Remote Workers:
Asia Pacific Guide for Employers

INTRODUCTION

The Asia-Pacific members of the Employment Law Alliance (ELA) have come together to prepare this publication designed to provide insights into hiring remote workers in several Asia-Pacific jurisdictions. The expert lawyers of the ELA address frequently asked questions such as “whether it is possible for a foreign entity to hire remote workers in the relevant jurisdiction” and “the common risks associated with hiring remote workers”.

We hope you will find this publication useful and relevant. The information in this publication is meant as an overview and does not constitute legal advice. If you have any questions on the law in any of the jurisdictions, please contact the relevant member firm, who can provide the appropriate legal support.

About the Employment Law Alliance

The Employment Law Alliance (ELA) is a global network of leading labor and employment lawyers. The ELA provides HR executives, general counsel and business leaders with comprehensive labor and employment and immigration services. Multinational companies choose ELA lawyers for fast, efficient, responsive services tailored to meet the unique needs of their global workforce.

The ELA offers global reach with local experts. With more than 3,000 lawyers in 100-plus countries, including every state in the United States and every Canadian province, the ELA's employment lawyers represent the best legal minds in the world. Approximately 90% of ELA members have earned recognition from Chambers and Partners. The ELA itself has been top ranked by Chambers and Partners as an Elite Global Network.

ELA members live and work in their jurisdictions. They know the local courts, local laws, and have specialty expertise in varied industries including oil, gas and energy, higher education, retail, transportation, and technology, and many other leading industry sectors. Whether you are a GC, CLO or HR Exec, aligning with the ELA gives you access to leading experts in labor and employment, providing the confidence and resources that allow you to manage and recruit the world's best leaders and employees without boundaries. Bring the ELA your questions about compliance, wages and employee benefits. Call on us with challenges regarding discrimination, sexual harassment or wrongful termination allegations. The ELA has innovative solutions, matched with access to the world's top labor and employment lawyers and immigration attorneys in every corner of the world.

How the ELA Works

While the ELA is comprised of separate law firms, all members have been rigorously selected, and only the very best have been invited to join. Members have established strong personal relationships with their colleagues around the world that are built on trust. Clients who work with the ELA benefit from a single, seamless legal resource that is truly integrated.

The ELA provides a relationship manager for multi-state or multi-national employers in need of a team of local experts in multiple jurisdictions. Clients are assigned a primary ELA contact who coordinates service and assures continuity, consistency, quality and responsiveness from every law firm assigned to the legal matter. We also offer consolidated billing at local firm rates. Unlike multi-office law firms, whose high rates often support their costly global infrastructure, ELA clients are billed at local, hourly rates.

Whether it is a multi-state or a multi-national project, the ELA has a team in place to respond to your needs for innovative, cost-effective HR legal solutions. The ELA has a proven track record of providing the highest quality service to some of the world's most sophisticated companies.

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A. A foreign entity could engage individuals in China on a contractor or service relationship basis. An employment relationship is not possible because a foreign entity does not have the legal capacity under PRC law to be an employer.

While there are no legal requirements for a service or contractor relationship, if the use of the workers in China by a foreign entity is deemed to create a permanent establishment, then the foreign entity could be subject to PRC tax.

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. As discussed above, possible tax exposure is a risk for the foreign entity. Protection of intellectual property is often an issue because the foreign entity has no presence in China to pursue infringement. Also, competition risks increase because of a lack of an entity and direct employment contracts.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so?

A. There is a likelihood that the foreign jurisdiction entity can impose its foreign law as the governing law, but if there is a dispute it may be difficult to apply that law in China.

Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

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A. Again, there is a probability that the entity may require disputes be submitted to its own country's court, but an individual in China likely would not go to the hassle and expense to file a lawsuit abroad.

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. If there are only a few workers, the contracts are drafted properly and the workers are given great latitude when and how they perform the services, then there may be little risk to the foreign entity. However, if the foreign entity wants to exert control, and wants to grow its business with substantial workers in China, then the foreign entity should consider establishing a local entity, at least a representative office.

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Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. Yes, foreign entities can employ remote workers based in Hong Kong, and there is no distinction at law between an employee hired by a non-Hong Kong entity and a Hong Kong entity. Hong Kong labor law only distinguishes between employees and independent contractors, whereby only the former is protected by labor law.

There is case law showing that even if an employment contract is not governed by Hong Kong law, if the employees are providing their services materially in Hong Kong and their employment is therefore a Hong Kong employment, the protections afforded to employees under the Employment Ordinance – such as the granting of statutory holidays and protection from unlawful deduction of wages – would still apply. Other basic employment protections including minimum wage (currently at HK$37.5 per hour) and enrollment in the mandatory provident fund scheme (MPF, i.e., Hong Kong's mandatory pension system) similarly apply to remote workers unless exempted. Employers are also required to maintain insurance coverage in respect of employees employed in Hong Kong pursuant to the Employees' Compensation Ordinance to cover their liabilities for work-related injuries, but there is currently no statutory requirement to provide medical benefits. The aforementioned only applies to employees and not independent contractors.

A person with a Hong Kong permanent identity card can freely take up employment in Hong Kong even though he is providing his service to a foreign entity.

Where a non-resident employer employs persons in Hong Kong to carry on its business or part of its business, there is a material risk that it will thereby constitute a Hong Kong permanent establishment (PE), which is a separate taxable presence of that employer in Hong Kong. Whether a PE is constituted will depend on the terms of any double taxation agreement in force between Hong Kong and the employer's jurisdiction of residence or, otherwise, on domestic Hong Kong

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law. Constituting a PE will trigger certain tax reporting requirements, for which see further below. If the employer constitutes a PE in Hong Kong or otherwise commences to carry on a business in Hong Kong by virtue of employing Hong Kong employees, it will be required to apply for a business registration license, as every person carrying on business in Hong Kong must register their business with the Business Registration Office of the Inland Revenue Department within one month of the commencement of business, and such business registration certificate must be renewed annually. For those purposes, every company incorporated in Hong Kong or non-Hong Kong company, i.e., branch, registered under the Companies Ordinance is deemed to be a person carrying on business and is required to be registered.

In practice, business registration in Hong Kong functions as a de facto tax registration. All entities registered under the Business Registration Ordinance will in practice be issued with a tax return, notwithstanding that they may not at law be taxable in Hong Kong, generally within 18 months of registration.

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. <u>Data security and privacy</u>

Hiring a remote worker in Hong Kong would inevitably entail information flow into and out of Hong Kong.

Employees are under an implied duty not to disclose the employer's confidential information. During employment, such duty attaches to all kinds of information learned in the course of employment, except for information that is trivial or in the public domain. Independent contractors are under no such implied duty. In any event, employers are advised to further draft in contractual confidentiality clauses for better protection.

Regarding the remote worker's personal data, Hong Kong data privacy laws govern all personal data (being any data that relates directly or indirectly to a living individual, from which the identity of the individual can practicably be

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directly or indirectly ascertained, and which is in a form that is practicably accessible or processable) collected in Hong Kong. The starting point is that the data collection must be necessary for a lawful purpose and the collection is adequate but not excessive in relation to that purpose. Certain matters are required to be notified to an employee before or when his or her personal data is collected, such as the classes of persons to whom the data may be transferred, and the purpose of the data collection. An employer must not thereafter use the worker's personal data for a different purpose without first obtaining his or her express consent. The employer must take all reasonably practicable steps to ensure the security of the personal data and that such data is not retained longer than is necessary for the fulfillment of the purpose (including any directly related purpose).

Hong Kong law does not prohibit employers from monitoring the activities of their remote workers. However, if the process of monitoring involves collecting personal data, the employer (as a data user) would be required to comply with the Personal Data (Privacy) Ordinance.

Contravention of Hong Kong's data privacy laws may result in civil and criminal consequences including fines and imprisonment.

Statutory employee benefits

As explained above, if the employee carries out most of his or her duties in Hong Kong, the Employment Ordinance is likely to apply irrespective of the governing law of the employment contract and statutory employee benefits would apply. The foreign employer must therefore ensure that all statutory entitlements are complied with and granted when due, such as timely payment of wages, minimum wage, MPF enrollment and contribution, annual leave, statutory holidays, maternity and paternity leave, sickness allowance, severance and long-service payments and protection from unreasonable and/or unlawful dismissal (such as dismissal of an employee who is pregnant or on paid sick leave). Independent contractors are not afforded the same benefits.

Unless exempted, an employee must be enrolled by the employer into a MPF scheme during the first 60 days of employment, and the employer must thereafter make mandatory contributions to, and on behalf of, the employee. In addition, an

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employee must be enrolled in the mandatory employees' compensation insurance scheme for work-related injuries. Please note, however, that if the foreign entity does not have a business registration certificate in Hong Kong, in practice, it is unlikely for them to enroll in the aforesaid schemes.

Employers in Hong Kong are under a statutory duty to, so far as reasonably practicable, ensure the health and safety of their employees at the workplace. Although the aforesaid duty does not extend to independent contractors, Hong Kong law stipulates that an occupier (including an employer that occupies a premise) who fails to maintain the premises they control in a safe condition may be held liable for the injuries or damage suffered by a visitor (including an independent contractor).

Vicarious liability in discrimination claims

Employers should also take note that in Hong Kong, they are vicariously liable for any act of unlawful discrimination and harassment by an employee committed during his or her employment unless the employer can show that it took all reasonably practicable steps to prevent the unlawful act. Whereas there is no statutory definition of bullying, it may fall within the definition of harassment.

Disputes

In terms of disputes, if the employment contract has a governing law clause, Hong Kong courts will generally enforce it, and in the absence of an express choice of law clause, the courts will consider whether there is a factual basis for inferring an agreement as to the choice of law, and if such inference is not possible, the contract will be governed by the system of law with which the employment has its closest and most real connection. If an employee is clearly based in Hong Kong, in the absence of an express governing law clause, the Employment Ordinance will therefore apply.

Tax

From the perspective of an employer, the prior question is whether it has constituted a Hong Kong PE or other taxable business presence by virtue of employing employees in Hong Kong. Hong Kong has a territorial tax code: generally speaking, only business and trading profits arising in or derived from

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Hong Kong are chargeable to tax in Hong Kong. It would follow that an employer who has constituted a taxable presence in Hong Kong would only be chargeable to profits tax on so much of its profit as is attributable to its operations in Hong Kong. Irrespective of whether a person with a Hong Kong PE or otherwise carrying on a business in Hong Kong is taxable, it will in the ordinary course be required to file an annual tax return and to provide supporting documentation, including its most recent audited financial statements.

From the perspective of an employee, Hong Kong adopts a territorial basis of taxation, whereby salaries tax is charged only on income from an office or employment, or any person arising in or derived from Hong Kong, including income derived from services rendered in Hong Kong, subject to any applicable double taxation agreement. An employee is personally required to file his own tax return and to account for any salaries tax assessed, and there is no requirement in the ordinary course for an employer to withhold any sums due to an employee on account of tax. An employer is required to notify the Inland Revenue Department ("IRD") of the commencement and cessation of employment of its employees in Hong Kong. If an employer is aware that its employee is about to leave Hong Kong for a period exceeding one month (save in the case of an employee who is required in the course of his employment to leave Hong Kong at frequent intervals), it is required to notify the IRD by filing the prescribed form and to withhold payments of salaries and all other moneys due to the employee for a period of one month from the filing of the prescribed form or until receipt of the Letter of Release issued by the IRD, whichever is earlier. Employers are also required to file annual tax returns in respect of all employees.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so?

