NEWSLETTER ASIA

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CHINA

EVOLUTION OF THE SOCIAL SECURITY IN CHINA

The chinese social security system was established thanks to a decree on the 26th February 1951.

The system was not amended until 1980, up to this date different reforms took place.

At the moment, the political power is developing legislation to improve the system and to reach its target: to coordinate the social security cover around all the territory and for all the population.

Indeed, there exists today an important discrepancy for the population depending on whether it lives in the country or in the towns, depending whether it works in a public, ---- public or private company.

Moreover, the system poses a problem for migrant employees because they lose the benefits of their financial right when they travel from one town to another.

I – The current system

There are five social insurance systems: pension, unemployment insurance, health insurance, workers' compensation insurance and maternity.

The social contributions are paid first by the State, second by the company, lastly by the employee.

Furthermore, a distinction must be made between a Chinese employee and a foreign one.

Indeed, the foreign ones has no obligation to contribute in China, they just have the possibility to do that in Guangzhou, …

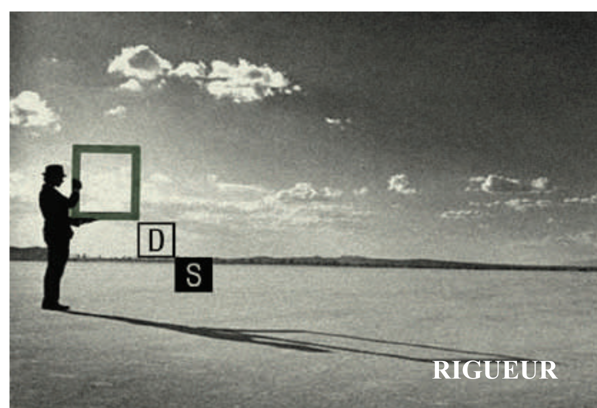
At the moment, foreign employees are allowed to contribute in the five towns in the following insurances :

II – Evolution of the foreign employees' situation regarding the new legal measure

The most recent social security laws, published on the 28th October 2010, will come into force on the 1st July 2011.

It arises from a first analysis of the law that the foreign employee will have to contribute.

However, without the publication of the rule's application, it is difficult to have an idea of the effect of this reform for the foreign employees' social statute in China.



For the moment, as explained here above, the foreign employees do not have the obligation to contribute in China, in order that they always stay subject, for example, to French regulations if they are seconded, and contribute to a voluntary insurance if they are expatriated.

What will the implications of this law be if it renders contributions mandatory for the French?

Obviously there will be an additional cost for the companies with foreign assets.

Indeed, to date, there does not exist any convention of social security between France and China. This is nevertheless under discussion.

As it stands, for lack of a convention, the companies will contribute on two accounts. On the one hand at the CFE, in order to cover French employees with the amount that they would have in France, and on the other hand in China because of the obligation which will be made to them.

It is advisable however not to lose sight of the fact that the insurance at the CFE is purely voluntary so that the employer will be able to be satisfied with contribute in China, but it is probable that few employees will agree to join a company which does not offer the advantage of a reliable social security.

We can indicate right now that the foreign companies will have some reserves with contribution only in China if they wish to attract executives coming from France.

In addition, it is advisable to specify that the payment of the national insurance contributions is capped in China at three times the average wages of the town of reference. That means, that for the major part of the expatriates whose wages are higher than this ceiling, the amount of the national insurance contributions will be calculated on the basis of this ceiling.

Would the ratification of a convention of social security change things?

According to our information (discussions having taken place during the 1st quarter 2011), it would seem that health insurance could be excluded from the convention.

Consequently, on the assumption that foreign employees would be actually subjected to national insurance contributions in China, this will generate an additional cost for companies which will wish to ensure their employees a continuity of their cover because in addition to the obligatory payment of national

insurance contributions in China, they will have to maintain an affiliation to the CFE.

