CHINA

Third Edition

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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

PREPARED BY MERITAS LAWYERS IN ASIA

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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

This is the third revised edition of Successful Strategies for Doing Business in Asia which was first published in 2006. Prepared by lawyers from 12 leading Asian Meritas firms, this book offers practical insights and targets foreign investors and business people who want to pursue opportunities throughout Asia. Each chapter contains general information and guidelines, not legal advice. Do not rely on these materials without first consulting with legal advisors who are familiar with your particular areas of interest.

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RMB	Chinese Renminbi	PHP	Philippine Peso
HKD	Hong Kong Dollar	SGD	Singapore Dollar
INR	Indian Rupee	TWD	New Taiwan Dollar
IDR	Indonesian Rupiah	THB	Thai Baht
JPY	Japanese Yen	USD	United States Dollar
KRW	Korean Won	VND	Vietnamese Dông
MYR	Malaysian Ringgit		

Please be aware that the information on legal, tax and other matters contained in this book is merely descriptive and therefore not exhaustive. As a result of frequent changes in legislation and regulations from country to country, the situations as described throughout this book do not remain the same. Meritas cannot, and does not, guarantee the accuracy or the completeness of information given, nor the application and execution of laws as stated.

Five years have passed since the worst financial crisis in 70 years erupted. Today many countries and economic regions are still suffering, but there is one bright spot – Asia. Home to 3.8 billion people, Asia continues to take a leading role in driving the world economy back to healthier times. China rebounded quickly to high single-figure annual growth following the 2008-09 downturn, and in 2013-14 is expected to have a rise of 8% in GDP. India too is exhibiting signs of long-term growth potential, as are Singapore, Malaysia and others in Asia.

For 30 years I have worked closely with multinational companies as they explore investment and business opportunities throughout Asia. I have discovered that countries in the Asian region can at the same time appear similar yet be remarkably different. While specific legal systems and local government regulations will vary, there are universal issues in every country that foreign investors will face. This book was designed to provide practical and useful insights into the 12 most common questions that potential investors in Asia need to address:

1. What role does the government play in approving and regulating foreign direct investment?
2. Can foreign investors conduct business in a particular country without a local partner? If so, what corporate structure is most commonly used by foreign investors?
3. How do governments regulate commercial joint ventures between foreign investors and local companies?
4. What laws influence the relationship between local agents and distributors and foreign companies?
5. How does the government regulate proposed merger and acquisition activities by foreign investors? Are there any prohibited areas for foreign investors in the economy (e.g., natural resources, telecommunications or energy)?
6. How do labor statutes regulate the treatment of local employees and expatriate workers?
7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?
8. What types of taxes, duties and levies should a foreign investor expect to encounter?
9. How comprehensive are the country's intellectual property laws? Do local courts and tribunals enforce IP laws uniformly regardless of the nationality of the parties?

10. If a commercial dispute arises, do local courts or international arbitration offer a more beneficial forum for dispute resolution for foreign investors?
11. What advice can you offer for how best to negotiate and conduct business in your country?
12. What other practical lessons can you share with those who want to do business in your country?

Leading law firms within the Meritas alliance in Asia have contributed to this book. These firms are comprised of local lawyers who possess extensive experience in advising international clients on how best to conduct business in their respective countries. The law firms were presented with these "Twelve Questions" and invited to write a chapter providing an overview of the laws in their jurisdiction along with timely insights and advice. In a concise manner, the book hopes to provide readers with a clear understanding of the similarities and differences, strengths and weaknesses of countries in the Asian region.

One final thought: For those who are patiently waiting for Asia to become more predictable before pursuing business or investment opportunities, do not wait too long. Most non-Asian multinationals are already there. Those who delay will find themselves missing out on the greatest economic expansion in history. There are risks, certainly, but also great rewards for the savvy – and educated – investor.

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1. What role does the government of China play in approving and regulating foreign direct investment?

In the past, foreign investment in China was highly regulated. However, following China's entry into WTO a decade ago, governmental approvals and regulations on foreign investments in many sectors have become more routine and less formal. Nevertheless, foreign direct investors still need to go through approval procedures with the competent Chinese commerce authority as their first step for establishing a business vehicle, or for acquiring ownership in a Chinese entity.

