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# Taiwan

## International Estate Planning Guide

IBA Individual Tax and Private Client Committee

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## TABLE OF CONTENTS

I. Wills and Disability Planning Documents .....	1
A. Will Formalities and Enforceability of Foreign Wills .....	1
1. Applicable Laws .....	1
2. The Formality of a Will .....	1
3. The Enforceability of a Foreign Will.....	2
B. Will Substitutes (Revocable Trusts or Entities) .....	3
C. Powers of Attorney, Directives, and Similar Disability Documents .....	3
II. Estate Administration .....	3
A. Overview of Administration Procedures.....	3
1. Person in Charge of Initiating Procedures.....	3
2. Collection of Probate Assets and Notice to Creditors.....	3
3. Taxation .....	3
4. Transfer of Asset Titles to Heirs .....	4
B. Intestate Succession and Forced Heirship .....	4
1. Most People Die Without Leaving a Last Will Behind.....	4
2. Determining the Shares of a Descendant's Assets .....	4
3. Forced Heirship.....	4
C. Marital Property .....	5
1. Overview of Marital Property Regimes in Taiwan.....	5
2. Calculation of the Remainder of the Property.....	6
D. Tenancies, Survivorship Accounts, and Payable on Death Accounts.....	6
1. Tenancies.....	6
2. Survivorship Accounts.....	6
3. Payable on Death Accounts .....	6
III. Trusts, Foundations, and Other Planning Structures .....	7
A. Common Techniques .....	7
1. Trusts .....	7
2. Reserved Portions.....	8
3. Foundations .....	8
B. Fiduciary Duties (Trustees, Board Members, Directors, etc.) .....	8

1. Trustees .....	8
2. Directors of a Foundation .....	9
C. Treatment of Foreign Trusts and Foundations .....	9
IV. Taxation .....	9
A. Domicile and Residency .....	9
B. Gift, Estate, and Inheritance Taxes .....	10
1. Computation .....	10
2. Filing .....	10
C. Taxes on Income and Capital .....	10

## I. Wills and Disability Planning Documents

### A. Will Formalities and Enforceability of Foreign Wills

#### 1. Applicable Laws

In Taiwan, will issues are mainly governed by the Chapter on Inheritance in the Civil Code, in the Notary Act, and in the “Act Governing the Application of Laws to Civil Matters involving Foreign Elements” (hereinafter “Private International Law of Taiwan”).

##### a. Legal Capacity

###### i. Being a Testator

A person must possess a certain status in order to produce a will. In accordance with Article 1186 of the Civil Code, a person without disposing capacity may not make a will. A testator must be a person who has full disposing capacity and has reached the age of 20. If a testator is a person over 16, but has not reached the age of 20, then he or she must obtain the approval of his or her legal representative before making a will. In addition, a person with limited disposing capacity may not make a will without first obtaining the approval of his or her legal representative. A person with limited disposing capacity who has not reached the age of 16 may not make a will.

###### ii. Serving as a Witness

Many types of wills require a witness. In accordance with Article 1198 of the Civil Code, the following persons may not act as a witness to attest a will:

- A person who is under the age of 20;
- A person who has been deprived of the ability to dispose of his or her property by a court order;
- An heir, the spouse or lineal relatives by blood of such heir;
- A legatee, the spouse or lineal relatives by blood of such legatee;
- Persons who are assistants to, or employed by, or living with, the public notary or the person that exercises the functions of a notary public.

#### 2. The Formality of a Will

A will can only be legitimately produced by the following five methods:

##### a. Handwritten Will

A handwritten will is a will that has been written by the testator, stating the date, and including his or her signature. In the case of any insertion, cancellation, erasure or alteration of a will, the testator must make and sign an additional note stating the place in the will where text has been inserted, erased or altered, and the number of words.

##### b. Notarized Will

For a notarized will, a testator must designate at least two witnesses and make an oral statement of his or her testamentary wishes before a notary public. The statement must be in handwriting, read over and explained by a notary public, and, after the testator has given approval, signed and dated by the notary

public together with the witnesses and testator. In case a testator is not able to sign his or her name, he or she will be allowed to affix a fingerprint instead so long as the notary public records the circumstances in the will.

#### c. Sealed Will

To make a sealed will, a testator must, after signing it, have it securely sealed in an envelope with his or her signature on the seam of the envelope, designate at least two witnesses, and declare before a notary public that such sealed will is his or her will prepared and written by himself or herself. Then a notary public must state on the envelope the date in which the will is presented to the notary public and the declaration of the testator, and sign the envelope together with the testator and the witnesses. If a will was not written by the testator personally, then the testator's declaration must contain the name of the person who drafted the will for the testator.