INDIA

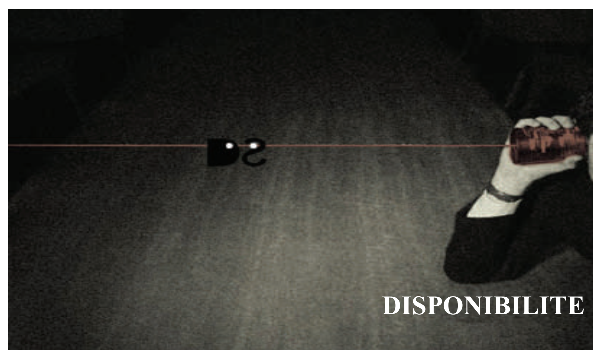
IFRS CONVERGENCE APRIL 2011 PHASE 1

India has adopted International Financial Reporting Standards which as of 1 April 2011 will apply to public companies listed on the BSE Sensex, Nifty 50 and stock exchanges outside India, as well as companies (listed or otherwise) whose net worth exceeds INR 10 billion. This excludes companies in the insurance and finance (banking and non banking) sectors, for whom convergence has been deferred to April 2012.

As far as business combinations are concerned, there are some noteworthy differences.

Under IFRS business combinations are defined to include mergers and acquisitions in but Indian GAAP's the definition is restricted to mergers.
Acquisition costs (finders' fees, legal expenses etc) are accounted for in the period in which they were incurred and the services provided, Indian GAAP had no provisions in this regard.

While determining whether or not an entity has the power to govern and influence the policies of another entity, IFRS takes potential voting rights into consideration,



Indian GAAP does not consider them while assessing significant influence and control.

As IFRS focuses on the substance of a transaction and not just its legal form, it envisages situations where the legal subsidiary's shareholders effectively control the combined group, including the legal parent company. Thus in reverse acquisitions the legal acquirer will be treated as the acquiree, unlike the Indian GAAP rule based on legal form, where the acquirer is treated as the acquirer for legal as well as accounting purposes.

<u>Enforcement of international arbitration awards: Delhi & Bombay</u>

Pacific Basin Ihx (UK) Ltd v Ashapura Minechem Ltd (Arbitration Petitions Nos 24 &25 of 2010)
Judgement dated 20 December 2010
Bombay High Court
Justice S.C.DHARMADHIKARI

A dispute over the alleged breach of a contract of carriage of goods governed by English Law arose between the parties. In accordance with the dispute resolution clause, Pacific Basin initiated arbitration proceedings in the UK. When the parties were notified of the award issued by the sole arbitrator, Ashapura challenged the award under Section 34 (Part 1 applicable

to domestic awards) of the Arbitration and Conciliation Act 1996 before the District Judge of Jamkhabiliya, Gujarat, and also applied for an injunction to restrain Pacific Basin from enforcing the award. The District Judge dismissed the application for interim relief (to stay enforcement proceedings).

Pacific Basin filed two separate petitions before the High Court of Bombay seeking enforcement of the award and security for the award amount.

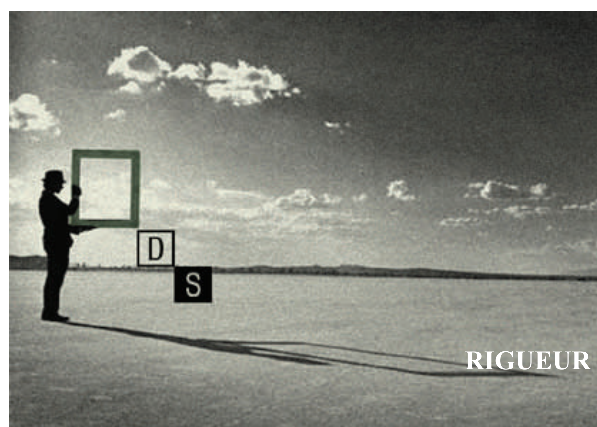
Ashapura challenged the jurisdiction of the High Court of Bombay to hear the enforcement petition on the grounds of litis pendens, and that under Sec 42 of the Arbitration and Conciliation Act 1996 the District Court in Jamkhabaliya had exclusive jurisdiction to entertain, try and adjudicate any subsequent proceedings including the enforcement petition. It requested the adjournment of the enforcement petition *sine die* until the District Court had ruled on its own jurisdiction.

The High Court of Bombay held that while it was for the District Court to rule on its territorial jurisdiction, the adjournment of the enforcement petition indefinitely and without conditions, would defeat Pacific Basin's right to seek the enforcement of the award. The Court also pointed out that granting an adjournment *simplicitor* on the grounds of litis pendens could lead to parties filing dilatory annulment proceedings to stall and delay the enforcement of a foreign award. The Court therefore adjourned the enforcement proceedings until the District Court ruled on its jurisdiction, but ordered Ashapura to furnish security with respect to the award amount.

