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CHINA

More and more collective bargaining in China ?

Trade Unions and Employees Representative Congress

Recent reforms in China's labour laws tend to establish stronger employees' representative bodies within privately owned enterprises, following the model of State Owned Enterprises. For example since 2006, one third of the Supervisory Board of limited liability companies must now be designated by employees. It also appears that the All China Federation of Trade Unions ("ACTFU") is increasingly lobbying in order to establish trade union committees within Foreign Invested Enterprises. And as from January 1st 2008, the new Employment Contract Law aims not only to strengthen the role of trade unions in companies, but also to generalize Employees' Representative Congress.

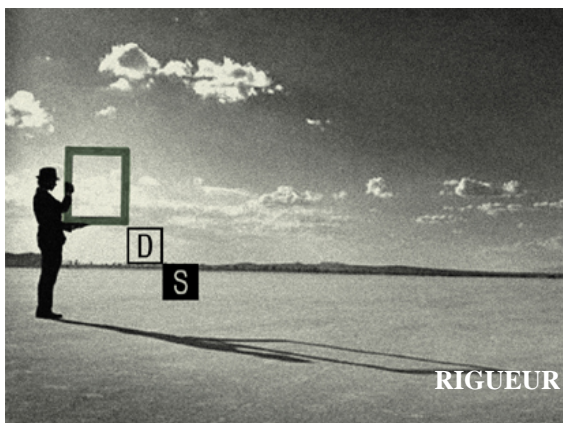
1/ The Trade Union Committee within the company

Trade Unions in China have been legally recognized for the first time by a local regulation of Guangzhou in 1922. Since then, trade unions in China have always been linked with the All China Federation of Trade Unions ("ACFTU") and have operated under the impulsion of the Chinese Communist Party. Under the ACFTU, around a dozen of different trade unions exist at national level, but

they aren't very active. Any other kind of independent trade union or association is forbidden.

This hyper-centralised control by the ACFTU and the Party, who find an interest in a sound development of privately owned enterprises, has allowed to have trade union representatives generally cooperative and pragmatic with the companies' managers. Although the PRC Trade Union Law promulgated in 1992 provide that trade unions in China must "uphold the rule of the People's democratic socialist state political power based on the worker-peasant alliance and led by the working class", this piece of legislation also mention obligations for trade unions to assist the company in its management - for example in the event of a strike, the trade union should assist the enterprise "in restoring production and work as soon as possible".

According to Chinese law, employees are free to establish a trade union committee in any enterprise, not only in companies (i.e. joint-venture, WOFE, ...) but also in other kinds of work units such as representative offices ; and such a grassroots trade union committee can be established whatever the number of trade union members. From a legal point of view, employers may not oppose to trade union activities by their employees or to ACFTU representatives who come to encourage employees to set up a trade union committee (such a refusal sparked the Walmart scandal in 2006). In practice, enterprises of a certain size often prefer to take the initiative of establishing a trade union committee and to attempt having a trusted manager elected as chairman of the committee (for example the deputy general manager or the financial manager, but local regulations in some municipalities may for-



bid such combination).

In any case, whether an enterprise in China has a trade union committee or not, it must contribute 2% of the total wages of all its employees each month to the relevant trade union organisation as outlay. Employees who are members of a trade union should not dedicate more than 3 working days per month to trade union activities – without salary decrease. But the trade unions of enterprises with more than 200 employees are entitled to have at least one full-time employee responsible for the trade union committee. Moreover, Chinese law heavily punishes any dismissal of an employee based on his/her trade union activities (penalty of up to 2 year salary). Some local regulations may also provide for additional obligations, such as spare premises for the trade union committee, etc.

In a general manner, a trade union committee organises cultural and sportive activities for the enterprise's employees. However, recent Chinese laws have progressively laid down several cases where employers must consult trade unions. When an enterprise doesn't have any trade union committee, it must consult in certain cases with the relevant local ACFTU cell.

