NEWSLETTER

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I. China: Limits on the free movement of foreign nationals

The principle of free movement of foreign nationals in China is recognized by two international conventions which have been ratified by China: "the Universal Declaration of Human Rights" in 1948 and "the International Convention on the elimination of all forms of racial discrimination". "The International Covenant on Civil Law and Political Rights" was adopted in New-York and signed but has not been ratified by China yet. On a national level, this principle is confirmed by Article 4 of the "Law of the People's Republic of China on the control of the exit and entry of Aliens" adopted in 1985 (hereafter "Law 1985"), which prohibits the violation of alien's freedom. However, the same article also stipulates that aliens may only be arrested with the approval or by a decision of the public prosecutor or by a decision of the court, and the arrest must be made by a public security organ or a state security organ. On the contrary, the "People's Republic of China Exit-entry Administration

Law" which came into force on July 1st, 2013 (hereafter "Law 2013"), and which has replaced the "Law 1985", only specifies that the legitimate rights and interests of aliens in China shall be protected by laws, provided that aliens comply with Chinese laws.

I - Legal grounds for prohibiting a person from leaving the territory

The free movement right is not an absolute one and a foreign national may be prohibited from leaving the Chinese territory in one of the cases described below:

I.1. with respect to administrative matters

a) Foreign nationals who do not provide valid travel documents (such as passport, identity card and/or visa), provide a forged travel document or a document belonging to someone else or who refuse to have their identities controlled, may not be allowed to leave the territory1.

b) In general, a foreign national can be prohibited from leaving the Chinese territory if he/she has committed acts in violation of Chinese law which have not been settled and against whom the competent authorities consider it necessary to prosecute2.

I.2. with respect to civil matters

a) Foreign nationals who are involved in on-going civil cases3 (please refer to point III below) and who have been notified a prohibition to leave the territory by the People's Court4;

b) Foreign nationals who have not fully enforced the judgment rendered by the People's Court in a civil case5;

c) Foreign nationals are in arrears of labor remuneration, and upon decision by relevant departments under the State Council or people's governments of provinces, autonomous regions and municipalities directly under the Central Government are not allowed to exit China.

In practice, in case of civil litigation, a foreign national will not receive a prior notification from the People's Court most of the time. He/she will discover that he/she is under a prohibition to leave the territory and that at the same time, a

[1] Article 12 of the implementing regulation for the Law of the People' s Republic of China on Control or Entry and Exits of Aliens in 1985

[2] Article 23 of the Law 1985

[3] Article 28.2 of the Law 2013

[4] Article 23 of the Law 1985

[5] Article 231 of the Civil Procedure Law

complaint has been filed by a third party, only when he/she will attempt to leave China.

I.3. with respect to criminal matters

a) When a foreign national is a criminal defendant or a suspect in a criminal case; or in case of a criminal sentence which has not been fully served, the foreign national may not be allowed to leave the territory, except in case of transfer of the suspect to another country in compliance with the provisions of a convention signed between China and the said country6;

b) The physical presence of a foreign national is necessary to a criminal case.

Furthermore, in case a criminal offence is suspected, a foreign national may be held under house arrest or on probation (travel within China is then submitted to the competent authorities' approval), or held under custody pending his/her trial. For instance, in case of suspicion of smuggling, a decision to forbid the foreign national from exiting the territory may be issued directly by the Anticorruption Office of the Administration of Customs and then be withdrawn by the same office, which will forward, in both cases, such information to the Public Security Bureau in charge of controlling exit and entry of territory.

II - Categories of Foreign nationals who may be forbidden to exit the territory

Article 23 of Law 1985 and article 28.2 of Law 2013 state that only foreign nationals who are a party in a civil case as an individual, may be prohibited from exiting the territory. However, in practice, a foreign employee of a company (incorporated in China or abroad) which is involved in a civil or criminal proceedings, may be personally prohibited from leaving the territory when he/she holds the position of legal representative or when she/he can be considered as a "manager directly responsible" or as an "other person directly responsible" for the act or offence in question. This practice has been confirmed by the minutes of a meeting of the Supreme Court in 2005.