A. Although parties are free to choose the governing law of the employment contract, as mentioned in the response to Question 1 above, there is case law showing that even if an employment contract is not governed by Hong Kong law, the employment protections afforded to employees in Hong Kong would still apply. Therefore, if the employment contract is not governed by Hong Kong law, the employer may find itself needing to grant employee benefits in accordance with both the foreign law and Hong Kong law.

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There is otherwise no similar concern with independent contractor agreements, as independent contractors are not regulated in Hong Kong.

Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. In terms of disputes, if the employment contract has a governing law clause, Hong Kong courts will generally enforce it, and in the absence of an express choice of law clause, the courts will consider whether there is a factual basis for inferring an agreement as to the choice of law, and if such inference is not possible, the contract will be governed by the system of law with which the employment has its closest and most real connection. If an employee is clearly based in Hong Kong, in the absence of an express governing law clause, the Employment Ordinance will therefore apply.

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. No.

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Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. Yes, it is possible for a foreign jurisdiction entity to hire remote workers in India subject to compliance with legal requirements. Direct hiring of remote workers in India as 'employees' without setting up a local legal entity can create adverse tax (permanent establishment) and foreign exchange regulatory risks, hence the most common approach is to engage remote workers as independent contractors or via third-party employers. Depending on the number of remote workers being hired, the nature and longevity of activities and operations, and associated tax considerations, setting up a legal entity in India to hire the workers can also be explored as a long-term option.

Application of local law: In India, employers are required to comply with certain requirements under central labor legislations as well as state-specific legislation depending on the state in which the company has operations and employees are working. These state-specific obligations include obtaining necessary registrations under applicable laws, other procedural requirements such as maintaining records, making filings, etc., and such laws also govern provisions regarding entitlement to leave, working hours, overtime, etc. The requirements vary from one state to another.

Normally, an employee working in the office of the employer in a particular state would be entitled to the benefits under the laws in that state. But courts have construed 'home offices' as commercial establishments in some situations for the purpose of extending the benefit of statutory provisions even in cases where the employer did not have a physical establishment in the state. Accordingly, if individuals are working remotely from multiple locations across India, one could attempt to argue that the employer should comply with the local laws as per the location of the remote employee. In the context of a remote working arrangement involving a foreign employer, if the employees are going to be permanently based in India despite the fact that they'll be hired by a foreign entity (presumably also under a foreign law-governed contract), there can be a risk of such employees raising claims for local Indian employment benefits and protections (such as protection from 'at-will' termination, which isn't recognized in India, compensation for work related injuries, etc.). While an attempt can be made to exclude the application of Indian laws in the contracts they sign, such provisions are unlikely to be binding in an employer-employee setting.

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Do note that some social security laws in India only apply to organizations with a minimum employee strength (usually 10 to 20 employees depending on the law). If a foreign entity doesn't employ such threshold number of remote employees in India, then the likelihood of such benefits extending to them is low.

Registration: Generally, the procedural requirements (like obtaining registration, etc.) can only be complied with if the employer has a physical establishment in that particular state. Where a foreign employer is hiring an individual without a local entity or office, it would not be possible for such foreign entity to comply with such procedural requirements. The lack of a physical office may not, however, necessarily deprive the employee from attempting to rely on the benefits of local employment laws (subject to some of the underlying eligibility and threshold requirements being met).

Engagement model: A foreign jurisdiction entity may engage an individual to work remotely either as an independent contractor or an employee. The decision in relation to the model of engagement is often driven by tax and other corporate law considerations. Hiring employees in India without a local entity could potentially expose the foreign entity to the risk of adverse consequences under Indian tax and foreign exchange laws.

From an employment law standpoint, employees are entitled to minimum wages and the employer would also be required to make social security contributions and extend other benefits depending on the applicability of the statute. Many of these statutes only apply to organizations with a minimum employee head count (usually ranging between 5 and 20, with state-specific variations), so hiring 1-2 individuals may not necessarily trigger these obligations. At-will employment is not recognized in India. Accordingly, termination of employment could be a more complex process in India except in case of a fixed term contract.

In comparison, engagement with an independent contractor can be terminated more easily by providing notice in accordance with the contract. Employers would not be required to provide employment benefits if an individual is being engaged as an independent contractor, although such arrangements would also need to be well-structured and implemented to avoid co-employment claims. If this arrangement is challenged and if the independent contractors are held to be employees, then this could result in higher costs, as the employer would be required to pay arrears of all the employment benefits, along with interest and penalties. Risk of de-facto employee

claims can be high if adequate safeguards and mitigating measures are not taken while engaging someone as an independent contractor. In scenarios where such claims are raised by labor authorities or individuals, courts can look beyond the terms of the written contract and examine the actual practices and nature of the relationship between the individual and the entity. Indian courts have also laid down a number of tests to determine whether an individual should be classified as a consultant or as an employee of a company.

Another model often evaluated by companies is engaging and entering into an agreement with a Professional Employment Organisation (PEO) in India, which can employ individuals to work remotely for the foreign jurisdiction entity. A PEO model would also require careful structuring to avoid permanent establishment risks, and also ensuring that the PEO complies with all statutory requirements for its employees under the relevant labor laws. This would involve tracking and monitoring whether the PEO has obtained necessary statutory registrations, is making adequate social security contributions, is filing returns, maintaining registers, etc.

Visa: The requirement to obtain a visa or work permit would vary depending on whether the remote worker is an Indian national or a foreign national. Indian nationals do not require a visa, or a work permit to work in India. Foreign nationals may enter India for employment only by obtaining an employment visa (also referred to as an e-visa). In fact, it would not be possible for a foreign national (unless they happen to be an Overseas Citizen of India or OCI) to work in India without an Indian sponsor for their employment visa. The lack of a local Indian branch or subsidiary that can sponsor an e-visa could therefore make it difficult for a foreign entity to hire non-Indian employees to travel to and work remotely from India. Visits to India for the purpose of employment while on a tourist visa or dependent visa may be considered as a violation of the visa conditions and expose the individual (and potentially any employer who condones such activity) to legal liabilities.

Payment of benefits and compensation: Indian law prescribes minimum wages based on the nature of the job and location. Salaries are typically structured based on commercial negotiations and often are split into various allowances to make the pay more tax efficient for the employee. For remote workers, the method of payment of compensation would be driven by how the arrangement is ultimately structured.

Independent contractors would normally receive a commercially agreed service fee without any other benefits (like leave benefits, insurance covers, etc.), against

submission of a periodic invoice by the service provider. They would also bear the costs for procuring necessary tools and infrastructure required to perform services, or those would be built into the service fees.

In the employment context, where remote workers are being hired directly without a local entity or PEO (which is unusual to do), the salary would normally reflect the same structure that the foreign entity follows to the extent possible. Where the individual is being hired through an Indian entity/PEO, the salary structure would look similar to what Indian companies normally offer, i.e., a basic salary component, along with other allowances for tax planning and the cost of various employer contributions to social security like provident fund, etc. (depending on eligibility). Further, local labour statutes do not generally prescribe a statutory obligation on employers to pay individuals for routine expenses incurred by them while working remotely from home. However, from a common law and equity perspective, employees cannot be expected to incur incremental costs on a personal level to perform the activities expected from them by the employer.

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. **Data privacy:** The recruitment of cross-border workers in India may involve the collection, processing, disclosure, or transfer of personal information shared by cross-border workers in India. At present, the collection, processing, disclosure, and transfer of personal information is primarily governed by the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (Privacy Rules), under the Information Technology Act, 2000. The Privacy Rules primarily regulate the collection and processing of Sensitive Personal Information (SPI), which includes financial information such as payment instrument details, password information, medical records, and health data.

Under the Privacy Rules, an entity collecting SPI from its employees must obtain express written consent (including by way of electronic mode) from such employees in order to collect and process such information.

While obtaining consent, the following information must be communicated to the data subject:

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(a) the fact that the information is being collected;
(b) the purpose for which the information is being collected;
(c) the intended recipients of the information;
(d) the name and address of (i) the agency that is collecting the information and (ii) the agency that will retain the information; and
(e) the fact that the data subjects have the right to not provide their consent for the processing of this data.

Additionally, the Privacy Rules require entities collecting personal information (PI) or SPI to publish a privacy notice/policy that contains the following:
(a) clear and easily accessible standards of the company's practices and policies;
(b) type of PI or SPI collected by the company;
(c) purpose of collecting and using the PI or SPI;
(d) details of disclosure of PI and SPI; and
(e) details of the security practices and procedures implemented by the company.

They also require entities to provide data subjects with the right to access and rectify their PI. Further, an entity that processes SPI must:
(a) provide data subjects the right to withdraw their consent for the processing of sensitive personal data and have this data deleted;
(b) ensure that SPI collected is not retained for longer than is required for the lawful purpose for which it was collected, or for purpose mandated by law;
(c) appoint a grievance officer to settle grievances in relation to this data;
(d) disclose only with the consent of the individual or as required to comply with a legal obligation;
(e) transfer this information only with the consent of the individual or if necessary to perform a lawful contract; and
(f) implement reasonable security practices and standards commensurate with the information assets being protected. The IS/ISO/IEC 27001 is one such standard specified in the Privacy Rules that bodies corporate may implement.

India is in the process of overhauling its existing privacy regime and replacing it with an omnibus data protection legislation loosely modelled on the EU General Data Protection Regulation (GDPR). This draft legislation, i.e., the Data Protection Bill, 2021, as and when enacted, would apply to all data processed in India and introduce additional data principal rights and a stricter regime for data protection compliance.

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Monitoring productivity and communication: There are state-specific requirements governing working hours, overtime, etc., which vary from one state to another. While it is difficult to track the work timings or monitor the performance of individuals working remotely, companies typically structure their policies such that the work timings and other modalities applicable to employees in physical offices are also extended to employees working remotely. With cross-border remote workers, it is not uncommon to align the working hours of the employees/independent contractors to suit the timings of the overseas employer/service recipient, depending on the nature of the services being performed. Obligations are also placed on individuals to ensure that they are available during their regular working hours, are maintaining an interference-free work environment, etc.

Employees working remotely would continue to have a duty of due care and responsibility to their employers and toward their tasks, even while they are working from home. Working remotely or from home will not suspend applicability of the terms and conditions of their employment contract and they are expected to continue to abide by all provisions of their contracts and policies, including but not limited to confidentiality, exclusivity, non-solicitation and conflict of interest provisions.

Tax considerations

Income tax implications for the employee working remotely: Under the Indian income-tax laws, the tax liability of an individual is dependent upon the residential status of such individual during the relevant financial year (1 April – 31 March). The tax residential status of an individual is determined based on the length of his physical stay in India during the relevant financial year as well as his stay in the preceding years.

A resident individual is further classified as a resident and ordinary resident (ROR) or a resident but not ordinary resident (RNOR) depending upon his past stay in India. If an individual qualifies as ROR under the Indian tax laws, the global income of such individual is subject to tax in India. On the other hand, in the case of RNOR, only income that is received in India or accrues in India is subject to tax in India. At this juncture, we note that any salary income earned by an employee is deemed to accrue or arise in India where such salary is in respect of the services rendered in India. Services rendered in India is generally equated with the physical presence in India. Thus, assuming that the remote worker would be working from India, the salary income earned from the exercise of employment from India will be taxable in India.

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Tax implications for foreign jurisdiction entity (employer):

- Compliance with withholding tax obligations: The provisions of the Indian income-tax laws require an employer to withhold tax at the applicable progressive tax rates from the salary income payable to an employee. There is no provision under the law that exempts a foreign employer from this obligation. Thus, even the foreign jurisdiction entity (foreign employer) would be required to withhold taxes from the salary payable to the remote worker in India at the applicable rates.