For instance, the trade union can actively participate and defend the rights of employees in case of litigation with the employer, such as abuse of overtime, violation of security or hygiene rules, violation of special rules protecting women and underage workers, unlawful deduction or decrease of an employee's wage, and generally any serious violation of labour law. According to the new employment contract law, any dismissal must now result in prior communication of the dismissal legal ground by the employer to the trade union. In case of mass layoff



of over 20 employees (or for small enterprises, more than 10% of the staff), the enterprise must seek the opinion of the trade union or of all staff.

According to the new Company law, in case of restructuring of the company and major issues concerning business operations, employers requested to listen to (but not necessarily "follow") the opinions of the trade union.

Although freedom of strike is not detailed in Chinese laws and that the Trade Union Law itself doesn't specially mention the term "strike", trade unions are legally required to represent employees who have "stopped or slowed work", consult the enterprise on behalf of the employees and assist the enterprise to do whatever is necessary for resolution of the issues, so as to restore production and work order as soon as possible.

More frequently, an enterprise planning to modify its internal rules regarding some working conditions must negotiate with trade unions or the Employees' Representative Congress since January 1st, 2008. The law doesn't provide for any clear solution in case of disagreement, but it is hoped that a future implanting regulation will detail the extent of these negotiations.

2/ Employees' Representative Congress

Until recently, Employees' Representa-

tive Congress or "ERC" was mainly an institution found only in State Owned Enterprises. In the beginning, it used to be an experimental way for workers to directly manage a State Owned Enterprise, in a "democratic" manner according to a law issued in 1986... Privately owned Enterprises are not legally required to establish an ERC with such powers. However, the new Employment Contract Law does mention that any enterprise (State Owned or privately owned) must consult its ERC when it plans to modify essential work conditions or, in practice, when it intends to change its internal rules or employee handbook. And if there isn't any ERC within the enterprise, the employer must discuss with all staff before changing major aspects of the internal rules or employee handbook – which is actually not conceivable for enterprises of over hundreds of employees.

Up to now, the Employment Contract Law and the implementing regulation do not provide any legal framework for the election and organisation of the ERC of a privately owned enterprise. As a comparison, the legal framework applicable to State Owned Enterprise specifies that members of an ERC are elected by an assembly of at least 2/3rd of the enterprise's staff. At least 50% of the ERC must be composed of basic level workers (i.e. production or direct sales). Trade union members may also be member of the ERC. And to lawfully hold an ERC meeting, at least 2/3rd of

its members must be present or represented, in order to vote decisions with a simple majority.

Since January 1st, 2008, all employers must discuss with their ERC or all their staff, when they want to formulate, revise or decide on rules or major matters pertaining:

- labour remuneration,
- working hours,
- rest periods and off days,
- labour safety and health,
- insurance and welfare,
- staff training,
- labour discipline and labour quota administration
- and generally all matters that directly involve the vital interests of workers.

The ERC (or if it doesn't exist, all the staff) is entitled to make proposals and give its opinion. The employer shall carry out equal negotiation with the ERC or with the trade union before making and notifying its final decision to the staff.

The measures of internal rules and/or employee handbook of an enterprise which contain provisions on the above listed items and which have not been adopted according to this legal procedure, may not be enforceable in case of litigation with employees.

Further to the new labour laws and regulations, China has laid down a dual system of collective bargaining in an enterprise. Depending on the issue, an employer must now inform, or sometimes consult with, the trade union or the ERC... or even both.



INDIA

Birth of a legal structure foretold : the Indian LLP

The Limited Liability Partnership Bill, 2008 might become an Act very soon.

Recently adopted by the Upper House of the Indian Parliament, the Rajya Sabha, this bill, which still needs to be signed by the President of the Republic of India, might give birth to a new legal vehicle whose creation announced in 2006 was particularly awaited by professionals from the services sector.

The « Limited Liability Partnership » or LLP is a brand-new corporate structure that combines the flexibility of the partnership and the advantages of legal personality and limited liability which was so far exclusively reserved to companies.

This reform should benefit a wide range of independent professionals such as lawyers, chartered accountants, doctors, architects, consultants but also finance professionals such as venture capital funds or hedge funds which will, from now on, avail of a new legal framework more sophisticated and less cumbersome than the one governing trusts.