The initial question for a foreign investor to ask is whether the proposed investment in a particular sector is permitted under Chinese laws. The Foreign Investment Industrial Guidance Catalogue issued by the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOC) lists the industries where foreign investment is encouraged, permitted, restricted, or prohibited. The "restricted" or "prohibited" categories can be considered as the "negative list" for foreign investment. The current catalogue is the fourth edition since it was first published in 1995.

Here are a few examples of the "encouraged" sectors:

- Developing new agricultural cultivation technologies
- Technologies to improve product functions
- New technologies for the improved utilization of resources, and methods to abate and control pollution
- Establishing and operating venture capital enterprises, intellectual property services, and family services
- Exploration and the development of oil and natural gas resources (in cooperation with Chinese partners only)

The following are examples of the "restricted" sectors:

- The exploration of certain minerals and natural resources
- Basic telecommunication services. Foreign ownership cannot exceed 49% [the new catalogue specifies "telecommunications companies: value-added telecommunications services (foreign investment not exceeding 50%) and basic telecommunications services (foreign investment not exceeding 49%)"]

- Value-added telecommunication services. Foreign ownership permitted up to 50%
- Life insurance. Foreign ownership up to 50%
- Securities Brokerage. Foreign ownership limited to 33%

Examples of the "prohibited" category are:

- Production of genetically modified plant seeds
- Exploration and mining of radioactive mineral products and ores
- Manufacturing of weapons and ammunition
- Operating postal services
- Any ownership in news agencies, TV stations, and radio broadcast stations
- The construction and operation of villas

Note that areas which are not specifically mentioned in the catalogue fall into the permitted sectors. However, in certain permitted sectors, foreign ownership may not exceed a certain percentage. For example, in the business of manufacturing automobiles and motorcycles, the foreign ownership may not exceed 50%.

The approval authority for foreign investment projects is MOC, or its local counterparts at the provincial or city level. This will depend on the proposed amount of total investment in particular projects. In some cases, approvals from other PRC governmental agencies are required if the project falls into the restricted category, such as telecommunications, insurance, and transportation. Similarly, if a proposed foreign investment project will involve investments into the infrastructural facilities, or add capacities to public facilities, or have possible harmful environmental impacts, then the prior consent from the governmental agencies of NDRC and environmental protection must be obtained.

Once all requisite governmental approvals are obtained, the parties are required to file for formal registration with the appropriate industry and commerce bureau to obtain a business license.

2. Can foreign investors conduct business in China without a local partner? If so, what corporate structure is most commonly used by foreign investors?

Except in those sectors where foreign ownership is subject to a cap, foreign investors may conduct business in China without a local partner. Certainly, if a foreign investor prefers, it may also set up a joint venture with a Chinese partner in a sector where no restriction on foreign ownership is imposed.

In most cases, foreign investors decide to establish in China a business structure known as a wholly foreign owned enterprise (WOFE). A WOFE is a legal entity that is 100% owned by the foreign investor. It is usually in the form of a limited liability company, and it can engage in a full range of business activities, from R&D, manufacturing, marketing and sales, to distribution and services. The range of activities a WOFE can conduct is listed in the business license of the WOFE. Each WOFE must operate within its approved business scope.

Government approval is required to establish a WOFE in China. Once governmental approval is obtained, a number of additional filings are required in order to register the WOFE with various government offices. Following is a summary of the application steps.

Step One: Site selection. The first step is to select an office location for the WOFE. It can be purchased or leased. If the office is leased, then the lease needs to be recorded with the local real estate administration bureau. The lease must have a minimum term of one year.

Step Two: WOFE name preregistration. Chinese law only requires that the Chinese name be registered, which is the official name of the WOFE. The company can have an English name if it so desires. In most cases, it is desirable to have a non-Chinese (English) name.

Step Three: File for government approval with the local commerce committee. Once an approval is obtained, a certificate of approval will be issued.

Step Four: Register for the business license with the Local Industry and Commerce Administration Bureau.

