NEWS LETTER ASIA

OCTOBER 2009

CHINA

ONLINE ARBITRATION

With an experience in online arbitration since 2002 (over 1000 disputes have been handled to this date), solving the disputes arising from the use of the .CN domain names, the China International Trade Arbitration Commission (CIETAC) has recently released its first "Online Arbitration Rules" (the Rules). These Rules came into effect on May 1, 2009, and apply preferably and not only to the resolutions of disputes over online commerce transactions, but also to any other dispute in which the parties agree to apply these Rules.

CIETAC has become the second arbitration commission in the world (with the "American Arbitration Association") to introduce specific online arbitration rules.

I- <u>Exchange of documents</u>

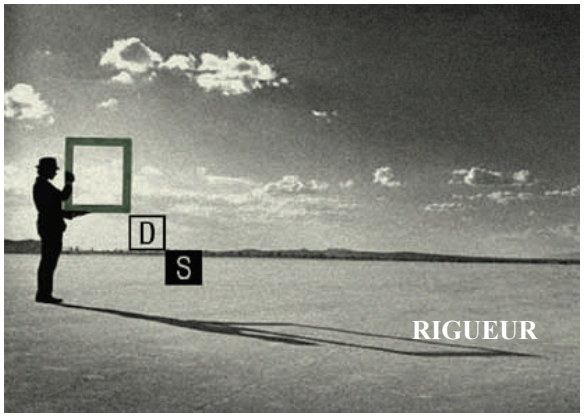
The secretariat of CIETAC shall serve all the documents, notifications and materials pertaining to arbitration on the parties and/or their representatives by electronic mail, electronic data interchange or facsimile transmissions, although the secretariat of CIETAC and the arbitration tribunal may at any time chose to use wholly or in part other traditional modes such as the post or express courier, depending on the progress of the case.

In the absence of a specific request from the parties regarding the media of information transfer, the secretariat of CIETAC shall, depending on the circumstances of the case, use one of the following means in accordance to the preference order hereafter:

- Electronic transmission, allowing for a transmission receipt
- Facsimile transmission, allowing for a confirmation of transmission
- Postal or express courier services allowing for the follow up of the mail
- Any other efficient media.

In the same way, the requests for arbitration, the memorials, conclusions, pieces of evidence and any other document or material related to the arbitration served by the parties to CIETAC shall be transmitted through email, electronic data interchange or facsimile. However the secretariat of CIETAC or the arbitration tribunal, or the parties upon approval from the secretariat of CIETAC or from the arbitration tribunal, may also chose to use postal or express courier, wholly or in part.
The electronic documents produced, transmitted, received or stored by electronic, optical or magnetic means are considered as evidence by CIETAC. Besides, CIETAC will be paying a close attention to the difficulty of identifying the reliability and authenticity of a piece of electronic evidence produced by the parties, and especially to the difficulty of identifying the authenticity of electronic signatures. This is partly the reason why CIETAC may resort to traditional modes such as post and courier for the communication of the documents.

Moreover, the Rules provide that CIETAC will use all reasonable endeavours to keep secure data communications between the parties, the arbitral court and the secretariat of CIETAC, and the confidentiality will be ensured through encrypted electronic data.



II – Proceedings and time limits

II-1. Commencement of arbitration proceedings

The proceeding is deemed to commence on the date on which the request for arbitration is filed with the CIETAC (using an application form set by the CIETAC and indicating the selected media of communication transfer), along with the documents to support its claim and relevant arbitration fees as determined by CIETAC's arbitration fee schedule.

Within five days from receipt of the request for arbitration, the CIETAC shall accept or refuse to handle this request and inform the claimant of its decision. The CIETAC shall then notify the respondent of the commencement of the arbitration proceedings. Within thirty days from the date of receipt of the notice of arbitration, the Respondent shall file a statement of defence, or a counterclaim using a form set by the CIETAC, along with all complementary documents to support its defence.

II.2. Arbitrators

Within six days of receipt of the notice of arbitration, the parties must nominate one or three arbitrators from CIETAC's approved panel of arbitrators. Where the parties have appointed an arbitrator from outside of the CIETAC's panel of arbitrators, the Chairman of the CIETAC must approve such appointment. Where the appointment is refused, the CIETAC has no obligation to explain the reasons for the refusal.

II.3. Hearing

As a general rule, no oral hearing shall take place. Where considered necessary however, the arbitration tribunal shall conduct an online trial hearing (using internet video conference for example), although the arbitration tribunal may also use traditional in-person trial hearing if it is considered necessary.

