

china



LEHMAN, LEE & XU

china

Lehman, Lee & Xu

Address:	10-2 Liangmaqiao Diplomatic Compound No. 22 Dongfang East Road, Chaoyang District Beijing 100600 China
Tel:	+86-10-8532-1919
Fax:	+86-10-8532-1999
Email:	mail@lehmanlaw.com
Web:	www.lehmanlaw.com

Lehman, Lee & Xu is one of China's most prominent and Beijing's largest law firm, experienced in providing valuable assistance in China's modern business and legal environment.

Established in 1992 as one of the first private law firms in China, Lehman, Lee & Xu has quickly grown to become one of the largest and most successful law firms in China, with now over 150 experienced lawyers representing both foreign and Chinese clients throughout China in a variety of enterprises. With branches in various Chinese cities including Beijing, Shanghai, Shenzhen, Macau and Hong Kong, as well as in Mongolia and Washington D.C., Lehman, Lee & Xu is considered a leader of the re-established Chinese legal profession. The firm has been recognized by the media and the Chinese Ministry of Justice as one of the best law firms in China.

Lehman Lee & Xu is unique in that it is the only nationwide firm that has been approved by China's regulatory bodies to represent foreign applicants in filing and prosecuting patent and trademark applications. We are licensed by the State Intellectual Property Office (SIPO) to practice patent law and by the Trademark Office to practice trademark law. We are also licensed by the China Securities Regulatory Commission to advise and assist clients in the filing of securities documents. Our team of foreign and Chinese licensed attorneys, fluent in both English and Chinese, and also in Spanish, is highly qualified, graduating from prestigious law schools in China and abroad. Our partners have experience practicing law since the re-establishment of China's legal profession, and also have vast experience functioning with foreign law firms.

Lehman, Lee & Xu is committed to high quality work and excellent client service. Our mission is to be the best law firm in China, providing practical solutions to our clients' problems and exceeding their expectations.

Clients

Lehman, Lee & Xu boasts one of the most impressive client lists of any law firm in the world today, including some of the most recognized multinational companies in the world. Aventis, Novartis, Eli Lilly, Royal Dutch Shell, Sun Microsystems, Sony and Bayer are some of the companies that retain our services.

Practice Areas

The lawyers at Lehman, Lee & Xu have the expertise and experience to guide foreign enterprises through the complex government laws and approval processes to establish foreign investments in China. Lehman, Lee & Xu's extensive experience in both Chinese and American law, particularly Chinese law, has enabled the firm to provide continued satisfaction to its many clients.

INTELLECTUAL PROPERTY

Lehman Lee & Xu helps its clients to register and enforce patents, trademarks and copyrights through an efficient worldwide network since 1992. In 2004, Lehman, Lee & Xu was recognized by the Managing Intellectual Property

Association, not only as one of China's top four trademark and copyright law firms, but also as one of the top ten patent law firms in China.

PATENT

Lehman, Lee & Xu has been successfully representing patent clients by providing excellent service in the areas of licensing and litigation involving patent issues. We counsel a diverse group of patent clients on filing patent applications and avoiding patent-related claims.

TRADEMARK

Lehman, Lee & Xu is a licensed Chinese intellectual property agency, which has been successfully aiding clients in executing trademark protection strategies. We assist numerous clients, from large multinational companies to small businesses, to create first-class trademark protection strategies. We are very proactive concerning trademark protection in China, organizing several trademark seminars.

COPYRIGHT

The attorneys at Lehman, Lee & Xu are experienced in negotiating and drafting agreements relating to the creation, exploitation and transfer of works of authorship of all types, including computer-related works, literary, publishing and musical works.

Our services in this area include:

- Protection and the strategic planning of copyrights
- Acquisition of copyright registration in both China and abroad
- Managing copyright matters associated to the Internet
- Copyright licensing
- Employee and third-party waivers and releases
- Administrative and judicial enforcement of copyrights
- Assignment agreements

FILING IN HONG KONG, MACAO, AND TAIWAN

Although sometimes considered as part of the greater China region, these jurisdictions must be treated uniquely with regards to the protection of your intellectual property. Each geographic area has its own registration and filing system, a unique legal system, and separate enforcement mechanisms. Despite

the disparity of the legal systems, Lehman, Lee & Xu is able to offer you full intellectual property services in Hong Kong, Macau and Taiwan.

LICENSING

Intellectual property licensing and technology transfer agreements play an increasingly important role in China's strategic business plan for many companies. Our intellectual property attorneys understand that technology transfers and licensing agreements involve far more than intellectual property rights. We draw on the full knowledge and resources of the firm to anticipate the competitive implications for all parties in licensing and marketing negotiations.

SOFTWARE REGISTRATION

Rapid growth of the technology industry in China and an intensification of competition have increased the importance of taking measures to protect your rights as a software developer, manufacturer or author. Registration of software in China as well as at home can ensure that your revenue and your reputation are not damaged by infringement or outright piracy.

Foreign Direct Investment

With over 57 billion dollars in foreign direct investment in 2004, China has become the main international destination for foreign investment.

Lehman, Lee & Xu have been providing foreign direct investment since China's economic boom in the early 90's and have vast experience in all aspects of commercial and investment law in China, including the establishment of companies, real estate contracts and due diligence matters among others. Lehman, Lee & Xu also provides assistance in debt collection cases, including non-refunded deposits.

