CHAPTER 1

SURVEY OF THE LABOUR LAW IN CHINA

[¶1-000] Laws and regulations covered in this chapter

(1) *Administrative Regulations on the Human Resource Market* (issued for the first time on 11th September 2003; revised on 22 March according to *The Decision of the Ministry of Personnel and State Administration for Industry and Commerce on Modifying the Provisions on the Administration of Talents Markets*; Announcement No. 4 on 22nd March 2005 by the Ministry of Personnel and the State Administration for Industry and Commerce);

(2) *Provisional Administrative Regulations on Sino-foreign Joint Venture Employment Intermediaries* (Announcement No. 2 on 4th September 2003 by the Ministry of Personnel, Ministry of Commerce and the State Administration; amended on 24th May 2005 according to *The Decision of the Ministry of Personnel, Ministry of Commerce and the State Administration on Modifying the Provisional Regulations on Management of the Sino-Foreign Joint Venture Employment Agency Agencies.*

Survey of the Labour Law in China

[¶1-005] Composition of human resources cost in China

Human resources cost is the expenditure arising from the acquisition and development of human resources, and this includes acquisition cost, usage cost, development cost and separation cost. China's labour regulations are precise mainly on the issue of use cost of the human resources, that is, the wages of employee, social security, public housing funds, labour protection fees and welfare.

(1) Wages—general salary given out as hourly wages, piece rate wages, bonuses, incentives, allowances, overtime wages, and payment given in special circumstances;

(2) Social security—inclusive of endowment insurance, medical insurance, unemployment insurance, maternity insurance and work accident insurance. Except for maternity insurance, where the contribution is determined by regional regulations, the payment for the other four insurances is mandatory;

(3) Public housing funds—long term housing savings deposited by both the employers and the employees for the purchase of public housing. Employers are responsible for contributing to the public housing fund;

(4) Labour protection fees—employers are responsible for the payments, so as to prevent accidents and injuries during work;

(5) Welfare—additional expenditure set aside by employers to improve the production and living conditions of their workers.

[¶1-010] Responsibilities of the human resources manager

Adapting the human resources ("HR") policies of global companies to the Chinese context

The global HR policies of multinational corporations ("MNCs") are unusually standardised, but in view of differing laws of different countries, appropriate adjustments must be made to the global HR policies, so as to comply with the legal requirements of the territory.

Multinational corporations in China should adapt the global HR policies they plan to adopt in China to the Chinese context, making adjustments in accordance to the laws in China.

Establishing localised policies

One of the responsibilities of the HR manager is to establish HR policies that are suitable for China and MNCs based in China.

According to Art 4 of the *Labour Contract Law*, employers shall establish and perfect rules and regulation in accordance with the law, so as to ensure that employees enjoy the right to work and fulfil labour obligations. The rules and regulations here refer to the internal rules and regulations that will affect the employees' rights and obligations. The law enforcement agencies, labour disputes arbitration organization and judicial courts will recognise and implement the rules and regulations that comply with the Chinese laws.

According to the usual practice in the implementation of labour law, in the event that the employer is negligent in establishing the regulations in accordance to the law, or should the regulations not contain detailed measures of implementation, a pro-employ-

ee stance will be employed in the interpretation and evaluation of the provisions of the labour law. According to the *Labour Contract Law*, if the rules and regulations of the employer violates the stipulations of the law and the legal provisions, and this causes the employee to suffer losses, the employee can dissolve the labour contract; the labour administrative department will issue a warning and a rectification order; the employer will be liable for the losses suffered by the employee. This, therefore, makes the localisation of the HR policies all the more important.

Inspections for regulation compliance

The HR manager must ensure that the rules and regulations adopted by the employer comply with the *labour law* requirements of China. The Labour Law here includes the precise interpretation of the *Labour Law of the People's Republic of China* (passed on 5th July 1994 on the 8th meeting of the 8th Standing Committee of People's Congress with effect on 1st January 1995; hereinafter refers to *Labour Law*) and also the relevant laws, administrative regulations, regional laws, rules, and civil interpretations that are formulated by the relevant national agencies in accordance with their legislative functions as defined in the *Legislation Law of the People's Republic of China* (passed on 15th March 2000 of the 9th Standing Committee of People's Congress with effect on 1st July 2000; hereinafter refers to *Legislation Law*).

Laws

The National People's Congress and the Standing Committee of the National People's Congress are in charge of national legislation, ie the authority to enact laws. The responsibility of the interpretation of these laws belongs to the Standing Committee of the National People's Congress.

Administrative regulations

The State Council will establish administrative regulations in accordance to the Constitution and laws.

Regional regulations

Members of the People's Congress and its standing committee from the provinces, autonomous regions and municipalities can establish regional regulations in accordance to the actual situation and requirements of the area, as long as it does not violate the national Constitution, laws and administrative regulations. Members of the People's Congress and its standing committee from large cities can also establish local regulations, as

long as it does not violate the national Constitution, laws and administrative regulations, and also the laws and regulations from the home province or autonomous region. The People's Congress standing committee of the province or autonomous region must first approve the regulation before it takes effect.

Rules

The various departments of the State Council, committees, People's Bank of China, the Audit Commission and organisations directly under them with administrative management functions can establish rules under their purview in accordance to the national laws and administrative regulations, decisions and orders of the State Council. The People's Government from the provinces, autonomous regions, municipalities and large cites can also establish rules in accordance with the national laws, administrative regulations and the local laws of the province, autonomous regions and municipalities.

The various laws, administrative regulations, regional regulations and rules form the basis of the inspections for regulatory compliance. On top of that, the legal interpretations by the Supreme People's Courts based on the Constitution also form a basis for reference.

Implementation of HR policies of companies

During the implementation of the HR policies, the HR manager must pay attention to the archiving of all types of documents and vouchers for evidence preservation, especially those that involve legal documents. This includes job invitation letters, labour contract texts, rules and regulations (employee handbook), training records, assessment records, etc. Extra attention must be given to the management of labour contracts, and a reminder system regarding the expiry of contracts should be set up so that the HR manager would not make any mistakes in this area. In the management of errant workers, it must be clearly verified through the collection of adequate evidence, with consideration given to the applicability of the law, and carried out with proper procedures.

THE LABOUR LAW SYSTEM OF CHINA

[¶1-015] Labour Standard Law

Labour Standard Law is the collective term for regulations regarding minimum wa-

ges and basic labour conditions. It covers working hours, rest and vacations (maximum working hours), wages (minimum wages), labour safety and hygiene conditions, and protection of females and minors etc. When hiring, employers should adopt wage and labour conditions that are higher, but never lower, than what is beneficial to the employee as stipulated in the regulations of the Labour Standard Law.

The Labour Standard Law of China is mainly established through the *Labour Law*, and covers areas such as working hours, rest and vacations, wages, labour safety and hygiene conditions, labour protection of female workers, and labour protection of minors.