The salient features of the reform are the following

1. The LLP is a body corporate with legal personality characterized by a high flexibility : the internal structure is freely organised and determined by the partnership agreement.
2. The LLP is an opened structure available for use by any professional who fulfills the requirement of the LLP Bill, 2008
3. A Private limited company or a Public limited company can be converted into a LLP.

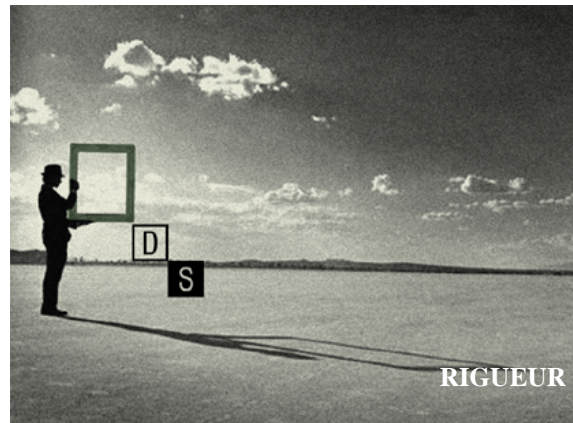
4. The liability of the partners is limited to their agreed contribution in the LLP. No partner can be jointly liable on account of the independent or unauthorized actions of another partner.

5. The LLP being a body corporate is not governed by the provisions of the Indian Partnership Act (1932) and will most likely be governed by the Companies Act (1956).

6. The number of partners in the LLP is not limited to 20 as in the partnerships. The LLP Bill even sets out provisions pertaining to merger and acquisitions of LLP, which should facilitate the development of important structures.

As far as foreign investors are concerned, the reform is also decisive : chapter IX of the Bill initiates the possibility for the latter to create LLP in India. This is a very important innovation, indeed, foreign investors were so far prohibited from resorting to partnerships and they could only set up operations through limited liability commercial companies.

Subject to the signature of the Bill, a new legal vehicle flexible and protective will be available to foreign companies and individuals wishing to invest in India and to those, already present in the country, who want to limit the legal constraints inherent in commercial companies.



JAPAN

Summary of the Labor Contract Act

The Labor Contract Act was promulgated on December 5, 2007 and implemented on March 1, 2008.

In Japan, while the minimum standard for employment conditions had been stipulated in the Labor Standard Act, there were no provisions that systematically provided civil rules on rights under individual contracts to solve individual labor-related disputes. Hence, the Labor Contract Act was implemented for the purpose of stabilizing individual labor relations while protecting employees (Article 1).

- Main Contents

1/ Principles of Labor Contracts (Article 3)

(1) A labor contract shall be executed or amended based on an agreement between an employee and an employer on an equal footing

(2) A labor contract shall be executed and amended with consideration by an employee and an employer of balance between work and life (work-life balance).

2/ Rules of Employment

(1) In a case where a labor contract is executed and an employer informs an



employee of rules of employment in which reasonable employment conditions are set forth, the terms and conditions of the labor contract shall be in accordance with the employment conditions set forth in the rules of employment (Article 7).

(2) In a case where employment conditions are amended by amending rules of employment, and if an employer informs an employee of the amended rules of employment and the amendments to the rules of employment are reasonable, employment conditions that are terms and conditions of a labor contract shall be in accordance with the relevant amended rules of employment: this is an exception to the principle of agreement in labor contracts (Article 10).

(3) Standard in a labor contract that does not satisfy standard set forth in rules of employment shall be raised to the standard set forth in the rules of employment with respect to part that does not satisfy the standard in the rules of employment (Article 12).

(4) In a case where employment conditions set forth in rules of employment violate any laws, regulations or collective agreements, the employment conditions shall not become terms and conditions of a labor contract (Article 13): this is a provision similar to Article 92, Paragraph 1 of the Labor Standard Act that sets that the rules of employment shall not infringe any laws and regulations or any collective agreement applicable to the workplace concerned.

3/ Disciplinary Actions and Terminations

(1) A disciplinary action shall be an abuse of rights and invalid if it is found to objectively lack a reasonable

ground and not to be appropriate under the generally accepted norms (Article 15).