China's WTO accession has opened the China doors even further. New opportunities appear for foreign companies at every moment. Lehman, Lee & Xu is the access gate to participation in the vast opportunities available in the People's Republic of China.

china | corporate law

Main Regulations and Rules

IN GENERAL

- Corporate Law (Adopted on Dec.29, 1993, recently amended on Aug.28, 2004)
- Partnership Law (Adopted on Feb.23, 1997 and effective on Aug.1, 1997)
- Sole Proprietorship Law (Adopted on Aug.30, 1999 and effective on Jan.1, 2000)
- Township Enterprise Law (Adopted on Oct.29, 1996 and effective on Jan.1, 1997)
- Securities Law (Adopted on Dec.29, 1998 and effective on July1, 1999)
- Code of Corporate Governance for Quoted Companies in China (Effective on Jan.7, 2002)

FOREIGN INVESTMENT ENTERPRISE

- Law of Sino-foreign Equity Joint Venture (Adopted on July 1, 1979 and amended on March 15, 2001)
- Law of Sino-foreign Co-operative Joint Venture (Adopted on April 13, 1988 and recently amended on Oct.31, 2000)
- Law of Wholly Foreign Owned Enterprises (Adopted on April 12, 1986 and amended on Oct. 31, 2000)

ON REGISTRATION

- Regulations on Company Registration (Effective from July 1, 1994)
- Regulations on Partnership Enterprise Registration (Effective from Nov. 19, 1997)

Types of Companies

Limited Liability Company and Company Limited by Shares

The Liabilities of Shareholders in Limited Liability Company

- Shareholders shall undertake liability for the company to the extent of their respective capital contributions; and
- Each shareholder shall invest in full the amount of the capital subscribed for under the articles of association; and
- Shareholders are forbidden to withdraw capital the company has been registered; and
- Shareholders shall also assume the liabilities stipulated in the articles of association or related laws and regulations.

The Liability of Shareholders in a Company Limited by Shares

Shareholders of Companies Limited by Shares are liable for the company to the extent of their shares. They are also required to assume other liabilities as the shareholders of Limited Liability Company.

THE MINIMUM REGISTERED CAPITAL OF A LIMITED LIABILITY COMPANY

- RMB 500,000 for a company engaging principally in production operations;
- RMB 500,000 for a company engaging principally in wholesaling commodities;
- RMB 300,000 for a company engaging principally in commercial retail;
- RMB 100,000 for a company engaging principally in scientific technology development, consultation and services.

Where the minimum amount of registered capital for a limited liability company in a specific industry is higher than the amount stated in the preceding paragraphs, that amount shall be stipulated by separate laws or administrative regulations.

THE MINIMUM REGISTERED CAPITAL FOR A COMPANY LIMITED BY SHARES

The minimum amount of the registered capital of a Company limited by shares is RMB 10,000,000. Requirements for the minimum amount of the registered capital for a company limited by shares to be higher than the above amount is stipulated by separate laws or administrative regulations.

Shares issued to the public may be either registered or bearer shares. Present Chinese laws do not refer to preferred or ordinary shares.

Corporate Governance

SHAREHOLDERS MEETINGS OF A LIMITED LIABILITY COMPANY

Any resolution adopted in a shareholders' meetings relating to the limited liability company's increase or reduction of registered capital, division, merger, dissolution or change of corporate form or amendment of the articles of association requires not less than 2/3 affirmative votes by shareholders.

SHAREHOLDERS MEETINGS IN A COMPANY LIMITED BY SHARES

The shareholders' general meeting's adoption of a resolution for merger, division or dissolution of the company, or amendment of the articles of association requires not less than a 2/3 affirmative votes out of the votes made by those shareholders who attend the meeting.

Appointment of the Directors of a Limited Liability Company and Company Limited by Shares

The shareholder's meet to elect and replace directors and decide on matters regarding the remuneration of directors.

Power of Directors of Limited Liability Company

The board of directors exercises the following powers:

- being responsible for calling meetings of shareholders and presenting reports thereto;
- implementing resolutions adopted by the shareholders in the shareholders' meeting;
- determining the company's operational plans and investment programs;
- formulating the annual financial budget and final accounting plans for the company;
- formulating profit distribution plans and plans for the recovery of losses;
- formulating plans for increasing or reducing the company's registered capital;
- drafting plans for merger, division, change of corporate form and dissolution of the company;
- determining the company's internal management structure;
- appointing or dismissing the manager (general manager) (Hereinafter referred to as the "general manager") of the company, appointing or dismissing, upon the general manager's recommendation, deputy managers of the company and the financial officer, and determining their remuneration;
- formulating the basic management system of the company.

Power of Directors of Company Limited by Shares

The board of directors exercises the following powers:

- being responsible for calling general meetings of the shareholders, and presenting reports thereto;
- implementing resolutions adopted by the shareholders in their general meetings;
- determining the company's operating plans and investment programs;

- formulating the annual financial budget plans and final accounting plans for the company;
- formulating the company's profit distribution plans and plan to cover company losses;
- formulating plans to increase or reduce the company's registered capital, and plans to issue company bonds;
- drafting plans for merger, division or dissolution of the company;
- determining the company's internal management structure;
- appointing or dismissing the general manager of the company; appointing or dismissing, upon the general manager's recommendation, deputy general managers of the company and the financial officers; and determining their remuneration;
- formulating the company's basic management system.

Minimum Number of Independent Directors in Quoted Companies

No less than 1/3 of the board of directors shall be independent directors.

Term of Appointment for Company Directors

The articles of association specify the term of appointment for directors, provided that each term shall not exceed 3 years. A director may serve another term if re-elected. Prior to the expiration of a director's term, the shareholders, in their general meetings, may not dismiss the director from office without cause.