In addition, some concrete regulations are also incorporated in related laws and ordinances, and rules and regulations, which mainly include the following:

(1) Main regulations relating to working hours and rest and vacations—*State Council Provisions on Working Hours for Employees* (revised and issued by the State Council on 25th March 1995); *Method of Vacations for National Holidays and Memorials* (revised and issued by the State Council on 14th December 2007, was implemented with effect from 1st January 2008);

(2) Main regulations relating to wages—*Regulations Governing the Composition of the Gross Income* (approved by the State Council on 30th September 1989, State Statistical Bureau Order No. 1, issued on 1st January 1990); *Payment of Wages Provisional Regulations* (issued by the Department of Labour on 6th December 1994); *Minimum Wage Regulations* (Ministry of Labour and Social Security Order No. 21, issued on 20th January 2004), etc;

(3) Main regulations relating to labour safety and hygiene—*Law of the People's Republic of China on the Prevention and Treatment of Occupational Diseases* (PRC President's Order No. 60, issued on 27th October 2001); *Safety Production Law of the People's Republic of China* (PRC President's Order No. 70, issued on 29th June 2002); *Regulations on Reporting the safety production and investigation settlement* (State Council Announcement No. 456, issued on 9th April 2007); *Regulations on Management of Labour Safety and Hygiene Education of Workers and Employees in Enterprises* (Department of Labour, issued on 8th November 1995); *Regulations on the Administration of Labour Protection Articles* (Department of Labour, issued on 23rd April 1996); *Regulations on the Supervision and Administration of Labour Protection Articles* (State Administration of Work Safety's Order No. 1, issued on 22rd July 2005),

etc; and

(4) Main regulations relating to the special protection of female and minor workers—*Provisions on the Labour Protection for Female Workers* (State Council Order No. 9, issued on 21st July 1988); *Provisions on Special Protection for Minor Workers* (Department of Labour, issued on 9th December 1994); *Provisions on Prohibition of Child Labour* (State Council Order No. 364, issued on 1st October 2002), etc.

[¶1-020] Labour Contract Law

The labour contract is an agreement in which the employee and the employer establish their labour relationship vis-à-vis each other and it specifies the rights and obligations of both parties.

The *Labour Contract Law* was promulgated in China, and was implemented with effect from 1st January 2008. It regulates the conclusion, performance, amendment, dissolution or termination of labour contracts.

The *Labour Contract Law* is approved and promulgated by the General Office of the National People's Congress Standing Committee, and is a special law which is applicable throughout the entire country. The *Labour Contract Law* is consistent with the *Labour Law* in terms of legal principles. In addition, the Ministry of Labour has stipulated many departmental regulations with regard to labour contract as the supplement of the *Labour Law*. For instance, *Economic Compensations due to Violation or Rescission of Labour Contracts* (issued on 3rd December 1994 by the Ministry of Labour) and *Measures on Compensating for the Violation of Relevant Provisions on Labour Contracts under the Labour Law* (issued on 10th May 1995 by the Ministry of Labour).

[¶1-025] Collective Contract Law

The collective contract is a written agreement which is executed between a representative nominated by the trade union or employer and the employer, in accordance to the provisions of the laws and regulations and based on equality and consensus reached through consultations.

In the *Labour Contract Law* which will be implemented with effect from 1st January 2008, there is a chapter on "Collective Contracts" which makes provisions for this area of the law.

Other regulations that make detailed and comprehensive provisions for this area in-

order, and the execution period has expired less than five years, or had been deprived of political rights because of crime and the execution period has expired less than five years;

(3) Had been appointed as the company or corporate director or manager of bankrupted companies, or was personally responsible for the bankruptcy. It has only been less than three years since the date which the companies or enterprises declared bankruptcy;

(4) Had been appointed as a legal representative of companies or enterprises which had violated the law, resulting in the revocation of business licences and closure of companies, or need to bear some forms of personal responsibility. It has only been less than three years since the companies and their business licences were revoked; and

(5) Large personal debt outstanding at maturity.

According to Art 125 of the *Enterprise Bankruptcy Law in People's Republic of China* published in August 2006 and implemented since 1st June 2007, corporate directors, supervisors or senior management personnel who have violated the duty of loyalty, diligence obligations, resulting in bankruptcy of an enterprise, cannot hold appointment as corporate directors, supervisors and senior management personnel within three years from the date of the end of the insolvency proceedings.

According to the *Securities Act*, any situation under Art 147 of the*Company Law of People's Republic of China* or any one of the following cases, the persons are not allowed to serve as corporate directors, supervisors or senior management personnel:

(1) The persons in charge or corporate directors, supervisors and senior management personnel of the Stock Exchange, Securities Clearing Organisations who had violated the law or because of disciplinary misconduct, being removed from their duties. It has only been less than five years since being relieved of their duties; and

(2) Lawyers, CPA or investment advisory bodies, financial advisers, credit rating agencies, asset evaluation agencies and professionals from certification agencies who had violated the law or because of disciplinary misconduct, resulting in the revocation of their professional licence. It has only been less than five years since the date their licences had been revoked.

According to the above – mentioned laws and regulations, when appointing directors, supervisors or senior management positions, employers should conduct background

checks on personnel to ensure that they have the qualifications.

[¶4 – 035] Background checks of personnel prior to joining a special industry

Besides the special legal restrictions on some special positions for candidates, practitioners in certain industries also have their legal restrictions.

For example, under the *Securities Act* in China, expelled employees from Stock Exchange, securities clearing agencies and securities service agencies, securities companies due to law violation or disciplinary misconduct, and the employees expelled from the government agencies cannot be recruited as employees for securities companies.

Therefore, employers from such sectors would need to conduct this level of background checks on their candidates before hiring them.

[¶4 – 040] Prior notification or consent of background checks

Existing laws and regulations in China have no clear provisions for prior notification or consent on background check. We understand that employers are not required to obtain prior consent of the candidates before they conduct checks, but the precondition is that the checks conducted by the employers should closely revolved around whether the candidates have attained the requirements for the job, directly related to the matters which are linked to the management of the staff after they are hired, including, but not limited to matters directly related to candidates with the duties of the position requirements (including professional ethics), or matters related to cultural requirements by the employers.

In addition, for specific industries or specific jobs, employers should also checks on candidates whether they have criminal records, law violation records and poor credit record information or occupational performance information. Prior notification and consent is not needed when obtaining such information.

According to the current practice of laws and regulations in China, to conduct checks on the basic personal information, educational qualifications, work experience and vocational aptitude of candidates, whether the candidate has the non – competition obligations to previous employers or obligations of confidentiality, and other information directly related with the appointment, prior notification or consent of the candidates is not required. Whether the other information is also included in the scope of checks

inces, autonomous regions, municipal labour and social security administrative departments can increase the record information appropriately as needed.

[¶4-100] Filing time requirements of a labour contract record

According to the *Notice to Establish Labour Record Filing System*, employers who recruited new employees or have renewed labour contracts with their employees should file the recruitment or renewed labour contracts within 30 days. The termination of labour contracts should be filed within seven days after the termination or dissolution of the labour contract takes place.

If there are changes made in the name of employer, legal representative, economic type, organisation code, filing of the changes should be done within 30 days. Deregistration of employers should be done within seven days.

[¶4-105] Department filing labour record procedures

Notice on the Establishment of a Labour Record Filing System states that from 2007 onwards, all employers who hire their employees through legal means should register their filing records with their respective labour and social security administrative departments above the county level. And if what the employers register turns out to be different from the actual operation, actual operating procedures need to be filed in the labour and social security administrative departments.

It must be noted that some regions are stricter in terms of implementation based on the understanding from the labour department, for example Tian Jin, Shanghai, Guang Zhou; there are also some regions (like Beijing) that do not require the employers to register their filling records.

PROHIBITION ON RECRUITMENT

[¶4-110] Prohibition on employers in the recruitment process

The *Labour Contract Law*, *Employment Promotion Law* and *Regulations of Employment Service and Employment Management* have set out the prohibition provisions when employers are performing recruitment, including, but not limited to, the points

below.

Publishing false advertisements is prohibited

Employers are prohibited to provide false recruitment information or to issue false recruitment advertisement during recruitment.