Step Five: Filings for business registration with the following government offices:

- Public Security Bureau
- State Tax Bureau

- Local Tax Bureau
- Foreign Exchange Administration Bureau
- Quality and Technical Supervision Bureau
- Customs
- Statistics Bureau
- Financial Bureau

As of the date this chapter is being written, the normal time required for completing the above five approval/registration steps (it varies from city to city) is two to four months, but it can take longer.

3. How does the Chinese government regulate commercial joint ventures between foreign investors and local companies?

There are two types of Sino-foreign joint ventures in China: equity joint ventures (EJV) and contractual joint ventures (CJV). They are governed by a specific set of laws and regulations.

An EJV and a CJV are both considered as “foreign investment enterprises” (FIEs) and are entitled to any preferential treatment available to FIEs (if the total foreign ownership is no less than 25%). The application procedure for both is the same. The major difference between the two types of joint ventures is how profits and losses are shared by the investors. In the case of an EJV, the profits and losses are shared strictly according to the registered capital subscribed and contributed by the investors; whereas in the case of a CJV, the profit and loss distribution ratio can be set up by the parties, which does not have to match exactly with each party’s capital subscription. Further, in the case of a CJV, a foreign party can recover its investment ahead of its Chinese partners, subject to certain conditions and the approval by the local tax bureau and the financial bureau. Evidently, a CJV appears to be a more flexible alternative for a foreign investor.

Currently, there has been movement toward acquisitions of local Chinese companies by foreign investors as a way to establish a joint venture with the local Chinese firms. The acquisition can be done either through a share acquisition or asset acquisition. This is a quicker way for market penetration as it saves time and effort that would otherwise be required when setting up a company from scratch. Government approval is required for the acquisition. The application procedure for acquisition is essentially

the same as that for setting up a joint venture from scratch. In essence, the Chinese target company will be transformed from a wholly Chinese-owned entity to an FIE. However, pursuant to the Antimonopoly Law of China, before merger and acquisition of undertakings, antitrust review will be required when the proposed business concentration reaches the statutory thresholds.

Notably, if a joint venture is to be set up by way of greenfield establishment, the Chinese partner of the joint venture has to be a legal entity. If a foreign investor acquires certain ownership in an existing Chinese company by way of share deal and consequently has a joint venture in China, as far as an individual shareholder of the Chinese company has held the equity for more than one year prior to the acquisition, such an individual shareholder will be able to be the Chinese partner of the joint venture.

4. What laws influence the relationship between local agents and distributors and foreign companies?

Under Chinese law, the relationship between local agents/distributors and the foreign companies is regulated by the Law of Contracts, General Principles of Civil Law of the People's Republic of China and relevant interpretations. All the basic Chinese contract law principles, civil rights, and liabilities apply to an agency/distribution relationship. In addition, if the agency involves distribution of regulated products (such as medicine and medical equipment or automotives) special industry regulations will apply that may require special permit or licensing restrictions.

Since foreign trade is government-controlled in China, when engaging a local agency, a foreign investor should first investigate if the agent has the trading license, namely whether the agent has the license to conduct international trade. If the agent or distributor does not have the trading license, it will not be permitted to sign international trade contracts directly with a foreign party, and will not be able to handle import/export customs declarations, in which case a second agent who has such license will have to be engaged as an intermediary for the sales transactions.

5. How does the Chinese government regulate proposed merger and acquisition activities by foreign investors? Are there any prohibited areas for foreign investors in the economy (e.g., natural resources, telecommunications or energy)?

There are extensive regulations governing mergers and acquisitions by foreign investors in the key sectors of the Chinese economy. Foreign investment is restricted or prohibited in certain sectors, as specified in the Foreign Investment Industrial Guidance Catalogue. If a target area of investment is restricted, approval from special government authorities must be obtained first before applying for the business license. Also, if the foreign investor's market share reaches a certain threshold, antitrust review and MOC approval will be required. With the growing number of multinational companies expanding business operations into China, antitrust has become an increasing concern for the Chinese government. The Antimonopoly Law of China and other relevant regulations are intended to maintain the free market economy and fair competition among all businesses in China. Such laws and regulations include: the Antimonopoly Law, the Foreign Trade Law, the Price Law, Methods for Reviewing a Concentration of Undertakings, Methods for Filing a Concentration of Undertakings, Thresholds for Prior Notification of Concentrations of Undertakings, among others.

