DS AVOCATS

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CHINA

THE ANTI-MONOPOLY LAW

I – Overview of the AML

Entering into force on August 1, 2008, the Anti-monopoly Law (AML) has been in effect for exactly two years. Though the AML took nearly 20 years to be drafted, it has consequently provided the basis necessary to the development of an anti-monopoly framework which has been lacking in mainland China. Divided in eight chapters, including 57 articles, the AML prohibits three kinds of monopoly acts well known by the western practitioners: reaching monopoly agreements, abusing a dominant market position, and concentration of business operations.

Furthermore, the abuse of administrative powers which may exclude or restrict competition (hereinafter the "administrative monopoly") also falls within the scope of the AML.

II – Draft of new regulations

The State Administration for Industry and Commerce (SAIC) has recently released ***Draft*** *for Public Comment of Three Anti-Monopoly Law Provisions Including the Draft Provisions for Prohibiting the Abuse of Dominant Market Position*, subject to public comment up to June 7, 2010.
These Drafts provide significant clarifications with regard to some provisions of the AML related to the bans of anti-monopolistic acts.

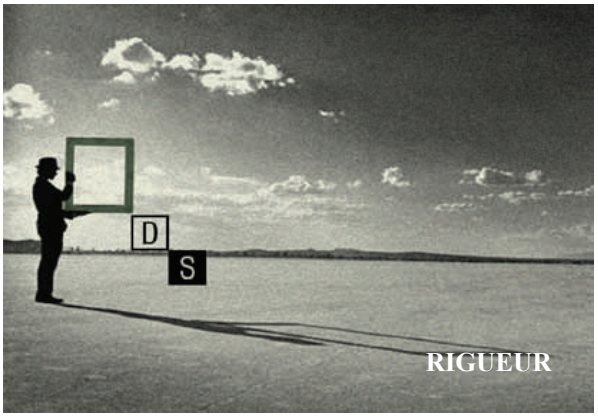
II.1. Clarifications with regard to leniency program

Where a business operator, excluding the one who has initiated the monopolistic agreement, voluntarily reports "important evidence" of this agreement in which it has participated, to the relevant administration of industry and commerce, immunity or mitigated penalties may be granted. The first operator who reports may obtain immunity, and operators who subsequently come forward may receive mitigated penalties according to the circumstances of the case.

The Drafts give a definition of "important evidence" which refer to key evidence enabling the SAIC to initiate an investigation or identify the participants, product range, the way the agreement has been reached, etc.

II.2. Clarifications with regard to abuse of a dominant market position

Referring to article 14 of the AML, the Drafts defines the dominant market position as the ability for an operator to control prices, quantities or any term of the transaction, as well as the ability to influence the entrance of other operators to the relevant



markets. An operator who enjoys such a dominant market position cannot refuse to deal "without any due cause", or impose commercial terms which appear in favor to him. However the interpretation of 'abuse' is made on a case-by-case basis.

II.3. Clarifications with regard to administrative monopoly

The SAIC would still have no authority to punish the administrative agency which would have abused its powers to advantage an enterprise, or to impose conditions which would have restrained competition. It can only make recommendation since the ability to punish belongs to the offending agency's superior.

II.4. The connection with the intellectual property rights

The Drafts explicitly state they will not apply to intellectual property (IP) rights exercised in accordance with the relevant IP laws. Thus the application of the AML remains only possible in case of 'abuse' when exercising the IP rights. However, the proposed rules do not clarify the definition of 'abuse', which leads to a problem of enforcement of these principles.

III – The remaining questions

III.1. Inequality under the AML

Though the AML seems not to distinguish anymore the origin of the operator, article 31 provides that where a foreign investor participates in a concentration of business operators and that 'state security' is involved, additional examinations should be taken. Some practitioners have thus feared that this regulation would give too much discretionary power to the relevant authorities. However, realizing the too wide and unclear definition of 'state security', the National Development and Reform Commission (NDRC) is thinking on how to clarify it.

III.2. The need of an effective anti-monopoly executive agency

The powers granted to both anti-monopoly executive agencies, ie the NDRC responsible for anti-competitive acts not related to prices, and the SAIC responsible for price-related offences, have not yet reached its goals due to the lack of means provided and lack of efficient punishment power.

Furthermore, the delimitation of powers is still not strictly defined, which may lead to a risk of overlap. Hence, in case of an investigation led by both agencies, the application of cumulative punishments is still on debate.