Detention of certificates is prohibited

Employers are prohibited from detaining employees' identity card and other certificates during recruitment. According to *Law of Employment Contract*, the labour administration authority shall order the resident identity card or other certificates be returned to the employee within a prescribed period of time, and meanwhile, impose a fine in accordance with the provisions of relevant laws. Labour

Seeking unlawful profits is prohibited

Employers are prohibited to collect property or personal belongings from employees as guarantee or under some other guise, and seek unlawful profits or conduct other illegal activities in the name of recruiting. According to *Law of Employment Contract Labour* employers who collect any property or personal belongings from employees as guarantee or under some other guise, the labour administration authority shall order the property or personal belongings be returned to the employees within a prescribed period of time, and impose a fine on the employer at the rate of RMB 500 to RMB 2,000 per concerned person; where any damage has been caused on the employee as a result thereof, the employer shall be liable for compensating the damages.

Employers are prohibited from recruiting candidates who shall not be employed

No employers may recruit minors under the age of 16 or other persons that shall not be employed according to any State law or administrative regulation (refer to "Ban Recruitment").

Employers are prohibited from recruiting personnel who do not have legal identity documents.

Unfair competition is prohibited in the recruitment

No employer may recruit employees by defaming any other employer, by commercial bribery or any other unjustifiable means.

Discrimination is prohibited

No employment brochure or job advertisement that is issued by an employer shall

been expanded to include private non – enterprise units and their employees.

Secondly, it provides that where the laws or administrative regulations contain, or the State Council has formulated, separate regulations concerning the conclusion, performance, modification, dissolution or termination of employment contracts by and between public institutions and their employees who are subject to the employment system, matters shall be handled in accordance with such regulations. In the absence of such regulations, the issues shall be handled in accordance with the relevant regulations in the present law. In other words, it clearly stipulates that public institutions and their employees who are subject to the employment system will also need to establish labour contracts vis – à – vis each other. However, consideration is given to the fact that employment systems implemented by public institutions may differ from general labour contract systems in the rights and obligations of both parties of the labour contract and in the management system. Therefore, these institutions are given the first right to choose to adopt special regulations.

Thirdly, it provides that the *Labour Contract Law* is applicable to the conclusion, performance, modification, dissolution or termination of employment contracts when government agencies, public institutions, social organisations establish labour relationships with their employees. In other words, apart from civil servants and personnel who are subject to the laws for the management of civil servants and employees who are subject to the employment system in public institutions, government agencies, public institutions, and social organisations should establish labour relationships with their other employees and implement the *Labour Contract Law*.

In addition, Art 3 of the *Implementation Regulations on the Labour Contract Law of the People's Republic of China* (issued and implemented on 18 September 2008) clearly provides that partnerships and foundations of legally established accounting firms, legal firms, etc, are legally considered as employers in the *Labour Contract Law*.

[¶5 – 020] Effectiveness of the Labour Contract Law

The *Labour Contract Law* was passed and promulgated by the General Office of the National People's Congress Standing Committee, and is a special law which is applicable throughout the country. The *Labour Contract Law* is consistent with the *Labour Law* in terms of legal principles. On the other hand, the *Labour Contract Law* is a new piece

of legislation which contains more detailed provisions on various issues related to labour contracts. Based on the principles of applicability of laws such as "new laws takes precedence over old laws" and "special laws takes precedence over general laws", if there are inconsistencies between the provisions in the *Labour Contract Law* and the *Labour Law*, the provisions of the *Labour Contract Law* shall apply.

[¶5 – 025] Implementation of the Labour Contract Law

According to Art 98 of the *Labour Contract Law*, the law comes into force as of 1 January 2008.

Article 97 of the *Labour Contract Law* regulates:

Labour relationships

If an employment relationship was established prior to the implementation of the *Labour Contract Law* without the conclusion of a written employment contract, the contract shall be concluded within one month from the date on which the law becomes effective.

Labour contracts

Employment contracts concluded before the implementation of the *Labour Contract Law* and continue to exist on the implementation date of the law shall continue to be performed.

The number of times of which a fixed – term labour contract can be renewed

The number of instances of consecutive conclusion for a fixed – term labour contract stipulated in item (3) of Art 14 shall be computed with effect from the renewal of the fixed – term labour contract following the implementation of the *Labour Contract Law*.

Financial compensation

If an employment contract existing on the implementation date of the *Labour Contract Law* is dissolved or terminated after the implementation of this law, in accordance with Art 46 of this law, a financial compensation is payable and the number of years for which the economic compensation is payable shall be counted from the implementation date of this law. If, under relevant effective regulations prior to the implementation of this law, the employee is entitled to financial compensation from the employer with regard to a period prior to the implementation of this law, the matter shall be handled in accordance with the relevant effective regulations at that time.

(1) The employee himself: So – called "authorised persons" or "agents" cannot substitute the employee in signing the labour contract. For the same reason, the trade union which represents and protects the interests of the employee under the labour laws has the right to represent the employees to sign a collective contract with the company, but it cannot substitute the employee in signing the labour contract with the employer.

(2) Statutory age of employment: The country's laws and regulations have set legal requirements for the employment age. In China, the general statutory age of employment is 16. Article 15 of the *Labour Law* prohibits the employment of minors under the age of 16. There are some exception provisions for professions with special requirements: for example, according to Art 8 of the *Provisions on the Prohibition of Using Child Labour*, artistic, sports or other special skills units may, upon agreement by parents and guardians and approval by the above – county level Labour Department, recruit minors under the age of 16 as artists or sportsmen.

The employer

According to Art 2 of the *Labour Law*, the employer refers to enterprises, individual private businesses, government agencies, service units, and social organisations within the country that are legally established, have the ability to pay wages and social security fees, to provide labour protection conditions and can take on relevant civil responsibility. According to the Labour Contract Law, private non – enterprise entities are also included.

(1) Can the employer's branch office sign and conclude the labour contract?

According to Art 4 of the *Implementation Regulations on the Labour Contract Law*, a branch office established by an employer as defined in the *Labour Contract Law* which has obtained its business license or registration certificate according to law may conclude employment contracts with employees in the name of an employer; if it has failed to obtain a business license or registration certificate, it may conclude employment contracts with employees only upon the authorisation of the employer.

(2) The employer should have the legal operating qualifications.

According to Art 93 of the *Labour Contract Law*, employers who do not have the legal operation qualifications and operate illegally shall have to take on legal responsibilities, pay the remuneration and financial compensations to employees who have started working according to the relevant local regulations, and compensate workers who have

suffered damages.

[¶5 – 080] Invalid labour contracts

In accordance with Art 26 of the *Labour Contract Law*, the following contracts shall be invalid or partially invalid:

(1) A party uses means such as deception or coercion, or takes advantage of the other party's situation to cause the other party to conclude or amend the labour contract contrary to the true intent of the other party;

(2) The employer excludes itself from its legal liabilities, and removes the rights and interests of the employee;

(3) The mandatory provisions of the laws and administrative regulations are violated.

If there is any dispute regarding whether a labour contract is invalid or partially invalid, the matter shall be resolved by the Labour Dispute Arbitration Committee or the People's Court.

In accordance with Art 27 of the *Labour Contract Law*, if the labour contract is partially invalid, such invalid provisions shall not affect the validity of the other provisions, which shall continue to be valid.

Furthermore, in accordance with Art 28 of the *Labour Contract Law*, if the labour contract is adjudicated to be invalid, and the employee has already performed labour, the employer shall pay the employee a labour remuneration. The amount of the labour remuneration shall be determined with reference to the labour remuneration of another employee with the same or similar job position in the employing company.

[¶5 – 085] Exclusive labour contracts and exceptions

The labour contract is a basic method for establishing a labour relationship, and it signifies that an employee is employed by one employer. Generally, an employee can establish a labour relationship with only one employer and can sign only one labour contract. However, under special circumstances, an employee can be employed by different employers, which will result in the same employee signing two or more labour contracts. The laws and regulations of China have set relatively strict and clear limitations on such situations.

the employee have agreed on following the relevant provisions of the place of registration of the employer, the relevant provisions of the place of registration of the employer shall apply.