Regulations on Director's Remuneration

Corporate Law stipulates that matters relating to the remuneration of directors shall be determined in the shareholders' meetings. The China Securities Regulatory Commission requires the boards of directors to report and disclose the remuneration of directors in the shareholder's meeting. At present there is no legal limitation on the remuneration of directors in China.

Regulations on the Annual Financial & Accounting Affairs of the Company

A company shall prepare its financial and accounting reports at the end of each fiscal year, which shall be reviewed and verified in accordance with the law.

The financial and accounting reports shall include the following statements and subsidiary statements:

- balance sheet;
- income statement;
- statement of cash flow;
- explanation of financial conditions;
- statement of profit distribution;

A limited liability company shall deliver its financial and accounting reports to each shareholder within the time limit prescribed by the articles of association.

The financial and accounting reports of a company limited by shares shall be available at the company for the shareholders' inspection not later than 20 days prior to the annual shareholders' general meeting.

A company limited by shares established through a public shares offering shall publish its financial and accounting reports.

Code of Corporate Governance for Quoted Companies in China requires information disclosure, transparency and other special rules for quoted companies.

china | tax law

Contact

Foreign enterprises with a presence in China are subject to PRC corporate tax laws. In addition, as discussed below, the income of foreign enterprises without a presence in China such as dividend distribution, loan interest, rental income, intellectual property licensing royalties are also subject to enterprise income tax on a withholding basis.

General Notes

China maintains a bifurcated tax system with separate tax collection on the national and on the local level. Foreign investment enterprises ("FIE") may enjoy favorable tax incentives from both levels.

The major taxes applicable to an FIE in China are: (1) tax on income, such as Enterprise Income Tax ("EIT"), Withholding Income Tax, and Individual Income Tax ("IIT"); (2) tax on transactions (turnover tax), such as Business Tax ("BT"), Value Added Tax ("VAT") and Consumption Tax; (3) tax on specific objectives, such as Land Appreciation Tax; (4) tax on resources, such as Resources Tax; (5) tax on property, such as Urban Real Estate Tax; (6) tax on behavior, such as Vehicle and Vessel Usage and License Plate Tax and Stamp Tax; (6) tax levied by Customs, i.e. Land Appreciation Tax; (7) tax levied by the finance department, i.e. Deed Tax.

Significant Developments

China is embarking on comprehensive tax reform, the purpose of which is to simplify the tax system, to broaden the tax base, to lower tax rates and to strengthen tax collection.

The various taxation reforms include:

- the reform of preferential taxation policies for development zones that are inconsistent with national tax rules,
- the integration of separate EIT systems between domestic enterprises and FIEs, the law regarding is supposed to be promulgated in March 2005 at the earliest,
- converting the current production-type VAT into a consumption-type VAT, with the pilot reform began in 2004,
- the adjustment of export VAT refund rates,
- the regulation of tax payment methods for the Representative Office of foreign enterprises,
- the implementation of a credit rating system for corporate taxpayers.

Taxes on Corporate Income

EIT

Generally, FIEs engaged in production and business operations are subject to EIT at a rate of 33% (the EIT will likely be reduced to 24-27% after reform).

Taxable Income: Taxable income includes income from production and business operations, profits (dividends), interest, rent, income from the transfer of property, income from the provision or transfer of patents, proprietary technology, income from trademark rights and copyrights as well as other non-business income.

Deductions: Income generated from sources outside of China may be deducted from the taxable amount if it has already been taxed abroad;

Net operating losses and taxes (such as business tax, consumption tax and resources tax) shall be deducted when the EIT is determined.

Public donations may also be deducted when the EIT is determined.

Incentives:

- Reduced base EIT rate. The tax rate could be reduced to 24% or 15%.
- Tax holiday for production enterprises. FIEs engaging in production (manufacturing or software development but not service-oriented FIEs) with a term of more than ten years may avail themselves of a two-year EIT exemption from the first profit-making year, and 50% reduction for the three years following tax exemption.
- Other EIT incentives. Tax holiday may be provided for certain industries; with the approval of relating taxation authority, FIEs may accelerate depreciation of fixed-assets; R&D expenses may be deducted 150%; reinvestment may be refunded.

WITHHOLDING INCOME TAX

The income of foreign enterprises without a presence in China, is also subject to EIT on a withholding basis. The usual withholding tax rate is 10% for interest, rentals, royalty and other income.

Reduction or exempted for advanced technology. Tax on royalties upon the transfer of advanced technology or on preferential conditions may be reduced or exempted.

INDIVIDUAL INCOME TAX

The tax rate is from 5% to 45%.

Corporate Taxes on Transactions

VAT (VALUE ADDED TAX)

The VAT is levied on the transfer of taxable goods and services at each stage of the production process. The general VAT is 17%. A lower rate of 13% applies to

goods such as books, newspapers, magazines, cereals, coal products for residential use, etc.

- Refunds are available for export goods. Import-related VAT may be refunded for those goods that are exported.
- Refund for software and IC products. The portion of VAT above 3% for the sale of self-manufactured software may be refunded before the end of 2010.

The portion of VAT above 6% for sales of IC products may be refunded before the end of 2010.

CONSUMPTION TAX

Consumption tax is levied on 11 categories of consumption goods, such as beer, cigarettes and gas oil, the rates range from 3% to 50%.

BUSINESS TAX

Business tax is levied on taxable services and labor, sales of immovable property and assignment of intangible assets. The tax rates range from 3% to 20%.

Other Corporate Taxes

LAND APPRECIATION TAX

The gains generated from the transfer of the real property and its attachments receive land appreciation tax at progressive rates ranging from 30% to 60%.

RESOURCES TAX

Resources tax is levied on the exploitation of taxable mineral products and salt.