INDIA

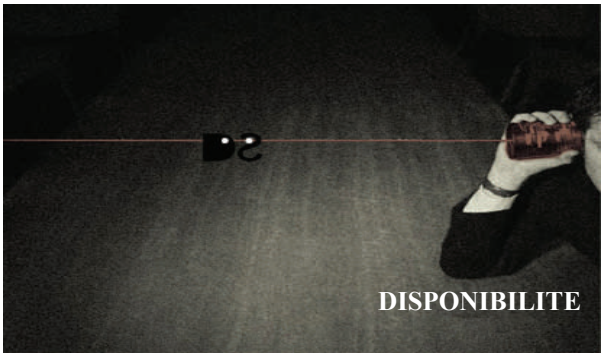
CLARIFICATION ON INDIAN VISAS FOR FOREIGN PROFESSIONALS

In a much awaited clarification dated 27 July 2010, the Ministry of Home Affairs has provided noteworthy clarifications on the two types of visas issued by India to foreigners for work related visits, namely, Business Visa designated as 'B' Visa and Employment Visa designated as 'E' Visa.

I - Eligibility criteria for the grant of a business visa

The instruction first clarifies that a Business visa may be granted, among others, to a foreigner for the following purposes:

* Visit India to establish industrial/ business venture or to explore possibilities to set up industrial/ business venture in India.
* Purchase/sell industrial products or commercial products or consumer durables.
* Technical meetings/discussions, attending Board meetings or general meetings for providing business services support.
* Recruitment of manpower in India.
* Consultations regarding exhibitions or for participation in exhibitions, trade fairs, business fairs etc.
* Transact business with suppliers/ potential suppliers at locations in India, to evaluate or monitor quality, give specifications, place orders, negotiate further supplies etc., relating to goods or services procured from India.



* Visit of short duration in connection with an ongoing project with the objective of monitoring the progress of the work, conducting meetings with Indian customers and/or to provide technical guidance.
* Pre-sales or post-sales activity not amounting to actual execution of any contract or project.
* Foreign trainees of multinational companies/corporate houses coming for in-house training in the regional hubs of the concerned company located in India.

II - Duration of a Business Visa

The instructions also provides that a Business Visa with multiple entry facility can be granted for a period up to five (5) years or for a shorter duration.

A stay stipulation of a maximum period of six (6) months will be prescribed for each visit by the concerned Indian Mission keeping in view the nature of the business activity for which such Business Visa is granted.

In case Missions/ Posts abroad, while issuing Business Visa, decide to prescribe a stay stipulation of maximum 6 months for each visit, a

clear endorsement should be made stating "each stay not to exceed 6 months (*or the duration of stay stipulation*) and registration not required". In case no such stay stipulation is being prescribed, a simple endorsement stating "registration within 14 days" should be made.

III - The instruction also sheds light on the eligibility criteria for the grant of an Employment visa

In relation to Employment Visas, the instruction indicates that the applicant must be a highly skilled and/or qualified professional, who is being engaged or appointed by a company/ organization/ industry/ undertaking in India on contract or employment basis. It is specified that Employment Visa shall not be granted for jobs for which qualified Indians are available. Employment Visa shall also not be granted for routine, ordinary or secretarial/ clerical jobs.

The Ministry provides for specific conditions in the IT Software and IT enabled Services sector where the foreign personnel sponsored for the Employment Visa needs a minimum salary in excess of US $ 25,000 per annum.

However, for grant of Employment visa to skilled/highly skilled workers in the IT Software and IT enabled Services sector, the guidelines issued by the Ministry of Labour & Employment limiting the number to 1% of the total persons employed subject to a maximum of 20 will not be applicable.

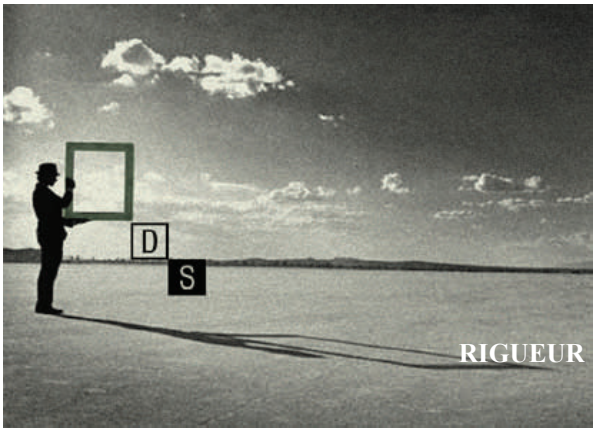
In sectors other than IT Software and IT enabled Services, only highly skilled and professionals can be granted Employment visas by the Indian Missions to the extent of 1% of the total persons employed in the company/project subject to a maximum of 20.
However, if the 1% of the total number of persons working in the company/project works out to be less than 5, the company could be permitted to bring such persons.