[¶5-180] Other regulations relating to the content of the labour contract

Other matters

Other matters (or other content) of the labour contract refers to some areas related to the content of the labour contract but not part of the necessary clauses of the labour contract that still need to be negotiated and are included into the contract after reaching consensus. This content is established by the parties voluntarily and is not legally mandatory. In other words, the legal validity of the labour contract is not affected whether or not these clauses are added into the labour contract.

Article 17 of the *Labour Contract Law* states that, other than the necessary clauses, the employer can also agree with the employee in the labour contract on other matters such as the probation period, training, safeguarding of commercial secrets, supplementary insurance and welfare benefits.

Prohibiting clauses (invalid clauses)

The content of the labour contract should be within the law and adhere to the principles of fairness, equality and voluntariness. Therefore, in view of the content of labour contracts, labour contracts that include mandatory regulations that violate the laws and administrative provisions, or those whereby the employer relieves itself from any responsibilities and excludes the rights of the employee will be considered as wholly or partially invalid.

Situations where the agreement is not clear

According to Article 18 of the *Labour Contract Law*, in the event that the labour contract is not clear on standards such as the labour remuneration and labour conditions, and this results in disputes, the following procedures and methods can be employed to settle the issue:

(1) The employer and the employee can renegotiate the contract;

(2) If negotiation fails, the regulations for collective contract can be used;

(3) If there is no collective contract or if the collective contract does not stipulate

any regulations on labour remuneration, the "equal pay for equal work" system will be implemented; if there is no collective contract or if the collective contract does not stipulate any regulations on standards such as labour conditions, the relevant State regulations will apply.

Accessory to the contract

During the conclusion of the labour contract, there are times when the employer and the employee have to go into details regarding some clauses due to objective reasons. In regards to this, both parties can either list out clearly all the items agreed in the original contractual text, or choose to list out items agreed upon by means of an accessory to the contract. In practice, the appendix to the contract commonly found is the confidentiality agreement, non-competition agreement and training agreement. In such situations, the appendix is considered part of the labour contract, which means that it should adhere to the regulations on labour contract stipulated in the *Labour Contract Law* and other relevant laws and legal provisions. At the same time, the appendix possesses the legal validity of the labour contract.

There is also another type of appendix to the labour contract. This is when two parties with a labour relationship have concluded the labour contract, but due to changes to certain conditions, there is a need to renegotiate some of the clauses in the contract. Such situations will be considered as modifications to the original labour contract.

PROBATION PERIOD IN THE LABOUR CONTRACT

[¶5-185] Probation period in the labour contract

The probation period (also known as the adjustment period) refers to a period of mutual observation and review that is agreed upon in the labour contract by the employer and the employee through consultations on an equal basis in concluding the labour contract for the purpose of mutual understanding and selection.

In accordance with the *Labour Contract Law*, the employer and the employee can enter into consultation to determine the probation period. Here, the use of the word "can" is not equivalent to "shall". If the employer and the employee are of the opinion that there is no need to establish a probation period, then after consultations on an equal

In accordance with Art 83 of the *Labour Contract Law*, if the employer breaches the present regulations and agrees to a probation period with the employee, the Labour Administration Department shall issue an order for rectification to be carried out. If the agreed probation period in violation of the law has already been performed, the employer shall pay compensation to the employee according to the duration of the *ultra vires* probation period that has already been performed, based on the monthly wage that is due to the employee after the probation period.

[¶5 – 200] Industrial attachment, apprenticeship, internship and probation periods

In accordance with the provisions of item (3) and (4) in the *Reply of the General Office of the Ministry of Labour Regarding the Enquiry on Relevant Issues for the Management of Labour Employment*, a simple analysis and comparison of the concepts of the internship period, apprenticeship period, industrial attachment period and probation period is given below.

The industrial attachment period is a period of time within the industrial attachment system. The industrial attachment system is a form of practical training and appraisal where the State allocates and dispatches college and secondary school graduates to employers, and it is applicable for government agencies and companies. The concrete contents of the industrial attachment system are as follows: the industrial attachment period is for one year, whereby an industrial attachment wage is implemented during this period, and the job cannot be adjusted. After the period is over and if the graduate passes the appraisal, the job position will be officially confirmed. However, if the graduate does not pass the appraisal, the period shall be extended, and the wage may be reduced by one level.

Although the industrial attachment period has been ordered to be abolished, it can be seen from the provisions for the probation period of civil servants and the probation period of employment contracts that the industrial attachment period has been replaced by various types of probation periods.

The apprenticeship period is a period of time within the apprenticeship system. The apprenticeship system is a training system or a known training method to help a new employee in a new job position familiarise himself/herself with the job and to improve his/her skills. It is a type of on – the – job training after a labour relationship has been established. Currently, this training system is still being implemented, and the apprenticeship period is determined based on technical levels.

The internship period is a period of time within the internship system. The internship system is a type of training and education system implemented by the State for technical schools, secondary schools and vocational institutes. Usually the school would sign an internship agreement with the employer that it is corresponding with, and the employer will provide the place and equipment for the internship. It is a type of on – the – job training before a labour relationship is established. The scope of such internship training has widened, and many undergraduates will look for employers to do their internship before graduation. Therefore, the agreement that is signed between the employer and the intern should not be viewed as a labour contract, but as a type of civil contract.

The probation period refers to a period of mutual observation and review that is agreed upon in the labour contract by the employer and the employee through consultations on an equal basis in concluding the labour contract, for the purpose of mutual understanding and selection. The probation period should not exceed six months.

It can be seen that the internship period, apprenticeship period and probation period belong to three different types of systems, where the differences are as follows:

(1) Duration. The apprenticeship period is determined based on the requirements of the technical level; the industrial attachment period is at least one year; the probation period does not exceed six months.

(2) Methods of confirmation. It is mandatory to implement the apprenticeship and internship period according to the existing administrative regulations. While the probation period is confirmed through agreement, the duration can be determined through consultation within a timeframe of six months;

(3) Target groups for the implementation of the scheme. The apprenticeship period is mainly implemented for new employees in certain job positions; the industrial attachment period is mainly for college and secondary school graduates, and technical school graduates who are newly employed; and the probation period is for employees that include the abovementioned personnel. Therefore, where the apprenticeship system or industrial attachment system is implemented, an employer may stipulate a probation period not exceeding six months when signing a labour contract with an employee.

The "recognisance" mentioned in the various regulations listed above also includes the different types of fees that is similar in name to recognisance, and possess the characteristics of "requiring the employee to provide guarantee or using other reasons to collect the property of the employee" as described in Art 9 of the *Labour Contract Law*. According to Art 11 of the *Labour Contract Law*, when recruiting an employee, the employer is not allowed to request the employee to provide guarantee, or collect the property of the employee under the pretext of guarantee, nor detain the identification certificate or other identifications of the employee.

As a regulation that safeguards employees at a greater length as compared to previous regulations, the *Labour Contract Law* has also formulated a system of fine and the rates for such violations. Article 84 of the Regulations states that, in the event that the employer violates the Regulations and collects properties of the employee in the name of guarantee or other reasons, the Labour Administrative Department will order the employer to return the properties back to the employee within a prescribed period, and impose a fine of more than RMB 500 but less than RMB 2,000 per head as punishment; if the violations cause damages to the employee, the employer should assume liability to compensate.

If the employee dissolves the labour contract legally and the employer detains the records or other objects belonging to the employee, the punishment for the violation will be in accordance with the regulations mentioned above.

[¶5-310] "Special operation" and "special operation qualification"

"Special operation" refers to operations that pose serious dangers to the safety of the operator, the people around him/her, and also the surrounding facilities.