Under Chinese Law, the notion of "manager directly responsible" refers to a manager being responsible for the action of the perpetrator and does not refer solely to the legal representative. Concerning the notion of "other person directly responsible", it refers to any employee who committed, or participated in, the act. The identification of such managers or persons directly responsible is subject to the wide interpretation of the competent authorities. For instance, by reference to the suspicion of smuggling mentioned previously, in the case where a foreign company sells its products in China through a Chinese distributor, the Commercial Director responsible for the sales of the foreign company (who is the person the most likely to

[6] Article 23 of the Law 1985, Article 28.1 of the Law 2013, Article 322 - Interpretation of the implementation of the Supreme Court (1998) concerning the application of the Law on Criminal Procedure.

travel to China) can be considered by the Chinese competent authority as the person directly responsible and hence, be prohibited from leaving China.

III – Lifting the prohibition to exit the territory in case of on-going civil proceedings

The court may impose a prohibition to leave the territory only upon express request of the plaintiff, and only after the court has agreed to hear the complaint. Although it is not specifically provided by law, some courts require the plaintiff to pay a deposit whose amount varies according to local practice, before issuing a prohibition to leave the country. The People's Court of Guangdong Province requires the payment of a deposit of RMB 50,000 up to RMB 100,000 whereas other courts require the payment of a deposit equal to 20% of the amounts claimed. In theory, such deposit is intended for compensating losses suffered by the foreign national who has been wrongly forced to remain in China.

The foreign national who is subject to such prohibition may request for the ban to be lifted prior to a final Court ruling (not subject to an appeal) and/or its execution, by paying a deposit of an amount equal to the amount claimed by the plaintiff. After having verified that the deposit has been duly received, the court hearing the civil procedure shall transfer the request for approval of the ban lifting to the higher court. The lifting of the ban will be effective only after obtaining such approval, and after transmission of the decision to the Public Security Bureau in charge of entry and exit. Overall, such procedure takes approximately four weeks during which the alien has to remain in China.

II. Japan: Dealing with Parallel Imports (Part 2)

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Trademarks: In Japan the trademark owner also retains the trademark's use rights. As noted, parallel imports were formerly considered to be an unauthorized import of registered trademark goods, without the IP owner's consent. As such, any resulting sales were deemed to be a trademark infringement. Today, parallel imports of genuine goods no longer amount to counterfeiting, even where the IP owner has not granted a license to permit the activities. In a landmark Supreme Court ruling of 27 February 2003, the Court prescribed three conditions which needed to be fulfilled for imports of genuine goods not to amount to trademark infringement in Japan:

(i) the trademark must have been affixed on the parallel import goods by the foreign brand owner or its licensee;

(ii) the trademark holders (both in the exporting country and in Japan) must be a single party or may be legally or economically considered as the same party, so that the mark affixed on the imported goods is deemed to indicate the same origin of goods as the origin indicated by the registered trademark in Japan (i.e., no damage to the origin indication function of the trademark); and

(iii) the goods subject to parallel imports and goods bearing the registered trademark in Japan are not noticeably different in terms of quality. The Supreme Court relied on the "function theory" of the trademarks and considered that neither the source function nor quality function was harmed when these three conditions were met.

Client pan - Parallel Imports: Which legal framework?

In this particular case, the owner of the "Fred Perry" brand in Japan claimed damages from the importer of "Fred Perry" polo shirts. The imported goods were produced by a trademark holder in Singapore but the manufacturing of the goods was traced to China in breach of a license agreement. The court determined that the above conditions were not satisfied as a violation of the license agreement impeded a clear indication of the brand's origin and quality. The goods were produced outside of the contractual territory and without supervision by the licensor.

Whenever the imported goods do not meet the quality level of the authentic goods sold in Japan, the importation and sale by a parallel importer may amount to trademark infringement. The above principles do not apply exclusively to trademarks. If the quality of the goods is affected during the reconditioning or repackaging process prior to sale in Japan, this may amount to an infringement of the brand's reputation. Rulings on "repackaging" are rare (Tokyo Court of Appeal, 1922, LT Peabel, SNC v. Tamizo Kanazawa, on the bottling of perfume in smaller vials; Osaka District Court, 1976 and 1994: STP Corp. on oil, also decanted, and Magamp K concerning fertiliser).