II.4. Arbitration award

The arbitration tribunal usually makes its award within four months of its constitution. This time period may be extended if necessary.

II.5. The summary procedure and the expedited procedure

The summary procedure applies for all disputes with a value of more than RMB 100,000 but less than RMB 1,000,000, while the expedited or fast-track procedure applies for disputes with a value of RMB 100,000 or less. The parties regardless of the amount at stake may also use such procedures upon specific request.
In these cases, the arbitral tribunal is composed of one arbiter only, who shall make its award within two months of its constitution under the summary procedure and within 15 days under the expedited procedure.

This new arbitration procedure appears perfectly suitable to the disputes over online commerce transactions: such disputes usually occur between parties living in places geographically distant from each other and using electronic communications media for all exchanges; faster than the classic procedure: four months instead of six months; and cost effective: the arbitration fees are lower than in the case of a traditional arbitration, with no transport fees to participate in a hearing. However, the main difficulty remains the confirmation of the authenticity of the documents served by the parties.

INDIA

Direct Tax Code

The Ministry of Finance released on 12 August 2009 the draft of the Direct Tax Code that is to replace the 1961 Income Tax Act and other direct tax laws.

The Code is purposed to enter into force from next financial year (2010-2011) that appears unlikely because of the current great debate there about.

The new Code aims at four main goals:

Simplification of the current direct tax system

The Code would repel the I-T Act 1961 and some other laws.

Codification

This would be the first tax codification attempt.

Reduction of the direct tax burden for both individuals and corporate

Individuals:

The tax scale will be revised and tax brackets will be increased.

(cf: board)

Corporate:

Direct tax system for domestic and foreign companies will be unified.

Tax rates for both domestic and foreign companies are proposed to be reduced from respectively 33.99% and 42.23 to a single 25% rate.

Domestic should still be subject to the distribution dividends tax at a reduced rate of 15% whereas foreign companies should be subject to a new "branch profits tax" at the same 15% rate.

Effective reduction of the corporate tax burden could be threatened by shifting the taxable basis of Minimum Alternative Tax (MAT) from "book profits" to "gross assets". That would mean that MAT should be paid at 2% rate on gross assets by any company whose chargeable corporate tax amount would be less that amount of MAT.

Redefinition of incentives granted to companies

Some of current incentives granted to companies are to be eliminated such as export based incentives.
Others, like exemptions or reductions granted in the Special Economic Zones would be discontinued from 2011 but without affecting companies having being granted such advantages before.

At last a new set of incentives linked to capital investment shall be released for a list of priority projects (power, infrastructure, oil-gas, hospitals…).

Current income brackets (INR)	New income brackets (INR)	Tax rates
Up to 160,000 190,000 for women 240,000 for + 65 years	Up to 160,000 190,000 for women 240,000 for + 65 years	0
160,001 - 300,000	160,001 - 1,000,000	10%
300,001 - 500,000	1,000,000 - 2,500,000	20%
Above 500,000	Above 2,500,000	30%

JAPAN

Accession of Japan to the Vienna Sales Convention

The United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980 (Vienna Sales Convention; "CISG") entered into effect in Japan on August 1, 2009.

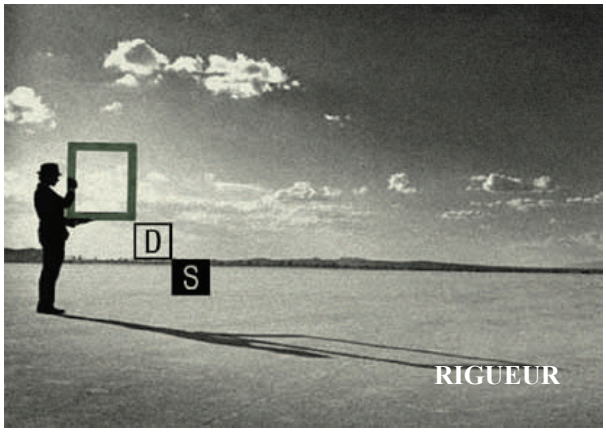
The CISG's unifying substantive rules for international sales have become Japanese substantive law for international sales. From now, the CISG replaces essential provisions of the Japanese Civil Code and Commercial Code relating to sales of goods.

1. Cases of application of the CISG

A sales contract is governed by the CISG when the said contract entered into the scope of application of the CISG and when the parties do not expressly exclude the said application of the CISG.