- Risks of constituting permanent establishment in India: The hiring of remote worker/s in India can also trigger permanent establishment (PE) implications for the foreign jurisdiction entity in India. If the PE of the foreign jurisdiction entity is being constituted in India then the entire profits earned by such foreign jurisdiction entity as attributable to the Indian PE would be subject to tax in India. There are several types of PEs such as fixed place PE, service PE, construction PE, agency PE, etc., which may be constituted based on the scope of activities undertaken by the foreign jurisdiction entity and the applicable tax treaty. Ultimately, the determination of a PE is primarily dependent upon the language employed under the applicable tax treaty and requires a detailed fact-based analysis.

Health and safety of remote workers and vicarious liability: There is no formal government or regulatory guidance on the various health and safety measures that employers are expected to implement relating to workplace ergonomics in a remote working arrangement. In practice, few organisations tend to follow international practices and voluntarily facilitate supply or local procurement of tools and items that benefit employees from an occupational health and safety perspective. Where the engagement is as an independent contractor, the individual is normally responsible for their own health and safety.

Compensation: Though, statutorily, there is no requirement for employers to hold an insurance policy to cover injuries sustained by an employee during the course of remote working arrangement, employers may be held liable to compensate an employee for any injury/accident suffered by her/him arising out of and during the course of employment while she/he is working remotely.

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In India, statutory provisions highlighting an employer's liability for an injury caused to an employee are prescribed under the Employees' Compensation Act, 1923 (EC Act). If an employee's home is considered as a 'commercial establishment' or 'place of work', individuals could potentially raise compensation claims under the EC Act for an injury they suffer while they are working remotely. Under this statute, an employer is liable to pay compensation if personal injury is caused to an employee by an accident *"arising out of and in the course of employment".*

While this position would be easy to enforce by an employee in the context of a remote working arrangement with an Indian employer, it may be comparatively harder for an employee to maintain such a claim against a foreign employer with no registered physical presence or office in India.

To the extent commercially feasible, foreign employers should examine procuring insurance policies to cover liability associated with any remote work-related injuries as well. Further, the employer should ideally have robust policies and mechanisms in place to ensure that employees are taking measures to ensure a safe workplace at home.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so? Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. Yes, the foreign jurisdiction entity may impose its foreign law as the governing law on the remote worker's contract. It is a commercial call to decide the governing law and jurisdiction. Since the individual working remotely and the employer are based in two separate countries, the employer could choose to apply the foreign law and vest jurisdiction on the courts in such country.

However, the individual working remotely from India may demand that any disputes be dealt with in India since it would be difficult for him/her to pursue any litigation overseas. Such an argument is likely to be more persuasive in case of an employer-employee relationship, as compared to an independent contractor arrangement.

Further, even if the contract is governed by foreign law, it doesn't preclude an individual from claiming employee benefits under local laws.

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The usual approach where someone is being hired remotely as an independent contractor is to apply the laws of the foreign jurisdiction with a carve-out that allows the foreign service recipient to seek urgent injunctive relief in India, in case of sensitive issues like confidentiality breaches, etc.

A disadvantage of applying the laws of the foreign jurisdiction would be that any judgment/decree passed by such foreign court would have to be enforced in India, which may prove to be a difficult and long-drawn process. For example. India and the United States are not reciprocating countries for the purpose of enforcement of foreign judgments. So, a US judgment can only be enforced by filing another lawsuit in India for a fresh order based on the foreign ruling, which only has evidentiary value.

Hence, if disputes in a remote worker's contract are to be submitted to the foreign entity's jurisdiction and laws, it shall be important to ensure that there is carve out allowing urgent interim relief to be obtained in India.

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

In the context of cross-border arrangements, it's critical to closely examine any potential tax and PE risks and visa hurdles before deciding the appropriate form of the remote working arrangement. In majority of cases, foreign employers tend to hire remote workers under robust independent contractor arrangements (usually when the number of remote workers is small) or through local Indian entities/PEOs (especially where there is a larger number of remote workers being hired). The manner in which the contracts are structured can be hugely relevant in mitigating any tax and employment risks.

Generally speaking, in India, the existing central and state-specific labor statutes do not contain any statutory provisions that contemplate, facilitate or require remote work arrangements. A provision that discusses work from home or remote work is only mentioned in respect of women employees under the Maternity Benefit Act, 1961, wherein, employers can permit them to work from home after their maternity leave, subject to the nature of their work. This is also not obligatory on the employer and is subject to mutual agreement.

While more and more companies based in India are adopting a partial or complete remote working model, the provisions and mechanics around the same are largely

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governed by internal policies and practices adopted by the companies. The draft Model Standing Orders for the service sector issued by the Ministry of Labour and Employment on 31 December 2020 stipulate:

"Work from home - Subject to conditions of appointment or agreement between employer and workers, employer may allow a worker to work from home for such period or periods as may be determined by employer."

Though the Model Standing Orders intend to allow employees to work from home subject to the conditions stipulated under the employment contract, the same do not make it mandatory for employers to make remote working arrangements mandatory.

Remote working arrangements gained momentum and were made mandatory for the service sector (other than essential services) on account of lockdowns which were imposed by central and state governments. However, the lockdown orders were temporary measures which were taken by governments on account of spikes in COVID cases. In various states, the lockdown orders provide that offices and establishments should explore plans for employees working from home and also stagger the working hours to avoid crowding. That said, these orders are not in the nature of formal legislations and keep changing on account of the COVID situation.

In summary and as matters stand, remote working models are primarily governed by internal company policies/contracts and there is no labor law (central or state) which makes it mandatory for employers to take such measures or specifically governs the rights, obligations and compliances that relate to remote working.

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INDONESIA

Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. Indonesia does not have any specific regulations on the hiring of remote workers by foreign employers. Generally, the hiring of workers by employers in Indonesia would be subject to the Indonesian Manpower Law and its implementing regulations. In such cases, the employer employing the workers should be an individual or entity that has a presence or is established in Indonesia. Thus, the foreign jurisdiction entity intending to hire the remote worker under an employment relationship should be locally present, e.g., either in the form of a subsidiary or any form of legal representative.

Indonesian labor laws are the applicable laws for any employment relationship made under the jurisdiction of Indonesia. Hence, the employees will be entitled to the benefits and compensation as stipulated in the Indonesian Manpower Law (e.g., social security programs, severance pay for permanent employees, compensation pay for fixed-term employees, etc.).

Practically speaking, it is also possible for a foreign entity to engage a remote worker using a consulting service approach. In such cases, the foreign entity is not required to have a local presence to conduct the hiring. The relationship between the foreign entity as the hiring party and the remote worker as the independent contractor/consultant will not be subject to the Indonesian Manpower Law, and thus the worker will not be subject to the abovementioned employee entitlements. Pursuant to the freedom of contract principle acknowledged in the Indonesian Civil Code (ICC), the service fee and any other entitlement would instead be subject to the agreement made between the parties. We believe the relevant applicable laws would also be subject to the parties' agreement since there are no specific regulations on such matter. The possible tax implications and the risk of permanent establishment exposure should be considered in this approach.

If the remote worker is a non-Indonesian national, the remote worker must have the required work permits, which can only be obtained based on sponsorship by a local entity in Indonesia. In other words, it is the obligation of the local employer

to apply for the work permits (i.e., *Pengesahan RPTKA* or RPTKA Approval), VISAs, and stay permits for any expatriates it intends to employ. Thus, if a foreign entity (through its local presence) intends to employ expatriates locally, it must comply with the work permit application submission requirements to the Minister of Manpower (MOM) as set forth in Government Regulation No. 34 of 2021 regarding the Utilization of Foreign Workers and MOM Regulation No. 8 of 2021 regarding Implementing Regulation for Government Regulation No. 34 of 2021 regarding the Utilization of Foreign Workers.

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. The following are some of the general common issues we view worth taking into consideration by the hiring entity of cross-border workers.

Data Privacy and Security

Data breaches are undoubtedly a risk that should be considered in cross-border data exchanges. Moreover, Indonesia does not yet have in place a single and comprehensive data protection law serving as legal protection for data exchanges. Currently, the existing data protection provisions are spread across several laws and regulations. Note that the Indonesian House of Representatives is in the process of finalizing the comprehensive Personal Data Protection Bill, but there is no certain time frame for when the bill will be passed into law.

Monitoring Productivity and Communications

Practically speaking, monitoring the productivity of workers remotely is a challenge in cross-border hiring, even more with the absence of a local presence of the hiring entity or authorized representative of the same. We expect the risk of miscommunication would be heightened because of the difficulties in real-time face-to-face communications between the parties.

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Dispute Resolution and Enforcement

Considering that the hiring entity and hired worker are located in different jurisdictions, dispute resolution in the event of a dispute is also a point worth considering. Noting that it is possible for the agreed choice of forum to be a foreign jurisdiction court, we view that such arrangement might be quite unfavorable to the party not from the jurisdiction of the chosen forum, in terms of time, cost, and the effort required for that party to submit its claims to the foreign court (if any).

Furthermore, the enforcement of a foreign court's orders might also be an issue since the orders of a court in one country might not be directly executable in another country. (Please see below for further discussion of this matter.)

Tax Issues

Practically speaking, either in an employment or consulting services arrangement, the parties may agree between themselves that the incurred income tax resulting from the employment or service shall be borne and paid to the Government by the employee or contractor/consultant. The risk of double taxation might arise if the workers were to travel back and forth from one country to another for work.

Specifically, for hiring under a consulting services arrangement, the hiring entity may want to confirm whether the received service is subject to local value added tax (VAT) payment obligation. Note that the Indonesian Value Added Tax Law provides a list of non-taxable services, e.g., medical health services, social services, financial services, insurance services, etc. Services not included in this list are theoretically subject to VAT payment.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so?

A. Indonesian law shall be the governing law for any employment agreement made under the jurisdiction of Indonesia, including but not limited to an employment agreement between a foreign entity (through its local presence) and the employed remote worker.

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Separately, in the case of a consulting services agreement, we believe the foreign entity and the contractor/consultant may agree upon their choice of law governing the agreement. Arguably, it is possible to choose a foreign law for the agreement pursuant to the freedom of contract principle.

We believe the choice of law and choice of dispute resolution forum should be jointly considered. If the contract is governed by a foreign law while the choice of forum is a national court, the understanding of the relevant judges of the governing law might be tricky. But this would not be an issue if the governing law and dispute resolution forum were from the same foreign jurisdiction. However, the enforcement of the foreign law and the foreign court's judgement might arise as a separate issue (see the response to Question 4 below for a detailed discussion).

Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. Indonesian law shall be the governing law for any employment agreement made under the jurisdiction of Indonesia, including but not limited to employment agreements between a foreign entity (through its local presence) and employed remote workers. Specifically, the Indonesian Manpower Law requires all industrial relations disputes to be settled in the Labor Court (unless the dispute has been settled in the preceding non-litigation processes), thus the employer is restricted from freely setting a choice of dispute forum under the employment agreement.

Separately, in the case of a consulting services agreement, we believe the foreign entity and the contractor/consultant may agree upon their choice of dispute resolution forum under the principle of freedom of contract. If the choice of forum is a foreign jurisdiction court, from the contractor's perspective, we believe the associated risks would be in terms of time, costs and the effort to engage foreign counsel or to submit claims to the designated foreign jurisdiction court.

Meanwhile, from the perspective of the hiring entity, we expect the enforcement of claims might be an issue since foreign court judgements cannot be enforced by Indonesian courts. An extreme example is that if the foreign court renders a confiscation order for the contractor's assets which assumably are located in Indonesia, the foreign court's order would not be executable locally. Pursuant to

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Article 436(2) of *Reglement Op De Rechtsvordering*, the only way to execute a foreign court order would be to submit a new lawsuit to the Indonesian courts using the foreign court order as evidence. Again, this is a very time-consuming approach.

