



▶ LEGAL UPDATE:
CIVIL PROCEDURE LAW
AMENDMENTS
..... 1



▶ FDI UPDATE:
ESTABLISHMENT OF
TRADE UNIONS IN THE
PRC..... 2

▶ CHANGES TO FOR-
EIGN INVESTMENT IN
REAL ESTATE 3

▶ LEGAL UPDATE:
AMENDMENTS TO THE
PRC LAWYER LAW. . 4

CHINA Legal Bulletin



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Executive Summary

Legal Update: Civil Procedure Law Amendments

The legal landscape is gradually becoming more transparent and easier to navigate. One major problem for foreign and Chinese businesses alike remains the strength of the rule of law, and specifically the difficulties in enforcing contracts. This is not only a problem of getting your rights recognized by a court—something your lawyer should be able to deal with— but even more it is about the challenge of getting a court judgment actually enforced, ie getting your money back. Recent amendments in the Civil Procedure Law are designed to tackle this issue.

By Maarten Roos and Zhang Kehua

FDI Update: Establishment of Trade Unions in the PRC;

Trade Unions were announced in the recent amendments to the Labor Contract Law as mandatory for any enterprise having more than 25 employees. For foreign enterprises unsure of how to go about this labor specialists Pan Lidong and Lu Yunguang provide a brief overview of what companies need to consider establishing a trade union.

By Pan Lidong and Lu Yunguang

Legal Update: Amendments to the PRC Lawyer Law

In the past PRC lawyers were not legally allowed full freedom to defend clients in criminal matters or to operate their businesses. Recently the Lawyer Law has been amended to give lawyers the right to be able to meet with their clients privately, receive immunity from sanctions when making statements in defense of a client, and open law firms as independent practitioners. These new amendments are not without restrictions however as Client Service Manager, Zachary Wortham points out in his overview of the amendments and their implications on the legal industry.

By Zachary Wortham

LEGAL UPDATE:

Civil Procedure Law Amendments

One of the most profound weaknesses of the present Chinese legal environment is the difficulty in enforcing contracts. This is a fundamental aspect of the rule of law, and as China develops it will need to improve its record to give individuals and companies the confidence that if a party is in breach of its obligations, that its counterpart can use the law to protect its interests.

Enforcement problems in China can broadly be divided into two categories. The first relates to the question of whether there is an effective means to get ones claim recognized by a court of law in a valid and effective judgment. One difficulty is that for disputes over small amounts, filing a lawsuit is more costly than the potential award since Chinese courts are conservative when calculating damages, and usually do not award legal costs. Another is that courts impose on the plaintiff a high burden of evidence. Indeed these matters can be more easily regulated under an arbitration agreement, which has made arbitration the preferred method for many foreign companies to deal with disputes in China. Nonetheless, in most cases the parties fail to come to an agreement on arbitration, leaving them vulnerable to the particularities and discretions of Chinas judiciary system.

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Legal Update: Civil Procedure Law Amendments continued



The second problem, and arguably the biggest, is that even if a court (or arbitration tribunal) renders an enforceable decision, it may still not be enforced. According to an official report, 2.13 million civil case rulings made by Chinese courts in 2006 were not implemented by the due date, and over half had not been implemented by mid-2007. Common reasons are that companies and individuals can appear to no longer have any (visible) assets, or that courts and enforcement officers have insufficient resources to pursue assets transferred to third parties. And in some cases, local protectionism and corruption continue to play a role.

Chinas legislators are aware of the problem, as is shown in the recent amendment of the Civil Procedure Law. Adopted on the 28th of October, 2007 and effective as of the 1st of April, 2008, the amendment focuses on improving the procedures for enforcing court judgments. Specifically, the amendment provides for the following improvements:

1. Under present law, if a party fails to perform a verdict, the opposing party has 6 months (if both parties are legal persons or other organizations) or 1 year (if one or both parties are natural persons) to apply with the court for mandatory enforcement. In the amendment, this time period has been extended to two years equally for legal and natural persons, from the last day of the period specified by the legal document for its performance, or from the effective date of the legal document. This gives applicants more time to consider applying for mandatory execution if the opponents fail to perform the judgment.