#### d. Dictated Will

In order to make a "dictated" will, the testator must designate at least three witnesses, produce an oral statement of his testamentary wishes, and have it written down, read over and explained by one of the witnesses. After the testator has given his or her approval, the statement bearing the full date and the name of the draftsman must be signed by all the witnesses and the testator together. If a testator is unable to sign his or her name, he or she must affix his or her fingerprint in lieu of the signature.

#### e. Nuncupative Will

A nuncupative will is valid only if it is made because a testator is facing an imminent danger of death or other exceptional circumstances that make the testator unable to make a will in any of the aforementioned forms.

A nuncupative will can be prepared by either of the following processes:

- A testator must state his or her testamentary statement before at least two witnesses designated by the testator. One of the witnesses must write down the statement, indicating the complete date, and sign together with all other witnesses.
- A testator must declare his or her testamentary statement, the names of the witnesses as well as the year, month and day to an audio recording machine before at least two witnesses designated by the testator. In addition, the witnesses also must state to the audio recording machine their names and the authenticity of the will. Then the witnesses must put the recording in an envelope and seal the envelope. Last, all the witnesses must write down the complete date on the envelope along with each witness's signature.

### 3. The Enforceability of a Foreign Will

A foreign will is enforceable in Taiwan if the will is valid under Taiwan law. According to the Act Governing the Application of Laws to Civil Matters involving Foreign Elements, a foreign will is valid if the will is made in compliance with the necessary legal requirements stipulated by either one of the following countries' laws:

- The mother country of the testator when the will is made.
- The country where the will is made.
- The residence of the country where the testator dies.
- If a will involves any real estate, the country where the real estate is located.

## B. Will Substitutes (Revocable Trusts or Entities)

Aside from making a will, creating a living trust is the only other way for a person to arrange his or her property before the succession happens.

## C. Powers of Attorney, Directives, and Similar Disability Documents

Making a will usually requires no additional documentations from a testator or a witness because a will can only become effective when such a will is made in the presence of the testator and participating witnesses. If a testator chooses to make a notarized will by using the service of a notary public, then a notary public will need to review related property certificates of the property that is mentioned in the will.

# II. Estate Administration

## A. Overview of Administration Procedures

### 1. Person in Charge of Initiating Procedures

Following a decedent's death, someone must initiate administration of the estate. In cases where a decedent has left a valid will naming an executor, the executor will be the person in charge of administration of the estate.

If no administrator has been named by the decedent, the person in charge of administration of the estate will usually be one or more of the heirs. The legal order of succession is as follows: (1) lineal descendants by blood (nearest in degree of relationship coming first); (2) parents; (3) siblings; (4) grandparents, according to the Taiwan Civil Code Article 1138 and 1139, the spouse being in the same category with the first living heir in this order. If the deceased is succeeded by more than one heir, those heirs can decide to either jointly handle the matter or to choose and authorize one among their midst to initiate and follow up on procedures.

Where, following the death of the decedent, it is as yet unknown whether or not there is an heir, the family council shall appoint a person in charge of administration of the estate. Both the case of succession and appointed administrator must be made known to the court where the decedent's domicile was located.

In the absence of a family council, or where the family council fails to appoint an administrator on time, any stakeholder or prosecutor may apply to the court to appoint an administrator, according to Article 1178 Paragraph 2 of the Taiwan Civil Code.

### 2. Collection of Probate Assets and Notice to Creditors

The administrator's main tasks are to collect all of the decedent's probate assets, to prepare a list of said assets, and to take necessary measures to preserve all assets. In addition to this, the person in charge shall also, via public notice, notify all the decedent's creditors and legatees of the decedent's death and the time period in which they can declare their claim of credit or acceptance of legacies. The administrator shall make repayment out of the probate assets to the creditors who presented their claims within the specified time period and to other creditors known to him in proportion to the amounts of their respective claims. In doing so, the rights of the preferential creditors must not be harmed.