The scope of the special operation is classified into 10 categories: electric work operations; boiler operations; pressure vessel operations; crane operations; blasting operations; metal welding (gas cutting) operations; gas check operations in underground mines; automobile vehicle driving; motorboat driving; turbine operation; and scaffold erection operation in building construction.

The national standard *Management Rules on the Technical Safety Assessment of Special Operation Personnel* (GB5306-85) and the *Provisions on the Management of Technical Safety Training and Assessment of Special Operation Personnel* (Issue No. 31 (1991) of the Ministry of Labour) promulgated by the Ministry of Labour have given

clear stipulations on the scope of special operations and the requirements, training, assessment and permit issue for special operation personnel.

"Special operation qualification" refers to the possession of the "Special Operation Personnel Operating Permit" issued by the labour department and other relevant departments that the special operation personnel must obtain before being allowed to commence operation at the work post. The personnel must undergo technical safety training, and pass the technical safety theory examination and actual operating skills assessments before being issued the permit. This permit is a type of national occupational qualification certificate.

[¶5-315] "Other labour rights stipulated by the law"

"Other labour rights stipulated by the law" refers to the right of employees to participate and organise labour union in accordance with the law, right to participate in the democratic management of the employees, right to participate in social voluntary labour activities, right to participate in labour competitions, right to propose reasonable proposals, right to engage in scientific research, technological innovations and inventions, right to dissolve a labour contract in accordance with the law, right to refuse the orders of employer that gives directions against rules and force orders on dangerous operations, right to voice out and criticise actions that endangers life and physical health, right to impeach and file charges, right to supervise actions that violate the labour law, etc.

[¶5-320] "Daily wage" and "hourly wage"

The *Circular of the Ministry of Labour and Social Security on the Issues Concerning the Average Monthly Working Hours in a Year and Wage Conversion of the Employee* (Issue No. 3 (2008) of the Ministry of Labour and Social Security) states that, according to the amendments by the State Council on the regulations of the *Measures on Having a Holiday for National Annual Leave and Memorial Days* (Order No. 513 of the State Council), the number of public holidays for all citizens is increased from the original 10 days to 11 days. Based on this, the average monthly working days and working hours in a year are adjusted to 20.83 days. At the same time, monthly wages are adjusted to 21.75 days, and the daily and hourly wage of the employee is calculated based on these figures.

Trade Union Committees and Committee Members

[¶6 – 135] Trade union committees

The trade union committees at every trade union level is the management and executive body of the trade unions. Article 9 of the *Trade Union Law* states that trade unions at every level are established on the principle of democratic centralism, and trade union committee members at every level are elected democratically by the trade union members' assembly or the trade union representative assembly. The trade union members' assembly is formed by all members of the trade union. The trade union representative assembly is formed by representatives who are elected through democratic elections.

[¶6 – 140] Election of trade union committee members

The trade union committees of trade unions at every level are the management and executive bodies, and the selection should reflect the choice of voting members. The list of nominated members should be deliberated and scrutinised repeatedly. Voting will be anonymous, and the vote can be a formal competitive election by having more candidates than needed and voting desired candidates. Alternatively, a list of popular candidates by a previous differential voting can be produced before the formal round of voting to determine the actual winners of the vote.

In order to avoid the appointment of spouses or relatives of the manager, director or key personnel of the state – owned enterprise into the trade union committee, hence, possibly compromising the legal rights of the employees, the *Trade Union Law* states that the close relatives of the enterprises' key personnel are not allowed to stand for the election of the trade union committee.

[¶6 – 145] Benefits of trade union committee members

Part – time committee members

According to cl 2 of Art 40 of the *Trade Union Law*, non – full – time basic level trade union committee members can use normal production or working time to attend meetings or participate in trade union work for up to three working days per month without penalty.

Full – time committee members

According to Art 41 of the *Trade Union Law*, the wages, bonuses and allowances

of full – time committee members of enterprises, public institutions and organs are to be paid by the relevant enterprise/unit/body:

(1) Wages, including supplementary wages; public institutions with structured wage system should include basic wage, vocation wage and retirement wage;

(2) Bonuses, including monthly bonuses, year – end bonuses and productivity bonuses awarded by the enterprise/public institution, similar to management staff of similar rank;

(3) Allowances, including national allowances and allowances given by enterprises, public institutions or organs to their staff;

full – time staff of basic level trade union are to receive similar treatment with other staff in social security and other welfare benefits.

[¶6 – 150] Benefits of trade union chairman

According to *Trade Union Law* and *Measures for the Election of the Trade Union Chairman of an Enterprise* (Provisional), the trade union chairman of an enterprise shall be selected generally from the deputy executive level and shall receive equivalent benefits. The enterprise should ensure that the working hours and benefits of a non full – time chairman are in accordance to the law. The union should not change the work duties of the chairman at will within his tenure. In case a change of work duty is necessary, the approval of the trade union committee at the same level and the trade union at the next higher level must be sought, and a democratic procedure should be implemented according to the law. From the day on which a full – time chairman assumes the post, the duration of his labour contract shall be extended, the extension shall be equal to his tenure; if the unfulfilled labour contract duration of a non – full – time chairman is shorter than his tenure, the labour contract duration shall be extended until the expiry date of his tenure. However, this is not applicable to chairmen who have committed serious negligence or who have reached the legal age for retirement. The dismissal or change of chairman of an enterprise trade union can be approved only when half or more of all the members of the general trade union assembly or all the representatives of the trade union assembly consent to the dismissal by anonymous balloting.

onclusion of Collective Contracts

[¶6 – 250] Draft discussion

A collective contract is the labour contract agreed and signed by the trade union or e trade union representative on behalf of the unit. As such, the draft collective con- act must be discussed and approved by the employee representative assembly or the en- e workforce; the China law regulates the attendance numbers and number of positive otes for the meeting.

Article 51 of the *Labour Contract Law* states that a collective contract on labour ages, working hours, rest and leave, labour security and hygiene, insurance and wel- re, etc, can be worked out by employees with employers through fair negotiation. he draft of collective contract should be submitted to the employee representative as- mbly or the entire workforce for discussion and approval.

Article 36 of the *Regulations for Collective Contracts* states that the employee rep- sentative assembly or the meeting of the entire workforce shall be attended by at least wo – thirds of the employee representatives or employees when discussing the draft col- ctive contract or draft special collective contract. In addition, the draft collective con- act or draft special collective contract would need the approval of at least 50% of the mployee representatives or workforce.

Once the draft collective contract has been approved by the employee representative ssembly or the entire workforce, it will be signed by both the chief representatives of he collective negotiation.

[¶6 – 255] Examination of collective contracts

According to relevant laws of China, the collective contract should be submitted to he Labour Security Administrative Department for legal examination, and must pass the eview with no objections before it can be effective.

In China, the Labour Security Administrative Departments of district level and a- ove oversee and examine matters relating to collective contracts in the respective locali- ies. This means that the actual supervision and examination of collective contracts is ased on territorial jurisdiction by the Labour Security Administrative Departments of listrict level and above in the respective locality of the employer, and these departments

will enforce the relevant procedures.

However, the collective contracts of employers controlled by the central govern- ment and employers of inter – provincial, autonomous regions and municipalities shall be submitted to the Ministry of Labour and Social Security or the provincial – level La- bour Security Administrative Department as directed by the Ministry of Labour and So- cial Security.

The conclusion and modification of collective contracts shall be submitted to the Labour Security Administrative Department for examination within a stipulated period. Once a collective contract is signed or amended, the collective contract in triplicate should be submitted to the Labour Security Administrative Department for review by the employer within 10 days of the signing of the contract by both chief representatives.

If no objection is raised by the Labour Security Administrative Department within 15 days of receipt of the contract, the collective contract or special collective contract will become effective.

After objections are raised by the Labour Security Administrative Department, the terms objected shall be renegotiated through collective negotiation, and the amended collective contract in triplicate shall be submitted by the employer to the Labour Security Administrative Department within 10 days of the signing for review.

