



漢坤律師事務所  
HAN KUN LAW OFFICES

# Newsletter

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## Insights & Ideas

### **China Adopts its Social Security Insurance Law (Author: Hong LI)**

On October 28, 2010, the Standing Committee of the People's Congress enacted the *PRC Social Security Insurance Law* (the "**Social Security Insurance Law**"), after reading it four times, which will become effective on July 1, 2011. Before the enactment of this new law, social security insurance schemes have been in position in China for several years, though there is no one fundamental law concerning these issues.

#### **Fundamental Pension Scheme**

Under the current fundamental pension scheme, different regions have their own fundamental pension schemes, thus one's fundamental pension cannot be transferred to other regions when he moves to other regions and the term of making contributions of fundamental pension premium in different regions cannot be calculated together. The Social Security Insurance Law will establish a nation-wide fundamental pension scheme. Under this new scheme, one's fundamental pension can be transferred freely to other regions and the term of making contributions of fundamental pension premium in different regions before and after transfer can be calculated together.

Under the current fundamental pension schemes, where one's term of making contributions of fundamental pension premium to his personal pension account has not reached the prescribed 15 years when he retires, he cannot receive pension benefits under the pension scheme and shall receive a one-time payment of all his contributions to his personal account. Under the new nation-wide fundamental pension scheme, a retiree, whose term of making contributions to his personal pension account has not reached the prescribed 15 years, may still make contributions after his retirement till the term reaches the prescribed years and thus be qualified to receive pension benefits.

#### **Fundamental Medical Insurance Scheme**

Like the pension scheme, under the current fundamental medical insurance scheme, one's fundamental medical insurance cannot be transferred to other regions when he moves to other regions and the term of making contributions of pension premium in different regions cannot be calculated together<sup>1</sup>. The Social Security Insurance Law will establish a nation-wide Fundamental medical insurance scheme. Under the new scheme, one's fundamental medical

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<sup>1</sup> Each region has its own required term of making contributions of fundamental medical insurance premium. In Beijing, 25 years of making contributions for retired men and 20 years for retired women are required. But in Shanghai, the required term is 15 years.

insurance can be transferred freely to other regions and the term of making contributions of fundamental pension premium in different regions before and after transfer can be calculated together.

Also, under the new scheme, a retiree, whose term of making contributions to his personal medical insurance account has not reached the prescribed years<sup>2</sup>, may still make contributions after his retirement till the term reaches the prescribed years and thus be qualified to receive medical insurance benefits.

Under the new nation-wide fundamental medical insurance scheme, where a third party should bear the medical costs of an employee and the third party refuses to pay or cannot be found, the Fundamental Medical Insurance Fund shall make an advanced payment of the medical costs and reserve the right to recover such costs from the third party.

### **Work-related Injury Insurance Schemes**

Under the new law, employers shall make contributions of work-related injury insurance premium and employees have no obligation to make any contribution.

Under the new law, where an employer does not make contributions of work-related injury insurance premium as required by law, the employer shall pay employee's work-related injury insurance benefits when such work-related injuries occur. If the employer refuses to make such payment, the work-related injury insurance fund shall make an advanced payment of work-related injury insurance benefits and reserve the right to cover such costs from the employer. The same issue involving a third party is dealt in the same way as that involving an employer.

### **Unemployment Insurance Scheme and Maternity Insurance Scheme**

According to the Social Security Insurance Law, an employee has no obligation to make contributions of maternity insurance premium and an employer has the obligation to make such contributions. Also, the Social Security Insurance has provided detailed rules concerning prescribed years of making contributions of unemployment insurance premium and terms of claiming unemployment insurance benefits.

### **Other Major Provisions**

The Social Security Insurance Law has extraordinarily expanded the scope of people who can

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<sup>2</sup> The Social Security Insurance Law does not specify the required term of making contributions of fundamental medical insurance premium. It only specifies that the term should comply with national standard and does not make it clear what the national standard is.

receive benefits under the new social security insurance scheme. Self-employed workers, migrant workers, foreign workers may participate in the new social security insurance scheme in accordance with the provisions of the new law.