1.1 Determination of the application of the CISG

The CISG is applicable to contracts signed by parties who have their places of business in the different contracting states (Article 1-1-a), or who have their places of business in a contracting state and in a non-contracting state, or in different non-contracting states when the rules of private international law lead to the application of the law of a contracting state (Article 1-1-b).



- Two parties are located in contracting states of the CISG

If a governing law is not stipulated in a contract, the CISG governs such contract and supersedes the relevant provisions of the national laws (including the private international laws) of the parties. If the parties designate French law or Japanese law as the governing law without excluding the application of the CISG, the CISG is in principle applicable to the contract and is completed by French law or Japanese law when elements are not covered by the CISG.
In order for the said international contract to not be governed by the CISG or by some provisions of the CISG, the parties must expressly stipulate the exclusion of the CISG in their contract. In this regard, it should be noted that most of the provisions of the CISG are discretionary so that the parties can derogate from some provisions of the CISG only and have their contract governed by the CISG.

- Only one party is located in a contracting state of the CISG

On the other hand, in the event that the contract is signed between parties, one of which is located in Japan and the other in a non-contracting state (e.g.Vietnam, Thailand, etc.), and that the contract provides that Japanese law is applicable or that Japanese law is designated by the rules of the private international law of a court, the CISG is applicable except if it is expressly excluded in the contract..

1.2 Scope of the application of the CISG

The CISG is applicable to sales contracts for goods bought not for personal, family or household use, in general.

The CISG is applicable to contracts signed after the entry into force of the CISG in Japan.

2. Consequences of the application of the CISG: principal differences between the CISG and Japanese law

The parties to a sales contract of which one party is a Japanese enterprise will have to take into consideration the consequences of the application of the CISG, especially because certain provisions are different from Japanese law. Such differences include, without limitation, the following points.

(1) Relaxation of the mirror image rule. The CISG sets forth that even in the event that the reply to an offer contains additional or different terms, the said reply constitutes an acceptance of the offer when the said terms do not materially alter the terms of the offer, provided that the offeror does not make an objection (Article 19-2). Under Japanese law, acceptance should be identical to the offer in order for a contract to be made. A reply accompanied by additional or different terms constitutes a counter-offer.

(2) Negation of the principle of fault for liability. In principle, a party is liable even in the absence of fault (Article 45-1-b, Article 61-1-b). Under certain conditions, cases of *force majeure* can be allowed to negate liability (Article 79). Under Japanese law, fault or negligence is necessary in order for liability to be applicable (Article 415 of the Japanese Civil Code).

(3) Cooperation between the parties in the event of a breach by the obligor. The CISG contains provisions aiming at promoting the cooperation of the parties, even in the event of a breach of one party: the right of later repair of the seller (Article 48), the obligation to minimize damage (Article 77), the obligation of conservation of the objects (Articles 85 and 86), etc. This obligation of cooperation in favor of the breaching party is not provided under Japanese law.

* * * * *

Considering the fact that the provisions of the CISG are, in principle, applicable in a discretionary manner, and taking into account the interpretation difficulties and the risk thereof, it is advisable for the parties to expressly stipulate in their contract to which extent they wish to apply the provisions of the CISG.

SINGAPORE

AN EXEMPLE OF RESPECTIVE OBLIGATIONS OF DIRECTORS, EMPLOYEES AND TOP MANAGEMENT, FOR THE USE OF GROUP CHANGING TH COMPANIES FOR WHICH STAFF IS WORKING: THE *ABB HOLDINGS PTE LTD AND OTHERS V SHER HOCK GUAN CHARLES* CASE

In this case, the High Court (HCJ) had to pronounce itself about an action commenced by three companies of a group specializing in High Voltage circuit breakers against one of its former employees.

This former member had set up his own business competing with the group's at the time he left the group. The plaintiff alleged that the defendant had

breached several of the obligations he owed to the group, based on the status of employee, director and member of the group's top management.
This case is interesting as it allows perceiving similarities and differences of loyalty obligations owed by an employee, a director and a member of the top management.

I - Director's loyalty obligations extend to the top management

Directors have duties toward the corporate entity that appointed them, such as avoiding conflicts of interests. The High Court, following the persuasive precedents from other Common Law jurisdictions, decided that these obligations extend to the top management, whom have direction powers over the corporate entity.