2. If any interested party considers that the enforcement is in violation of legal provisions, it may raise a written objection to the peoples court responsible for enforcement and even apply for reconsideration by the peoples court at the next higher level if the objection is rejected. Although this provision could protect the rights and interests of the party concerned, it also could be used for prolonging enforcement efforts against the parties who fail to perform the judgment.

3. If, during the course of enforcement, a person who is not involved in the case raises a written objection, the peoples court shall review the written objection within 15 days after receiving it. Compared with the present Civil Procedure Law, the new law provides a time limit for review of the objection raised by non-related persons, which will force the peoples court to increase their working efficiency.

4. If the court fails to execute the judgment within six months after receipt of the application for execution, the applicant is entitled to apply to the court at a higher level for execution. This possibility gives applicants a means to work around overburdened or uncooperative courts, and will certainly pressure courts to deal with applications promptly.

5. If the party subject to execution fails to fulfill the obligations specified in the legal document and conceals or transfers his property, the execution officer is entitled to carry out the execution measures in force. Furthermore, the party must provide the court with detailed

information on all of its assets over the past year. Any failure to cooperate may be punished with detainment of the person involved.

6. The fines against parties that refuse to execute a civil court ruling have been multiplied ten-fold, to RMB 10,000 (approx. USD 1,300) for natural persons, and RMB 300,000 (approx. USD 39,000) for legal persons.

7. If the party subject to execution fails to fulfill the obligations specified in a legal document, the peoples court may enforce or notify relevant authorities to assist in enforcing any restricting measures. Including recording with the credit system, making public any information about nonperformance of duty through the public media or any other measure stipulated by law. The Peoples court is also entitled to take auxiliary measures, such as making an expanded negative record on the credit system thereby subjecting the person who fails to fulfill his obligations with financial hardships such as being prohibited from getting loans from banks in the future. These negative repercussions are in line with the international practice and will make enforcement stronger.

The above amendments will make it easier for parties to enforce court judgments, and as such should be welcomed.

By Maarten Roos and Zhang Kehua

FDI Update: Establishment of Trade Unions

Chinese law states that a company must set up a trade union within 6 months of the date on which it starts business or obtains its Business License. However, in practice, trade unions at a higher level will always require the company to establish a trade union when it starts production and employs more than 25 employees.

Many companies, including foreign-invested enterprises, try to avoid Chinas complex law on trade unions, as they see such a trade union as an impediment to being able to control workers. However, this does not need to be the case. In fact, not only are companies

obliged to allow the establishment of trade unions, but such a union may also help them in managing their operations.

Legal Risks for Foreign-invested Enterprises with No Trade Union

The Trade Union Law and the Regulations on Labor Security Supervision include three provisions that speak directly to the risks that companies take when not establishing or when hindering the establishment of trade unions. Article 50 of the Trade Union Law and Article 29 of the Labor Security Supervision both provide that any organization or

individual that keeps employees from joining or organizing a trade union or that obstructs higher level trade unions from assisting employees in the establishment of a trade union must answer to the department of labor and if they refuse to do so, the department of labor may apply to the government at the county level or higher for a resolution. Further any company or person found to be not in compliance with the trade union law or that refuses to follow a court order in regards to the establishment of a trade union can be fined between RMB 2,000 and RMB 20,000.

FDI Update: Establishment of Trade Unions continued



Advantages of Having a Trade Union

Trade unions may be regarded as a necessary evil. But they are also organizations which safeguard the rights of the employees, therefore it is important to communicate well with your employees, and choose qualified candidates to be members of the trade union establishment committee and also to be the committee members of the trade union. After the establishment of the trade union, the cooperation of the committee members and the chairman of the trade union could be helpful in the normal production and operation of your company. Finally, the creation of a well rounded and transparent trade union will only serve to make your company stronger, your employees happier, and your job easier.