On a separate note, we are aware that in practice foreign arbitration has been used as the dispute resolution forum under consulting agreements. The foregoing is a feasible option considering that the Indonesian Arbitration Law stipulates that foreign arbitration orders may be enforced following the acknowledgement by the District Court of Central Jakarta, subject to the fulfilment of criteria and requirements set forth therein.

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. As discussed above, there are no specific regulations applicable for the hiring of remote workers in Indonesia. Hiring of workers in general is done on an employment basis by a local entity (e.g., the foreign entity's subsidiary or representative office) and therefore is subject to the Indonesian Manpower Law and its implementing regulations. Assuming that the remote workers are to be hired for the completion of certain work under a specific term, it is common in practice for an employer to employ the workers under a fixed-term employment arrangement.

Aside from the above, it is also common to find an entity utilizing the services of Indonesian workers under an independent contractor/consultant arrangement. We believe this might be an additional option for the hiring of remote workers in Indonesia. Additionally, the foregoing might be a more preferable option for short-term hiring purposes, since the hiring entity would not be obliged to provide the employees' entitlements as stipulated under the Indonesian Manpower Law.

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JAPAN

Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. Yes, it is possible. A foreign jurisdiction entity can hire remote workers in Japan as contractors or employees, if the worker is a Japanese national or has a valid work permit in Japan. If hired under an employment contract, Japanese labor laws will apply irrespective of the agreement on governing law between the foreign jurisdiction entity and the worker, in principle.

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. The common risk is wrongful dismissal. As a result of the application of Japanese labor laws, the foreign jurisdiction entity needs to have “reasonable cause” to dismiss its employees. Japanese courts are generally pro-employee and do not easily find “reasonable cause” for dismissal. If it is determined that there is no “reasonable cause” for the dismissal, it will be found to be invalid and reinstatement to work and back pay for the dismissed employee will be ordered.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker’s contract? What are the risks in doing so?

A. If the contract is an employment contract, even if the foreign jurisdiction entity imposes its foreign law as the governing law in the remote worker’s contract, if the worker desires that Japanese labor laws apply, Japanese labor laws will apply. That being said, imposing a foreign law as the governing law in the remote worker’s contract itself is not illegal.

JAPAN

Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. The foreign jurisdiction entity cannot require in the remote worker's contract that disputes be submitted to its own country's courts, in principle, if it is an employment contract.

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. There is a guideline called "Guideline for Appropriate Introduction and Implementation of Telework," which was issued by the Ministry of Health, Labor and Welfare

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KOREA

Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. Yes, a foreign jurisdiction entity can hire Korean nationals as remote workers in Korea. Regarding potential responsibilities as an employer of the remote worker, there are two key issues: exposure under Korean labor law and tax exposure under the legal concept of permanent establishment.

1. Application of Korean Labor Law

There is a law called the Private International Act of Korea, which provides that if a person "habitually provides their labor in Korea," then they may claim that the labor and employment laws of Korea apply to them regardless of the choice of law or hiring entity. There is no clear precedent as to how long a person must reside in Korea to "habitually provide labor in Korea," but courts have focused on factors other than duration to determine the application of the labor and employment laws of Korea, i.e., whether the employee is consistently supervised by a local entity and not by the regional or overseas office, whether the employee performs the same or substantially the same work as a regular Korean employee, whether the employee will move on to another jurisdiction after completion of assignment, etc. Assuming that this law might cause Korean labor and employment law to apply to the employees hired by the foreign entity, then the foreign entity would be subject to the following requirements, among others:

- Cannot terminate an employee unless there is "just cause," which is based on Article 23 of the Labor Standards Act (LSA).
- Fixed-term contracts cannot exceed two years, unless one of the following exceptions apply – if the employee was hired for a particular project that extends beyond two years, if the employee is 55 years of age or older at the time the contract is entered into, or if the average annual income for the past two years of the employee, whose job is listed under the Statistics Act, i.e., people manager or certain professionals, falls within the top 25 percentile of employee compensation in Korea.

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- Obligation to pay a statutory retirement benefit upon the employee's separation from the company, regardless of the reason(s), equal to at least 30 days' "average wage" for each year of service (an employee must have at least one year of continuous service and work at least 15 hours per week on average [a four-week rolling average] to be eligible for this benefit).
  - This obligation applies even if only one employee is hired in Korea.
  - This obligation should be factored in when developing an employee's compensation package.
- Obligation to grant annual leave in accordance with the LSA and compensate employees for unused annual leave on an annual basis.

2. Social Insurances

Another notable requirement under the LSA are the four mandatory social insurances, which are national health insurance, national pension, unemployment insurance and workers' compensation.

Korean companies are required to subscribe to these four insurances on behalf of their employees and bear 50% of the costs of the first three insurances mentioned above and 100% of workers' compensation insurance.

A foreign entity is not able to enroll in the four social insurances. However, national health insurance and national pension are mandatory for all people living in Korea. Therefore, the remote workers hired by the foreign entity will be required to enroll in national health insurance and national pension by enrolling in those programs in their region(s) (rather than through the company). Further, the employees hired by the foreign entity will be held responsible for 100% of the cost of these insurances. To help offset the cost of these insurances, it is not uncommon for foreign entities to provide an allowance to their Korean workers equal to the 50% portions of these insurances that Korean companies would normally pay.

3. Permanent Establishment

If a remote worker who is hired by a foreign jurisdiction entity carries out business functions critical to its business in Korea for a long period of time, e.g., for more than six months during a consecutive 12-month period, then their activities and long-term presence in Korea would likely constitute a physical presence and a

permanent establishment (PE) from a Korean tax perspective. If and when a PE is deemed to exist, the Korean tax authorities will take the position that a deemed PE should have reported its sales revenue attributable to Korea and paid income tax thereon, in which case the foreign jurisdiction entity may be assessed additional corporate income taxes and VAT in addition to heavy statutory penalties.

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. As noted above, the common risks primarily involve application of Korean labor laws, including the provisions of the LSA, and permanent establishment, which has certain tax implications. Please note that non-compliance with the Korean VAT law, e.g., non-issuance of VAT invoices, could trigger a criminal investigation.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so?

A. Yes, the parties can agree to have foreign law as the governing law under the remote worker's contract. However, even with such a provision in the employment contract, the mandatory protections under Korean labor law, such as "just cause" for termination, annual paid leave and statutory severance (as explained in our response to Question 1 above), will still be applicable to the remote worker if they "habitually provide their labor in Korea" pursuant to the Private International Act.

Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. Yes, the parties can agree on the dispute forum for any issues arising from the remote worker's employment and that forum does not have to be a court within the remote worker's country, i.e., Korea. However, the employee may still raise claims for any applicable Korean law provisions before the Labor Relations Commission or a local court.

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Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. There are no specific laws on remote work, but below are some practical considerations when implementing a remote working system:

1. Consensus between employer and employee: Due to the different nature of working from home as compared to ordinary work, to introduce and establish a working from home scheme in a workplace, it is important to avoid unnecessary misunderstandings and form a consensus between the employer and the employees. Accordingly, it is advisable to discuss its purpose, work scope, candidacy and the means of performing work from home with the employees before implementation and document the discussion in writing.

2. Smooth workflow: For the working from home employee to perform his/her work smoothly and efficiently, it is advisable to document the work scope, means of performing work, and other relevant information in writing and providing the same to the working from home employee. Given that the working from home employee will be working outside of the company workplace, it is also advisable to pre-determine the contact information for normal and emergency situations.

3. Fair performance evaluation and HR management: A working from home employee may have fairness concerns because of the fact that he/she will not be physically present at company workplace. Accordingly, it is advisable to establish a system of evaluating performance and HR management taking into account such concerns.

   If performance evaluation or HR management is handled differently for a working from home employee in comparison to other ordinary employees who are working at the designated workplace, such differences would need to be reflected in the Rules of Employment (and the employment contract) and explained to the relevant employee in advance.

4. Costs: Accommodating or settling such costs incurred by the working from home employee promptly or systematically may be difficult given that the employee will be working at a distance from the company workplace. Accordingly, it would be necessary to discuss the method of settlement, e.g.,

advance cost allowance, reimbursement, and the scope of the costs covered with the employee in advance and reflect the same in the Rules of Employment (or the employment agreement).

5. Training: Because of the nature of working from home, a working from home employee may face difficulties in participating in on-the-job training. Accordingly, it is advisable to take necessary steps to ease his/her concerns for missing out on such training opportunities at the company workplace.

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MALAYSIA

Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. It is possible under Malaysian laws for a foreign jurisdiction entity to hire remote workers in Malaysia.

There are two possible categories of remote workers in Malaysia:

a. Malaysian citizens/Permanent residents ("PRs");
b. Non-Malaysian citizens.

Malaysian citizens/PRs

There is no legal prohibition under Malaysia's laws for a foreign company to engage citizens/PRs to perform work remotely in Malaysia.

The basic requirements will be for the terms of engagement to be set out via an employment contract or the contract for services. If parties elect to opt for the employment contract method, the next question for the parties would be the choice of law.

If parties opt for Malaysian law, there will be a need to comply with local employment legislation for the following aspects:

a. Minimum wages (pursuant to the Minimum Wages Order);
b. Minimum standards on terms and benefits of employment (Employment Act 1955);
c. National retirement age (Minimum Retirement Age Act 2012);
d. Unfair dismissal protection (Industrial Relations Act 1967);
e. National Retirement Fund, Insurance Scheme and Social Security (Employees Provident Fund Act 1991, Employment Insurance System Act 2017 and Employees Social Security Act 1969);
f. Health and safety (Occupational Health and Safety Act 1994)
g. Data protection laws (Personal Data Protection Act 2010); and
h. Income tax deductions for salaries earned (Income Tax Act).

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If the foreign jurisdiction entity has no physical and registered presence in Malaysia, the employer will have to appoint a local agent to administer the statutory employment and tax deductions.

Non-Malaysian citizen/PRs

Foreign employees who are engaged as remote workers in Malaysia must obtain the necessary employment pass for the remote workers to legally work in Malaysia. Further, to apply for the employment pass, it will be necessary to have a local entity/agent to sponsor the work permit application.

Employment or Independent Contractor?

One of the considerations for parties is whether to opt for the employment model or the independent contractor model. If the latter is preferred, there will not be any requirement for the parties to comply with local employment laws. However, the courts in Malaysia are not bound by the labels used by parties in the contract. The courts would examine the quality and substance of the relationship and ascertain whether in reality the engagement was that of an employment relationship.

In Malaysia, the main test to ascertain employment is the control test. In essence, the control test will examine the degree of control that the company will have over the individual in respect of the manner of performance of the functions. The higher the degree of control, the higher the risk of employment. The courts will also examine whether the engagement is exclusive in nature and whether the individual is free to be engaged elsewhere for his/her services.

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. Employers should be mindful of the following types of risk:
Permanent Establishment

Tax is payable on the income of any person which accrues or is derived in Malaysia.

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A foreign employing entity could be subject to income tax in Malaysia if the activities/presence in Malaysia trigger permanent establishment.

Whether permanent establishment exists or not is a question of fact depending on the nature of activities and double taxation treaty between Malaysia and the relevant countries.

Data Privacy and Security

Personal data that are collected in Malaysia cannot be transferred outside the country unless there is sufficient consent obtained.

Data security remains a perennial issue. There is a statutory obligation for employers to ensure that client and employee data are processed with sufficient security standards remotely.