II - Exclusion of the notion of group in the context of directors' duties

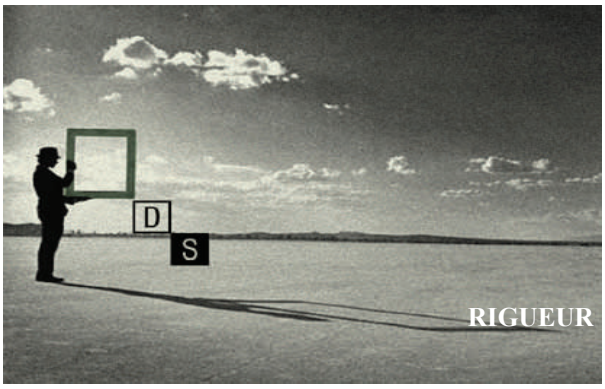
The judge expressly out ruled any contagion of the duty owed to one company to other companies of the same group. It might therefore seem paradoxical that the judge has been looking for past employments in the companies of the same group when assessing whether the position held was a "top management" position. However, this assessment was done within the frame of a factual research to understand what precisely the position held was.

The judgment appears however not to exclude the possibility to provide for the protection of the whole group in a contract. Further case law would be interesting in this respect. Indeed, such kind of clause could certainly raise the same questions as non-competition clauses. An ambiguous drafting seems also to suggest that such extension could an implied term.

III - The practical consequences of these distinctions

Group of companies, such as "Multi-National Corporations" often have staff changing position and moving from member to member companies of the group. In the context of a change of position from one subsidiary to another, contracts are signed that might neglect to protect the interests of the group as a whole. This case illustrates that this loopholes must be closed by specifically drafted clauses.

Furthermore, under the laws of Singapore, the enforceability of non-competition clauses is subjected to a restrictive legal framework. This case outlines that top management and directors have obligations that may come and back protection offered by such clauses.



THAILAND

Customs audit

Despite the economic crisis, Customs audit have increased in Thailand targeting reputable foreign owned companies. Carried by the Customs Department, a governmental agency under the Ministry of Finance, these audits are mainly aimed at preventing and suppressing offences such as smuggling, tax and duty evasion.

Since the end of 2008, we have noticed a tendency of Customs authority to increase their control, the current economic crisis apparently being a contributing factor.

Infringement, if established, can lead to substantial penalties. Here below is an overview of challengeable situations, common charges applicable and ways to minimize related risks and/or penalties.

I- situations:

The Thai administration regularly succeeds to evidence "invoice schemes". The authorities have tools to identify when official invoices disclosed underestimated value of goods in order to reduce Thai import tax, Thai V.A.T and Thai domestic excise tax.

Other issues may occur when a company imports machinery which must be run by software and the so-called software is downloaded from a server after the physical custom clearance of the machine. In this case the price of the software is invoiced separately and does not appear on the invoice related to the physical importation of the machine.

A similar risk arises when goods are sold but their related know-how is licensed to the buyer after. As the know-how can significantly increase the value of the physical goods, the customs value of the goods may have to include the amount of royalties charged for the know-how transfer, bearing in mind that the total amount of royalty might not be known at the time of importation.

II- Common charges:

Smuggling:

Section 27 of the Thai Customs Act (as last amended in 2005), provides that all importation of goods without proper customs clearance are subject to qualify for "smuggling".
The amount of penalty can reach up to four times the customs duty applicable to the value of the goods.

False declaration of goods:

Section 99 of the same Act limits the penalties to not more than 2 times the unpaid customs duty and to 1 time the amount of V.A.T unpaid, when declaration or documents are incomplete, missing, misleading or falsified. The offender will also be subject to a fine not exceeding 1000 EUR.

III- Minimizing risks and penalties:

Preventive measures:

Companies should endorse and implement through internal guidelines

good corporate governance about import and export procedures. Business undertakers should also check inter-companies agreements especially in case of know-how transfer.
Preventive measures can also be to destroy customs relevant documents after a 5 year period, and to outsource to an external warehouse's service providers data storage, in particular for documents which are not necessary for the day to day business.

Negotiating with Customs authorities:

Improperly imported goods can later on be reported to the Customs authorities by the Importer. The decision to waive or charge the applicable penalties and fines remains at the discretion of the Customs Officers.

In case the offence is established, the best option remains negotiation. Indeed, instead of filing a court procedure, the offender should decide in favor of an out of court settlement. This avoids a time input and cost burden.