URBAN REAL ESTATE TAX

The owners, users or custodians of houses and buildings are taxed at the rate of either 1.2% of the original value with certain deductions or 12% on the rental value.

VEHICLE AND VESSEL USAGE AND LICENSE PLATE TAX

Vehicles and vessels used in the PRC are levied at a fixed amount.

STAMP TAX

Certain vouchers and documentations in China will be taxed at a rate between 0.005% to 0.1%, or for 5 Yuan for each documentation.

CUSTOMS DUTIES

The import or export of goods will be taxed at various rates. Certain goods may be exempted from Customs duties.

DEED TAX

Transferees or assignees who own of land use rights or real property will be levied a Deed tax at a rate from 3% to 5%.

Branch Income

The sole business of a Representative Office of a foreign enterprise ("RO") is to perform market research, provision of information on business conditions or other preparatory and auxiliary activities for the self-run commodity trading of its head office.

The activity of RO is taxed. The head office can provide evidentiary materials confirming that it has been consistently engaging in self-run trading in respect to China, but in practice it is very difficult to qualify for a head office exemption.

Group Taxation

Business transactions between Affiliated Enterprises (regarded as “direct or indirect ownership or control of capital, business operations, “sales and purchase, etc.”, “direct or indirect ownership or control of both parties by a third party” and “other affiliate relationships arising from mutual interests”) shall be subject to the standard of normal transaction tax. The taxpayer is obligated to submit a declaration regarding connected transactions, and shall disclose certain information as required by the taxation authorities. Transfer pricing would be investigated, audited and adjusted by relating tax authorities.

Tax Administration

The State Administration of Taxation and the Ministry of Finance are responsible for the interpretation/implementation of tax regulations. And the General Administration of Customs is responsible for the interpretation and implementation of customs rules as well as the collection of import-stage VAT.

china | foreign investment

A foreign investor has several options that it can use to establish a business presence in the People's Republic of China (PRC) by way of foreign direct investment (“FDI”). The option selected will depend on the type of business activity and the business plan formulated by the investor.

The Foreign Investment Guidance Catalogue (“Catalogue”) issued by the Chinese government lists various types of foreign investment projects under the following category heads: encouraged, restricted and prohibited. All foreign investment projects not included in the Catalogue are considered to be permitted.

According to the laws and regulations of the PRC, there is one main type of business structure that can be used to establish a simple business presence in the PRC, namely, a Representative Office and there are several main types of enterprises with foreign investment (“FIEs”) that can be used to set up an operating entity in the PRC, namely, Sino-foreign equity joint ventures, Sino-foreign cooperative ventures, wholly foreign owned enterprises.

Establishing a resident representative office (“RO”) is the most common method by which foreign companies form a long-term presence in China. However, a RO may not engage in direct profit-making activity and may not collect revenue for services provided.

The Law of the PRC concerning Wholly Foreign-owned Enterprises defines wholly foreign owned enterprises (“WFOEs”) as those enterprises established in the PRC by foreign investors in accordance with relevant Chinese law, exclusively with their own capital. There are restrictions on the setting up of WFOEs in the PRC. Therefore, the WFOE structure can only be used in certain business sectors.

The Joint Venture (“JV”) is the most traditional form of FIE in China and was the only vehicle available to foreign investors by the Chinese government for many

years. According to the regulations, there are two JV structures that may be set up: equity joint ventures ("EJVs") and cooperative joint ventures ("CJVs"). The major difference between the two structures is that partners in EJV must pay in registered capital and derive profits in direct proportion to the equity held by each partner, and EJV assets are owned in proportion to equity holding. CJVs are more flexible in a number of ways; profits may be allocated between the partners contractually, one party may recover its investment through an accelerated repayment structure in return for waiving rights to CJV assets upon termination or liquidation, and the partners may agree on special investment/profit provisions on an ad hoc basis for individual CJV projects.

Establishment of foreign-invested enterprises ("FIEs") requires approval from the Ministry of Commerce ("MOFCOM") (the successor in powers and authorities of the former Ministry of Foreign Trade and Economic Cooperation), or its local counterpart, the provincial or municipal Bureau of Commerce ("BOFCOM"). While MOFCOM and the local BOFCOM do have some discretion in certain aspects of the FIE approval process, the process is considered to be well established, and the foreign investment vehicles in China are considered stable.

Registration

Usually the following process is followed in establishing a FIE. The investors to a FIE shall file an application with the examination and ratification department of the BOFCOM at the city or provincial level in the locality where the invested company is to be located. Upon receipt of the above-mentioned application, the examination and ratification department shall, in line with the invested company's scope of business operations, make a general examination of the application as well as all the required documents before giving out the permit. For some FIEs engaging in certain businesses, such as education or medicine, approval from the related governmental authorities is needed in addition to the BOFCOM permit.

If the examination and ratification department gives a permit to an FIE, the enterprise shall, upon presentation of the permit, file an application for registration with the company registration department of the Administration of Industry and Commerce (AIC) in the locality where the invested company is to be located.

The company registration department shall, in accordance with the relevant stipulations of the Rules for the Administration of Company Registration, decide whether to grant registration or not. Should registration be granted, a (annotated) Business License will be issued. After the Business License is issued, the FIE has to go to the local taxation bureau and the customs office for taxation recordal and customs recordal before it can start business.

Foreign Exchange and Profit Repatriation

Another concern for FIEs is the foreign exchange system and profit repatriation procedures. In order to fulfill its commitment without negatively affecting its attempt to maintain a stable RMB exchange rate, China has been adopting a unified, controlled, floating rate foreign exchange (forex) system.