Penn Racquet Sports v Mayor International Ltd (Execution Petitions No 386/08 & Execution Applications 4541, 704-705 & 77 of 2010)
Judgement dated 11 January 2011
Delhi High Court
Justice VIPIN SANGHI

A dispute over the alleged breach of a Trademark Licence Agreement governed by Austrian Law arose between the parties. Penn Raquet initiated arbitration proceedings before the ICC in Paris in accordance with the dispute resolution clause. As Mayor did not sign the terms of reference drawn up by the sole arbitrator or deposit arbitration fees, its request for additional time to file its statement of defence was rejected.

When Penn Raquet sought to enforce the award issued by the Sole Arbitrator, Mayor challenged the enforcement of the award under Section 48 of the Arbitration and Conciliation Act 1996 on the



grounds that it had not been given the opportunity to defend itself and that the award was contrary to public policy in India as the arbitrator had gone against the provisions of the Trademark Licence Agreement thus exceeded the scope of the terms of submission.

The High court of Delhi held that it was for the arbitral tribunal to interpret the provisions of the Trademark Licence Agreement governed by Austrian Law, and that Mayor could not apply Indian Law to interpret its provisions. The Court also found that Mayor's claim that the principles of natural justice were breached was without merit, pointing out that by virtue of the dispute resolution clause Mayor was bound by ICC Rules, and that it could not argue that its statement of defence should have been considered by the sole arbitrator despite its failure to comply with the ICC's rules on advance payment of costs. The Court held that the award was enforceable.

JAPAN

STRENGTHENING OF TRADE SECRET PROTECTION

Since 2003 Japan has had a dedicated system of protection against theft of trade secrets. This system, despite several amendments, including the reinforcement of statutory penalties, was subject to various criticism among which the fact that it only enabled to punish acts made with a "purpose of unfair competition," that it set restrictions on the means used to obtain trade secrets, and, lastly, that it did not play a strong enough preventive role. A new amendment to the Unfair Competition Prevention Act ("UCPA"), which was enacted on April 21, 2009 and came into effect on July 1, 2010 ("New Amendment"), tries to address this criticism.

Broadening of the element relating to the intention

It is now possible to punish any act of infringement of a trade secret made for "the purpose of acquiring an illicit gain, or causing injury to [the] holder." Disclosing a trade secret to persons who are competitors for the purpose of acquiring illicit gain, or posting a trade secret on a website simply for the purpose of causing injury to the holder of such trade secret, will constitute the crime of trade secret infringement, even if such act is not conducted for the purpose of unfair competition.

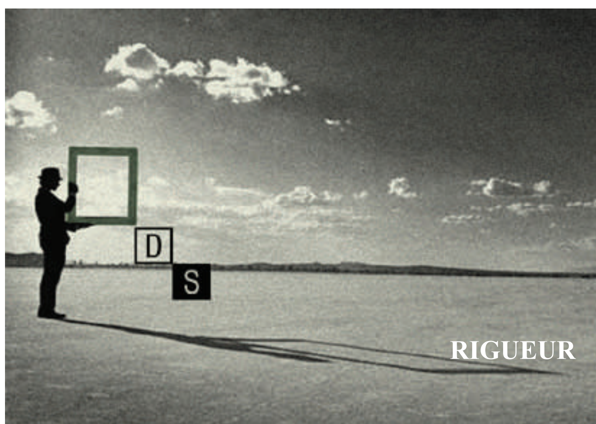
Expanding the scope of criminal punishment for wrongful acquisition of trade secrets

The New Amendment also abolished the limitation concerning the method of acquisition of trade secrets. Now, the overall acquisition of trade secrets for the purpose of acquiring an illicit gain, or causing injury to the trade secrets holder, are subject to punishment, no matter how these trade secrets were obtained. This means that illegally accessing the company's server and directly reading and taking out a trade secret can be subject to sanctions.

Applying criminal punishment to wrongful acquisition, etc., by a person who has a duty to manage a trade secret

Before the New Amendment, a person to whom a trade secret was disclosed by its holder, such as an employee or a business partner, was not subject to criminal punishment when he wrongly took a trade secret, but was subject thereto when he wrongfully used or disclosed such trade secret.