(2) A termination shall be an abuse of rights and invalid if it is found to objectively lack a reasonable ground and not to be appropriate under the generally accepted norms (Article 16).

- Comments

The enactment of the Labor Contract Act constitutes a new balancing in the employer/employee relationship. Through the invitation made to the parties to set all matters related to employment in employment contracts on a balanced and equal basis, a decrease in the currently growing number of judicial disputes is also expected.

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SINGAPORE

1. Introduction of a new business structure in Singaporean Law

In order to attract more investors and provide a greater flexibility in the business structure, the government of Singapore is about to enact a law to allow the formation of “limited partnerships”.

This structure, similar to the French *société en commandite*, comprises 2 categories of partners. On one hand, the “General partners” (one at least) or partners with unlimited liability: they have joint and several liabilities for all debts and have management control.

On the other hand, the “limited partners” (one at least) or partners with limited liabilities: their liability is limited to the extent of their investment, they are prohibited from participating in the management of the company, and they even cannot oppose the introduction of a new partner (“sleeping partners”).

The limited partnership is a structure most likely to appeal to investors from private equity or fund investment businesses. Indeed this structure will allow the investors to stay away from the management of the company they have invested in, and their liability is limited to their financial contribution. Only the partner who has the required competency to manage the company is empowered to do so. In consideration of which, this partner has unlimited liability (including his personal assets).

The limited partnership is not required to file its accounts or have them audited and not liable to corporate income tax. The partners are taxed on their personal income.

2. Singapore labour amendments: the most significant changes

The Employment Act was last amended in Singapore in 1995. The next reform is being finalized and will come into effect on January 1st 2009.

The Employment Act (EA) has been revised to apply to a wider range of workers. The most significant changes are as follows:

- Extend coverage of the EA to confidential staff (accountants, personal assistants, lawyers...).
- Extend some of the provisions of the EA to young employees occupying an executive position (junior managers and executives) earning a salary of \$2,500 (about 2500 €) and below.
- Raise the salary ceiling to S\$2,000 (from S\$1,600) for non-workmen, allowing them to enjoy the benefits of the provisions under Part IV of the EA.
- Introduce a salary ceiling of S\$4,500 for workmen in order for them to enjoy the benefits of the provisions under Part IV of the EA.
- Re-define part-time employees as those working 35 hours a week maximum (instead of 30) in order to encourage employers to offer more part-time jobs. The advantage is that employers are allowed to pro-rate the benefits of a part-time employee.
- Apply paid sick leaves and paid public holidays to all employees covered

under the EA (and not just those covered under Part IV of the Act.).

- Vest the employment inspectors with additional powers and increase penalty fines for infringement of the Employment Act.

Obviously this amendment requires from the legal and human resources departments an updating of the employees registry, based in particular on the new ceilings, as well as an adaptation of the employment contracts.

THAILAND

"GLOBAL TREND PROVOKES THAI LOCAL LAW-MAKING: THE COMPUTER CRIME ACT"

I: Background: What is a Computer Crime?

Computer crime, cyber crime, e-crime, hi-tech crime or electronic crime generally refers to criminal activity where a [computer](#) or [network](#) is the source, tool, target, or place of a [crime](#). These categories are not exclusive and many activities can be characterized as falling in one or more category. Additionally, although the terms computer crime and cyber crime are more properly restricted to describing criminal activity in which the computer or network is a necessary part of the crime, these terms are also sometimes used to include traditional crimes, such as [fraud](#), [theft](#), [blackmail](#), [forgery](#), and [embezzlement](#), in which computers or networks are used to facilitate the illicit activity. As the use of computers has grown, computer crime has become more important.

Computer crime can broadly be defined as criminal activity involving an information technology infrastructure, including illegal access (unauthorized access), illegal interception (by technical means of non-public transmissions of computer data to, from or within a computer system), data interference



(unauthorized damaging, deletion, deterioration, alteration or suppression of computer data), systems interference (interfering with the functioning of a computer system by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data), misuse of devices, forgery (ID theft), and electronic fraud.