[¶6 – 260] Expansion capability of collective contracts

Although the collective contract is an agreement signed between the trade union or employee representative with the employer after negotiations, the effect of the collective contract is, however, experienced by all the employees. As such, valid collective con- tracts shall be announced to the entire workforce by the negotiating representatives in an appropriate form on the day the contract comes into force. Labour contracts signed be- tween employers and individual employees should not have lower standards than that of the collective contract.

According to Art 6 of the *Regulation for Collective Contracts*, "collective contracts or special collective contracts in line with this regulation have legal binding force on the employer and entire workforce of the employing entity". The standards in labour condi- tions, wages, etc, in labour contracts signed between employers and individual employ- ees cannot be lower than that in collective contracts and special collective contracts.

Article 4 of the *Labour Contract Law* stipulates that, the formulations, amendments on rules and regulations or major decisions made by the employer, which have a direct impact on employees' immediate rights and interests, such as those on labour remunerations, working hours, leave and rest, occupational safety and hygiene, insurance and welfare, training, work discipline and work quota management, or also on other major matters should be presented to and discussed with the employee representative congress or all the employees The proposal and advice thereof will be determined after consultation with the trade union or employee representative on the basis of equality.

The trade union or employees have the right to voice out any inappropriate issues during the implementation of the rules and regulations or major matters, and the employer should consult with the union or employees for revision.

The *Company Law* that was revised on 27th October 2005 also provided a legal basis for the fulfilment of democratic procedures by a company. In Art 18 (3) of the new *Company Law*, when the company plans to make a decision on restructuring, or any major issue related to business operation, or the formulation of any important rules and regulations, the company should seek the opinions of the company's trade union, and seek the opinions and proposals of the employees through the meeting of the representatives of the employees or through other methods.

Open procedure

Open display has the similar meaning to public display. The law requires the employer to make public the internal labour regulations, with the intention of letting the employees to be familiar with the internal labour regulations that have a binding effect on them. This is the unilateral action of the employer, and there is no need to seek approval from the employees. There are many ways to make public the internal labour regulations; it can be done by putting up the regulations on the bulletin board, or on the internet where the employees can surf freely. However, no matter which method is used, the employer must ensure than the employees are familiar with the internal labour regulations. It is the legal obligation of the employer to acknowledge the labour regulations of the entity to the employees.

Article 4 of the *Labour Contract Law* states that, employers shall announce decisions on rules and major matters which directly involve the vital interests of employees or notify the employees. This regulation is a type of protection of the employees' rights to know, which will in turn protect their greater rights and interests.

Evidence on open display: From practical point of view, in labour dispute cases, the burden of proof usually lies with the employer. In the case where the employer is unable to produce evidence that the employer is familiar with, and the employees do not admit that they are familiar with the internal rules and regulations of the entity, the labour dispute arbitration committee and the People's Court will tend to reject using the internal labour regulations as the basis for labour dispute. This is the reason why employers usually lose lawsuits.

Recording procedure

The internal labour regulations involve the implementation of the provisions and policies of the labour law; hence they are closely related to the interests of the employees. In order to make sure that the content of the internal labour regulations is legal and safeguards the interests of all the employees, many countries legislature enforce the submission of the internal labour regulations to the relevant departments for examination or records, so that the formulation of the internal labour regulations can be under the supervision of the State.

Basis of recording: According to the *Circular Concerning the Implementation of the System of Labour Rules and Regulations and the System of Records by Employing Entity that is Newly Established* (Ministry of Labour Issue No. 338 (1997)), from 1st January 1998 onwards, newly established employing entities have to submit their internal labour rules and regulations to the labour administrative department for records, and the labour administrative department must also conduct checks and supervision when organising inspection tours of the entities.

However, in practice, some provinces and municipalities (such as Beijing and Shanghai) do not actually require the employers to carry out record filling of the rules and regulations at the administrative labour department.

Punishment for violation of regulations

Article 74 of the *Labour Contract Law* states that the labour administrative department of the local People's Governments at the county level and above should supervise and inspect, in accordance with the law, the rules and regulations formulated by the employer that have directly related to the immediate interests of the employees, and also the implementation thereof.

For internal labour regulations that violate the law, Art 80 of the *Labour Contract*

document can be considered as evidence where its effect is undetermined, the strength of its evidentiary effect will be determined by the strength of the corroborative evidence that the employer provides.

In judiciary practice, there are usually two ways to enhance the strength of the duplicated document as evidence:

(1) The employer can independently collect evidence that enhance the evidentiary effect of evidence with undetermined effect, such as duplicated documents, so as to ensure the full validity of such evidence; and

(2) If the employer cannot independently collect the evidence, it can apply to the court to obtain evidence through investigation that will enhance the strength of its own evidence.

In the case that the employer is unable to provide corroborative evidence to support its evidence, the employer will have to assume the consequences that come with the inability to produce evidence as stated in Art 2 Item 2 of the Supreme People's Court's *Several Regulations Concerning Evidences in Civil Lawsuits*: "If there is no or inadequate evidence to validate the claims of the party who provided the evidence, the party will have to assume any unfavourable consequences".

[¶7-135] Fax documents

Fax document is considered a type of data telegraph. It has two obvious characteristics Firstly, the nature of the fax document varies with differing objective facts which means that the fax document can be deemed as the original document or a duplicate Secondly, the authenticity of the content of the fax document is hard to be verified, as alteration of the content can be made using certain technology or method.

The Art 3 of the *Electronic Signature Law of the People's Republic of China* only accords certain degree of recognition to the legal validity of fax document. According to the regulation, only when the employer and employee agree and clearly state that fax documents can be used during the fulfillment of the labour contract will then the fax document is accorded legal validity. Without these two requirements, the fax document cannot be used independently as evidence due to the characteristics of fax document mentioned earlier. Fax documents that are legally valid and meet the characteristics of evidence generally have the same weight of proof as the original document.

In judiciary practice, a few situations must be differentiated when determining if a fax document has evidentiary effect:

(1) The nature of a fax document must be clearly determined ie the fax must be verified if it is considered as an original document. Document that is faxed between the two parties and amended or verified can be considered as original copy. However, fax documents with the objective of transferring the text or pictures are similar in nature to duplicated documents, so they are considered as evidence with undetermined effects and cannot be independently used as evidence.

(2) The weight of proof of a fax document should be determined according to objective circumstances. Sometimes, even though the fax document is considered as original document, it cannot be used solely to determine the truth of a case. Only fax documents that can directly proof the truth of the case, and relate to the actual facts of the case will be considered as original evidence of the case.

(3) Before determining the evidentiary effect of the fax document, its authenticity must first be verified. As the content of the fax document can be doctored through certain means such as photocopy, therefore, although fax document can have full evidentiary effect as original document, generally its authenticity must be verified through other evidence. If there are no other evidence to prove the authenticity of the fax document, the judge has to differentiate based on actual circumstances of the case and discretional evaluation of the evidence.

[¶7-140] General procedure in the internal punishment

To sum up, the main procedures are as follows:

Discussion through meetings

Based on evidence gathered and obtained, the investigation into the regulation violation by the employee will be conducted, and the preliminary decision on the punishment will be made.