The central concept of control over inbound or outbound forex depends on whether the nature of the transaction involves the transfer of capital or ordinary expenditures. If the transaction has the purpose of creating capital, i.e. equity investments (into FIEs), loans, securities investments, guarantees benefiting a foreign entity etc., the forex will be regarded as a so-called "capital account" item with strict control over its movement in the PRC currency market. Such an item has to be placed in a controlled bank account and virtually all such related transactions require the approval of the appropriate department under the State Administration of Foreign Exchange ("SAFE"), which is routinely obtained without difficulty in many circumstances. If the forex transaction is within the category of cross-border expenditure in the ordinary course of business, e.g. payments and receipts from international trade of goods and services, payment of interest on forex loans (but not repayment of principal) and repatriation of dividends from an FIE, the item is classified as a "current account" item and is usually only required to be supported by documentation that will be checked by the relevant bank, although such current account items may still be subject to authentication by SAFE in certain cases.

Chinese banks remitting forex are required to confirm the authenticity of the remittance and, in certain respects, the underlying transaction. For forex capital account remittances requiring SAFE approval, the SAFE approval document must be presented to the bank. Even for forex current account remittances not

requiring SAFE approval certain additional guidelines apply. For example, remittances of payments for imported goods may be made only if proper customs clearance documents are presented to the bank and other anti-fraud and anti-money laundering requirements are satisfied. Similarly, remittances of royalties under a cross-border technology license contract are subject to presentation of a technology import registration certificate or an import permit for the license contract.

Foreign investors may repatriate profits from an FIE without restriction subject to compliance with certain procedural requirements, such as prior PRC accounting to determine profits, payment of income tax and obtaining SAFE approval, which is routinely granted.

There is no direct cap on profit repatriation. However, FIEs are required to allocate a certain rate of after-tax profit, determined by the board of directors, to a reserve fund and to an employee bonus and welfare fund. Joint ventures additionally have to make allocations to an enterprise expansion fund. WFOEs are required to allocate 10% of their after-tax profits to the reserve fund and cannot reduce this rate until the fund reaches an amount equivalent to 50% of the registered capital. Furthermore, profit distribution is not permitted until the WFOE has made up for the losses incurred in previous years.

Foreign Personnel

FIEs may employ both Chinese employees and foreign employees. The FIEs have to apply for a permit to employ foreign employees with the labor administration department of the local government by submitting the JV contract, articles of association, business foreigners with permission to work in China should apply for the proper type of visa at a Chinese embassy, consulates or visa offices, bringing with them the invitation or employment certificate sent by the FIE, or the letter or telex of visa notification sent by the FIE. They should apply for the foreigner residence certificate at the local public security organ within 30 days after entry. A labor contract has to be signed between the FIEs and the foreign employees.

china | labor law

Employment Contracts

Labor contracts are agreements reached between the laborers and their employer to establish labor relationships and specify the rights, interests and obligations of each party. Before any labor relationship is established, the labor contract must be concluded and shall become legally binding in accordance with law.

The terms and conditions of labor contracts between a FIE and its local employees are negotiable subject to compliance with the labor laws of China. Nonetheless, once the contract is concluded the parties involved shall fulfill the obligations stipulated in the contract.

In China, there are two main classes of labor contracts: COLLECTIVE and INDIVIDUAL.

A collective labor contract must be concluded between the labor unions or representatives elected by the employees as one party and the enterprise as the other party. There are detailed rules that have been set out in relation to entering into negotiations and the settlement of disputes with respect to collective labor contracts. The terms of these contracts concerning labor remunerations work hours, breaks and leave, labor safety and sanitation, insurance, welfare treatment and other matters, are covered mainly by national laws and regulations as well as local regulations, and serve to set minimum standards for individual labor contracts. However, companies (mainly FIE's), are reluctant to enter into collective labor contracts because they are concerned that labor unions would gradually increase their collective bargaining power.

Parties to an individual labor contract are allowed to agree on other terms of employment in addition to the statutory content. Local labor bureaus tend to prescribe model labor contracts that the employer and the employees within their respective jurisdictions are obligated to use. Standard form labor contracts

prepared by the employers themselves shall be subject to examination by local labor bureaus, before they are performed.

Labor contracts shall be concluded in written form in both English and Chinese, and contain the following clauses:

- Time limit of the labor contract;
- Scope of work;
- Labor protection and labor conditions;
- Labor remuneration;
- Disciplinary procedures;
- Conditions for the termination of the labor contract;
- Liabilities for violations of the labor contract.
- Any other provisions agreed upon through consultation.

Apart from remuneration, the most important matters that should be addressed in the contract are the terms and the conditions justifying early termination.

There are several ways for the employer to dissolve the Employment Agreement under the Labor Law of the PRC.

DISSOLUTION BY CONSULTATION

An employment agreement may be dissolved upon agreement of the parties concerned through consultation.

DISMISSAL

Employers may dismiss employees without notice only when the employee:

- does not meet the employer's employment standards within the period of probation;
- has seriously violated the employment policies, rules and regulations established by the employer;
- has committed serious dereliction of duty or resorted to deception for personal gain and has caused serious losses to the interests of the employer;
- has been affixed with criminal responsibility.

Employers may otherwise dismiss employees, by first giving 30 days' notice only when the employee:

- is unable to take up his original or any new work upon returning from non-work-related medical treatment for illness or injury;
- is unqualified for his job and remains unqualified even after receiving training or a reassignment to another work post;
- is unable to agree with the employer, after mutual consultation, to modify his labor contract when the purpose for which he was originally hired was significantly changed or no longer exists.

REDUCTION OF STAFF DUE TO BUSINESS REASONS.