Due to their hardship, penalties are most of the time negotiable and often reduced. Nevertheless, Customs officers receive bonuses based on the supplementary customs duty amount paid by the importer. In that context of conflict of interest, the willingness to settle cases at a lower amount may become questionable.

VIETNAM

NEW PROVISIONS REGARDING THE CAPITAL CONTRIBUTION AND PURCHASE OF SHARES BY FOREIGN INVESTORS IN LOCAL COMPANIES

Last 18th of June, 2009, the Prime Minister issued the Decision No.88/2009/ND-CP (the « Decision 88 ») enacting the *Regulation on capital contribution and purchase of shares in local enterprises by foreign investors* ("the Regulation").

Scope of application

The Regulation applies to investments made in existing companies in Vietnam through the following ways:

✦ Capital contribution or subscription for shares ; or
✦ Acquisition of a part of capital contribution or shares from an existing member or shareholder.

This Regulation puts aside foreign direct investments such as the setting up of a 100% foreign owned companies or joint venture under the Enterprises law and the Investment law of 2005, investments under BCC (Business Cooperation Contracts), BOT (Build Operate Transfer), BTO (Build Transfer Operate), BT (Build Transfer), and merger & acquisition transactions. Furthermore, this Regulation does not apply to stock market transactions which have to be prescribed by specialised legislation.

Suppression of the Decision 36/2003/QD-TTG

The Decision 88 and the Regulation replace the Decision 36/2003/QD-TTg dated 11th of March, 2003 (the « Decision 36 ») that was issued before the adoption of the new corporate corpus of Enterprises Law and Investment Law of 2005 which provided the capital

contribution and purchase of shares in local companies by foreign investors. However, after the effective date of these two laws as from 1st of July, 2009, the Decision 36 had not been officially suppressed though it contained provisions which did not comply with the Enterprises Law, the Investment Law, and the WTO Commitments of Vietnam.

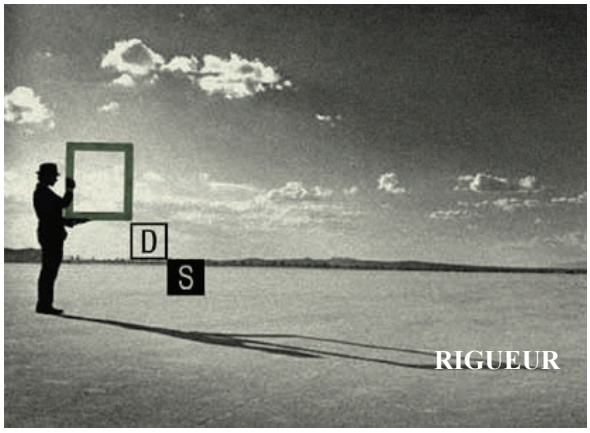
Replacing the Decision 36, this Decision 88 contributes to clarify the above mentioned incoherent situation.

Existing conflict with the Investment Law

Under the Regulation, the following entities shall be considered as *foreign investor*:

✦ An organisation established outside Vietnam ;
✦ An organisation established in Vietnam in which foreign investors' contribution is higher than 49%;
A foreign individual not having the Vietnamese nationality who resides in Vietnam or abroad.

It seems that the Decision « has extended » the definition of foreign investor which also includes organisations established in Vietnam in which contribution by foreign investors exceed 49%. Such *foreign investor* is absent in the related definition mentioned in the Investment Law which refers more foreign investors more generally as *foreign organisations and individuals*.
Additionally, this definition of foreign investors does not include oversea Vietnamese who are generally considered separately as a specific kind of foreigners. Logically, the Decision 88 should apply to them since they do not have Vietnamese nationality. However, the Decision 88 does not clearly define this point.



Limit of foreign investors' participation in local companies

Pursuant to the Regulation, the level of foreign investors' participation in local companies is prescribed as follows :
✦ In public companies : in accordance with the securities legislations, saying 49% of capital of a public company;
✦ In companies with specific activities : in accordance with specialised provisions (e.g. limit of 30% of capital for a shareholding bank established in Vietnam) ;
✦ In companies carrying out services mentioned in international treaties : in accordance with provisions of the related treaties (e.g. the WTO Commitments of Vietnam);
✦ In State-owned enterprises in equitisation : in accordance with their equitisation plans ;
In other companies for which the laws does not impose any restriction, the foreign investors' contribution is not limited, meaning that foreign investors may purchase 100% of shares in these companies.