Last, the instruction concludes that there will be no specific minimum salary limit for grant of Employment Visa in such cases.

JAPAN

PROPOSAL TO REFORM THE WORKER DISPATCH LAW

A proposal to reform the Worker Dispatch Law was submitted to the Diet on April 6, 2010. The review of this proposal, however, was interrupted by the closing of the ordinary parliamentary session in June. Therefore it is not certain yet whether this proposal will become



law. The objectives of this reform are, however, to strengten the regulatory framework applicable to this business activity, and to operate a drastic review of the worker dispatch by aiming at stabilizing the employment of temporary workers. Below are the main points of this reform and the issues it raises.

I - Strengthening of regulations applicable to worker dispatch

I-1. Prohibition of short-term dispatches, dispatches in manufacturing industries, and registration-type dispatches

With this reform, staffing agencies will no longer have recourse to temporary workers if they are not their own permanent employees (however, 26 business activities such as clerical work, and translation/ interpretation are not subject to this prohibition).

The registration-type dispatch enables a staffing agency to put an end to the employment contract between it and a temporary employee when the contract between the staffing agency and the hosting company ends. This registration-type dispatch will be prohibited in order to prevent « haken-giri » (which consists of getting rid of temporary workers when economic difficulties arise).

Moreover, it will be forbidden to use temporary workers for short-term missions (dispatches shorter than two months) and for certains duties in the manufacturing industry designated by an ordinance, in particular for transformation works and assembling works (prohibition of temporary workers in manufacturing industries).

I – 2. Limitation to 80% of the use of worker dispatch in groups of companies

With this reform, companies that dispatch their employees on a temporary basis to companies of the group to which they belong must limit the dispatch rate within the group (mother company and consolidated daughter companies) (computed on a work hour basis) to less than 80%.

Currently, even if a company dispatches its employees to a specific company only, this dispatch is not illegal as long as the company makes enough effort to ensure jobs in group companies other than the hosting company, through advertising and the like. But with this reform, it will be necessary to keep the rate of dispatched employees below 80%.

II - Improvement of work conditions of temporary workers by strengthening indefinite term employment

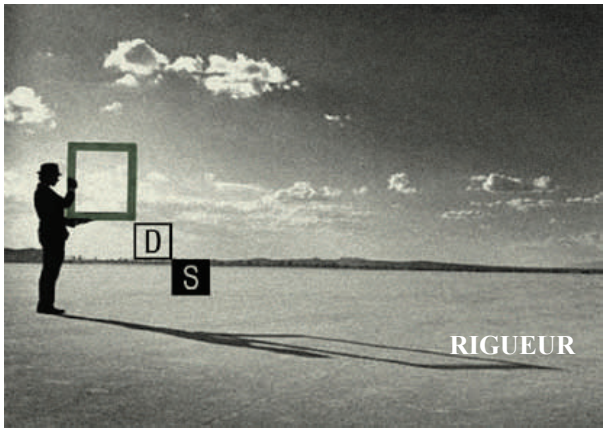
With this reform, staffing agencies are asked to make efforts to make it easier for temporary workers to get indefinite term employments by doing their best to allow them to find

indefinite term employment contracts with third companies, and by introducing them as candidates for job positions (« shokai yotei haken ») if they have a licence for this placement activity. These obligations, however, remain best efforts obligations and, accordingly, we believe it is not certain that these measures can improve the status of temporary workers.

III - A quick and efficient answer to illegal dispatches (the system of requalification of the offer in an employment contract (requalification in employment contract), and other issues)

With this reform, when companies accept to host temporary workers coming from staffing agencies in violation of the law (including in the event of disguised subcontracting), they will be considered to have issued an offer of employment contract to the relevant temporary workers whose terms and conditions are identical to the ones of the contract between the staffing agency and the relevant temporary workers.

This system was created as the most important measure of the reform. It will allow an employment contract to be formed between the hosting company and the temporary worker when the latter expresses its intent to accept the offer.



Nevertheless, considering the frequency of disputes between staffing agencies, hosting companies, and temporary workers on the illegal aspect of dispatch, there is concern that there will an increase in litigation on the « requalification in employment contract » at the initiative of temporary workers against hosting companies. This will generate serious trouble. Besides, the « requalification in employment contract » will not apply if the hosting companies ignored that the dispatch was illegal. In case of non faulty ignorance of the illegal aspect of the dispatch, hosting companies will not be in violation of the law.