Wrongful dismissal occurs when an employer terminates an employee's employment for unfair or illicit reasons. In China it is illegal to dismiss a member of staff due to the following:

- Pregnancy, nursing or maternity leave;
- Receiving prescribed treatment for illness or injury;
- Suffering from occupational illnesses or work related injuries;
- Claiming violation of rules but with no evidence to back it up.

A successful claim by an employee of "wrongful dismissal" can result in restitution of damages for the loss incurred by the employee.

With regard to the types of compensation afforded to the dismissed employee, there will be no compensation in the case of voluntary resignation by the employee. In all other cases of lawful dismissal, no compensation is granted if the employee has been employed for less than six months. However, if the employee has been with the company for more than six months, there are varying degrees of compensation afforded, ranging from one month to six months or even one year's pay.

Regarding Directors, if a director is part of the company's Board of Directors, an employment contract is unnecessary since directors are not employees of the company. Actually, the company does not employ Directors, because they are appointed officials, and as such their authority and obligations come directly from the law and not from any employment contract.

In the case of the Managing Director, since he is effectively employed by the company, an employment contract is needed, and this contract will follow the same rules and regulations as any other employment contract with no variation.

Employees' Representatives and Union Representation

Trade unions are mass organizations of the working class voluntarily set up by staff members and workers. Their legal rights and interests are ensured by the state and their opinions are binding upon the enterprise.

In addition to safeguarding the overall interests of the people in the entire nation, trade unions should safeguard the legal rights and interests of staff members and workers.

Trade unions can assist and guide workers in signing labor contracts with enterprises and may represent staff members and workers in signing collective contracts with the administrative departments of enterprises or institutions. In the event that the enterprise wants to make or amend a labor agreement, it must listen to the opinion of the trade union.

Trade unions have the right to assign representatives to investigate infringement by their enterprises, institutions or organs upon staff members and workers' legitimate rights.

If an enterprise infringes upon the labor rights and interests of the workers in violation of the contract, the trade union may demand that the enterprise assume responsibilities for its acts.

Trade unions have the right to voice their opinions if they deem that staff members or workers are inappropriately dismissed or penalized by enterprises or institutions.

Furthermore, these trade unions shall, on behalf of the workers, make representations to the enterprise in the event that the company, in violation of labor laws and regulations, infringes upon the labor rights and interests of the workers and staff members, and demand that it take measures for rectification. Should the enterprise refuse to respond, the trade union may apply to the local people's government for a decision in accordance with the relevant laws of the PRC.

A trade union has the right to submit suggestions, in accordance with state regulations, regarding working conditions as well as the safety and public health facilities. If the trade union determines that the enterprise has given a command contrary to the established rules and has compelled workers to operate under unsafe conditions, the trade union shall have the right to present proposals for a solution, and the enterprise shall consider the proposal and reply to the trade union without delay.

Trade unions take part in the enterprises' mediation of labor disputes. In the event of a work stoppage or slow-down strike the trade union shall, on behalf of the workers and staff members, hold consultation with the enterprise, present the opinions and demands of the workers and put forth proposals for solutions, which the company shall try to satisfy.

When discussing major issues of operation, management and development, the enterprise shall listen to the opinions of the trade union. The representatives of the trade union in an enterprise shall attend any meetings held by the enterprise or institution that discuss matters of wages, welfare, occupational safety and health, social insurance and other issues related to the immediate interests of the workers and staff members.

Regarding foreign invested companies, the establishment of labor unions is effectively mandatory since 1994 in economic development zones and coastal cities and they cannot be sidelined in terms of management decision-making.

Collective Bargaining Agreements and Other Agreements

Although collective bargaining agreements do exist in China, as well as collective labor contracts, the truth is they are quite rare and it is much more usual that if workers have a contract at all it is an individual contract. As previously mentioned, national laws and regulations as well as local regulations are the primary regulation for the terms of these contracts.

Even though codes do not replace the collective bargaining process between unions and company management, they can promote collective bargaining by providing explicit provisions on the right of workers to form and join unions as well as to bargain collectively. Codes are general and provide minimum

standards; collective bargaining agreements are specific and address particular issues that workers face in their workplaces.

Wages and Other Types of Compensation

The employer shall determine its form of wage distribution and wage level on its own and in accordance with the Law. Enterprises have full autonomy over their own wage system. The State shall implement a system of guaranteed minimum wages. Provincial, autonomous regional and municipal people's governments stipulate specific standards on minimum wages.

Worker's wages generally include pay on a time basis, pay on a piecework basis, bonuses, allowances and subsidies, over-time pay and other payment for special duties. The following will not be included in worker's wages:

- Social insurance and welfare benefits, such as bereavement, poverty relief and family planning grants paid by the employer to individual staff;
- Labor protection-related benefits, such as allowances on work clothes, detoxification agents and special drinks;
- Other labor remuneration not listed in the total payroll according to relevant regulations.

Employers must pay living subsidies and provide medical treatment allowances for all PRC employees. The State established a social insurance system, and set up social insurance funds so the laborers can receive help and compensations when they become old, suffer diseases or work-related injuries, lose their jobs and give birth. Both employers and individual laborers shall participate in social insurance in accordance with the law and pay social insurance costs.

The wages an enterprise pays to its workers must not be lower than the minimum rates promulgated by the local labor administrative department. Standards on minimum wages shall be fixed and readjusted with reference to:

- The lowest living costs of laborers themselves and the number of family members they support;
- Average wage level of the society as a whole;
- Productivity;
- Situation of employment;
- Differences between regions in their levels of economic development.