### 3. Taxation

After claims have been paid and legacies have been delivered, the administrator shall file a return for estate tax. The Estate and Gift Tax Act provides that all property of a decedent who was a citizen of and continuously resided in Taiwan shall be subject to the Act. In cases where the decedent was a foreigner or a Taiwanese citizen who resided outside of Taiwan continuously, only those assets located within Taiwanese territory shall be subject to the Estate and Gift Tax Act. The estate of the decedent may not be

split, delivered to legatees, or undergo recordation of title transfer before the estate tax has been paid. The tax return shall be filed and completed within six months of the date of the decedent's death. (See *Sec. 4 for further information on estates and taxes*).

#### 4. Transfer of Asset Titles to Heirs

What remains of the estate after creditors and tax authorities have been paid must then be transferred to heirs or entitled persons by the administrator. In the case of assets which are subject to a registration system, for example, real estate property or vehicles, this is done by filing a title transfer application with the competent authority. The procedure has been completed once all remaining assets have been distributed among heirs and beneficiaries in this way.

#### B. Intestate Succession and Forced Heirship

##### 1. Most People Die Without Leaving a Last Will Behind

In Taiwan, as in many other Asian countries, death is very much a taboo subject. This way of dealing with matters related to dying also has an impact on issues surrounding the drafting of a last will or discussions concerning estate planning in general, which is one reason why many Taiwanese die intestate. The complicated formalized procedures for preparing a valid will do not help matters either: Article 1189 of the Taiwan Civil Code sets out five different procedures for the making of a will: (1) hand-written will; (2) notarized will; (3) sealed will; (4) dictated will; and (5) oral will. Each one of the above types of will calls for a different procedure. Thus in those few cases where a will has been made, complex formal requirements will often lead to the document being declared invalid in court based on such requirements not having been fulfilled. This becomes apparent and happens rather frequently, for example, in the case of a hand-written will, where the Taiwan Civil Code requires the testator to write the entire text by hand. A will that was typed and signed by the testator will be declared invalid.

For the reasons laid out above, intestate succession is still the norm in Taiwan.

##### 2. Determining the Shares of a Decedent's Assets

Where the decedent has died without leaving behind a last will, the legal order of succession outlined in the Taiwan Civil Code determines how the probate assets are distributed among the heirs.

According to Article 1144 of the Taiwan Civil Code, the surviving spouse shall share the assets with other descendants or relatives in the following ratio:

- Where the spouse inherits concurrently with the lineal descendants by blood, the spouse is entitled to a portion equal to that of the other heirs;
- Where the spouse inherits concurrently with the parents or siblings of the decedent, the spouse is entitled to half of the inheritance amount, the remaining half of which is distributed in equal parts to the other heirs;
- Where the spouse inherits concurrently with the decedent's grandparents (or, in case of their prior death, concurrently with their heirs), the spouse is entitled to two-thirds of the inheritance amount, the remaining part of which is distributed in equal parts to the other heirs;
- Where there are no other descendants or relatives, the spouse is the sole heir.

##### 3. Forced Heirship

Independent of what may be set out in an existing and valid last will, those heirs listed in the legal order of succession have a legal right to a certain minimum amount of the inheritance unless the heir forfeits the

right to inherit. Cases where the heir forfeits his right to inherit are listed in the Taiwan Civil Code and are limited to killing of the decedent, serious threatening or insulting of the decedent, and forging or altering of the will.

According to Article 1223 of the Taiwan Civil Code, this minimum amount of inheritance shall be calculated as follows:

- For a lineal descendant by blood, the portion is one-half of the inheritance amount to which he would be entitled if no will existed;
- For a parent, the portion is one-half of the inheritance amount to which he would be entitled if no will existed;
- For a spouse, the portion is one-half of the inheritance amount to which he would be entitled if no will existed;
- For a sibling, the portion is one-third of the inheritance amount to which he would be entitled if no will existed;
- For a grandparent, the portion is one-third of the inheritance amount to which he would be entitled if no will existed;

Article 1225 of the Taiwan Civil Code further provides that a person entitled to a forced heirship may have the amount of the deficit deducted from the property of a legacy, if the amount of his forced heirship becomes deficient on account of the legacy made by the testator. If there are several legatees, deductions must be made in proportion to the value of their respective legacies.

## C. Marital Property

### 1. Overview of Marital Property Regimes in Taiwan

Determining which part of the assets belonged to the decedent at the time of his death is not always easy, especially when the decedent was married at the time. The Taiwan Civil Code lists three different types of marital property arrangements: statutory property regime, community-of-property regime and separation-of-property regime. The first of these is the “default regime”, whereas the community- and separation-of-property regimes need to be agreed to by both partners and registered with the authority in charge. Taiwanese couples rarely agree on a community- or separation-of-property regime and register this with the competent authority. Local practice is thus still dominated by the statutory property regime.