The Organizational Structure of a Trade Union (e.g. in Guangzhou)

- Basic Trade Union of the Enterprise
- Guangzhou Development District Federation of Trade Unions
- Guangzhou Federation of Trade Unions
- Guangdong Federation of Trade Unions
- The All-China Federation of Trade Unions

If your company has no trade union and employs more than 25 employees, higher level trade unions may go directly to your company to assist and guide you in setting up a trade union. However, in practice, higher level trade unions will firstly urge an enterprise to set up a trade union before offering to guide the employees to set up a trade union. (*Note: It is very important to establish good relations with higher level trade unions to facilitate the entire establishment process*)

General Procedures Key Issues

1. Organizing and encouraging employees to join. Any employee with a labor contract with the company has the right to become a member of the trade union. This includes foreign nationals. Currently there are no legal or practical time limitations for the development of members, and companies may take a month or more in setting up the trade union, as this process is normally determined by the staffs eagerness in joining the trade union. We note that the Guangzhou Federation of Trade Unions has from time to time required that companies speed up the establishment of their trade unions. The trade union establishment committee has the power to determine when to hold the first assembly of the members.

2. Candidates for the trade union committee.

The trade union committee should be made up

of 5 or 7 persons, and the minimum number of candidates for these positions should be 6 or 8. The candidates must be agreed upon and recommended by the members of the trade union and the managerial staff of the company (with members making the final decision). The list of candidates running to be a committee member must be examined and approved by a higher level trade union federation, though most will not examine the list of candidates for trade union committees closely. In any case, no administrative principal of a company (specifically referring to the senior managerial staff such as chairman of the board, directors, or manager, etc.) or their close relatives may be members of trade union committee or act as the chairman of the trade union. On the other hand, the laws give no definite provision regarding whether the head of the human resources department may be a member of the trade union or act as the chairman of the trade union, something that in practice is encouraged by higher level trade unions. In some circumstances, the principal of the production department of the company can act as the chairman of the trade union as well.

3. The first meeting of the trade union committee. During the first meeting of the newly elected trade union committee a chairman of the committee must be elected and the work of the committee should be divided between the members. The first meeting of the committee can be held at the same time of the members assembly or shortly thereafter, however, the time interval between the two meetings should not be too long.

4. Membership Dues. According to the Trade Union Law of the PRC, contributions regarded as part of the companys operational costs should be equivalent to two percent of the monthly payroll of all workers and staff members. This includes overtime salary, bonus and allowances, and does not differ between employees of Chinese nationality and foreign nationalities. According to the Guangzhou Development District Federation Trade Union for example, companies will not be allowed to allocate less than two percent of their monthly payroll to the trade union. All funds allocated by the company for the trade union should be divided with 60% going to the trade union and 40% to the higher level trade union. Finally, membership dues are 1-2 yuan/month for employees, and 3-5 yuan/month for managers. All membership dues paid by members will be kept in the trade union of the company and are not required to be turned over to the higher authority.

By Pan Lidong and Lu Yunguang

CHANGES TO FOREIGN INVESTMENT IN REAL ESTATE

Foreign investment in China is subject to the Foreign Investment Industry Guidance Catalogue (the *Catalogue*). The Catalogue categorises foreign investment in particular industries in China as either encouraged, restricted or prohibited. If an industry is not specifically referred to in the Catalogue then investment in that industry is considered to be permitted.

The following changes have been made in the real estate sector under the revised version of the Catalogue that was issued by the MOC and the NDRC on 31 October 2007, which took effect on 1 December 2007:

- real estate secondary market transactions and real estate agency and brokerage has been added to the restricted category; and
- the development of ordinary residential property has been removed from the encouraged category, so it is now simply in the permitted category.