With respect to proposed acquisitions of Chinese entities by foreign investors, antitrust reviews and approvals from MOC are required when certain thresholds are reached:

- The total worldwide turnover of all undertakings of the concentration exceeds RMB10 billion and the turnover in China of each of at least two undertakings exceeds RMB400 million; or
- The total turnover in China of all undertakings is above RMB2 billion and the turnover in China of each of at least two undertakings is above RMB400 million.
- Even if the above thresholds are not met, when the facts and evidence collected indicate that the market concentration may have an impact of excluding or limiting competition, an antitrust filing may then be required.
- When a foreign investor contributes to the concentration of a sector by merging and acquiring of a domestic enterprise or by other means (which involves Chinese national security) the matter is subject to review with respect to national security exposure as required by state regulations which are in addition to the normal review on business concentration.

- If a proposed merger or acquisition is in a key economic sector, or involves the transfer or control of well-known Chinese trademarks, it may also be subject to government scrutiny.

Also, if the target of the proposed acquisition and merger includes state-owned assets, then the acquisition and merger must be conducted through public procedures which require an asset or enterprise evaluation from an independent appraiser.

6. How do labor statutes regulate the treatment of local employees and expatriate workers?

The employment relationship is governed and protected by the Chinese Labor Law, the Labor Contract Law, as well as a series of state and local labor regulations.

An employer is required to sign labor contracts with its employees. Failure to sign labor contracts by the employer may result in the employer being liable to pay double salary to the employee.

The labor practice of an employer must comply with all the applicable local and state regulations with respect to wages and benefits, working hours and working conditions, confidentiality and noncompete, probation, duration and termination of employment, severance payment, etc. All such matters are to be addressed in the labor contract. If disputes arise between the employer and the local employees, labor arbitration will be sought first. If either party is unsatisfied with the result of the arbitration, a lawsuit can be initiated at the local court.

The hiring of expatriates is governed by a comprehensive set of regulations, including the Regulations on the Administration of Employment of Foreigners in China, which were first promulgated in 1996 and revised in 2010. The local employer will have to file for employment authorization with the local labor bureau. Once the employment authorization is obtained, a foreign employee can apply for a work visa to come to China. After the employee lands in China, the employer will need to apply for a work permit for the employee. In addition, the employee will also need to register with the local public security bureau for a resident permit.

An expatriate who lives and works in China is subject to Chinese individual income taxation, regardless of whether his/her wages are paid by the employer in China or overseas. However, a bilateral tax treaty may exist between China and the expatriate's home country that provides for certain

exemptions or exceptions. For example, an expatriate is exempt from Chinese taxation if a) his/her stay in China in a given year is less than 90 days in the aggregate; or b) his/her stay in a given tax year is less than 183 days in the aggregate and his/her salary is paid by the foreign employer and not charged to its affiliated Chinese entity.

7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?

Foreign exchange is a government-controlled area in China. The use or exchange of foreign currency is subject to strict foreign exchange control regulations. However, foreign exchange spending under current items is permissible upon documentary proof of certain usage, such as:

- To pay for imported goods
- To pay for services rendered by a foreign company
- To pay for wages of expatriates in China
- To pay for overseas business travel expenses
- To pay for foreign currency loan
- To pay for dividends to a foreign party

To initiate a foreign exchange banking transaction, certain documents must be submitted to the bank for approval. In addition, approval by the foreign exchange control bureau is also required where, for instance, the payment involved is relatively large, or the purpose of payment is for capital expenditure.

8. What types of taxes, duties and levies should a foreign investor in China expect to encounter?

A foreign company doing business in China is subject to Chinese taxation, including the following:

CORPORATE INCOME TAX

Pursuant to the new Enterprise Income Tax Law, a uniform rate of 25% is applied on all companies, whether Chinese-owned or foreign-owned. However, preferential tax rates are provided to encourage sectors such as energy conservation and environmental protection, public utility

infrastructure projects, agricultural and husbandry, and high-tech. Even if a foreign company does not have any permanent establishment in China, it is subject to Chinese taxation for any income derived from sources within China. But China has signed bilateral treaties with a number of countries for avoidance of double taxation. If any inconsistency arises between the treaties and the Chinese Enterprise Income Tax Law, the treaties shall prevail.