The minimum wage, for instance in Nanjing, capital of Jiangsu province and an important industrial base of China, is from RMB 540- 390 per a month in the different districts.

Laborers should work for no more than eight hours a day and no more than 44 hours a week on average. Enterprises requiring different standards may, with approval from the local labor administration, adopt flexible work systems. In practice employees work much longer and do not go after the employer for such overtime.

Restrictions apply to overtime work. Overtime may not exceed one hour a day and 36 hours a month, although, under special circumstances and subject to the agreement of the trade unions and employees, it may be longer. Standard overtime wages are:

- 150% of regular wage for overtime;
- 200% of regular wage for work on rest days;
- 300% of regular wage for work on statutory holidays.

Employment Regulations

The legal framework for employment/ labor matters consists of various laws and regulations issued by different level of government/ authorities, general particulars are as follows:

- Constitution Law: The Constitution law sets up the principle of labor law, such as every one has the right to work and the right to have rest on breaks/holidays, females and males have an equal right to employment.
- Labor Laws issued by the National People's Congress: The PRC Labor Law, effective from 1 January 1995, and the PRC Trade Union Law, promulgated on 28 June 1950 and revised on 3 April 1992 and 17 October 2001, are the principal Chinese labor laws.
- Regulations issued by the Central Government, such as Unemployment Insurance Regulation, Regulation of Management of Employment of Foreigner in China, Regulation of Payment of Wage.
- Regulations issued by Local Government, i.e. Beijing Minimum Wage Standard.
- Judicial Interpretations issued by the Supreme Court.

Social Security

Social security includes social insurance as well as other forms of social welfare benefits such as social relief. It aims to guarantee to employees or their dependents a minimum standard of living should the employees lose the ability to work due to reasons such as old age, illness, maternity, debilitating injury, death or unemployment. Participation in social insurance is mandatory and the employer is responsible for ensuring the payment of the employees' contributions, which may be either withdrawn from the employee' salary or paid directly by the employee according to the labor contract.

Under the social insurance system, the amount of contribution, the methods and standards for distributing benefits, and the means of administration and supervision over the various regions, types of enterprises and employees are all standardized.

Both local and foreign enterprises should provide social insurance for their employees through the local social insurance organizations, in accordance with the type of social insurance and contribution standards stipulated in the Labor Law and other laws, regulations and measures related to social insurance.

There are five types of social insurance in China: old age, medical, unemployment, work-related injury and childbearing. Among these, the premiums for old age, medical and unemployment insurance are jointly contributed by the enterprise and the individual, whereas work-related injury and childbearing insurance premiums are the sole responsibility of the enterprise.

In accordance with the example given before, the major social insurances in Nanjing are as follows:

- Unemployment insurance: Employer pays 2% and the employee pays 1%
- Pension: Employer 21% and employee pays 8%
- Medicine insurance: Employer pays 8% and employee pays 2% plus RMB 60 per year for serious sickness.
- Injury insurance: Average 1% (various industries are different)
- Giving birth insurance: 0.8%

Health and Safety

The employer shall establish and perfect its system for labor safety and sanitation, strictly abide by State rules and standards on labor safety and sanitation, and provide laborers with labor safety and sanitation conditions meeting State stipulations.

Two sets of legal obligations are to be taken into account by employers:

- a. Regulations providing for a range of measures to be adopted in order to prevent accidents and ensure the health of all employees;
- b. The cost, the administrative consequences and the risk of prosecution incurred when an incident involving health and safety obligations occur.

While the Labor Law of the People's Republic of China sets down basic principles for protecting employees' health and safety, numerous specific regulations stipulate the detailed terms and conditions for their implementation.

These basic principles include:

- Legal limitation of work hours to eight hours per day and 44 hours per week;
- Prohibition of employing workers under 16 years of age, in line with ILO conventions;
- Prohibition of assigning particularly exacting tasks to women;
- Protection of workers suffering from occupational diseases or work accidents. Before taking up employment, an employee must undergo a medical examination to ensure his or her health condition complies with the assigned tasks. Besides, enterprises must ensure regular medical checks for each employee after employment.

Legal consequences of health and safety incidents may be divided into civil, administrative and criminal liability. In each field, liability incurred by the employer depends not only on relevant regulations, but also on court and administrative practices.

china | real estate

PRC Land Policy

All land in China is effectively state owned except for that land belonging to Agricultural Collectives. The State refers to the Central and local government in terms of land ownership. The State Council, which is the highest organ of State administration, exercises the State land ownership itself or through its subordinate organs. The State has the right, if it deems that it is in the public interest, to requisition the Agricultural Collective land. Land ownership was given to the State in the 1982 amendments to the Chinese constitution. Contrary to Western historical perspectives, before the 1982 constitution there was some land not owned by the public. The amount of urban land is rapidly expanding due to the ever increasing economic development in China. Therefore since urban land should be state owned land under Chinese law, the State continually requisitions more and more Agricultural Collective land. Agricultural Collectives are land that was given to the peasants in the Agrarian Reform of the 1950s and land allocated to agricultural communes under the 1962 Sixty Articles belonging to Agricultural Collectives. The collectives are the modern day version of the communes established in China during the 1960s."

Land Use Rights

Any company, enterprise, other organization, or individual inside or outside China may acquire State-owned land through "land use rights". There are two types of land use rights "allocated land use rights" and "granted land use rights". "Allocated Land Use Rights" come from the socialist planned economy era, while "Granted Land Use Rights" originate from the new market economy. Allocation and grant are the ways through which the land users can originally obtain the land use rights from the State. Allocated Rights have the following characteristics: an indefinite term, used for narrowly described special purposes, in most cases require no compensation to be paid to the State (some may have to be paid to any displaced parties), not transferable unless converted to a

granted land use right, not leasable (but the building on the land may be leased which effectively leases the land as well) and mortgageable in accordance with significant limitations. Granted Rights have the following characteristics: a specified term (maximum 70 years), specific approved purposes for the land that are generally described with unlimited potential, grantee pays in accordance with the granting contract, transferable subject to certain restrictions, leasable and mortgageable.