The main change is that Decision 88 suppresses the cap of 30% as provided in the Decision 36. Foreign investors' participation is now more opened and complies with the WTO Commitments of Vietnam as well as the Investment and Enterprises Laws.

Other changes compared with the Decision 36

In addition, the Decision 88 does not specify sectors available to foreign investors' participation. Consequently, foreign investors are authorised to

contribute capital or purchase shares in local enterprises in almost of sectors which are not prohibited by laws.

Otherwise, in comparison with the Decision 36, the Decision 88 provides some significant changes. Nowadays, foreign investors are entitled to subscribe for shares initially issued by a shareholding company. Regarding the capital contribution, in addition to the capital contribution or share purchase from a member of a limited liability company or a partnership company, the Decision 88 allows foreign investors to purchase shares from an individual enterprise owner or to contribute to capital with this owner in order to convert such individual enterprise into a limited liability company.

In conclusion, Decision 88 provide us with details regarding capital contribution and purchase of shares in local enterprises by foreign investors. We hope the Ministry of Planning and Investment will soon issue the related application circular so that the Regulation may enter into practice.

UPDATE ON PERSONAL INCOME TAX (PIT)

PIT remains an interesting topic since beginning of this year 2009, thanks to the State's policy of PIT exemption and reduction aiming at supporting the economy. Please find hereafter the latest updates.

Confirmation of PIT exemption

Recently, the Ministry of Finances has issued the Circular 160/2009/TT-BTC (« Circular 160 ») regarding the detailed instructions on PIT exemption under the Resolution 32 of the National Assembly.

With regards to salary and wages paid to employees in the first 06 months of this year, the following amount is subject to PIT exemption:

✦ Salaries and wages paid to employees for the first 06 months, during 1st of January to 30 of June, 2009 ;

✦ Salaries and wages derived from the first six months in 2009 in accordance with the labour contract which has been registered in the employer's books or approved by the latter but not having paid before 30th of June, 2009. In any case, this amount of salaries and wages must be paid before 31st of December, 2009 ;

✦ 50% bonus of the year 2009 such as year-end bonus, salary for 13th month. These bonuses must be paid before 31st of March, 2010 ;

✦ The whole of bonuses for the first two quarters of this year. In any case, these bonuses must be paid before 31st of December, 2009 ;

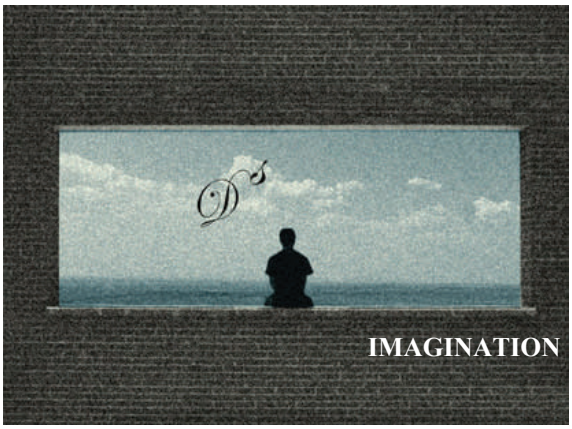
✦ Other payments such as vacation allowances (distinct from paid leave), holiday allowances (distinct from paid leave or public holiday), uniform allowances and other benefits which are paid in the duration from 1st of January to 30th of June, 2009 ;

Salaries and wages derived from the year of 2009 but paid during 1st of January to 30th of June, 2009.

Consequently, the 2008 bonuses paid in 2009 (such as *Têt – Lunar New Year* - bonus) are exempted from PIT.

PIT declaration and payment for employees: employees' or companies' obligation ?

As from the effective date of the new PIT legislation (1st of January, 2009), we received questions from several companies regarding PIT declaration



and payment for their employees.

Currently, employers and employees agree on gross salary payment (net salary + PIT) instead of net salary payment as previously. Furthermore, the employees now have their personal fiscal code. In this situation, the question to raised is who - employees or employers – should declare and pay PIT derived from the employees' salary and wages? It should thus logically be the employees.
However, in response to that question which we officially submitted, the Hanoi Fiscal Department has issued the official letter 13573/CT-Htr dated of 13th August, 2009, stating that nevertheless the new regulations, employers are obliged to declare and pay PIT for their employees. For this purpose, they have to continue deduct the PIT amount from their employees' salary and wage when paying the salary...

In brief: the regulations have changed, but the practice has not.