Patents: Regulations have evolved favourably for parallel importers since the days of the Brunswick Corp. v. Orion Kogyo K.K. case (1969), in which the District Court of Osaka advocated a very rigorous territorial approach to the ownership of patent rights. It refused to apply the patent exhaustion doctrine at international level in order to prohibit parallel imports of bowling material. According to this doctrine, the first unrestricted sale by a patent owner of a patented product exhausts the patent owner's control over that particular item. The doctrine follows from the premise that a patent owner is entitled to a single royalty payment for each patented product. That is, by selling or authorising sales of the patented products, the patent owner has bargained for, and received, an amount equal to the value of the patent rights that attach to the products. Stated another way, the first authorised sale of a patented product terminates the patent owner's rights with respect to that product and he should henceforth not be allowed to restrict the resale of those goods.

This doctrine can be applied both on a national and international scale. Nationally, rights will lapse but marketing abroad will not exhaust the patent owners' rights. However, applied internationally, the owners' rights are considered as having fallen away as a result of a sale overseas. In the Brunswick case, after much hesitation, the court chose to apply the Japanese Patent Act and adopted a harsh approach in terms of territoriality and independence of a patent rather than the application of the doctrine at international level. These principles of independence and territoriality of patents were rapidly perceived as an obstacle to the development of international trade and to the free movement of goods protected by a patent. Consequently, in 1997 the Supreme Court ruled in the BBS Kraftfahrzeugtechnik A.G. v. Racimex Japan K.K. case between BBS, a patent owner in Japan and Europe, and Japanese parallel importers, that parallel imports of vehicle spare parts arriving from Germany did not infringe the patent rights of BBS in Japan.

The Court ruled that Article 4-bis of the Paris Convention on the independence of patents did not apply. Whilst the Court did not go as far as to acknowledge the international patent exhaustion doctrine, it made significant progress. It ruled that BBS, having voluntarily marketed its goods, could not invoke any Japanese patent rights against the importer in order to control the resale of the goods. However, the Court considered that patent owners could agree with the initial purchasers that the goods will not be sold in Japan, whilst acknowledging the practical difficulty caused by the need to inform the following successive purchasers, who are not party to the initial agreement, of the existence of geographical restrictions. The restriction has to be expressly stated on the patented goods in order to have binding effect.

Under the current laws, parallel importers can thrive. This remains a grim state of affairs for IP owners and officially anointed distributors: remedies are scarce and limited and legally risky to implement. The strategies must be carefully planned out on a case by case basis.

III. India: Acquisition of land legislations

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ("2013 Act"), that came into effect on 1 January 2014 as modified by the ordinance of 31 December 2014, significantly modified the law in relation to the acquisition of land, previously governed by the colonial-era Land Acquisition Act, 1894 ("1894 Act").

For the longest of time, the 1894 Act legitimized arbitrary expropriation of land by the state for public purposes against payment of a paltry compensation and without any consultation, resettlement or rehabilitation mechanisms. Seen as coercive in nature, forcible land acquisitions under the 1894 Act led to violent protests from the civil

society in general and the affected segments of the community in particular with a turning point in 2006-2007.

In 2013, in response to a number of protests regarding forceful and arbitrary expropriation of land and criticism of the 1894 Act by the Supreme Court, the government enacted the 2013 Act aimed at reconciling the need for land for industrial projects and the rights of local communities.

The 2013 Act (as amended by the ordinance) therefore aims to balance the relations between the local community and the government, through fair compensation, thorough resettlement and rehabilitation of those affected, adequate safeguards for their well-being and complete transparency in the process of land acquisition.

Prior consent of the affected families

In order to avoid arbitrary expropriation of land, the 2013 Act provides a mechanism for obtaining the prior consent of the affected families. All projects requiring acquisition of land of more than 50 hectares in urban areas and 100 hectares in rural areas must from the enforcement of the 2013 Act, obtain the consent of:

- 80% of the affected families in case of acquisition of land for private companies; and
- 70% of the affected families for acquisition of land in case of a private-public partnership project

it being specified that the affected families must consent to not only the acquisition itself but also the amount of compensation proposed to paid.

Social and environmental impact assessment

Whenever the government intends to acquire land for public purposes, a social and environmental impact assessment must be conducted by a group of experts nominated by the relevant local administrative body within a period of 6 months from the date of its commencement. The assessment must be in the regional language and made available to the public.

Exemptions introduced by the ordinance of 31 December 2014

Certain projects have been exempted from the requirement to obtain the prior consent of the local population and of conducting the above mentioned assessment. This exemption extends, inter alia, to projects necessary for national security and defense of India, industrial corridors, construction of affordable housing and housing for the poor, etc.