Health and Safety

Employers will need comply with local health and safety laws even for remote workers who are working from home. It would be prudent to update your health and safety policy to cover remote working environments.

Risk of Unfair Dismissal Claims

Remote employees, irrespective of nationality, can still resort to unfair dismissal claims if the foreign entity has a local registered presence in Malaysia.

Risk of Vicarious Liability

A foreign entity will be vicariously liable for any tortious actions or omission of the remote workers.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so?

A. A choice of governing law and choice of jurisdiction, although distinct, are often considered together.

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Parties may opt for a foreign jurisdiction and/or foreign law in the contract, but in deciding on the applicable law and forum, the following principles will be applied and considered:

a. Where there is an express agreement that parties have agreed to submit to foreign jurisdiction/choice of foreign law, the courts will generally follow such clause and it would require a strong and exceptional case to satisfy the court in Malaysia that the agreement should be overridden;

b. At the end of the day, it is a matter for the discretion of the Malaysian court whether to give effect to the foreign jurisdiction clause;

c. The onus is on the party challenging the exclusive jurisdiction clause to demonstrate why they should not be bound to honor the part of the contract where they had agreed to jurisdiction;

d. The respondent must show more than just inconvenience to witnesses and cost of litigation. Practical inconvenience is not a determinative factor. What matters most is the suitability of the forum which will meet the ends of justice.

(See Globus Shipping & Trading (Pet) Ltd v Taiping Textiles Berhad [1976] 1 LNS 31; American Express Bank Ltd v Mohamad Taufiq [1995] 1 CLJ 273; World Triathlon Corporation v. SRS Sports Centre Sdn Bhd [2019] 1 CLJ 381 CA; Open Country Dairy Ltd v Able Food Sdn Bhd [2021] 7 CLJ 716 CA).

Although the threshold to set aside a foreign choice of law/jurisdiction is high, there remains a risk that the court may not give effect to the terms. If the courts were to rule that Malaysian law/courts apply instead of a foreign jurisdiction/law, the foreign entity most likely would not be in compliance with the local employment law.

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Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. Please refer to our answer to Question 3.

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. There are no specific laws or government-issued guidelines that are applicable to remote workers in Malaysia.

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MYANMAR

Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. No, there aren't any specific legal provisions governing remote workers. Generally, a duly incorporated overseas entity can hire remote workers in Myanmar.

Under the Overseas Employment Law, a worker who intends to work in a foreign country must obtain a registration card issued by the Ministry of Labor, Immigration and Population before leaving Myanmar. A medical examination certificate is also required.

If the employer and remote worker enter into the employment contract under Myanmar law, the employer must comply with local labor laws, noting the following aspects:

a. Enter into an employment contract (pursuant to the Employment and Skills Development Law 2013);
b. Use the standard employment contract (SEC) template (pursuant to Notification 140/2017);
c. Minimum wages (pursuant to the Minimum Wages Law 2013);
d. Social security contributions (pursuant to the Social Security Law 2012);
e. Income tax deductions (Income Tax Law 1947); and
f. Compensation for work-related injuries or death (Workmen Compensation Act 1923).

If the foreign entity has no physical or registered presence in Myanmar, the employer may hire the employee through a licensed recruitment agency or hire personnel as independent contractors.

<u>Employee or Independent Contractor?</u>

The labor laws of Myanmar only recognize employment of an "employee" based on a contract of service (employer-employee relationship). Employees may be employed on a full-time, part-time or casual basis. However, in practice,

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independent contractors are often engaged under a service agreement or an independent contractor agreement.

Employment legislation will not apply to independent contractors (or self-employed persons) provided that they are correctly categorized as independent contractors. There are various tests applied in determining whether the relationship is that of employment or of an independent contractor, with the exercise of control being a key factor. The characterization of the relationship by the parties in the terms of the contract is a relevant factor but not conclusive.

The labor laws do not explicitly differentiate between independent contractors and employees. Further, local labor laws do not require statutory benefits to be provided to independent contractors.

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. Local laws do not explicitly regulate the hiring of cross-border workers. The possible common risks are:

Data Privacy

Local laws do not specifically regulate notification requirements in regard to information collection and the transfer of information. However, an employer should obtain the prior written consent of the employee whose information will be transferred/collected. Due to the lack of any specific data protection and privacy laws in Myanmar, there are no specific forms that would be required for information collection and the transfer of information. Myanmar laws have no specific restrictions that will apply to the disclosure of an employee's personal data to third parties if the employee expressly consents to such a disclosure.

Wrongful Dismissal

If a foreign entity has a local registered presence in Myanmar, the employee has the right to file a claim for unfair dismissal.

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Permanent Establishment

There is no permanent establishment definition provided under existing Myanmar laws. The Internal Revenue Authority has the right to collect income tax from non-resident foreigners who receive income through any of the following means:

a. Income received from any capital asset within Myanmar; and
b. Income received from any source of income within Myanmar.

Whether permanent establishment exist or not is a question of fact depending on the nature of activities and double taxation treaty between Myanmar and the relevant countries.

Health and Safety

The Occupational Health and Safety Law (2019) (OHSL) was issued on 15 March 2019. However, its enforcement is subject to a relevant notification from the President whose expected date of issuance is not clearly scheduled. The OHSL applies to all industries such as government departments, organizations, co-operatives and private businesses owned by foreign nationals or citizens. Employers must comply with the provisions relating to health and safety regulated by the authorities. The workplace health and safety policies may be updated as necessary per the nature of the business to cover remote workers.

Risk of Vicarious Liability

The foreign entity will be liable for any tortious actions or omissions of the remote workers.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so?

A. Local law does not impose any restrictions in this regard. The parties may agree on the governing law of the employment contract in line with the law of the relevant country if the remote worker works outside of Myanmar. However, if the remote worker works in Myanmar, the employer must impose Myanmar law as the governing law of the remote worker's contract.

MYANMAR

Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. The Settlement of Labor Dispute Law does not explicitly require submission of the dispute between the foreign entity and remote worker to the Myanmar courts. The parties may agree on the dispute resolution arrangement of the employment contract in line with the laws of the relevant country if the remote worker works outside of Myanmar.

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. There are no specific laws or government guidelines applicable to remote workers in Myanmar.

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Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. Yes, a foreign jurisdiction entity may hire remote workers who work in New Zealand.

Employees covered by New Zealand law

A foreign jurisdiction entity is entitled to employ an employee based in New Zealand on the basis that they will be subject to the jurisdiction of New Zealand employment law.

A basic legal requirement for hiring employees in New Zealand is that the employer must provide the employee with a written individual employment agreement. The employment agreement may contain any terms upon which the parties agree, but must include:

- The names of the employee and employer;
- A description of the work to be performed;
- An indication of where the employee will work;
- Any agreed hours of work, or if no hours of work are agreed, an indication of the arrangements relating to times the employee is to work;
- The wages or salary payable to the employee; and
- A plain language explanation of the services available for resolving employment relationship problems, including informing the employee about the 90 days during which they should raise personal grievances.

In addition, under the Holidays Act 2003, employees are entitled to:

- not less than four weeks annual leave per year;
- up to 11 public holidays (with time and half and an alternative day (or day in lieu) provided to employees who work on such a holiday where it is an ordinary working day);

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- 10 days of sick leave per annum accruable to a maximum entitlement of 20 days per year;
- bereavement leave on the basis of three days for a close bereavement and one day for other bereavements provided certain criteria are met.

There are also provisions in the Holidays Act 2003 allowing for public holidays to be taken on alternative dates than those detailed above, such that New Zealand entitlements could be observed on foreign jurisdiction public holiday dates by agreement. Failure to comply with the requirements under the Holidays Act 2003 could result in liability for any unpaid leave and penalties of up to NZ$20,000 if audited by the Ministry of Business Innovation and Employment or if an employee brings a claim for failure to pay annual leave in accordance with the Holidays Act 2003.

Employees must be paid at least the minimum wage for each hour of work. The adult minimum wage is NZ$20 per hour.

The Health and Safety at Work Act 2015 (HSWA) and related regulations apply to persons conducting a business or undertaking (PCBUs). A foreign jurisdiction entity would fall within the definition of a PCBU and would owe duties under the HSWA. Specifically, the primary duty of care requires the PCBU to take reasonably practicable steps to ensure the health and safety of its workers. This duty covers risks to both physical and mental health. Workers also have duties under the HSWA in relation to their own health and safety. Workers include employees and contractors.

Foreign jurisdiction entities that are “carrying on business” in New Zealand are required to register in New Zealand in accordance with the Companies Act 1993. The term "carrying on business" is not exhaustively defined in the Companies Act 1993 and in every case the question is to be decided on its facts, in light of all the surrounding circumstances.

Further, non-resident employers may need to comply with the Pay-As-You-Earn (PAYE) withholding tax rules and allied regimes for the collection at source of accident compensation (ACC) levies, KiwiSaver contributions, child support and student loan repayments. Broadly, these obligations must be complied with by a non-resident employer (and the employer will face sanctions for failing to comply) if:

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- "the employer has made themselves subject to New Zealand tax law by having a sufficient presence in New Zealand"; and
- the services performed by the relevant New Zealand resident employee are "properly attributable to the employer's presence in New Zealand".

Employees covered by the law of a foreign jurisdiction

As noted in Question 3 below, a foreign jurisdiction entity may instead employ someone based in New Zealand pursuant to an employment agreement governed by the laws of a foreign jurisdiction. However, case law has confirmed that some New Zealand laws will still apply to the relationship (for example, anti-discrimination law).

Independent contractors

The above "employee" requirements do not apply to independent contractors. An independent contractor's entitlements are in accordance with the terms of the contract agreed between the parties, including liability for tax obligations. However, the courts have the ability to determine that the real nature of the relationship between the parties is one of employer and employee notwithstanding the parties' intent to enter into an independent contractor arrangement. This essentially involves considering whether an employee is genuinely in business on their own account.

If an independent contractor were to challenge their status, and be found to be an employee, they would be entitled to all the statutory benefits that are afforded to employees under the Employment Relations Act 2000, the Minimum Wages Act 1983 and the Holidays Act 2003.

Visa requirements

All workers must be legally entitled to work in New Zealand (on the basis that they are a New Zealand citizen, hold permanent residency or have an appropriate visa allowing them to legally work in New Zealand).

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Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. Employees covered by New Zealand law

New Zealand law does not recognize at-will termination of employment. Employees whose employment is terminated without justifiable cause or in a procedurally unfair manner are entitled to various remedies, including reinstatement, compensation for lost earnings, compensation for hurt and humiliation, lost benefits, penalties of up to NZ$20,000 per breach and legal costs. There is no statutory cap on the level of compensation that an employee may claim.

An employee can bring a personal grievance claim under several circumstances, such as where the employee believes that they have been unjustifiably dismissed or disadvantaged, discriminated against or subjected to sexual or racial harassment in their employment. The grievance must be raised within 90 days of the alleged incident. An unjustifiable dismissal occurs when there is no good substantive reason for the dismissal and/or when the dismissal has been carried out in a procedurally unfair manner.

As noted above, employers may also be found liable for breaches of the Holidays Act 2003. This is a complex piece of legislation and there have been widespread issues of inadvertent non-compliance with this Act in New Zealand.

New Zealand has a specific judicial system for employment-related disputes, starting with mandatory mediation before any formal judicial process. Then there is a dedicated Employment Relations Authority, a semi-formal tribunal, where results can be appealed to the Employment Court and then the Court of Appeal and Supreme Court (the highest court). Most disputes are resolved in mediation.