VALUE-ADDED TAX (VAT)

The standard VAT rate is 17% which is levied on the sale of most products. A lower rate of 13% is provided to certain special products such as grains, books and periodicals, newspapers, and fertilizers. Since the beginning of 2012, VAT has been levied at a rate of 6% on a pilot basis in several provincial areas including Shanghai, Beijing, Tianjin, Jiangsu, Anhui, Zhejiang, Fujian, Hubei, and Guangdong to replace business tax for transportation and certain areas of modern services industries.

BUSINESS TAX (BT)

The standard BT rate is 5% which is levied on the sale of services.

CONSUMPTION TAX

FIEs that manufacture, commission the processing of, import or sell the taxable consumer goods such as cigarettes, spirits and alcohol, cosmetics, valuable jewelry, gems and jade, firecrackers and fireworks, refined petroleum products, motor vehicle tires, motorcycles, light motor vehicles, golf balls and equipment, high-end watches, yachts, disposable wooden chopsticks and wooden flooring shall pay consumption tax and the rates thereof shall be subject to different taxable rates ranging from 3% to 45%.

STAMP TAX

A stamp tax is levied on the execution of legal documents, ranging from 0.05% to 0.1% of the transaction value.

DEED TAX

The transferee of any transfer of right or ownership to land and buildings shall be levied deed tax ranging from 3% to 5% of the transaction value.

In addition to the above taxes, a provincial surcharge in the range of 10% to 20% of the turnover taxes (VAT, BT or Consumption Tax) is levied according to the applicable provincial regulations.

9. How comprehensive are the intellectual property laws of China? Do local courts and tribunals enforce IP laws uniformly regardless of the nationality of the parties?

China has promulgated a series of intellectual property protection laws and regulations, including Patent Law, Trademark Law, Copyright Law, Anti-Unfair Competition Law, Regulations on the Protection of Rights to Information Network Communication, and Regulations on Computer Software Protection. On the enforcement side, a number of local courts have set up special IP sections that handle only IP cases. The Patent Bureau and Trademark Bureau also handle petitions concerning claims for illegal or improper registration of patents and trademarks. Further, the local Industry and Commerce Administration Bureau also conduct investigations and "raids" to confiscate counterfeit goods or to shut down illegal operations.

IP infringement has been a big concern for many foreign investors. As a precautionary step, registrations for trademarks, patents, and domain names should be filed. In addition, noncompetition and nondisclosure agreements should also be signed with the local supplier, customers, agents, and employees, as appropriate.

10. If a commercial dispute arises, do local courts or international arbitration offer a more beneficial forum for dispute resolution to foreign investors?

In the case of a dispute, the parties can initiate a lawsuit with the local Chinese court or pursue arbitration if the parties agree to arbitrate. Litigation at a local Chinese court can be time-consuming and possibly affected by local influence. The trial can take a few months to several years to complete. There will be one level of appeal after each trial. In comparison, arbitration usually takes much less time, and it is final and non-appealable. As such, arbitration has been favored by many foreign investors as a more desirable way for resolving foreign commercial disputes. The most prestigious Chinese arbitration commission that handles foreign commercial disputes is the China International Economic and Trade Arbitration Commission (CIETAC) which is headquartered in Beijing with branches in Shanghai, Shenzhen, Tianjin, and Chongqing. CIETAC has a list of arbitrators for the parties to choose from, including those from foreign countries. The parties can also specify that the arbitration proceeding be conducted in a foreign language.

In addition to arbitration in China, the parties can also choose arbitration in a foreign country. A foreign arbitration award can be enforced in China. China is a member of the 1958 UN Convention on Recognition and Enforcement of Foreign Arbitral Awards; and as such, an arbitration award issued in a member country can be enforced in China. To enforce a foreign arbitration award, a petition must be filed with the local Chinese court having jurisdiction.