Now, a person to whom a trade secret was disclosed by its holder may be punished if, by breaching his duty to keep safe such trade secret, and for the purpose of acquiring an illicit gain, or causing injury to such holder:



i. he embezzled a data storage medium, etc., containing a trade secret or an item representing (containing) a trade secret;
ii. he reproduced the content or record of a data storage medium, etc., containing a trade secret, or reproduces an object representing a trade secret; or
iii. he failed to delete the content or record of a data storage medium containing a trade secret that should be deleted, and disguised it as though such description or record is deleted.

In other words, it will now be possible for an employer to sue one of his employees who saved a trade secret to a USB memory card to work at home, but does not give it back after he achieves the purpose of using such USB memory card or disguising a trade secret kept in a UBS memory card he owns that must be deleted, as though it was deleted, without a trade secret being disclosed to a third party, or used for one's own purpose.

In conclusion, the New Amendment should allow companies to be able to receive greater protection for their trade secrets by keeping those trade secrets in proper custody, and thereby, it is expected that there will be an effect of preventing the risk of trade secret leakage. On the other hand, however, because the New Amendment sets forth that the companies are also subject to criminal punishment for the crime of

trade secret infringement, it should be noted that the companies might also be subject to penalty charges up to JPY300,000,000 if their employee commits the crime of trade secret infringement in relation to their business. With that in mind, we think that there will be a need for a stricter management system for trade secrets, such as keeping employees well informed of rules for taking custody of information containing trade secrets, or providing in-house training as to what kind of acts constitute the infringement of a trade secret.

SINGAPORE

LAUNCH OF REPRESENTATIVE NOTIFICATION FRAMEWORK

On 26 November 2010, the Monetary Authority of Singapore ("MAS") launched its representative notification framework ("RNF") in the form of amendments to the Securities and Futures Act ("SFA") and Financial Advisers Act ("FAA"), as well as complementary subsidiary legislation, MAS notices and guidelines.
Under the RNF, financial institutions intending to appoint a capital markets services ("CMS") or financial advisers ("FA") representative will have to lodge a notice of intent with the MAS and provide a "fit and proper" certificate in respect of that representative.

I - Applicability of RNF regime

The RNF regime is applicable to individuals carrying out CMS or FA activities as representatives of:

holders of CMS or FA licences; and

financial advisers and CMS providers which are exempted by the FAA or the SFA respectively from having to apply for a licence (this category includes banks, merchant banks, insurance companies and finance companies).

II - Types of representatives

Section 2 of the amended SFA and FAA refers to three categories of representatives.

Appointed representatives are those which meet in full the entry and examination requirements prescribed by MAS. The relevant regulations are:

⇒ Notice on Minimum Entry and Examination Requirements for Representatives of Licensed Financial Advisers and Exempt Financial Advisers (for FA representatives); or

⇒ Notice on Minimum Entry and Examination Requirements for Representatives of Holders of Capital Markets Services licence and Exempt Financial Institutions under the SFA (for CMS representatives).

Provisional representatives are those which meet the entry requirements but which have not yet passed the relevant examinations. They are given a grace period of three months to pass the examinations.

Temporary representatives are engaged by their principals for a limited period of three months, and are therefore not required to satisfy examination requirements. This category is only available for activities under the SFA and is intended to address unexpected business needs by accommodating overseas-based representatives on a temporary or short term basis.

A new Notice on Entry Requirements of a Provisional or Temporary Representative was issued with effect from 26 November 2010 for CMS representatives. A similar Notice on Entry Requirements of a Provisional Representative was also issued for FA representatives.

Admission criteria

Financial institutions need to ensure that their representatives meet the necessary admission criteria, which include possession of the necessary qualifications, passing of specified examinations and meeting of the "fit and proper" requirements as set out in MAS' Guidelines on Fit and Proper Criteria ("Fit & Proper Guidelines"). The Fit and Proper Guidelines have been amended with effect from 26 November 2010 pursuant to the changes to the RNF. They apply to all three categories of representatives.

Lodgement of documents

The forms to be submitted by the applicants are set out in the Financial Advisers (Amendment) Regulations 2010 ("FA Regs") and the Securities and Futures (Licensing and Conduct of Business) (Amendment) Regulations 2010 ("LCB Regs"). Each form contains the notice of intention of the principal to appoint the representative as well as the principal's certification that the representative is "fit and proper". For temporary representatives, the principal has to additionally undertake to ensure that the provisional or temporary representative is supervised or monitored by an appointed representative, director of the principal or other responsible person.