The Social Security Insurance Law has provided detailed disciplinary rules concerning actions in breach of its requirements: An employer, who fails to complete social security insurance registration, shall be ordered to make rectification within specified time. If the employer fails to do so, it will be fined between 100% and 300% of the overdue amount of social security insurance premium.

An employer, who fails to make full payment of contributions of social security insurance premium, shall be ordered to make rectification within specified time. If the employer fails to do so, social security insurance authorities may petition relevant government agencies at or beyond county level to issue decree concerning allocation of social security insurance premium. Social security insurance authorities may present the decree to employer's bank or employer's other financial institutions and request allocation of social security insurance premium from such employer's accounts.

An employer, who fails to make full payment of contributions of social security insurance premium, shall be order to make full payment within specified time and pay overdue fine in the amount of 0.5% of the overdue amount of social security insurance premium since the delinquency date. If the employer fails to do so, it will be fined between 100% and 300% of the overdue amount of social security insurance premium; If an employer fails to make full payment of contributions of social security insurance premium and provides no security, social security insurance agencies may petition courts to withhold, seize and auction employer's properties with value equals to that of the overdue amount of social security insurance premium.

### **Some Unsolved Problems Under the Social Security Insurance Law**

The Social Security Insurance Law has numerous clauses that authorize the State Council and other relevant agencies to formulate detailed implementing rules. This situation would undermine the role of the Social Security Insurance Law as the fundamental regulation of the social security insurance scheme. Also, the Social Security Insurance Law does not define a single responsible agency under the new social security scheme. It would impede the enforcement of this new law since more than one agency has the authority to collect social insurance premium in practice.

## Legal Updates

### 1. **China Launched Cloud Computing Services Innovation Trial Programs (Author: Xiaolan CHEN)**

China's Ministry of Industry and Information Technology (MIIT) and National Development and Reform Commission (NDRC) issued a *Circular Concerning the Trials of Cloud Computing Services Innovation* (“**Circular**”) on October 18, 2010. The Circular listed Beijing, Shanghai, Shenzhen, Hangzhou, and Wuxi as five trial cities for conducting cloud computing service trials.

The trials will focus on four main aspects: a) to promote the key domestic IT enterprises to explore various modes of cloud computing services(e.g. SaaS, PaaS and IaaS) specific to the government, enterprises of small, medium and large sizes, and individual consumer needs; b) to improve cloud computing core technologies and industrialization through the aforesaid enterprises; c) to organize a nation-wide cloud computing industry alliance; and d) to research and formulate the standards for cloud computing technology, services, and security management. The Circular urges provincial-level development and reform commission and industry and information technology administration to formulate local cloud computing service innovation and development plans in accordance with their localities' features and strengthen. It is stated that the two departments shall jointly submit these plans to MIIT and NDRC prior to November 25, 2010.

According to the statistics provided by IDC (International Data Corporation), during the period from 2009 to 2013, the cloud computing businesses are expected to generate RMB1105 billion revenue to China. As a matter of fact, under the leadership of international IT tycoons, such as IBM, Cisco, and Google, the industry chain of cloud computing has been established. Meanwhile, Beijing and Shanghai have started investment projects concerning the cloud computing. It is believed that the industry chain of cloud computing will become one of the most important investment spots in China.

### 2. **SAFE Imposed Penalties on Enterprises, Individuals and Banks against Their Illegal Foreign Exchange Activities (Author: Yeting CAI)**

For the purpose of safeguarding the state economy and financial security and cracking down on cross-border “hot money” flows, from the beginning of February 2010, the State Administration of Foreign Exchange (“**SAFE**”) organized a series of special actions to crack down on “hot money” and combat against illegal cross-border cash flows without real transaction or investment background. In the course of these special actions, SAFE

concentrated on inspecting enterprises' trade foreign exchange receipts and expenditures, capital settlement, foreign exchange settlement and sale of individuals and banks, short-term foreign debts, offshore finance, source of foreign exchange and its operation, etc., and promulgated respectively the *Circular on the Penalties Imposed on the Illegal Foreign Exchange Activities of the Banks* on October 28, 2010 and *Circular on the Penalties Imposed on the Illegal Foreign Exchange Activities of Enterprises and Individuals* on November 1, 2010.