Where a PCBU is alleged to have breached its obligations under the HSWA, WorkSafe (New Zealand's primary work health and safety regulator) may prosecute the employer. If an employer breaches a health and safety duty and this exposes their workers or others to a risk of death, serious injury or serious illness, they can be fined up to up to NZ$1.5 million if they are a company.

Notwithstanding the above, it is unlikely that WorkSafe would seek to prosecute a PCBU in relation to a remote working situation. Rather, it is more likely that an employee could also bring a breach of health and safety claim against their employer in the courts, on the basis that there has been a breach of their employment agreement (which contains an implied duty in relation to health and safety). If an employee is successful in establishing that their employer has acted in breach of its health and safety obligations, they may be awarded remedies including compensation for hurt and humiliation.

Employers will generally be vicariously liable for the acts of their employees carried out in the course of their employment.

As noted in Question 1 above, employers will need to comply with any relevant taxation obligations and we recommend seeking specific taxation advice in relation to this issue before employing an employee in New Zealand.

Employees covered by the law of an overseas jurisdiction

The risks relating to this category of employee are detailed in Question 3 below.

Independent contractors

As noted in Question 1, if an independent contractor were found to be an employee, they would be entitled to all the statutory benefits that are afforded to employees under the Employment Relations Act 2000, the Minimum Wages Act 1983 and the Holidays Act 2003. This includes minimum wage, holiday and leave entitlements, the right to a fair termination process, and the ability raise a personal grievance. Any employer liability to pay such entitlements would also likely need to be back-paid from the time the relationship became one of employment (to a limitation back-stop of six years).

It is not uncommon for the nature of an independent contractor's relationship to "evolve" during its term and over time, and care needs to be taken that this evolution does not negatively affect the real nature of the relationship. To avoid the implications outlined above, if the intention is to engage an independent contractor, once the parties have signed an appropriately worded agreement, the foreign jurisdiction entity should take care to manage contractors properly to ensure their status remains truly independent.

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For example, if the entity starts to exert a higher level of control over the workers' day-to-day activities, providing fixed hours and days of work, prevents them working for others, the contract keeps getting renewed and essentially starts treating them as employees, there is an increased risk that the workers may have a basis for challenging their status.

The principal may also be liable for prosecution by WorkSafe as a PCBU in relation to independent contractors.

Permanent establishment risks

An employer engaging a remote worker in New Zealand would need to evaluate any risk the arrangement may pose from a corporate tax perspective and in particular whether the worker's activities in New Zealand could create a "permanent establishment" for the employer in New Zealand (with associated New Zealand corporate tax filing requirements).

Privacy

The Privacy Act 2020 sets out New Zealand's privacy laws. It establishes 13 Information Privacy Principles that set out broad rules on personal information. The Act prescribes several rules and limits on the use, maintenance and security of personal information and outlines specific requirements related to cross-border information sharing.

An overseas business or organization that is "carrying on business" in New Zealand will be subject to the Privacy Act's privacy obligations, even if it does not have a physical presence in New Zealand. This includes any agency which provides services to New Zealanders and/or collects their personal information for its own purposes.

An employer/principal may monitor employees'/contractors' productivity and communications. However, the employer/principal must comply with the Information Privacy Principles in the Privacy Act 2020. Accordingly, an employer/principal must only collect personal information for a lawful purpose (where collection is necessary for that purpose); ensure that the individuals are aware that information is being collected (unless this would prejudice the purposes of the collection, or informing the individuals is not reasonably

practicable); and further ensure that the manner of collection is lawful and does not intrude unreasonably on the personal affairs of the individual concerned. An individual may apply for access to any personal information collected.

We note that individuals also hold their own privacy obligations (as agents of the employer/principal) and will be required to safeguard any personal information that they are privy to in the course of their employment. We recommend confirming these obligations in the applicable independent contractor/employment agreement.

The Privacy Act contains controls around the disclosure of personal information to foreign agencies and persons. The broad intent of the cross-border controls is to ensure that personal information being sent out of New Zealand will be subject to privacy safeguards that are comparable to New Zealand's. Agencies will now be accountable for the international disclosure of personal information and will need to demonstrate that they have carried out the necessary due diligence checks required. If a business or organization has a privacy breach that it believes has caused (or is likely to cause) serious harm, it will need to notify the Office of the Privacy Commissioner and affected individuals as soon as possible. Under the Privacy Act, it is an offense to fail to inform the Privacy Commissioner when there has been a notifiable privacy breach. The liability for breach notifications sits with the business or organization, and not the individual employees. Failure to notify could result in a fine of up to NZ$10,000 and possible damages claimed by any affected individuals.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so?

A. A foreign jurisdiction entity may provide for its foreign law to be the governing law on the remote worker's employment agreement or independent contractor agreement.

Under New Zealand law, there are three ways in which the proper law may be determined:

a. By express selection by the parties;
b. By inferred selection from the circumstances; or

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c. Judicial determination of the system of law with which the transaction has the closest and most real connection.

Where parties have expressly selected a system of law to govern the contract that choice will be given effect provided that it is bona fide and legal, and there is no public policy reason for avoiding the choice.

However, a choice of law clause will not be effective where a foreign system of law is chosen which has "little or no connection" with that contract of employment and thus comprises a contracting out by the parties of the governing application of section 238 of the Employment Relations Act 2000.

Some laws in New Zealand will apply regardless of the law of the governing contract. Although it is not entirely clear which laws will apply, in 2017, the Supreme Court of New Zealand held that the anti-discrimination provisions of the Employment Relations Act 2000 applied to an employment relationship regardless of the choice of law governing the contract (Brown v New Zealand Basing Limited [2017] NZSC 139. [2017] NZSC 139). The Court affirmed that the right not to be discriminated against was a free-standing right, not contractual, and therefore independent of the employment agreement. However, the Court has left open the question of what other provisions of the Employment Relations Act 2000 or other New Zealand laws could be found to apply to New Zealand based-employees who work for overseas-based companies and elect foreign law to govern their agreement. In light of this, other statutory rights could be found to apply to employees irrespective of the law elected to govern their contract with a foreign jurisdiction entity.

Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. A foreign jurisdiction entity can require disputes in a remote worker's contract to be submitted to the courts in its own country. However, as explained above, a choice of law clause will not be effective where a foreign system of law is chosen which has "little or no connection" with that contract of employment.

Where both a New Zealand judicial body and that of another country have jurisdiction to hear and determine a proceeding, the

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"forum conveniens" (the natural and appropriate forum) is the forum in which the proceeding could be more suitably tried in the interests of the parties and for the ends of justice. In determining this, the New Zealand courts look at the jurisdiction that has "the most real and substantial connection" both in terms of convenience and expense and also the law governing the issue. The New Zealand Court of Appeal has observed that "it is increasingly recognised that employment disputes should be resolved in the jurisdiction in which the work is carried out (save where the location is temporary)" *(Beal (Jardine Risk Consultants Ltd v Beal*) [2000] 1 ERNZ 405 at [28]).

There are no express territoriality limitations in the New Zealand legislation. Rule 31A of the Employment Court Regulations 2000 (Regulations) provides for service of Employment Court proceedings on overseas parties. There are also parallel provisions for the Employment Relations Authority. The New Zealand Supreme Court has held that the Employment Court's jurisdiction extends to claims for breach of contract, even where that contract is governed by foreign law (*Beal (Jardine Risk Consultants Ltd v Beal*) [2000] 1 ERNZ 405 at [47]). This means that despite the presence of a provision requiring a dispute to be addressed in a foreign dispute forum, New Zealand Courts could decide to hear the matter in New Zealand. However, an overseas party may challenge the assumption by the Employment Court of jurisdiction and, in cases not involving an Australian defendant, the Court may decline jurisdiction on forum non conveniens grounds provided for in rule 31G of the Regulations. For the Employment Court to decline jurisdiction it would need to be satisfied that:

a) it is more appropriate for the matter to be resolved in a place outside New Zealand;
b) the plaintiff will have a fair opportunity in the place to make the plaintiff's case;
c) the plaintiff will receive proper justice in the place; and
d) the defendant will suffer unfair disadvantage if the proceedings are heard in New Zealand.

We note that the Supreme Court has said that it would determine on a case-by-case basis whether the statutory rights under the Employment Relations Act 2000 apply to any particular claim (*Beal (Jardine Risk Consultants Ltd v Beal*) [2000] 1 ERNZ 405 at [41]). It is not entirely clear whether the Employment Court would have jurisdiction to give effect to statutory rights arising under a foreign statute

which correspond generally to New Zealand's personal grievance rights (Beal (*Jardine Risk Consultants Ltd v Beal*) [2000] 1 ERNZ 405 at [49]).

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. There are no laws which specifically apply to "remote workers."

However, WorkSafe (New Zealand's health and safety regulator) has released various resources in relation to best practice when working from home. Those resources may be accessed here: Working from home | WorkSafe

Those remote workers covered by New Zealand law will be subject to the legislation which governs employment relationships in New Zealand, including:

- Employment Relations Act 2000
- Holidays Act 2003
- Minimum Wage Act 1983
- Privacy Act 2020
- Human Rights Act 1993
- Health and Safety at Work Act 2015

As noted above, even if an employee is employed pursuant to another jurisdiction, they may still be covered by some of this legislation. Therefore, it is best practice to act in accordance with the minimum entitlements and rights contained in this legislation.

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PHILIPPINES

Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. Yes, it is possible for a foreign jurisdiction entity to hire remote workers in the Philippines as contractors without the need to establish a business presence in the country, as opposed to hiring the remote workers as employees, which would require a foreign jurisdiction entity to establish a business presence in the Philippines. The terms of the contracting arrangement, e.g., benefits and compensation, procedure for termination, etc., are left largely to the mutual negotiation and agreement of parties as opposed to the terms of an employment arrangement, which is subject to the terms of the local employment laws and is highly regulated by labor authorities. Foreign nationals seeking to work remotely for a foreign jurisdiction entity from the Philippines may enter the country only under a temporary visitor or other visa arrangement. They are generally not eligible to apply for a work permit or work visa as these applications will require a local sponsoring entity.

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. The most common risk involved in hiring cross-border workers in the Philippines is mischaracterizing the working relationship between the parties. In the Philippines, the contractual relationship is defined by law and not by the parties. This means that notwithstanding the agreement of the parties, i.e., notwithstanding that the agreement is captioned as a contractor agreement, a remote worker who is hired as a contractor may be declared an employee by our courts and regulators. In such case, the remote worker may claim protection under local employment laws.

Our courts and regulators use several tests to determine whether an employment relationship exists, but the most important test used in our jurisdiction is the "control test." The "control test" is based on the extent of control the client exercises over the contractor. Our courts have invariably ruled that an

independent contractor should carry on an independent business and undertake the contract work on his own account, under his own responsibility, according to his own manner and method, and free from the control and direction of his employer or principal in all matters connected with the performance of the work except as to the results thereof. In practical terms, this means that the client should not exercise "day-to-day" control over the contractor.

If an employment relationship is established, the foreign jurisdiction entity will be exposed to, among other things, the permanent establishment risk, i.e., it will be required by our regulators to establish a business presence in the Philippines; employment-related claims from its remote workers, i.e., as an employer, it may be asked to pay minimum statutory benefits and comply with social welfare legislations, etc.; and it may be deemed vicariously liable by third parties for the acts of its remote workers in the Philippines, i.e., in the Philippines, employers are liable for the damages caused by their employees who are acting within the scope of their assigned tasks.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so?