Notification of changes or cessation

Principals are to notify MAS of any changes to their representatives' particulars within 7 days of being notified or becoming aware of that

change. The representative is to notify its principal within 7 days of the occurrence of the change. Please refer to Regulation 10 of the FA Regs and Regulation 5 of the LCB Regs.
In the event of the cessation of a representative's appointment, the principal must notify MAS no later than the next business day.

VIETNAM

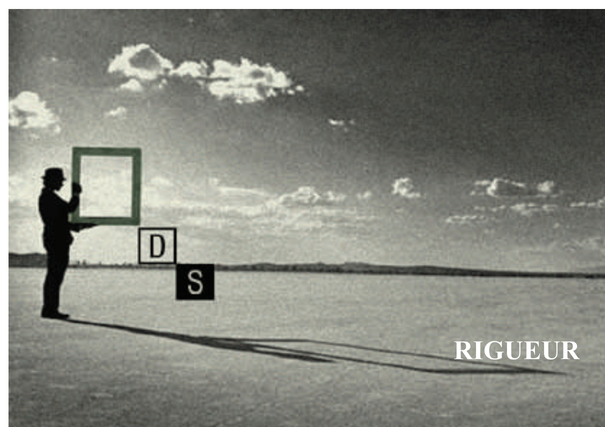
NEW PROVISIONS ON INVESTMENT AND DOING BUSINESS IN VIETNAM

The Law on Enterprises ("LOE") issued and effective from 1 July 2006 was completed by decrees and circulars issued to guide the implementation of the LOE. Thereby, Decree 139/2007/ND-CP ("Decree 139") dated 5 September 2007, provided detailed guidelines for the implementation of several provisions of the LOE. The issuance of Decree 139 resolved some difficulties of the enterprises governed by the LOE, especially concerning foreign owned companies. However, as from 15 November 2010, Decree 102/2010/ND-CP ("Decree 102") replaced Decree 139. This new decree is mostly considered as a step forward for the investment and business of investors and the operation of enterprises.

One of the notable provisions of Decree 102 relates to the regulation on capital contribution in kind which now allows investors to use intellectual property rights as equity contribution to the capital of companies. Previously, the law was silent on this matter and usually licensing authorities or the General Department of Tax were thus not authorizing such a practice notably for trademarks.

Among the new provisions of Decree 102, it should be acknowledged that minority shareholders are now entitled to be provided with some specific information about the company's related persons and their transactions with the company. They will have the right to sue the management board if it is found that it has breached the obligation of faithfulness, honesty, and cautiousness provided by the LOE.

Shareholders can also bring the case to the court for failure of performance by the Board of Directors, the Chairman or the Director or for violation of those principles in accordance with the company charter and relevant laws. This new provision completes the LOE which does not contain sufficient methods to protect minority shareholders in a company. Abuses of power and self-interested behaviors by management boards



of companies might have resulted therefore from this lack of protection.

Furthermore, the new decree requires that all foreign investors initially investing into Vietnam (irrespective of share equity in the paid up capital of the company to be established) must have an investment project and carry out the investment registration or investment investigation depending on the investment scale and business activities in order to obtain the investment certificate. As a result, the amount of foreign owned paid up capital will only be taken into consideration if the foreign owned company previously set up in Vietnam (the "FOC 1") intends to constitute another company. In the event the FOC 1 would own less than 49% of the paid up capital of the new company, investment conditions applicable to domestic investors would thus apply to the subsidiary. In the event the FOC 1 would own more than 49% of the paid up capital, then the investment conditions of foreign investment would be applied to the subsidiary. Previously, Decree 139 was only considering the amount of foreign owned paid up capital at the level of FOC 1. As this new provision is not favorable to foreign investors in comparison with Decree 139, those who want to enjoy the advantage in accordance with the procedures for domestic company should first set up an enterprise, and then make a joint venture with a local investor that will own more than 49% of the capital.

Decree 102 also raises new issues, notably regarding a new provision concerning paid up capital. According to Decree 102, paid up capital is the capital contributed or committed to be contributed by the shareholder in a specific term. For a limited liability company, this term is 36 months and for a shareholding company, this term is 90 days from the date of issuance of the business registration certificate. After such duration, if the capital contribution has not been made as required, the company will be obliged to carry out the registration to change the shareholders and the licensing authority shall only recognize the paid up capital of the company based on the actual paid up capital. This provision is considered as a deep interference of the State in the right of doing business of a company and thus as a backward step of the legislation.

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