Pursuant to the *Circular on Further Improving Administration of the Foreign Exchange Settlement and Sale Business for Individuals* (Hui Fa (2009) No. 56) issued by SAFE on November 19, 2009, no individual shall evade the annual quota administration of individual foreign exchange settlement and purchases within the territory of China by means of fund split and so forth, and the banks shall reject such applications once identified. Further, pursuant to *Circular of SAFE on Relevant Business Operation Issues Concerning Improving the Administration of the Payment and Settlement of Foreign Exchange Capital of Foreign-funded Enterprises* (Hui Zong Fa [2008] No. 142), a bank shall handle the foreign capital conversion of a foreign-funded enterprise in line with the relevant SAFE rules. Under Circular 142, RMB converted from foreign capital of a foreign-funded enterprise shall be used within its approved business scope. Unless otherwise specified, RMB converted from foreign capital shall not be used to make equity investments in China. Other than a foreign-funded real estate enterprise, no foreign-funded enterprise shall use the RMB converted from foreign capital to purchase domestic real estate for any purpose other than for its own use. A foreign-funded enterprise shall use RMB obtained converted from foreign capital for securities investment in line with the relevant provisions of the state.

Under the premise of strict implementation of the relevant foreign exchange regulations, SAFE promulgated the *Circular on the Penalties Imposed on the Illegal Foreign Exchange Activities of Enterprises and Individuals* on November 1, 2010, according to which, Shandong Qingdao Zhongjia Foodstuff Co., Ltd. made the statistical declaration on balance of payment by mixing up different kinds of business activities, which violated the relevant regulations regarding the statistical declaration on balance of payment; Liaoning Yingkou A'dani Industry Co., Ltd. received the advance payment for goods without real transaction background, which violated the relevant regulations regarding the verification of export earnings; Jiangsu Huai'an Wuzhou Real Estate Development Co., Ltd. provided loans in the territory of China by using the money obtained from the settlement of capital in the name of payment of land use fees, which violated the relevant regulations regarding the settlement of capital; Liaoning Yingkou Yunitela Garment Co., Ltd. conducted foreign exchange settlement and sale by splitting, which violated the relevant regulations regarding foreign exchanges for individuals; Liaoning Dalian Tianyuan Investment Management Co., Ltd. conducted the settlement of foreign

investment capital by using fake contract, which violated the relevant regulations regarding the settlement of capital; Jiangsu Nantong Hanshi Infrastructure Construction Co., Ltd. transferred the foreign investment capital into individual accounts in the name of payment of construction costs, which violated the relevant regulations regarding the settlement of capital; Liaoning Fuxin Xiehe Wind Power Equipment Manufacturing and Technical Services Co., Ltd. purchased new stocks by using the money obtained from the settlement of foreign investment capital, which violated the relevant regulations regarding the settlement of capital; Jiangsu Changzhou Zhanfeng Trading Co., Ltd. conducted the settlement of foreign capital in a false name, which violated the relevant regulations regarding the settlement of capital; and Mr./Ms. Ma, a domestic resident, received the US dollars and then conducted the settlement of foreign exchanges in the name of the employees of his company, which bearing the characteristics of fund split and violated the relevant regulations regarding the settlement of foreign exchange for individuals. The above enterprises and individual have been subjected to fines by the foreign exchange authorities due to their violations of the foreign exchange laws and regulations.