The elements mentioned above are the main points of the reform, but the reform contains others that also raises issues. It is therefore necessary to observe the evolution of the debates on this subject and, in particular, the fate of this proposal of reform.

SINGAPORE

THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE RELEASE NEW ARBITRATION RULES

The Singapore International Arbitration Centre ("SIAC") recently published its latest edition of the SIAC Arbitration Rules, which have come into operation on 1 July 2010 (the "New Rules").

The New Rules are based on the previous rules released in 2007 but have been clarified and updated. There are also some new provisions that were introduced to facilitate even more efficient and effective arbitration.

I - New expedited procedure

The New Rules introduce an expedited procedure which a party can apply for if the amount in dispute does not exceed S$5m, or if all parties agree, or in cases of exceptional urgency. If the SIAC Chairman agrees for expedited procedure to be used, then:

- the SIAC Registrar has the power to shorten any time limits under the Rules;
- the case shall be referred to a sole arbitrator (unless the Chairman decides otherwise);
- the award shall be made within six months from the date the Tribunal is constituted; and
- the Tribunal will only state the reasons for the award in summary form.

Notably, this provision intends to address the growing concern that the traditional benefits of arbitration, namely speed, cost and efficiency, have been eroded.

II - New Emergency Arbitrator procedure

In order to assist parties in obtaining emergency relief, the new Rules allow a party to apply for the appointment of an emergency arbitrator concurrent with, or following, the filing of a Notice of Arbitration but prior to the constitution of the Tribunal. An Emergency Arbitrator will be appointed by the SIAC Chairman within one business day of receipt of an application for emergency relief and must establish a schedule for consideration of the application within two business days of appointment.

The Emergency Arbitrator shall have the powers of the Tribunal and may order any interim relief he deems necessary. After the Tribunal is constituted, the Emergency Arbitrator shall have no further power to act, and the Tribunal may alter any interim relief granted by the Emergency Arbitrator. Any order issued by the Emergency Arbitrator will cease to be binding if the

Tribunal is not constituted within 90 days of the order, or when the Tribunal makes a final award.

III - Provisions to improve speed and efficiency

Various further amendments have been introduced to assist with the speed and efficiency of arbitrations. Notably, the time period by which a party must nominate an arbitrator has been shortened from 21 to 14 days if three arbitrators are to be appointed. The amendment also provides a more defined and efficient process to follow for the appointment of three arbitrators where there are more than two parties to an arbitration.

IV - New Tribunal powers

The new Rules give the Tribunal various new powers, some of which have been transferred from the Registrar. Notably, the Tribunal, rather than the Registrar, will decide the seat of arbitration where the parties do not agree. Further, the Tribunal may now choose to hold a hearing for the presentation of evidence and/ or for oral submissions, on its own initiative as well as at the request of the parties. The powers of the Tribunal set out in Rule 24 have also been expanded and clarified.

V - Removal of Memorandum of Issues

The requirement for a Memorandum of Issues defining the issues to be determined in the arbitration has been removed. This will shorten the timetable of some arbitration cases. However, as the use of a Memorandum of Issues can sometimes assist in clarifying the issues to be decided, it might still be useful in some arbitration cases.

VI - Right of either party to challenge an arbitrator

if he or she refuses or fails to act or is not fulfilling his/her functions in accordance with the Rules or within prescribed time limits. The Chairman of SIAC further has a discretionary right to remove an arbitrator for that reason (Rule 14).

VII -Additional protection of confidentiality by allowing the tribunal to impose sanctions in case of a breach of confidentiality obligations (Rule 35.4).

THAILAND

REGIONAL OPERATING HEADQUARTERS IN THAILAND (II)

The Thai Cabinet is currently considering a new bunch of measures in order to strengthen the competitiveness of the country in the Region. This new law mainly aims at improving tax regulations applicable to Regional Operating Headquarters (ROH).
The law is expected to be enacted soon.

I – Criteria

The criteria pertaining to the legal structure that can benefit from the ROH status will remain the same. Indeed, it will still be required by the new law that the minimum paid-up capital of the applying company is at least of 10,000,000 THB (250 000 EUR) or over at the end of each accounting period.
What is new is the calendar in which the ROH based in Thailand would have to evidence that it provides services to affiliated companies in countries outside Thailand. According to the new rules, the ROH will have to provide services to foreign companies situated at least:

- in 1 country at the end of the 1st and 2nd accounting years of its creation;
- in 2 countries at the end of the 3rd and 4th accounting years, and
- in 3 countries at the end of the 5th year.

The list of eligible activities will remain the same as in the previous scheme (business management, research and development, sourcing of raw materials, investment feasibility studies, human resources training…) plus any other type of activity that might be approved by the Board of Investment (BOI) on a case by case basis.