The main characteristic of the statutory marital property regime is that both the husband’s and the wife’s property are separated into two groups: property acquired before and property acquired during the marriage. Both husband and wife can manage, use, collect interest from, and dispose of his or her own property respectively.

Article 1030-1 of the Taiwan Civil Code regulates what happens to the second type of property, property gained during the marriage under the statutory marital property regime that must be partitioned because of one of the partners’ death: For the first step, the property acquired by both partners shall be distributed equally among the two. From the amount remaining of the decedent’s part after this distribution, debts incurred during the marriage shall be deducted, and property acquired by way of succession gift or solatium shall be excluded.



## 2. Calculation of the Remainder of the Property

The value of the remainder of the property acquired by a spouse during a marriage is calculated from the date of termination of the relationship; if the relationship is terminated by a juridical decree of divorce, it shall be calculated from the divorce date.

If a spouse discharged his or her debts incurred before marriage with his or her property acquired during the marriage, or if he or she discharged his or her debts incurred during the marriage with his or her property acquired before marriage, then these transactions must be entered into the calculation.

If a spouse, in order to reduce the other's share of distribution of the remainder (of the property), disposed of his or her property acquired in marriage within five years before the termination of the relationship under the statutory marital regime, this property shall be added to the calculation and deemed to be part of the remainder of the property acquired during the marriage unless the disposition was a gift based on moral obligation.

The right to claim distribution of the remainder of the property becomes time-barred if it is not exercised within two years from the time when the claimant gained knowledge of the existence of the remainder or five years from dissolution of the statutory marital property regime.

### D. Tenancies, Survivorship Accounts, and Payable on Death Accounts

#### 1. Tenancies

In many cases, the decedent will share ownership rights with other people. When a co-owner dies, the deceased co-owner's share may either pass to the decedent's heirs or else to the surviving co-owners. Unless designated otherwise in a last will, according to Article 817 to 831 of the Taiwan Civil Code, the deceased co-owner's share will be passed on to the co-owner's heirs.

#### 2. Survivorship Accounts

The concept of survivorship accounts is not common in Taiwan practice. In fact, Taiwan law does not provide for the relevant regulations and banks will usually not offer such a service. This is very much in line with Taiwan's dealing with regular joint accounts, which are rather uncommon. In the rare case of a couple sharing a joint account at the time of death of one of the partners, the money in the joint account will be considered common property and thus half of the amount will be deemed the decedent's property and distributed amongst the heirs while the other half remains property of the surviving partner.

#### 3. Payable on Death Accounts

Taiwan does not have payable-at-death account services and/or regulations. The decedent can use his last will to designate a legacy to any third party. Upon the decedent's death, the estate administrator shall follow the instructions in the will to transfer the legacy to the legatee. A legatee has the right to waive a legacy. Where a legacy is invalid or waived, the legacy remains a part of the property of the deceased and shall be distributed amongst the heirs.

### III. Trusts, Foundations, and Other Planning Structures

#### A. Common Techniques

##### 1. Trusts

###### a. Living Trusts

According to Taiwan's Trust Act, except where the law provides otherwise, a trust shall be established by a contract or a will. If a trust is established by a contract (a "living trust"), the following items must be noted in terms of the effectiveness of a trust:

###### i. The Trust Property, the Purpose of the Trust, and the Beneficiary

Under Taiwan's Trust Act, a trust refers to a legal relationship in which the settlor transfers or disposes of a right of property and causes the trustee to administer or dispose of the trust property according to the stated purposes of the trust for the benefit of a beneficiary or for a specified purpose. Although the term "trust" is not necessarily used in a trust contract, the contents of a trust contract shall be determinable. Therefore, the three elements of a trust—the trust property, the purpose of the trust, and the beneficiary - must be clear and determinable.

###### ii. The Settlor Must Transfer the Title of the Trust Property to the Trustee

In order to allow the trustee to administer or dispose of the trust property according to the purpose of the trust, the title of the trust property must be transferred to the trustee. Therefore, a trust will be effective only if the title of the trust property is duly transferred to the trustee.

###### iii. The Formality of a Trust Contract

Taiwan's Trust Act does not require a trust contract to be in writing or in any certain format. An oral trust contract is acceptable under Taiwan law. However, because a trust often involves material properties, and in order to avoid any future dispute, a written trust contract is highly recommended.