Besides, SAFE promulgated the *Circular on the Penalties Imposed on the Illegal Foreign Exchange Activities of the Banks* on October 28, 2010 against the activities of the banks in violation of the relevant regulations regarding the administration of foreign exchange. For example, Jiangmen Branch of China Construction Bank Corporation handled the capital settlement for a foreign-funded enterprise which did not use the money obtained from the settlement of capital in line with the purpose reported to SAFE, which violated the relevant regulations regarding the settlement of capital; Chengdu Guanghua Sub-branch of Agricultural Bank of China Corporation handled the settlement and sale of foreign exchange by splitting, which violated the relevant regulations regarding the administration of foreign exchange for individuals; Ningbo Zhenhai Sub-branch of Bank of China handled for a certain company the foreign exchange settlement for foreign debts, but the settlement purpose was not consistent with the one approved by SAFE, which violated the relevant regulations regarding foreign exchange settlement for foreign debts; Xining Guchengtai Sub-branch of Bank of China handled the settlement of capital for certain foreign-funded enterprise, and the enterprise used such money obtained from the settlement of capital for investment, which beyond its business scope and violated relevant regulations regarding the administration of the settlement of capital. The above banks shall have been subjected to fines by the foreign exchange authorities due to their violations of the foreign exchange laws and regulations.

### **3. An Introduction to SAIC Measures on the Supervision and Punishment of Unlawful Contractual Practices (Author: Muchun XU)**

The State Administration for Industry and Commerce (the “SAIC”) recently promulgated the

*Measures on the Supervision and Punishment of Unlawful Contractual Practices* (the “**Measures**”), which consists of 16 articles and took effect as of November 13, 2010. The Measures target three types of practices: a) contractual fraud; b) seeking an illegitimate benefit through contracts by means of bribery, coercion or collusion with others; c) using standard contractual clauses to disclaim liabilities of one’s own, aggravate liabilities of the consumers and exclude rights of the consumers. The SAIC has formulated specific provisions aiming at particular offenses.

### **Contractual Fraud**

The Measures clearly spell out the scope of contractual fraud by enumerating 10 types of prohibited behaviors including forging contract, and also enumerates 5 types of illegal contractual activities which harm state interest and social public interest. The behaviors of contractual fraud include but not limited to: a) fabricating subject matter of contract or fabricating supply of goods or the distribution channels to induce others to enter into or perform contracts; b) circulating or utilizing false information to induce others to enter into contracts; c) maliciously including in contract provisions which cannot be actually performed and rendering the counterparty unable to perform contractual obligations; and d) providing sham guaranty.

### **Standard Clause Contract**

The Measures also include specific rules regarding the standard clause contract entered into by and between business operators and consumers, and expressly enumerate the situations under which business operators cannot disclaim its own liabilities, aggravate consumers’ liabilities, or exclude consumer’ rights. According to the Measures, business operators are now prohibited to disclaim the following liabilities by standard contractual clauses: a) liabilities for personal injury to consumers; b) liabilities for property damage to consumers caused by willful misconduct or gross negligence of the business operators; c) warranty prescribed by law on goods and services provided by the business operators; d) liabilities arising out of breach of contract; and e) other liabilities prescribed by law. The Measures further list the following consumer rights that cannot be eliminated by way of standard contractual clauses: a) right to amend or terminate contract pursuant to applicable laws; b) right to claim liquidated damages for breach of contract; c) right to claim actual damages; d) right to seek explanation of standard contractual clauses; and e) right to bring up a lawsuit in connection with standard clause contract; f) any other rights enjoyed by consumers under applicable laws.

Lastly, it is provided in the Measures that the aforementioned illegal acts shall be subject to administrative penalties and administrative guidance. The Measures provide that, if there are existing laws and regulations regulating the aforesaid illegal acts, such rules and

regulations shall apply; if there are no applicable laws and regulations, the administrations for industry and commerce shall, based on the seriousness of the case, give warnings or impose a fine of up to three times the illegitimate gains but capped at RMB30,000, or, in case where there are no illegitimate gains, a fine of up to RMB10,000. The Measures also provide that no administrative penalty shall be imposed if the illegal act concerned is not serious and has been rectified timely without causing any damages.

## **Conclusion**

Part of the Measures deal with the situation under which business operators harm the rights of consumers by means of unfair standard clauses or the so-called “imparity clauses”. Unfair standard clauses, such as “we reserve the right to give final interpretation of the contract” and “caveat emptor”, are listed as unlawful clauses under the Measures. It can be expected that the promulgation of the Measures will to some extent suppress the adoption of “imparity clauses”.

## **Important Announcement**

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