In addition, the ROH will have to evidence a total business spending of at least 15,000,000 THB (375 000 EUR) per year or have at least 30,000,000 THB (750 000 EUR) of directly related investment in Thailand per year.

ROH structure will not have to comply with the common restriction regarding the ratio Thai/foreign workers but ROH will have to demonstrate that it employs skilled staff (Thai or foreigners) representing at least 75% of the total number of employees, at the end of the 3rd year.
At the end of the same year, the average annual remuneration per worker of at least 5 employees will have to be equal to at least 2,500,000 THB (62 500 EUR).

Once all these criteria are reached, the ROH has to notify the Revenue Department within the 5 years following the effective coming into effect of the law to benefit from the incentives described below.

II- New Incentives

The new package of measures is mainly composed of tax incentives measures which will be awarded by the Bureau of Large Business Tax Administration (LTO) of the Revenue Department.

The portion of income derived from overseas operations will be exempted of tax for a period of time of 10 years, renewable for 5 more years, whereas the portion of income derived from local operations will be taxed at the preferential rate of 10% (instead of 37%) for the same duration of 10 years, also renewable for 5 years.
This complementary Corporate Income Tax (CIT) exemption and/or preferential rate of 5 years will be allowed subject to the condition that the accumulated expenses of the ROH in the 10th year exceeds 150,000,000 THB (3 750 000 EUR).

The royalties will remain taxable at the same rate of 10% but the time frame in which ROH can benefit from this preferential rate will be reduced to 10 years.
The dividends received by the ROH as well as the dividends paid by the ROH to companies incorporated outside Thailand will remain exempted of CIT for the same period of 10 years.

At the Personal Income Tax (PIT) level, expatriates employed by the ROH will remain exempted for the portion of their income paid by oversea company.
The portion of their income paid directly by the ROH will still be taxed at a capped rate of 15% instead of 37%, but the duration of this measure will be extended from 4 to 8 years.
These tax benefits will apply only to expatriates working at an executive level and having high degrees of specialists.

The above exemptions will be subject to the fact that at least 50% of the total revenues of the ROH are income generated by services rendered to overseas companies.

III- Implementation

This new model is currently under the consideration of the Thai authorities and should be enacted soon.

ROH companies set up under the previous scheme will be able to decide whether to remain under the current scheme or to apply under the new scheme subject to compliance with the new criteria mentioned above. In order to do so, ROH companies will have to officially notify to the Revenue Department that they intend to terminate the previous scheme and apply to benefit from the new scheme measures.

VIETNAM

NEW PROVISIONS OF DRAFT OF REVISED LABOR CODE MAKES PROGRESS

The third version of the draft of the revised Labor Code (the "Draft") has been made available for further discussion and comments from legal experts and lawyers before being submitted to the National Assembly's approval in 2011. The Draft is

expected to make comprehensive changes to labor usage and management.

Substantial changes are expected in wages, working hours, gender equality, labor dispute and strike resolutions. Notably, the Draft introduces an innovative concept in Vietnam: the subleasing employee.

According to the Draft, the concept of subleasing employee means an employee recruited by an employer who would be on a sub-lease for another employer under a business contract between the two employers. The employee, accordingly, shall be under the management of the new employer while still under an employment contract with the main employer.

An enterprise which has been licensed for subleasing employees shall have the right to sublease its employees to another employer providing that the employees agree.

The Ministry of Labor Invalids and Social Affairs will be the authority issuing the license which would be considered as a sub-license/special license for the employer. It is noted that only employers being enterprises, but not employers as individuals, will be able to apply for a license.

The employee sub-lease business would be categorized as a conditional investment sector since the satisfactory conditions would be provided by the Government later on. In addition, according to the Draft, only a limited number of works can be subleased and content of the subleasing employee agreement between the two companies will be required to comply with provisions to be provided by the Ministry of Labor, Invalids and Social Affairs.

In order to protect the rights and benefits of the employee, the Draft provides that the subleasing enterprise is required to sign a labor contract with a definite term (from 12 to 36 months) or a contract with an indefinite term with its employee. The subleasing enterprise and the leasing enterprise are required to ascertain clearly rights and obligations of each party regarding the employee within the duration of work and undertake to ensure the rights and interests of the employee in accordance with the labor law.

It can be said that the provision would be deemed an acknowledgment of a practice which has occurred for years in Vietnam. Indeed, notably in the field of human resources services, a lot of HR companies have been providing the sub-lease of employees rather than providing only recruitment services as legally recognized in their business registration certificate or investment certificate.