A. In a contracting arrangement, the parties are free to establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy. In this connection, Philippine courts will uphold a choice of foreign law provided there is substantial connection between any of the parties or the transactions and the country whose laws are chosen as the governing law. Thus, the parties may agree to use the law of the home country of the foreign jurisdiction entity as the governing law of their contract as there would be substantial connection of said law to the parties and the transaction. Notwithstanding the above, however, Philippine law may still apply with respect to certain matters such as those bearing upon the authority and capacity of the contractor to enter into and perform the agreement. If foreign law will be asserted in a Philippine court litigation, such foreign law has to be proved before Philippine courts. Otherwise, such foreign law will be presumed to be the same as Philippine law on the disputed matter.

PHILIPPINES

Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. In a contracting arrangement, the parties may agree to submit their disputes to the foreign jurisdiction entity's court. However, such agreement will not oust a Philippine court of its jurisdiction to hear and rule on an action to enforce the agreement in a proper case brought before it. In other words, an agreement as to venue shall be deemed as non-exclusive, such that there is a risk of a conflicting judgment by a Philippine court that may assume jurisdiction over parallel proceedings.

Furthermore, while a foreign judgment obtained against a Philippine resident would generally be recognized and enforced by the courts in the Philippines without re-examination of the issues, there is still a risk of non-enforcement if the oppositor is able to establish that (a) the foreign court did not have jurisdiction in accordance with their jurisdictional rules, (b) the Philippine resident had no notice of the proceedings, (c) such judgment was obtained through collusion or fraud or was based on clear mistake of law or fact, or (d) the foreign judgment is contrary to public policy, which could be made to apply especially to rulings that are violative of labor protection policies, e.g., no "at-will" termination, under Philippine law.

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. The hiring of remote workers as contractors is primarily governed by the Philippine Civil Code. In a contracting arrangement, the parties are free to stipulate the terms and conditions of their contract as long as they are not contrary to law, morals, good customs, public order or public policy. Meanwhile, the hiring of remote workers as employees by a foreign jurisdiction entity will trigger the business licensing requirements under the Revised Corporation Code (and other relevant regulatory laws in the Philippines) as it will be deemed to be doing business in the Philippines. The employment relationship between the foreign jurisdiction entity and the remote worker-employee shall be primarily governed by the Labor Code of the Philippines. In an employment arrangement, parties are likewise free to stipulate the terms and conditions of their contract as

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long as they are not contrary to law, morals, good customs, public order or public policy. For example, the parties may not stipulate that an employee may be paid a salary lower than the government-mandated minimum wage or that an employee may be terminated "at will" because termination of an employee without cause is prohibited under the Labor Code of the Philippines. It would be deemed best practice for the parties to consult their respective counsel to ensure the proper characterization of the working relationship between the parties.

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SINGAPORE

Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. It is not prohibited under Singapore laws for a foreign jurisdiction entity to hire remote workers based in Singapore.

There are two possible categories of remote workers in Singapore:

a. Singapore citizens/Singapore Permanent Residents;
b. Foreigners in Singapore

<u>Singapore Citizens/Singapore Permanent Residents (SPR)</u>

There is no legal prohibition under Singapore laws for a foreign entity to engage Singapore Citizens/SPRs to perform work remotely from Singapore.

The basic requirements will be for the terms of engagement to be set out via a written employment contract or a contract for services. Under Singapore law, certain specified key written employment terms must be stated in an employment contact. Importantly, Central Provident Fund (CPF) contributions must also be paid to such employees' CPF accounts.

From a Singapore law perspective, it is likely that certain local employment legislation must still be complied with (in particular the statutory minimums afforded to employees), including but not limited to following legislation (where applicable):

a. Employment Act;
b. CPF Act;
c. Personal Data Protection Act (PDPA);
d. Income Tax Act;
e. Employment of Foreign Manpower Act;
f. Child Savings Co-Development Act;
g. Retirement & Reemployment Act;
h. Workplace Safety and Health Act; and

SINGAPORE

i. Tripartite Guidelines issued by the Tripartite Alliance for Fair and Progressive Employment Practices.

If the foreign jurisdiction entity has no physical and registered presence in Singapore, the employer will have to obtain a Corppass and/or appoint a local agent in order to administer the statutory employment CPF contributions and tax deductions.

Foreigners in Singapore

Foreign employees who are engaged as remote workers in Singapore must obtain the necessary employment pass for the remote workers to legally work in Singapore. Further, to apply for the employment pass, it will be necessary to have a local entity/agent to sponsor the work permit application. Tax withholding obligations for tax clearance purposes would also apply upon the intended termination of a foreign employee.

Employment or Independent Contractor?

One of the considerations for parties is whether to opt for the employment model or the independent contractor model. If the latter is preferred, then there will not be any general requirement for the parties to comply with the local employment laws and this would generally be subject to the parties' choice of law. However, the courts in Singapore are not bound by the labels used by parties in a contract. The courts would examine the quality and substance of the relationship and ascertain whether the engagement was effectively an employment relationship.

In Singapore, the legal test to ascertain employment is the control test. In essence, the control test will examine the degree of control that the company will have over the individual in respect of the manner of performance of the functions. The higher the degree of control, the higher the risk of employment. The courts will also examine whether the engagement is exclusive in nature and whether the individual is free to be engaged elsewhere for his/her services.

SINGAPORE

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. Employers should be mindful of the following types of risks:

Permanent Establishment

Tax is generally payable on the income of any person which accrues in or is derived from Singapore.

A foreign employing entity could be subject to income tax in Singapore if such person constitutes a Permanent Establishment (PE) as a result of such person's activities or presence in Singapore.

Whether a PE exists would depend on various factors, such as the nature of activities carried out by such person in Singapore, as well as the relevant double taxation treaty between Singapore and the relevant countries.

Data Privacy and Security

Personal data may only be collected, used and disclosed in compliance with the PDPA. Personal data collected in Singapore can be transferred outside the country by the relevant entity provided that (i) it complies with the PDPA in respect of the transferred personal data in its possession or under its control; and (ii) the recipient entity outside of Singapore is bound by legally enforceable obligations to provide a standard of protection that is comparable to the PDPA. For (ii), this may be satisfied by obtaining consent (in the manner legally proscribed under the PDPA and its regulations).

Health & Safety

Employers will need to comply with the general safety and health requirements in the Workplace Safety and Health Act, even for remote workers who are working from home.

SINGAPORE

Risk of Wrongful Dismissal Claims

Remote employees, irrespective of nationality, may file salary/wrongful dismissal claims with the Employment Claims Tribunal, subject to specified claim limits.

Risk of Vicarious Liability

A foreign entity can be held vicariously liable for any tortious actions or omission of remote workers.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so?

A. Parties may opt for a foreign jurisdiction and/or foreign law in the contract in deciding on the applicable law and forum. Where there is an express agreement that parties have agreed to submit to foreign jurisdiction/choice of foreign law, the courts will generally follow such clause unless "strong cause" can be demonstrated by the party seeking to breach the agreement.

That said, although the threshold to set aside a foreign choice of law/jurisdiction clause is high, there remains a risk that the court may not give effect to the terms of a choice of law/jurisdiction clause in an employment context given the potential inequality of bargaining power.

For completeness, the employer would nonetheless have to comply with the labor law minimums under Singapore law notwithstanding that there is a foreign governing law clause.

Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. Please refer to our answer to Question 3.

SINGAPORE

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. There are no specific laws or government-issued guidelines that are applicable to remote workers in Singapore.

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TAIWAN

Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. (Note: This document refers only to white-collar workers/employees.)

1. Hiring for business operations in Taiwan

   If the foreign entity is hiring remote workers for conducting its business operations in Taiwan, the foreign entity must first establish and register a branch in Taiwan for such business operations; otherwise, the violators may incur civil and criminal liabilities. Once established, the Taiwan branch will be deemed as the employer under Taiwan's Labor Standards Act (LSA) for workers hired.

   If the remote workers are from a foreign jurisdiction the Taiwan branch must further meet certain operational funding requirements before it can apply to the Ministry of Labor for work permits on behalf of the foreign remote workers. Once the work permits have been obtained, if the remote workers are outside of Taiwan, they will need to apply to the corresponding Taiwan embassy/representative office in that jurisdiction for a work visa, which will be needed to subsequently apply to the National Immigration Agency for alien residency status after they have entered Taiwan. If they have already entered Taiwan on a valid visa, they may apply directly to the National Immigration Agency for alien residency status. Generally speaking, the total processing time for all the above formalities is about four weeks.

   Both domestic and foreign workers hired by the Taiwan branch will be governed by the LSA, and both domestic and foreign workers so hired are generally entitled to the relevant national benefits and insurance policies, such as labor insurance, employment insurance, national health insurance and labor pension.

2. Hiring for business operations "outside of Taiwan"

TAIWAN

On the other hand, if the remote workers are not being hired to conduct the foreign entity's business operations in Taiwan, but will instead, e.g., provide labor services remotely on computer equipment located in Taiwan, the results of which are transmitted to the foreign entity outside of Taiwan, then the foreign entity need not establish and register its presence in Taiwan. While the foreign entity may hire remote workers in Taiwan, in general, the relationship will not be governed by the LSA, and those workers would not be entitled to the aforementioned national benefits and insurance policies. For the same reasons, the foreign entity will not need to apply for work permits for the foreign remote workers.

Unless specifically stated otherwise, our responses below assume Scenario 2, i.e., the foreign entity is hiring remote workers in Taiwan to provide labor services for its business operations outside of Taiwan.

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. If the foreign entity is not hiring remote workers for its business operations in Taiwan, the LSA generally does not apply and the relevant hiring risks would generally depend on the governing law of the employment agreement between the foreign entity and the remote workers, save for certain exceptions:

1. <u>Taiwan's Personal Information Protection Act would not apply to the foreign entity's collection and use of the remote workers' personal information</u>

Taiwan's Ministry of Justice has issued an interpretation (No. 10703502240) stating that pursuant to Article 51 of the Personal Information Protection Act, the processing or use of personal information outside of Taiwan would only fall within the scope of the Personal Information Protection Act if (i) the entity collecting, processing or using the personal information is a public or private Taiwan entity, and (ii) the personal information being collected, processed or used is from a Taiwan national. Because the foreign entity is neither a public nor a private Taiwan entity, its collection, processing and use of the remote workers'

personal information outside of Taiwan would not be governed by the Personal Information Protection Act.

2. <u>If the foreign entity has no fixed business location in Taiwan from which it engages in sustained business operations, there is little risk of creating a permanent establishment</u>

   Permanent establishment in Taiwan is primarily determined by examining whether the business location is of a "fixed" nature, under the "control" of the foreign entity and whether the foreign entity engages in "sustained" business operations at that location. If the business location, e.g., a building, facility, fixture or other, has been under the control of an entity from a jurisdiction with which Taiwan has entered into a double taxation and prevention of tax evasion and avoidance agreement, and the entity has conducted sustained business operations at that location for six months or more (or for less than six months but still used periodically), then the entity may likely be deemed to have created a permanent establishment in Taiwan.

   However, as the standards for determining permanent establishment are much less strict than the above determination for whether the foreign entity is conducting business operations "in Taiwan," as long as the remote workers are not working from a fixed business location from which the foreign entity periodically or continually conducts its business operations, the foreign entity is very unlikely to be deemed to have created a permanent establishment in Taiwan.

3. <u>Worker safety issues will be governed by Taiwan law if they are deemed to be tortious conduct</u>

   Taiwan courts have held that according to the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements, the appropriate governing law for worker/workplace safety issues that can be deemed as tortious conduct is the lex loci delicti, i.e., the law where the tort occurred. As such, the governing law for a worker safety incident involving a foreign entity's remote worker in Taiwan will be Taiwan law if the incident is deemed to be a tortious act, regardless of whether the foreign entity has business operations in Taiwan.