The following activities relevant to real estate remain in the restricted category:

- development of large pieces of land is still restricted, and such projects are still required to be by way of equity or cooperative joint venture. Note that this refers to land development as opposed to the development of the buildings on the land (which is discussed below); and
- the construction and operation of high-ranking hotels, villas, high-class office buildings and international exhibition centres and the construction and operation of large scale theme parks both also remain in the restricted category.

Legal Update: Amendments to the PRC Lawyer Law



On October 28, 2007, the standing committee of the National Peoples Congress amended the Law on Lawyers. The law attempts to change the rules governing the legal profession in China. It also introduces additional protections for lawyers to represent their clients. Below we have chosen a few of the more interesting and meaningful amendments.

The amended lawyer law keeps the management of the legal profession divided between Ministry of Justice and the Chinese Bar Association, while making it easier to open certain types of law firms. The law now specifically allows individual practitioner law firms, but places some restrictions on any such entrepreneurs such as the lawyer must have practiced for at least five years and not have had his/her license suspended in the last three years. These individual law firms will face a fair amount of risk in that any individual lawyer law firm will take full liability for their business dealings. Partnership law firms are now restricted when establishing branch offices, they are required now to have at least 20 lawyers in their firm and have been operating for at least 3 years whereas in the past there were no such regulations.

The amended law meets the concerns of lawyers practicing in criminal proceedings by giving protection for lawyers meeting with criminal suspects and defendants. Previously lawyers only had the right to meet with their clients, but no right to privacy. Article 33 states that lawyers can not be monitored while meeting with criminal suspects and/or defendants. This creates a problem however when viewed in connection with Article 96 of the 1996 Criminal Procedure Law, which states that when defense attorneys meet with their clients in a detention facility, authorities such as the

Public Security Bureau can send personnel to be present at the meeting, depending on the circumstances and need. This conflict still needs to be resolved through practice.

Next, the new version of the law gives lawyers some added protection when representing their clients. Article 37 protects lawyers from legal sanctions when making courtroom statements in defense of their clients. However this protection is not complete as it adds the exception that those statements that harm national security, intentionally slander others, or seriously disrupt courtroom order are not exempt from legal sanctions. Article 37 also goes on to say that if lawyers are detained or arrested in the course of litigation activities on suspicion of a crime, the detaining or arresting authorities must notify the lawyers relatives, law firm, and bar association within 24 hours.

In what could be termed as the most interesting of all the changes to the lawyer law, the amendments warn lawyers against excessive involvement with citizen protests. Article 40 specifically prohibits lawyers from "inciting or abetting parties to engage in disturbing public order, threatening public security, and other illegal methods to resolve grievances.

In recent years reformist Chinese lawyers have attempted to bring a range of criminal and civil challenges against government practices. The Chinese government is very sensitive to these changes and would like to see these challenges brought up in a managed way which will not cause too much controversy. The fact that the dual management system is still in place after the amendments indicates this position. Likewise, language barring lawyers from

aiding or abetting parties to disturb public order may be intended to warn lawyers to confine their activities to the courtroom, and to avoid pursuing broader protest or petitioning strategies. But at the same time it is apparent that some Chinese officials recognize that lawyers can play a useful role in exposing and combating local abuse and corruption. The language regarding the detention or arrest of lawyers engaged in litigation-related activities is indicative of a warning to any government official interested in detaining legal professionals challenging the corrupt or illegal practices of local governments.

For businesses operating and dealing in China these changes should be a welcome sign that transparency and protection for those individuals in the legal field are being strengthened. When the criminal system in China is brought up to standard with developed nations then the entire legal system will benefit. With a strong system of representation and reasonable appeals people will have a sense of security about their ability to defend themselves and be treated properly in the Chinese legal system. Even though the amendments are not comprehensive they are a step in the right direction and a good sign that the government is moving towards a more open legal system where lawyers can act in their clients best interests without fear of being victimized themselves.

By Zachary Wortham



*Happy Holidays from Wang Jing & Co. Law Firm
Wishing you and your family all the best at this
festive time of the year.*



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