II: Reaction on the Local Frontier: Thailand enacts the Computer Crime Act along with Stringent Follow-up Measures

Globally, computer crimes have run rampant, causing much damage which warrants a solution.

On the local Thai frontier, Thailand's new Computer Crimes Act (CCA), came into effect on July 19, 2007. The CCA was divided into two sections. The first dealt with criminal matters involving computer hacking, anonymous spam mail, etc. The second section introduced data retention requirements for service providers.

This trend paved the way for an even more stringent trend where the Ministry of Information and Communication (MICT) issued a notification detailing the data records to be retained as well as explaining which service providers are affected, which became universally effective on August 23, 2008. The MICT is stating that all entities within Thailand which offer internet access, computer communication, or data storage to their staff, fall within the CCA's data retention requirements. This is to say that nearly any party which uses a computer is required to log all data traffic and maintain personal data identifying users for 90 days or be subject to a criminal fine of up to THB 500,000, making Thailand a country with the most expansive mandatory data retention requirements in the entire world.

III: The Computer Crime Act in Action: Two Thais Arrested for Computer Crime

It seems that the Thai authorities



have used the recently passed Computer Crime Act [to arrest two Thais](#) for alleged offensive comments posted on the Internet about the country's revered monarch.

At least one person being detained in Bangkok Remand Prison for crimes against the new Computer Crime Act which came into effect on July 18, 2007. This arrest illustrates that the Computer Crime Act is quick to be used as a ground for arrest and that it is being faithfully executed by the authorities.

IV: Future Trend: Will the world follow Thai law or will Thai law be curbed to match global sentiment?

Thailand's Computer crime Act has surpassed those that exist globally. For example, current U.S. law only provides for "data preservation" as opposed to Thailand's more stringent requirement of "data retention."

Moreover, under the UK and EU laws, where data retention is mandated, such laws are limited to "public" service providers only, such as entities that provide services to the general public, and not to every entity that uses the internet or provides email in its operation as is the case in Thailand.

It will thus be very interesting to see whether the global trend will head toward a more stringent path and follow Thailand's lead or whether Thai law in the future will slacken and mirror the global sentiment.

**Vovan Bangkok –
“The Thai Board Of Investment significantly extends the privileges granted to six industrial sectors”**

The Board of Investment (“BOI”) is the Thai agency in charge of granting privileges to investors, whether Thai or foreigners.

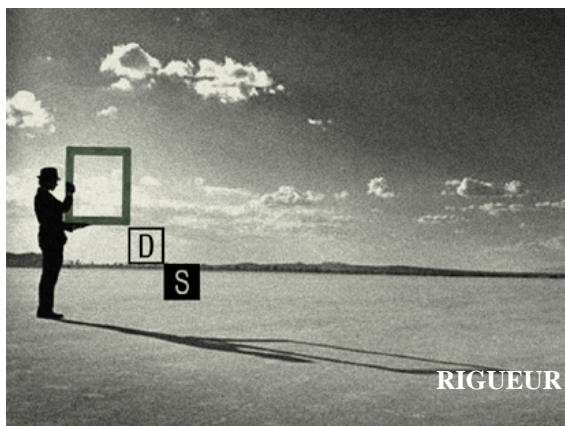
The BOI grants tax and non-tax privileges, the later including the right for a Company to be fully foreign owned, the right to buy land when fully foreign owned as well as facilitation and privileges in the field of employment of foreign labor.

This agency has used a three-zone system for more than two decades, with Zone 3 – the country’s 60 less developed provinces – attracting the highest incentives. The aim was to spread development throughout the country.

The BOI has decided to bring nuance to this policy trend. Indeed, six industries considered as the hardest hit by the global recession will see their privileges maximized in two out of three BOI regions. Bangkok region will not see its regime modified.

These industries are:

- energy efficiency,
- high-tech innovation,
- environmentally friendly products,
- government infrastructure



- megaprojects,
- tourism and real estate,
- high-tech agriculture

The incentives will be offered for investment projects submitted from now until the end of 2009, in a bid to revive the industrial sector.