Seeking the opinion of the trade union

According to Art 21 of the *Trade Union Law*, when an employer penalises an employee by dissolving the labour contract, the employer should first notify the trade union the reason for doing so. If the trade union deems that the action violates the laws, legal provisions and relevant contract agreements and thus it requests the employer to re –

According to the Article 9 of the *Reply by Labour Department to Questions on Em-ee Working Hours* (Labour Ministry Notice No. 271 (1997)), the implementation ggregate working hour system arose from the practical production situation in part of enterprises, and allows implementing comparable centralised system of work and to ensure normal production and the legal rights of the employees. As such, the au- of aggregate working hour system does not require the enterprise to comply with the ılations in the standard working hour system, but requires the enterprises to meet the owing two points:

(1) Enterprises adopting the aggregate working hour system or any work system ch aggregates the working hours should do so in negotiation with the trade union and loyees;

(2) For employees involved in labour Level 3 and above, they should not work inuously for more than 11 hours, and are to rest for at least one day per week.

[¶9-070] General information on reporting procedures

In general, for work applications under special work systems, we need to provide:

(1) "Declaration Form for Implementing Aggregate Working Hour System and - fixed Working Hour System";

(2) Business licence of the enterprise legal person;

(3) Specifications in application primarily indicating concrete reasons for not im- ienting the standard working hour system and needing a special work system, affect- ob appointments, number of employees and the work period and work/rest system ıe aggregate working hour system;

(4) Enterprise trade union's views on the implementation of the special work sys- Enterprises without a trade union should submit the combined views of the em- ees affected by the special work system;

(5) Other supporting materials that should be submitted.

With regards to this, the regional labour administrative department has more de- d and clearer requirements.

Extension and Reduction of Working Hours

[¶9-075] Extending working hours

According to the Article 3 of the *Reply to Questions on Employee Working Hours*, extending working hours is also known as the overtime (holidays and normal working days) system, and refers to the working time which the employer orders, arranges or requests the employees to work, which are beyond the statutory and standard working hours as determined by the laws and regulations. There are two types of overtime: one is arrangements for the employee to extend their working hours on rest days and holidays, the other is arrangements for the employee to extend their working hours on normal working days.

Article 41 of the *Labour Law* states that due to production and management needs, the employer can extend working hours after negotiations with the trade union or employees. Typically overtime per day cannot exceed one hour, while under special circumstances overtime per day can be up to three hours but not exceeding 36 hours per month. Hence as can be seen, enterprises are not allowed to extend working hours unilaterally, but are required to negotiate with its labour union or employees beforehand. However, it is stated in Art 42 of the *Labour Law* that under certain circumstances, it is possible to extend working hours without the aforementioned constraints:

(1) In the event of natural disasters, incidents or other reasons which threaten the lives, health and property of the employees and require emergency management;

(2) Malfunction of production facilities, transport lines and public facilities which affect production and the interests of the public and require timely repair;

(3) Other circumstances as stated in the law and administrative rules and regulations.

[¶9-080] Extending working hours on rest days and holidays

Section 2 and 3 of Art 44 of the *Labour Law* state that employees asked to work on rest days without time in lieu are to be remunerated no lower than 200% of their wage; employees asked to work on statutory holidays are to be remunerated no less than 300% of their wage. The labour department further points out in the *Reply to Questions on Employee Working Hours by Labour Department*, which according to Art 44 of the *La-*

probation;

) The employee seriously violates the rules and regulations set up by the em-

) The employee seriously neglects his duties or engages in malpractice for per-
ins and has caused severe damages to the employer;

) The employee simultaneously enters a labour relationship with any other em-
nd thus seriously affects his completion of the tasks assigned by the employer,
mployee refuses to recitify after the employer has pointed out the problem;

) The employee, by means of deception or coercion or by taking advantage of
loyer's difficulties, forces the employer to conclude or change the labour con-
ainst the employer's true will;

) The employee is under investigation for criminal liabilities;

) The employee is sick or is injured for a non – work – related reason and cannot
his/her original position after the expiration of the prescribed time period for
treatment, nor can he assume any other position arranged by the employer;

) The employee is incompetent for his position or remains so after training or
ssigned to another position;

0) The objective situation on which the conclusion of the labour contract is
as changed considerably, which makes it impossible to perform the labour con-
nd no agreement on changing the contents of the labour contract has been
after negotiations between the employer and the employee;

1) The employer is being restructured according to the *Enterprise Bankruptcy*

2) The employer encounters serious difficulties in production and business oper-

3) The employer changes its products, makes important technological renova-
r adjusts the way of business operations, and it is still necessary to lay off some
ees after modifying the labour contract; or

4) Other objective economic situations on which the labour contract is based
substantially, which makes it impossible to perform the labour contract.

Dissolution of Labour Contract Through Consultation

[¶10 – 040] Legal basis for dissolution of labour contract through consultation

According to Art 36 of the *Labour Contract Law*, an employer and employee may dissolve the labour contract if they so agree after consultation. Dissolution of a labour contract through consultation is one of the ways to remove the labour relationship. It is convenient, fast and confidential, hence, a popular method among employers and employees.

Article 18 and 19 of the *Implementation Regulations on the Labour Contract Law* also pointed out that, if both the employer and employee so agree, they may, according to the conditions and procedures prescribed in the *Labour Contract Law*, dissolve the labour contract with a fixed term, the labour contract without a fixed term or the labour contract that sets the completion of a specific task as the term of the contract.

[¶10 – 045] Legal requirements for dissolution through consultation

Principal parties in a consultation

The principal parties in the dissolution of a labour contract through consultation should be both parties in the labour contracts or their authorised representatives. Any third party (including relatives and friends) who is not authorised by the employer or employee is not allowed to enter into discussions about the dissolution of the labour contract with the employer or employee. Otherwise, the conclusion of the consultations will not be legally binding for both parties. However, exceptions are made if one party of the labour contract decides to honor the contract.

Principle of dissolution through consultation

Employers and employees should follow the principles of equality and free will in reaching unanimity through consultation. According to these principles, if both parties are unable to come to a consensus on the dissolution of the labour contract, the labour contract will continue to be in force. Neither party can dissolve the labour contract unilaterally without legal reasons; if it does, the party who breaches the contract will be liable for responsibility and/or compensation.

Format of dissolution through consultation

The *Labour Law* requires that the labour contract be established through a written

If the employer cannot, or is unwilling to, serve 30 days prior written notice, the oyer can pay an additional one month's wages in lieu of notice to replace the obli-n.

[¶10 – 150] Payment of financial compensation

tem (3), Art 46 of the *Labour Contract Law* clearly stipulates that an "employer lissolves the labour contract of the employee based on Art 40 of this law" should nancial compensation to the employee. An employee who is incompetent in his/b is considered one of the situations stipulated in Art 40 of the *Labour Contract*

olution of Labour Contract Due to Major Changes to Ob-ve Circumstances

¶10 – 155] Conditions for dissolution

ccording to item (3), Art 40, of the *Labour Contract Law*, when there are ma-anges to the objective circumstances upon which the labour contract is based, and sults in the inability to fulfil the original labour contract, and when the employer nployee is unable to come to a consensus to amend the labour contract after con-on, the employer can dissolve the labour contract. For the applicability of this tion, the employer must first possess the following conditions.

changes to the objective circumstances

ccording to Art 26 of the *Explanation of the Ministry of Labour Concerning the s Regulations of the Labour Law of the People's Republic of China*, the "objec-rcumstances" here refers to *force majeure* or other circumstances that cause the in-to fulfil all or part of the regulations stipulated in the labour contract. These cir-nces include moving out of the enterprise, mergers, and transfer of the assets of terprise. However, this term excludes the situations where personnel are re-d due to insolvency and reorganisation, or due to serious difficulties in produc-d operations.

ring the implementation of the original labour contract

hen there are major changes to the objective circumstances upon which the labour t is based, the original labour contract cannot be fulfilled. However, if the origi-

nal labour contract can continue to be honored, the employer will not be able to use this reason to dissolve the labour contract.

