work includes natural disaster, force majeure, or engine and production machineries failures. However, such definition of emergency and urgent work applies for IMTA under Regulation 16/2015. Therefore, we need to closely monitor whether such definition of emergency and urgent work under Regulation 16/2015 will be applicable for defining the emergency and urgent work under PR 20/2018.

Education and training for expatriates: In addition to several provisions that ease the process for companies to employ expatriates, PR 20/2018 also stipulates several requirements to be undertaken. Firstly, the company must carry out transfer of knowledge and training to Indonesian employees for the position that is currently held by expatriates so that Indonesian employees will be able to hold such position in the future. Secondly, the company shall facilitate the expatriates to attend Indonesian language courses. This appears to be manifestation of the requirement under Law No. 24 of 2009 on National Flag, Language, Emblem and Anthem, whereby if the employees who are working in Indonesian government institutions or private companies are unable to speak Indonesian language, the employer must facilitate them to learn it. Please note that this requirement is applicable to foreign employees in all positions, including the members of Board of Directors and Board of Commissioners.

Impact on Companies

PR 20/2018 states that on the date of enforcement of PR 20/2018:

a. RPTKA, IMTA or other licenses that have been obtained by the companies prior to the enforcement of PR 20/2018 shall remain valid until its expiry; and

b. RPTKA or other licenses that are applied for prior to the enforcement of PR 20/2018 will be processed in accordance with PR 20/2018.

Conclusion

In the past few years the procedures to employ expatriates have been quite cumbersome (in some cases approvals have taken more than 3 months to be issued). In this light, the issuance of PR 20/2018 has come as a breath of fresh air. However, the challenge of this new regulation lies in its implementation in practice once it comes into force. We are concerned that some provisions are too ambitious, for instance the 2 working days timing to obtain RPTKA approval which presently can take more than a few weeks in practice. Furthermore, PR 20/2018 leaves the MoM to provide further clarity on some of the provisions by issuing implementing regulations. Based on our experience, the issuance of implementing regulations can take more than 6 (six) months. Hence, in the meantime, we have to monitor all unwritten policies that may be determined by the MoM during the absence of implementing regulations of PR 20/2018.

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Malaysia

EFFECT OF COMPANIES ACT 2016 ON JOINT VENTURES

マレーシアでは 2016 年に成立した新会社法が 2017 年 1 月 31 日に施行された。マレーシアでのビジネス環境を向上させることを企図した全面改正であり、これにより設立手続の簡易化やより柔軟なコーポレートガバナンスの導入の実現が期待されている。本稿では、特に合弁会社に関連する改正の留意事項を紹介する。

Background

The Companies Act 2016 ("**CA 2016**") came into force on 31 January 2017 to replace the now repealed Companies Act 1965 ("**CA 1965**"). The introduction of CA 2016 is driven by the need to further facilitate Malaysia's status as the place to do business and to bring the regulatory framework in line with international standards. The changes range from simplifying company incorporation, modifying capital restructuring, enhancing corporate governance and financial reporting through to modernizing insolvency laws.

Generally, key changes introduced by the CA 2016:

(a) Optional for private companies to have a constitution – Provisions of CA 2016 will apply by default to companies who opt not to have a customized constitution;

(b) Unlimited capacity for companies – within the confines of CA 2016, companies have the rights, powers and privileges to enter into transactions or perform activities without having to rely on the same being specified in the company's constitution.

This article sets out a brief summary of the key changes that affect existing and proposed joint ventures:

Formation stage of the joint venture company

Constitution of the Company: It is advisable for joint venture companies in Malaysia to have its own constitution which reflects the terms of the shareholders' agreement. If a joint venture company does not have its own constitution, the powers of the shareholders and proceedings of the joint venture company (relating to for example, quorum and decision making processes in meetings of shareholders / directors) shall fall back on the provisions of CA 2016 which may be inconsistent with terms of the shareholders' agreement. Note that if the joint venture company does not have its own constitution and if there are any inconsistencies between the provisions of CA 2016 and the shareholders' agreement, the provisions under the CA 2016 will prevail over the terms of the shareholders' agreement. If however, the joint venture company has its own constitution which reflects the terms of the shareholders' agreement, to the extent that it does not contravene the provisions of the CA 2016, the constitution reflecting the provisions of the shareholders agreement shall prevail.