Compensation and resettlement

Departing from the previous legislation, the 2013 Act, provides for fair compensation of the population affected by the expropriation of land. The compensation will be up to 4 times the market value of the land in rural areas and twice the market value in urban areas. This compensation will take into account the market value of the land, any construction on the land, the loss of agriculture etc. On top of the compensation to be paid, a solatium amount equivalent to 100% of the compensation amount will be added. There is an additional tax advantage as the revenue from such a transaction is exempt from tax and stamp duty.

Further the new legislation provides for rehabilitation and resettlement of families affected by the land acquisition, it being specified that no transfer of land can occur prior to the implementation of the rehabilitation and resettlement measures.

Return of land in case of non-utilisation

Where land has been acquired under the 2013 Act, and such land has not been utilized for a period of (i) 5 years from the date of receipt of possession, (ii) for a specified period as required for the setting up of the project, the new owner will be required to return the said land to the previous owner or to the relevant State Land Bank.

Criticisms

Despite the attempts of the government to reconcile the opposing interests of the business community and the farmers, the 2013 Act has assumed a debatable dimension, being deemed pro-farmers by some and pro-industry by others.

In any case, the new process and financial consequences of acquiring lands will need to be taken into account by investors.

IV. Singapore: Changes to the directors' indemnity provision in the Companies Act and the implications for companies in Singapore

On 3 March 2015 the Monetary Authority of Singapore (MAS) and the Singapore Exchange (SGX) jointly signed a Memorandum of Understanding (MOU) with the Securities Commission, Malaysia and the Securities and Exchange Commission, Thailand to establish a Streamlined Review Framework for the ASEAN Common Prospectus. The Framework, which is an initiative under the ASEAN Capital Market Forum (ACMF) Implementation Plan will facilitate cross-border offerings of Equity Securities and Plain Debt Securities in ASEAN.

Under the Framework, the review process for a multi-jurisdiction offering of Equity Securities or Plain Debt Securities will be streamlined. The Framework requires both Home and Host Authorities to complete the review process at the same time, within three to four months from the date of submission. This will enhance market efficiency as the time taken for the issuer to obtain approval to offer its securities in multiple jurisdictions would be shortened, providing more certainty to the issuer in terms of the time-to-market.

Malaysia, Singapore and Thailand are the first three jurisdictions to sign the MOU. Securities regulators in other ASEAN jurisdictions will participate in the Framework when they are ready. The signatories to the MOU target to implement the Framework by the third quarter of 2015. The objective is to take a further step to set up an ASEAN common capital market.

V. Vietnam: New decree on Private and Public Partnerships (PPP)

Published on February 15th, 2015 and entered into force on April 10th, 2015, Decree 15/2015/ND-CP has now replaced decree 108, decision 71, decree 24 and becomes the only regime applicable for PPP in Vietnam.

One major reason of this implementation is the discrepancy between the continued growth of the economy and population, and the level of infrastructures. Given the insufficient public funds available to finance those developments, an increased call for private funding was the only remedy and required clearer and more attractive legal framework for investors, some of which are presented below.

Firstly, the PPP decree has introduced new forms of contracts which are supplementing the current arrangements as the Build Operate and Transfer (BOT), the Build To Order (BTO) and the Build and Transfer (BT).

The Decree has created the new following forms of contract:

- Build Own and Operate (BOO),

- Build, Lease and Transfer (BLT),
- Build, Transfer and Lease (BTL).
- Operate and Manage (O&M).

Moreover, if the governing law of the contracts shall, in principle, remain Vietnamese law, the new Decree allows, provided that some conditions are fulfilled, to apply foreign law for contracts involving a foreign private party. In addition, by reference to the Law on Investment, the new Decree would allow arbitration in case of a foreign party.

Furthermore, the new Decree foresees tax incentives for some investors and projects, the aim being to encourage their contribution for local development. These provisions will be clarified in the future with regard to the nature of the referred projects.

In conclusion, Decree 15 is a good signal sent to investors and will encourage investments in the infrastructure sector as it creates a more favourable environment and clarifies the role of the authorities. However the Decree still lacks some provisions such as a time limit for negotiation and signature of contracts. Besides, some of the new provisions will require further clarification.