11. What advice can you offer for how best to negotiate and conduct business in China?

Know who you are dealing with.
China is a vast country with many diverse elements and aspects. Corporate China is the same. As a foreign investor, get to know your Chinese business partners or counterparts before you start serious negotiations with them. For example, whether you are dealing with a Chinese state-owned enterprise (SOE) or a western-style Chinese entrepreneur, there will be differences. The same is true if you are dealing with a Chinese company located in a rural area where you may expect huge language difficulties that you would not have with a Chinese company located in the coastal area.

Be better informed than your rivals and your partners.
Although Chinese companies have made great achievements over the last two decades, the management of Chinese companies is not always as professional as you might expect. If you rely on the recommendations and advice from your Chinese business partners too much, it can be risky.

Do not play the "foreign face" card when it is not necessary.
Foreign face may bring certain advantages to foreign investments in China, since China has encouraged foreign investments for more than 30 years. However, it is highly appreciated by Chinese business partners and governmental authorities when a foreign investor and its subsidiary in China show their willingness to do business in a harmonious way. In return, your Chinese partners and governmental authorities may extend preferential treatments to the foreign investors and their subsidiaries in China to the maximum extent allowed under the law and policies.

***Guanxi* is not everything.**
Guanxi is probably the most widely publicized Chinese term in the business world. Many Chinese business people build up their business entirely on *Guanxi* (connections) that they have, especially in less urban regions of China. With the development of the Chinese economy and the increasing

complexity of Chinese law, *Guanxi* becomes less important in China nowadays. In the coastal areas of China, business and transactions are done more and more in a straightforward way, and *Guanxi* now seems another name for a sound public relationship and mutual respect and trust based on long-term cooperation and assistance. Therefore, do not rely on any *Guanxi* that is easily offered.

12. What other practical lessons can you share with those who want to do business in China?

Laws and regulations change frequently.
The Chinese government is constantly active at all levels. Laws and regulations frequently change. For example, it is common for administrative divisions to change the implementation of a particular law or state regulations by introducing new administrative decrees or provisions such as in the areas of foreign exchange control, taxes, and foreign direct investments.

Therefore, it is advisable to structure a deal as simply as possible. In the past few years, we have seen many sophisticated deal structures for acquisitions and mergers of Chinese companies fail because of unexpected changes in laws and regulations.

Do not underestimate the importance of good documentation.
China's procedural laws place great importance on written contracts and documents and there are no depositions of evidence under Chinese law. The arbitration or litigation courts in China heavily rely on written evidence because judges and arbitrators tend to base their judgments purely on the written evidence that they are asked to examine. Also, the appeal courts in China only have desk reviews on the appeal documents in most cases. Therefore, if a party does not have a working and reliable filing system, it may easily lose a lawsuit or an arbitration case in China.

HHP ATTORNEYS-AT-LAW

HHP Attorneys-at-Law (HHP) is a law office on the frontier of providing its clients with professional solutions to help them achieve the best possible commercial outcome.

All HHP lawyers hail from prestigious Chinese law schools with each of our senior partners carrying over ten years' practical experience. We not only possess an abundance of experience in our respective areas, but fully understand our clients' commercial needs, such that we are capable of creating innovative solutions for even the most discerning demands. HHP lawyers have acquired a rather diversified background prior to joining HHP: studying in overseas law schools, working at length in international law firms, practicing law in other prestigious Chinese law firms, working at length in large state-owned enterprises, and working in investment banks and multinational companies. Therefore, we are not only capable at handling all kinds of domestic legal affairs but we deliver insight into all aspects of multinational business transactions.

HHP has always focused on delivering outstanding service to companies, both home and abroad, which ambitiously seek to expand their scale yet are cautious towards various legal risks at the same time. These companies, therefore, are willing to grow in compliance with the law. Accordingly, the law office of HHP primarily focuses on investment and financing, compliance and risk control, and dispute resolution. With a keen eye on the latest legal developments in China, we are also a law office known for developing unique perspectives on such legal matters as antitrust, taxation, employment, foreign investment, and finance. We have also actively participated in the promulgation of laws, regulations, and rules by relevant legislative agencies and governmental authorities. Our ample experience has directly contributed to our vast exposure in the fields of banking, insurance, securities, trust, real estate, construction and infrastructure, pharmaceutical, automobile, commercial retail, internet, education, and food and mining among others.

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