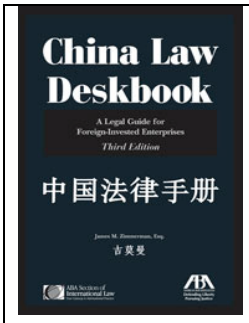

CHINA LAW DESKBOOK
(3rd Edition 2010)

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION

July/August 2013

JAMES M. ZIMMERMAN, ESQ.
BEIJING, CHINA

China Law Deskbook Monthly: News & Views from Beijing

The following are a few new laws, regulations, and policy trends that I find of interest this month:

- ***Suzhou Intermediate People's Court rejects the enforcement of an arbitration award issued by the renegade CIETAC-Shanghai***
- ***SPC issues a judicial interpretation enhancing criminal sanctions for environmental pollution***
- ***Labor Contract Law amended to provide for enhance supervision over dispatch arrangements***
- ***Shanghai SFDA issues blacklist of restaurant operators found to violate food safety laws***
- ***State General Administration of Press, Publication, Radio, Film and Television issue a circular to prohibit the publication of medical-related advertisements as news reports***

In 2012, the China International Economic & Trade Arbitration Commission (CIETAC-China) in Beijing and its regional sub-commissions fought a very ugly public battle that resulted in the Shanghai and Shenzhen sub-commissions declaring their independence from the national-level organization. The disintegration of CIETAC created issues concerning the enforceability of awards issued by the institution, and especially awards issued by the renegade branches. As expected, the courts are now reviewing and rejecting awards issued by the former sub-commissions. On May 7, 2013 in a case of first impression, the ***Suzhou Intermediate People's Court rejected an application for the enforcement of an arbitration award issued by the Shanghai International Economic and Trade Arbitration Commission***, the successor arbitral institution previously known as the China International Economic & Trade Arbitration Commission Shanghai Sub-commission. [*See* Jiangxi LDK Solar Hi-Tech Co., Ltd. and CSI Cells Co., Ltd. *(2013) Su Zhong Shang Zhong Shen Zi No. 0004*]. The parties to the underlying dispute agreed to arbitrate their claims before CIETAC in Shanghai. When a dispute arose, the parties submitted their claims to CIETAC-Shanghai in 2010. Subsequently, an award was issued in December 2012. The court held that the parties had chosen the national-level CIETAC to resolve their disputes and CIETAC-Shanghai had the jurisdiction over the case at the

time when the request for arbitration was originally filed in 2010. However, after CIETAC-Shanghai declared its independence from CIETAC-China in May 2012, it no longer had jurisdiction over the case. The court further held that the Shanghai institution had a duty to advise the parties of the situation and seek to hand over the case to CIETAC-China. *Business in China needs a predictable and stable dispute resolution environment in order to succeed and the situation with CIETAC throws into question whether Chinese arbitral institutions can support the business community. As noted in the Suzhou case, there is significant risk that a party to any contract with a CIETAC clause may endure the cost and inconvenience of a jurisdictional debate. Most experienced China hands – and before the disintegration took place – instruct their clients to, at all costs, avoid selecting Chinese arbitral institutions. This recommendation is based upon a number of key systemic problem areas including, but not limited to, unqualified staff and arbitrators, language difficulties, decisions driven by politics or local protectionism, rules that allow the tribunals to ignore the law/facts and to base decisions on equitable grounds or fairness (CIETAC arbitrators can act as amiable compositeurs, which is inconsistent with international standards), and lack of effective tools for interim relief. If the parties must choose a domestic institution, and this is usually the case if both parties are Chinese entities, we recommend that the dispute resolution clause be drafted in a manner to level the playing field as much as possible. The parties to a contract with a CIETAC clause would be wise to review their contracts and clarify, if necessary, the institution that they prefer to arbitrate their disputes and the rules of arbitration. If a contract calls for arbitration before any of the renegade branches, clarification is needed and before a dispute arises. For parties in foreign-related contracts that have the option to choose arbitration offshore, they would be wise to select an offshore forum such as the HKIAC, SIAC, or the ICC.*