Allocated land use right refers to the land use right lawfully acquired upon the approval by the people's government at or above the county level without payment of consideration and time limitation. The following types of land may be obtained by way of allocation:

- Land used by governmental bureaus and land for military purposes;
- Land used for urban infrastructure facilities and public welfare;
- Land used for energy, transportation, water or other infrastructure projects that have key support from State; and
- Land for other purposes prescribed by laws or administrative regulations.

In order to be conducive to the climate of rapid economic development the State has allowed several loopholes around the "hard spots" in the regulations for allocated land use rights. In general, allocated land use rights cannot be transferred, but instead they may be converted into granted land use rights. Allocated land use rights generally cannot be leased, but the buildings on the land maybe leased which carries a tacit understanding that when the State approves the leasing of the building it effectively eases the land use right. The interest achieved by allocated land users also may be covert into granted land use right. Much like the loophole found in leasing allocated land use rights there is a loophole in the rule that one cannot mortgage allocated land use rights. The owner of the land use rights may either mortgage the land anyway and hope that the foreclosure judge will foreclose on the land, and order the first proceeds to be paid to the State thereabouts converting the land use right into a granted land use right. Or instead of mortgaging the land the owner can instead try to convert the allocated land use rights into granted land use rights.

The 1988 amendment to the Chinese constitution created a new type of land use right the granted land use right. If land use rights are transferred by the State in its capacity as a land owner to a user for a fixed period, and the user of the land is obligated to pay a sum to the State as consideration, such a transfer is defined as a "grant". The land administrative authorities on the municipal and county level shall enter into contracts, on the behalf of the State, with the users of the land for granting land use rights.

Land use rights may be granted by means of auction, bidding or bilateral agreement. The Real Property Law demands that the prices of land grant by way of agreement must not be below the minimum land grant fees set by the State. The maximum term for which land use rights shall be granted shall be determined according to the following purposes of use:

- Land used for residential purposes, 70 years;
- Land used for industrial purposes, 50 years;
- Land used for educational, scientific and technological, cultural, public, health or sports purposes, 50 years
- Land used for commercial, tourism or recreational purposes, 40 years; and
- Land used for comprehensive or other purposes, 50 years.

The granted land use rights may be terminated or renewed by submitting the proper paperwork to the proper authorities. The granted land use rights may also be transferred and in most cases are transferred relatively quickly. The following restrictions apply to the transfer of granted land use rights: the transferor must have completed the payment of the fee and obtained a certificate for the land use rights, the transferor must have begun to develop by investing at least 25% of the total projected investment, and if the transferor finished its development project it must have obtained the proper registration for the property on the land.

Leasing

According to the 1995 Rules for Land Registration, the lease of land use rights and the lease of buildings both require separate registrations (except in some cases where the registry has been consolidated). The rules for registration occur

retroactively so no matter when the land or building was leased it must be registered in order to be legitimate. Leasing an urban building also requires that the parties engaged in leasing the building also be registered with the Real Estate Administration at the city or county level when they either execute or revise a lease contract. Article 214 of the 1999 Contract Law states that a lease term shall last no longer than 20 years. Theoretically the lease term should not exceed the term of the land use rights, but since both the lease and the land use rights are renewable one could assume by signing a lease contract whose term exceeds the term of the land use rights that the leaser agrees to renew the land use rights.

TRANSFER OF REAL ESTATE

The transfer of real estate shall go through an appraisal procedure for value of real property is transaction price declaration for the assigned real property. An owner of land use right and buildings and other fixtures on the land shall truthfully declare the transaction price to the local people's government.

Under the Real Property Law, ownership to land use rights or building should be registered and legitimate users or owners should be issued with certificated as title documents. When real property is assigned, an application for modified registration in real property shall be submitted to the local land and housing bureau above the county level to change the Building Ownership Certificate and State-owned Land Use Right Certificate.

For granted land, an assignee that changes the purpose of the land as provided in the original land grant contract after real property is assigned, must obtain the consent of the assignor and approval by local urban planning administrative authorities on municipal or county level. An amended or new contract for land grant shall be signed and the land grant fee shall be correspondingly adjusted.

Mortgaging

According to the 1994 Urban Real Estate Law mortgage in China is a quite similar arrangement to mortgage in the West. Banks, properly licensed financial institutions (including branches of foreign bank), and private individuals can

lend money, but private individuals cannot be in the business of lending money instead can just occasionally lend money to other individuals or entities. The only assets which can be mortgaged are; land use rights, multiple parcels, commonly owned property, and presale interests. A significant weakness in Chinese mortgage law is that leaseholds cannot be mortgaged. In General rules for lenders and borrowers are issued by the People's Bank of China (the major lender), but there are also several relevant laws established recently. The 1999 Contract Laws state that loans must be writing unless they are contracted by "natural person". The loan also states that borrowers must submit regular financial reports to lenders and that the 1995 Security Law shall apply to mortgages.

Foreign-Related Real Property Purchase and Leasing Issues

Chinese current real property laws and regulations have no specific stipulations governing real property and leasing issues of Wholly Foreign-owned Enterprises ("WFOE"s) or foreign individuals or entities. Therefore, this is a matter of negotiations with local authorities.