VIETNAM

NEW PROVISIONS ON PERSONAL INCOME TAX

On September 8, 2008, the Government of Vietnam issued the Decree No 100/2008/ND-CP (hereafter « Decree 100 ») regarding personal income tax (PIT). Decree 100 details the PIT Law of November 21, 2007, and shall come into force on January 1, 2009, on the same day as the PIT Law.

Furthermore, on September 30, 2008, the Ministry of Finance issued the Circular No 84/2008/TT-BTC (hereafter « Circular 84 ») detailing the PIT Law and Decree 100.

Taxable income

Article 3 of Decree 100 lists ten categories of taxable income, five of which were previously not submitted to PIT, i.e.:

- Income from capital investment comprising loan interest, dividends or income from capital investment in other forms;
- Income from capital transfers;
- Income from real property transfers;
- Income from an inheritance being securities, capital portion in business establishment, real property or other assets for which ownership or use rights must be registered;

-Income from a gift being securities, capital portion in business establishment, real property or other

assets for which ownership or use rights must be registered.

However, to determine whether an income is taxable or not, it seems more cautious to refer to the principle of exemption mentioned in article 4 of Decree 100. This article comprises a limited list of non taxable income, such as:

- Income from real property transfer between members of the same family;
- Income being interest on money deposited at a bank or income being interest from life insurance policies;
- Income being overtime salaries and wages;
- Income being scholarships.

Identical rates applicable to national and foreign individuals

From January 1, 2009, PIT rates applicable to Vietnamese and foreign residents in Vietnam shall become identical.

A progressive scale from 5% to 35%, divided into 7 tranches according to monthly income of each individual, shall apply to both Vietnamese and foreign residents in Vietnam.

Any individual present in Vietnam more than 183 days a year or having a permanent address in Vietnam (including those who have leasing titles for at least 3 months) is considered as a resident in Vietnam.

Deduction for family circumstances

From January 1, 2009, deductions for PIT calculation shall be made according to family circumstances. Thus, the monthly basis for tax assessment shall be decreased by 4.000.000 VND for

the taxpayer and 1.600.000 VND for each dependant whom the taxpayer is responsible for.

For example, taxable income of an employee with a monthly wage of 10,000.000 VND and responsible for two children less than 18 years old shall be as follows:

Taxable Income = 10,000,000 VND – 4,000,000 VND – (1,600,000 VND x 2) = 2,800,000 VND.

Consequences on fringe benefits for foreigners

Circular 84 lists the following fringe benefits for foreign employees which now become part of the basis for tax assessment as follows:

- Residential housing rent and associated fees;
- Premiums for non-compulsory insurances;
- Other membership fees (sport club...);
- Entertainment expenses;
- Other fringe benefits (expenses for holidays, domestic workers...).

In consideration of these new provisions, a large number of companies will have to review their methods of wages and salaries of their foreign employees.

SALE AND ASSIGNMENT OF STATE OWNED ENTERPRISES

On October 10, 2008, the Government issued Decree No. 109/2008/ND-CP on sale and assignment of State owned enterprises (« Decree 109 »).

Scope of application

Decree 109 applies to sales and assignments of State owned enterprises

and their independent or semi-independent subsidiaries.

Method of sale and assignment of State owned enterprises

The sale of State owned enterprises comprises the full and partial sale of these enterprises. In such cases, the ownership of the enterprise shall be totally or partially transferred to the purchaser(s).

Sales may be concluded through an auction or an agreement, with or without transfer of debts to the purchaser(s).

Moreover, State owned enterprises may be assigned free of charge to a collective of the State owned enterprise's employees. In such case, each employee shall own a part in the enterprise.

Participation of foreign investors

Decree 109 allows foreign investors to purchase equities or shares in a State owned enterprises on sale.

However, depending on the business activity of each enterprise, the percentage of their interest must comply with Vietnam's international commitments.

Determination of the selling price of a State owned enterprise

The determination of the selling price of a State owned enterprise must comply with the following principles:

- It must not be lower than the State interest in the enterprise's capital; and
- It must not be lower than the value of the enterprise.

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