Failure to amend the labour contract

In situations where the original labour contract cannot be honored, the employer cannot directly dissolve the labour contract of the employee, and should follow the principle of "ensuring the continuity of the labour contract", and consult the employee concerned on the possible amendment of the labour contract. Only when both parties are unable to reach a consensus on the amendment can the employer then dissolve the labour contract. The consultation on the amendment of the labour contract should follow the necessary procedures.

Employee not under conditions that prohibit the employer from dissolving the contract

The *Labour Law* and *Labour Contract Law* give employers the right to unilaterally dissolve the labour contract of the employee under certain conditions. However, the two laws also provide imperative provisions that restrict the employer from dissolving the labour contract in certain situations.

For more details, please see *Situations where dissolution by employer is prohibited*.

[¶10 – 160] Legal requirements

Request for amendment through consultation

When there are major changes to the objective circumstances upon which the labour contract is based, and the changes result in the inability to fulfil the original labour contract, the employer should consult the employee on the amendment of the labour contract with the hope to continue honoring the contract. Only when both parties cannot reach a unanimous decision through consultation can the employer then dissolve the labour contract. From this, the prepositive procedure for the dissolution of the labour contract by the employer is that both parties should conduct consultations on the amendment of the labour contract.

Seeking the opinion of the trade union

If the employer is to terminate the labour contract of the employee due to major changes to the objective circumstances upon which the labour contract is based, and the

0 – 250] Dissolution as a result of invalidity of the labour contract easons of the employer

ording to Art 26 of the *Labour Contract Law*, the labour contract will be whol-ially invalid in the following situations:

A party causes the other party to conclude or amend the labour contract against s true intent through fraud, coercion or exploitation of the other party's disad-position;

The labour contract absolves the employer from legal liability and denies the his/her rights;

The labour contract is in violation of the mandatory provisions of the law or ative regulations.

ording to Art 86 of the *Labour Contract Law*, if the labour contract is declared accordance with Art 26 of this law, the party at fault shall be liable for dama-y harm or loss caused to the other party.

ons where Employees can "Immediately Dissolve" the Contract (Due to Breach of Agreement or Violation of n the Part of the Employer)

0 – 255] Situations where employees can immediately dissolve the ontract (due to breach of agreement or violation of laws on the part nployer)

le 38 sec 2 of the *Labour Contract Law* states that where an employer uses :h as violence, threat or illegal restriction of personal freedom to coerce a to the provision of labour or where an employer gives orders which violate the orce a worker to engage in risk work which endangers the worker's personal e worker may forthwith rescind the labour contract and shall not be required to mployer advance notice thereof.

again, Art 18 of the *Implementation Regulations on the Labour Contract Law* these situations where the employee can dissolve the labour contract concluded mployer. In addition, according to Art 18 of the *Implementation Regulations bour Contract Law*, the above – mentioned labour contract includes labour

contracts with a fixed term, labour contracts without a fixed term or labour contracts which set the completion of a specific task as the term of the contract.

Comparing with the situations of violations of law and agreements as stipulated in Art 38 sec 1 of the *Labour Contract Law*, employers using illegal means, such as violence, will endanger the personal safety and legal rights of employees, hence, the regulation of "dissolving the labour contract immediately without giving any prior notice to the employer" is a form of protection for the employees facing peril.

[¶10 – 260] Forced labour

"Unlawful restriction of personal freedom" refers to the illegal deprivation or restriction of the freedom of the employee to dictate his/her activities according to his own will through detention, confinement or other coercion methods.

In a labour relationship, although the employee is bound by the internal labour regulations and labour contract, he/she is still entitled to basic personal freedom which includes full personal freedom out of the mandatory working hours and limited personal freedom within the mandatory working hours. If the personal freedom restriction of the employee imposed by the employer exceed that of what is required to fulfil the labour obligations, and there is no legal basis or if it is based on an unlawful labour contract and internal rules, regulations and systems, this will be considered unlawful restriction.

[¶10 – 265] Legal responsibilities of employers

Where an employer uses means such as violence, threat or illegal restriction of personal freedom to coerce a worker into the provision of labour or where an employer gives orders which violate the rules or forces a worker to engage in risk work which endangers the worker's personal safety, the worker may forthwith rescind the labour contract and shall not be required to give the employer advance notice thereof.

Article 88 of the *Labour Contract Law* stipulates that, if the employer is involved in any of the following, the employer should be subject to administrative punishment; if such conduct constitutes a crime, criminal liability shall be pursued in accordance with the law; if the employee suffers any harm or loss as a result thereof, the employer shall be liable for damages:

(1) Force an employee to work through the use of violence, coercion or unlawful restriction of personal freedom;

rly wages, piece rate wages, bonuses, incentives, allowances, overtime wa-
yment given under special circumstances.

e 27 of the *Implementation Regulations on the Labour Contract Law* states
onthly wages for calculating the financial compensation to be paid to an em-
stipulated in Art 47 of the *Labour Contract Law* shall be the monthly wages
nployee deserves, including the hourly wages or piecework wages and other
ncome such as bonuses, allowances and subsidies. If the average wages of
ee in the 12 months before the employment contract is dissolved or termina-
ow the local minimum wages level, the financial compensation shall be calcu-
l on the local minimum wages. If the working time of the employee is less
onths, the average wages shall be calculated based on the actual work time.

] –375] Items not within the wage scope

following items are not part of the wage scope:

Social insurance premiums and welfare benefits provided by the employer to
yee, such as funeral expenses and pension for the family of the deceased em-
ving allowance, and family planning allowance;

Expenses incurred in labour protection, such as uniforms, antidotes and re-
; provided by the employer for the employee;

Various kinds of labour remuneration and other income that are not incorporat-
total wages in accordance with regulations, such as Creative Invention Prize,
Spark Award, Natural Science Award, National Award for Progress in Science
nology, Innovation and Technological Improvement Award, Chinese Skills
. ;

Article and lecture remuneration, translation and other specialized job fees;

Food and entertainment subsidies during business trips, travelling expenses
ng – in allowances for job transfers;

Dividends (including share capital dividends) paid by the employee for the
of the enterprise's shares and bonds, and the interests gained;

Medical treatment subsidy and living expenses subsidy, etc, which the enter-
ld pay for the dissolution of the labour contract, as stipulated in the labour

[¶10 –380] General calculation of length of service

The "length of service" used in the calculation of financial compensation refers only to the "number of years the employee has been with the employer", which is tabulated from the day the employee and employer established a labour relationship. The duration of service of the employee with his/her previous employer is not included as part of the current length of service.

According to the *Reply of the Office of the Ministry of Labour on the Advice Concerning the Understanding of "Continuous Working Time at the Same Employer" and "Working Term of the Entity"*, "continuous working time at the same employer" refers to the period where the employee maintains the same labour relationship with the same employer. In calculating the medical treatment period and financial compensation, the "length of service in the entity" and "continuous working time at the same employer" are considered similar concepts, hence, the medical treatment period enjoyed by the employee in accordance with the law should not be reduced.

[¶10 –385] Determination of length of service

According to the *Reply of the Office of the Labour Ministry "Concerning the Advice on Relevant Issues on the Disbursement of Financial Compensations after the Termination or Dissolution of Labour Contract", Reply and Suggestions of the Office of Labour Ministry Concerning Whether the Length of Military Service of Retired Soldiers and the Length of Service of Relevant Workers Can be Calculated as Part of the Financial Compensation Term* by the office of the Ministry of Labour, and the *Implementation Regulations on the Labour Contract* Law, for the following situations, the "length of service" when calculating financial compensation should also include the employee's working time in the previous unit, as given below:

(1) The length of service of a permanent employee with an employer before the implementation of the labour contract system can be calculated as "length of service in the entity";

(2) For an employee who changes work unit due to reasons such as merger, acquisition and joint venture, changes in characteristics of the unit and change in name of the legal person, his/her length of service before the change can be calculated as "length of service in the entity";