Examples of default provisions governing proceedings of the board of directors in the absence of a constitution may be found in the Third Schedule to the CA 2016. Some of the areas of concern under the Third Schedule are:

(i) the quorum for board meetings shall be a majority of the directors unless otherwise fixed by the board of directors;

(ii) the chairperson of the board shall have a casting vote;

(iii) a director present at a board meeting is presumed to have agreed to, and to have voted in favour of, a resolution of the board of directors unless he expressly dissents from or votes to object against the resolution at the meeting; and

(iv) all resolutions in writing must be signed by all directors (instead of a majority of the directors).

Thus, if the shareholders' agreement provides for terms which differ from the above, the joint venture company should adopt its own constitution to reflect the terms consistent with the shareholders' agreement.

Further, if it is contemplated under the shareholders' agreement that the shareholders will subscribe for preference shares in the capital of the joint venture company, then the joint venture company would need to have a constitution to be able to issue any preference shares. This is because the CA 2016 requires that any issuance of preference shares must be authorised by a company's constitution and the rights attaching to such preference shares with respect to repayment of capital, participation in surplus assets and profits, dividends, voting and priority of payment of capital must be set out in the constitution.

Quorum for shareholders' meeting: Unlike the CA 1965, section 328 of CA 2016 expressly provides that 2 shareholders personally present at a meeting or by proxy shall be quorum for any shareholders' meeting unless a higher number is specified in the constitution. Therefore, it may be advisable for a majority shareholder of a joint venture company to have another nominee to hold shares in the joint venture company, so that such shareholder is not dependent on the minority shareholder to meet the quorum requirements for the shareholders' meetings.

Pre-emptive rights: Section 85 of CA 2016 now provides that subject to the constitution, where a company issues shares which rank equally to existing shares as to voting or distribution rights, such shares shall first be offered to the existing shareholders on a pro-rata basis. If a shareholder would like to carve out the application of such default pre-emptive right, it is necessary for the joint venture company to adopt a constitution which expressly carves out such pre-emptive right under section 85 of CA 2016.

Operational stage of the joint venture company

Change of the requirement of having unanimous vote for directors' written resolution of a joint venture company: The board of directors of a joint venture company may now pass a directors' resolution by the requisite majority of the board of directors who are entitled to receive notice of meeting of the board. This is different from the requirements under CA 1965 wherein the directors' resolution required the signature of all directors entitled to receive notice of meeting of the board.

For an existing joint venture company intending to adopt the new position under CA 2016, it would be necessary to amend the constitution of the joint venture company to allow for the passing of directors' resolution by the requisite majority of the board of directors who are entitled to receive notice of meeting of the board.

Change of the requirement of having unanimous vote for members' written resolution of a joint venture company: A company may now pass an ordinary resolution or special resolution by way of a written resolution circulated to all of the shareholders entitled to vote on the resolution and agreed by the requisite majority of the shareholders who are entitled to vote on such resolution. This is a departure from the CA 1965, wherein section 152A requires a written resolution of the shareholders to be signed by all of the shareholders who are entitled to vote for such resolution to be validly passed.

If an existing joint venture company had specified in its constitution that a written members' resolution must be signed by all shareholders, it would be necessary for that joint venture company to first amend its constitution and remove the said requirement, before the default position under CA 2016 can be relied upon.

Conclusion

The above outlines the general changes and considerations that a shareholder of a joint venture company would need to take into account before entering into a joint venture or to evaluate its existing joint venture. It must however be noted that there may be other changes introduced by the CA 2016 that are not covered in the above summary but which may need to be considered on a case to case basis.

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