###### b. Testamentary Trust

Unlike a trust established by a contract, a trust established by a will (a "testamentary trust") is a unilateral legal act. The settlor may create a trust in a will at the settlor's own discretion. The following should be noted while establishing a testamentary trust:

###### i. The Statutory Requirements for a Will

A testamentary trust is a trust established by a will. Therefore, the validity of such trust will be subject to the validity of the will. The will must be in compliance with the statutory requirements in order for the testamentary trust to be valid and enforceable.

###### ii. The Trust Property, the Purpose of the Trust, the Beneficiary, and the Trustee

As with a living trust, the trust property, the purpose of the trust, and the beneficiary must be clear and determinable, especially the fact that a testamentary trust becomes effective at the settlor's death. Also, since a testamentary will is a unilateral legal act, a trustee also must be appointed in a will. According to Taiwan's Trust Act, if a trustee rejects his appointment or cannot act as the trustee in a testamentary trust, the interested parties or a prosecutor may request that the court appoint another trustee.

## 2. Reserved Portions

Taiwan's Civil Code has provisions which require reserved portions to be kept for all statutory heirs. Hence, a testamentary trust shall not be detrimental to any statutory heir's reserved portion, according to the Civil Code.

Furthermore, regardless of whether a trust is a living or a testamentary trust, a trust will be null and void if: (i) the trust is established for any purpose against mandatory or prohibitive regulations; (ii) the trust is established for any purpose contrary to public order or good morals; (iii) the trust is established mainly for serving administrative appeal or litigation purposes; or (iv) the trust designates a beneficiary prohibited by law from holding any specific property rights.

## 3. Foundations

The other estate planning structure commonly known to the public is a foundation. According to Taiwan's Civil Code, a foundation can be established by endowment from a will. Foundations are governed by different government sections based on the nature of the foundation. Each government section has its own regulations on the type of foundation that the particular section governs. However, as a general principle heirs cannot retrieve property once the property has been endowed to establish a foundation. Upon the dissolution of a foundation, the remaining assets will be assigned to the local government. Using a foundation as an estate planning structure is not very popular or a commonly recommended practice in Taiwan.

### B. Fiduciary Duties (Trustees, Board Members, Directors, etc.)

#### 1. Trustees

According to Taiwan's Trust Act, a trustee shall administer the trust affairs with the care of a prudent administrator. For reference, Taiwan's Civil Code provides three standards for assessing civil liabilities. The lowest standard is that of gross negligence and intentional or willful conduct. The middle standard requires a degree of care in performing the obligation as the performing party would exercise in the management of his or her own affairs. The highest standard is that of a prudent administrator. The standards all reflect common elements of diligence and reasonableness. Moreover, according to the Trust Act, a trustee has other specific obligations as stated below:

- A trustee shall administer a trust property independently of his own property and other trust properties;
- A trustee shall administer trust affairs by himself; provided that a third party may be appointed to administer the trust affairs on behalf of the trustee if the trust act so provides or if there arises an event beyond the control of the trustee;
- If there is more than one trustee, all the trustees shall be jointly and severally liable to pay the debts incurred under the trust act;
- A trustee shall prepare and maintain separate books of account for each of the trusts being administered to record the condition of each trust;
- A trustee shall on no account be entitled to any benefits arising out of a trust unless the trustee is a co-beneficiary of the trust; and
- Except where the trust act provides otherwise, a trustee shall not resign without the consent of both the settlor and the beneficiary; provided that the approval of the court may be sought if the resignation can be justified by any factor beyond the trustee's control.

If a trustee fails to comply with his or her obligations, a settlor, beneficiary or other trustees may request the trustee to pay pecuniary compensation for damage caused to the trust property or to restore the damaged property to its original condition if the damage is incurred due to the trustee's improper administration of the trust property, or if the trustee disposes of the trust property in violation of the stated purpose of the trust. In addition, reduction of the remuneration payable to the trustee may also be sought.

## 2. Directors of a Foundation

Unlike a trust, the law does not specifically enumerate obligations of a director of a foundation. Instead, a foundation is supervised by each corresponding authority. Also, the law does not expressly impose a director of foundation the fiduciary duty as a director of a corporation.

As a result, it may be necessary to use the basic principle in the Civil Code to interpret the duty of a director of a foundation. The legal relation between a director and a foundation may be deemed as a contract of "mandate." The representative shall deal with the principal's affairs with the same care as he or she would use with his or her own affairs. If the representative receives remuneration, the representative shall handle the principal's affairs with the care of a prudent administrator.