▫ ▫ ▫ ▫

On June 18, 2013, the ***Supreme People's Court issued a judicial interpretation that imposes enhanced criminal sanctions on persons causing environmental pollution***. The SPC's order lists 14 types of activities that will be considered *"crimes of impairing the protection of the environment and resources."* As defined in the judicial interpretation, discharging, dumping or treating radioactive waste or waste containing infectious disease pathogens or toxic substances into sources of drinking water and natural reserves is deemed to be a criminal offense. Persons that engage in activities that force the relocation of 5,000 or more people or cause poisoning to more than 30 people is considered a crime. Pollution adjacent to hospitals, schools and residential areas is also considered to be a serious criminal offense. Such crimes are subject to prison terms of up to seven years and monetary penalties. The judicial interpretation also imposes criminal liability on individuals that cause serious injury to a person, while under prior rules liability would only be imposed if the pollution resulted in death. *Environmental degradation and injuries have resulted in mass protests and unrest throughout China, and has forced the government to give more attention to prosecuting environmental pollution as a crime. The SPC order seeks to clarify and enhance the jail terms that may be imposed for such crimes. Now, its up to the courts to prosecute the polluters; however, the courts will continue to be stymied given the lack of judicial independence, which is a clear problem when the judiciary seeks to crack-down on enterprises that are large, state-owned enterprises with the political clout.*

▫ ▫ ▫ ▫

Effective July 1, 2013, ***Labor Contract Law has been amended in many respects, and specifically with respect to the regulation of labor dispatch arrangements.*** The amended Law provides that a relationship between the dispatched employee and the company that receives the services of the dispatched employee may be considered a *de facto* employment relationship if the nature of the job duties fail to conform to the "temporary, auxiliary and substitute positions" principle required under the law. A *de facto* employment relationship can also be found if the percentage of dispatched individuals exceeds the maximum allowed by law, or if the individual is dispatched by an agency that is unlicensed. If a *de facto* employment relationship is found to exist, the law provides that an enterprise is required to conclude a written labor contract with the dispatched employee and the employer is subject to penalties for failing to conclude a written labor contract. The amended Labor Contract Law provides that an enterprise with a labor dispatch arrangement may convert to a direct hire arrangement, but must ensure that (1) the labor relationship between the dispatched employee and the dispatch agency is properly terminated and statutory severance is paid, (2) the employee and the enterprise, as the new employer, must establish a formal employment relationship and enter into a written labor contract, (3) the new labor contract is generally prohibited from including a probationary period, and (4) the employee's tenure (years of service) under the labor dispatch arrangement must be carried over to the new employment relationship. *These amendments are directed at correcting problems by unscrupulous labor outplacement firms that fail or refuse to pay seconded workers their compensation and benefits, and to avoid misuse of probationary periods to oust workers. The amendments to the Labor Contract Law were adopted to better control the abuses of dispatch arrangements; namely, that companies (mostly SOEs) wanted to avoid long-term commitments to their employees. It was reported that certain SOEs had thousands of "dispatched employees" that were in a perpetual state of temporary employment with dispatch agencies renewing contracts annually. Some employees have worked for 10+ years in the same position but were considered temps. The amendments are directed to stop the classic abuses mostly engaged by SOEs. A foreign company that operates a WFOE or JV in China can use FESCO or other labor bureau for a broad range of HR services, including for temporary dispatch services, payroll, recruitment, etc. But for permanent hires, they must be hired directly. That said, FESCO still plays a dispatch role for non-company entities such as a rep office of a foreign company. FESCO and other labor bureaus will continue to support the dispatch needs of rep offices, as they have for the past 30+ years. This is because a rep office is not a company in China and cannot legally enter into a contract with its employees.*

▫ ▫ ▫ ▫

On June 19, 2013, the Shanghai Food & Drug Administration released, for the first time, a ***food safety blacklist*** prohibiting several restaurant managers from working in the food industry for a period of five years. As examples, several hotpot restaurant operators and their employees were banned from the industry for collecting and reusing hotpot broth to customers. Other individuals were blacklisted for the processing and sale of diseased pork and for the sale of poisonous industrial salt as edible salt. All of the blacklisted

individuals also received hefty criminal sentences. *Food safety issues continue to nag the government, which has increased the institutional capacity to better supervise the industry. Additional criminal penalties and blacklisting will force the industry to meet basic standards.*

▫ ▫ ▫ ▫

The ***State General Administration of Press, Publication, Radio, Film and Television issued a circular*** on June 21, 2013, designed to better control advertisements of pharmaceuticals and healthcare products. Pursuant to the circular, publications are prohibited from advertising drugs or healthcare products, or to recommend doctors or healthcare institutions under the guise of news reports or in the name of scientific knowledge or promoting expert consultations. Advertisements are required to be clearly marked as advertisements, and are prohibited from being published as news reports. *China has seen an increase in ad-scams that appear to be news reports but are advertisements in disguise. This circular places the burden on the publishers to refuse such ads from business operators.*