TAIWAN

4. As the remote workers are not hired to conduct the foreign entity's business operations in Taiwan, there should be no significant tax implications

   Because the remote workers will not be directly making sales or providing labor services in Taiwan, the foreign entity is unlikely to incur any tax liability, e.g., income tax for for-profit enterprises, the business tax, etc., under Taiwan tax laws.

5. Regarding vicarious liability risks

   Although there is no court precedent in Taiwan directly on point regarding an employer's vicarious liability for remote workers, as the case for worker safety mentioned above, if a foreign entity's remote worker in Taiwan commits a tortious act, Taiwan law will apply regardless of the degree of the foreign entity's presence in Taiwan. As a result, whether the foreign entity may be held vicariously liable will depend on whether the remote worker may be held liable for his or her tortious act under Taiwan law.

   For legal risks in other aspects of employment, such as monitoring productivity and communications, wrongful dismissal and dispute resolution, as the relationship between the foreign entity and the remote workers is not governed by the LSA, the legal risks shall be determined according to the governing law of the employment agreement.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so?

A. The foreign entity may stipulate its foreign law as the governing law of the remote worker's employment agreement, regardless of the remote worker's nationality. However, if foreign law is stipulated to be the governing law, please keep in mind that there is precedent in which Taiwan courts have invalidated the use of foreign law in an employment agreement on the grounds that the application of the foreign law to the matter would directly conflict with the LSA, which, as a Taiwan statute, may be deemed as a source of public order and morals, and a contract provision that is in conflict with the public order and morals of Taiwan is void as a matter of law.

TAIWAN

Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. Just as for governing law, there is also no restriction on a foreign entity to stipulate a foreign forum for dispute resolution in the employment agreement. However, please note that if the remote worker files a labor dispute suit in Taiwan against the foreign entity despite the foreign forum stipulation in the employment agreement, the Taiwan court will still examine whether it has jurisdiction over the dispute based on Taiwan civil jurisdiction analysis, which involves factors such as fairness to the parties involved, procedural economy and the ability to render an appropriate decision.

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. While there is no express legal provision or best practices document directly on point with respect to remote workers in Taiwan who are not conducting business operations on behalf of the foreign entity in Taiwan, in case of Scenario 1 in Question 1 above, i.e., the foreign entity has established a Taiwan branch to hire the remote workers, as the LSA applies to the employment relationship, Taiwan's Ministry of Labor has published guidance documents titled "Guiding Principles for Workers' Working Hours Outside the Workplace" and "Reference Guide for Work-From-Home Safety and Sanitation" for reference by employers, which should be adhere to as a matter of best practice.

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THAILAND

Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. It is possible for a foreign jurisdiction entity to hire remote workers in Thailand.

Contractor vs. Employee

Thai labor laws distinguish between an independent contractor relationship and an employment relationship. Below is a comparison table:

Criteria	Employment Contract	Independent Consultancy Contract
Type of contract	Hire of Service	Hire of work
Relationship between parties	"Employer" and "Employee"	"Hirer" and "Contractor or service provider"
Objectives of contract	General work performed according to employer's instruction	The result/completion of specific work
Payment of remuneration/compensation	Salary/Wages	Service fee
Management Authority	The employer has the right to control/supervise the details of work performance	The employer does not have the right to manage or control the contractor
Work rules	Employee subject to employer's work rules	Contractor is not subject to hirer's work rules

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Severance Pay	Severance payable	No severance
Welfare benefits under the Labor Protection Act	Employer is required to provide welfare benefits to the employee	No welfare benefits requirement
Equipment	Equipment shall be provided by employer	Contractor shall provide his own equipment
Related laws to comply with	1) Civil and Commercial Code 2) Labor Protection Act B.E. 2541 3) Social Security Act B.E. 2533 4) Labor Relations Act B.E. 2518 5) Compensation Act B.E. 2537 6) Act on the Establishment of and Procedure for Labor Court B.E. 2522	1) Civil and Commercial Code

Work permits and visa requirement for hiring foreign workers in Thailand

Every foreigner who works in Thailand must hold a valid work permit. When the work permit has been obtained, the work permit holder may then apply to the Immigration Bureau in Thailand for a long-stay visa.

Business registration requirement in Thailand

Requirement to establish a legal entity in Thailand in order to hire Thai national employees in Thailand: In general, there is no requirement to establish any legal entity for this purpose.

THAILAND

Requirement to establish legal entity in Thailand in order to hire foreign employees in Thailand: Although Thai law does not expressly prohibit the issuance of a work permit to a non-Thai employee in Thailand of an offshore employer with no Thailand business presence, in reality no work permit would be obtainable by the employee in those circumstances, as the non-Thai employee (work permit applicant) would be unable to attach to his/her application the required supporting documents pertaining to the employer's business operations in Thailand.

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. **Permanent Establishment risk**

Hiring an independent contractor or an employee in Thailand may result in tax exposure for the foreign employer if the contractor or employee is deemed a permanent establishment of the employer. This risk will vary case by case, according to the applicable Double Tax Agreement, and according to the circumstances and activities of the contractor/employee.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so?

A. A Thai court would consider it contrary to public policy to uphold a foreign governing law in an employment contract. In an independent consultancy contract it is conceptually possible, but in practice it is very unlikely that the foreign law would be applied. In either case, should the foreign law not be applied, Thai law would apply.

THAILAND

Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. Such provision would not exclude the jurisdiction of the Thai courts. Also, foreign court judgments are not enforceable in Thailand.

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. No, there are no such specific laws or practices.

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VIETNAM

Q. Is it possible for a foreign jurisdiction entity to hire remote workers in your country? What are the basic legal requirements (if any) for hiring remote workers from a foreign jurisdiction (contractor vs. employee; work permits, VISAs, business registration in foreign country; which local laws will apply; benefits and compensation, etc.)?

A. It is possible for a foreign jurisdiction entity to hire remote workers in Vietnam. We discuss two cases of remote workers in Vietnam: (1) foreigners in Vietnam hired by a foreign jurisdiction entity and (2) Vietnamese passport holders hired by a foreign jurisdiction entity.

1.1 Foreigners in Vietnam hired by a foreign jurisdiction entity

Vietnamese law permits a foreign contractor (i.e., foreign entity or individual who has implemented contracts executed with a Vietnamese entity) to recruit foreign employees to work under their foreign contractor's contract signed with a Vietnamese entity.

The foreign contractor is not required to incorporate a company or a representative office to implement the contract of the Vietnamese entity and recruit employees. However, by law, the foreign contractor's key obligations for recruiting employees include:

- Report to competent authorities about the necessity (reporting details are required by law) of recruiting workers, including foreign workers and Vietnamese workers, and obtain the authorities' consent for recruiting foreign workers and Vietnamese workers;

- Recruit the employees (Vietnamese and foreign ones) and complete obligations as an employer. Accordingly, by law, an employer must provide statutory entitlements to its employees, such as salary; leave entitlement; statutory insurance (social insurance, health insurance and unemployment insurance); severance allowance and job loss allowance upon the termination of employment; obtaining work permits for foreign employees (if required); and other obligations.

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Key regulations governing employment include:

(i) Labor Code 2019;
(ii) Law on Social Insurance 2014;
(iii) Law on Health Insurance 2008 (amended in 2014);
(iv) Law on Employment 2013;
(v) Decree No. 145/2020/ND-CP of Vietnamese Government elaborating some articles of the labor code on working conditions and labor relations; and
(vi) Decree No. 152/2020/ND-CP of Vietnamese Government on foreign workers working in Vietnam and recruitment and management of Vietnamese workers working for foreign employers in Vietnam.

Other than that, Vietnamese law is silent on whether a foreign entity (without having a contract signed with a Vietnamese entity) can hire a foreigner in Vietnam as a remote employee and whether such hiring contract can be deemed an employment contract under Vietnamese law.

1.2 Vietnamese passport holders hired by a foreign jurisdiction entity

a) Hired as employees under employment contracts

Vietnamese law is silent on whether a foreign jurisdiction entity can hire Vietnamese passport holders in Vietnam as remote employees. In practice, we understand that Vietnamese labor authorities do not view a contract between a foreign entity and a Vietnamese passport holder as an employment contract under Vietnamese law and thus, there is no employment relationship between such foreign entity and the Vietnamese passport holder under Vietnamese law.

b) Hired as independent contractors under service contracts

Vietnamese law does not restrict a Vietnamese passport holder in Vietnam from being hired by a foreign entity as an independent contractor. Contractual relationships (e.g., via a service contract) as an independent contractor are not subject to Vietnamese labor laws and are governed by civil law. In practice, this approach of using service contracts is quite common.

VIETNAM

Q. What are the common risks involved in hiring cross-border workers (data privacy and security; monitoring productivity and communications; wrongful dismissal; dispute resolution; permanent establishment risk; workplace safety; tax implications, vicarious liability, etc.)?

A. Permanent Establishment

Under Vietnamese law on corporate income tax, if the foreign jurisdiction entity's activities/presence, via the remote workers in Vietnam, is sufficient to create a Permanent Establishment (PE), the foreign jurisdiction entity with a PE in Vietnam would be subject to tax payment in relation to the taxable income earned in Vietnam and on the taxable income generated out of Vietnam and related to the operations of the PE.

Data Privacy and Security

Under Vietnamese law, organizations and individuals that process (i.e., collect, edit, utilize, store, provide, share or spread) individuals' personal information in cyberspace for commercial purposes must obtain the prior consent of those individuals unless otherwise required by law.

Q. Can the foreign jurisdiction entity impose its foreign law as the governing law on the remote worker's contract? What are the risks in doing so?

A. Yes. Under Vietnamese Civil Code 2015, a foreign jurisdiction entity and Vietnamese workers in a service contract relationship, not an employment relationship, can agree to choose a foreign law as the governing law of the remote workers' contract.

However, even when the foreign law is imposed as the governing law, in case of disputes before the Vietnamese court, the Vietnamese court may step in and use Vietnamese law to resolve any dispute arising out of such remote worker's contract. Therefore, there is a risk that the foreign jurisdiction entity may lose its advantage when choosing its foreign law as the governing law in the first place.

VIETNAM

Q. Can the foreign jurisdiction entity require disputes in the remote worker's contract to be submitted to its own country's court (i.e., the dispute forum is foreign to the remote worker)? What are the risks in doing so?

A. Yes. If the remote worker's contract (under a service relationship, not employment relationship) is governed by foreign law, the foreign jurisdiction entity may submit the dispute related to the remote worker's contract to its own country's court.

Nevertheless, under the Vietnamese Civil Proceedings Code 2015, any civil judgments or decisions of foreign courts must be processed via the procedure of recognition and enforcement to be enforced in Vietnam. By law, foreign civil judgments or decisions are only considered for recognition and recognition in Vietnam when (i) they are the civil judgments or decisions of the courts of a foreign country provided for in international treaties to which both Vietnam and such country are signatories or (ii) they are the civil judgments or decisions of the courts of a foreign country which does not sign an international treaty with Vietnam that contains regulations on recognition and enforcement of judgments and decisions of foreign courts on the basis of principle of reciprocity.

In practice, the number of foreign judgments or decisions recognized and enforced by Vietnamese courts is low. By our public search of the website of the Vietnamese Ministry of Justice, from 1 January 2012 to 30 September 2019, there were only 12 judgments of foreign courts that were recognized to be enforced in Vietnam. Therefore, there is a chance that the Vietnamese courts may not recognize and enforce the foreign judgments in Vietnam.

Q. Are there any specific laws and/or best practices which apply to remote workers in your jurisdiction?

A. There are no specific laws or best practices that are applicable to remote workers in Vietnam.

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