## C. Treatment of Foreign Trusts and Foundations

There are no special laws or regulations regarding foreign trusts and foundations. According to the basic principle, an heir assumes all rights and obligations pertaining to the estate of the decedent at the time of the decedent's death unless the Civil Code provides otherwise. Therefore, foreign trusts are not used as a method for tax savings. Rather, foreign trusts or foundations can be used for planning purposes. Besides the benefits that can be enjoyed by using regular trusts, the most important benefit of a foreign trust or foundation is confidentiality. Usually, the settlor is not disclosed unless an international crime is involved. Also, if the trust is established in a country where the system of trust is mature and well developed, the settlor or beneficiaries may fully enjoy the benefits of a trust.

## IV. Taxation

### A. Domicile and Residency

In accordance with Article 1 of the Estate and Gift Tax Act, "All property of a decedent who was a Taiwanese citizen and has resided in Taiwan continuously shall be subject to estate tax under this Act, irrespective of whether the estate is located within or outside Taiwan. Property left by a decedent who was a Taiwanese citizen but resided outside Taiwan continuously or who was a non-Taiwanese citizen shall be subject to estate tax only to the extent that such estate is located within Taiwan." Furthermore, Article 3 of the Act states, "Property given away by a donor who is a Taiwanese citizen and resides in Taiwan continuously shall be subject to gift tax under this Act, irrespective of whether the property is located within or outside Taiwan. Property given away by a donor who is a Taiwanese citizen but resides outside Taiwan continuously or who is a non-Taiwanese citizen shall be subject to gift tax only to the extent that the property is located within Taiwan."

From the articles above, we know that whether a decedent or a donor "resides in Taiwan continuously" is relevant. Article 4 of the Estate and Gift Tax Act provides a definition of continuous residence:

- Having maintained a domicile in Taiwan within two years prior to the time of death or transfer of property as a gift.
- Residing inside Taiwan without maintaining a domicile, but having stayed in Taiwan for more than 365 days within two years immediately prior to the event of death or transfer of a gift, with the exception of a foreigner who was employed by the Taiwan government to render a service and had only stayed in Taiwan for a specific period of time.

If one of the criteria above is met, the decedent or donor's worldwide property is subject to an estate or gift tax in Taiwan, otherwise only property located within Taiwan will be taxed.

## B. Gift, Estate, and Inheritance Taxes

### 1. Computation

#### a. Estate Tax

Tax amount = (Value of gross estate – deductions – exemption) x 10%

The details (e.g. items and amounts) of the deductions and exemption are provided in Articles 17, 17-1 and 18 of the Estate and Gift Tax Act.

#### b. Gift Tax

Tax amount = (Total amount of gifts – deductions – exemption) x 10%

The details (e.g. items and amounts) of deductions and exemption are provided in Articles 21 and 22 of the Estate and Gift Tax Act.

### 2. Filing

#### a. Estate Tax

An estate tax return shall be filed within six months of the date of death.

#### b. Gift Tax

A gift tax return shall be filed within 30 days of the date of a gratuitous transfer for gifts made during a calendar year in excess of the annual exemption.

## C. Taxes on Income and Capital

In principle, all types of an individual's various incomes are subject to the consolidated income tax and levied according to the Income Tax Act. Capital gains also fall within the scope of the income tax. However, taxes are not imposed on gains derived from securities transactions. Taiwan uses a progressive income tax rate, for example 5 percent, 12 percent, 20 percent, 30 percent and 40 percent.

If an individual does not reside within the territory of Taiwan, tax shall be withheld. The withholding tax rate varies, e.g. 15 percent for income from transactions in structured products, 18 percent for salaries, 20 percent for dividends, commissions, rentals, royalties, etc.

\* \* \* \* \*

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As a senior partner of Eiger Law, Nathan has over a decade of professional experience in the Greater China area, advising clients in all matters pertaining to estate planning, investment law, and commercial disputes. Nathan has further provided various advice with regard to international private law issues arising out of cross-border inheritance matters, related tax issues, probate, drafting of wills, and negotiations with various authorities. He is also involved in litigation regarding trust administration and

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Nathan serves as trustee on the board of companies in Switzerland, China, Hong Kong and Taiwan. He further provides one-to-one counseling, tax and estate planning to high-net worth individuals.

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