SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

CHINA UPDATE

Squire, Sanders & Dempsey L.L.P.

November 2010

Inside

www.ssd.com

Sino-Foreign Travel Agencies Are Allowed to Provide Outbound Travel Services

Key Points:

- ***Sino-foreign joint venture travel agencies are allowed to provide outbound travel services on a trial basis***
- ***Only a limited number of agencies will be granted licenses***
- ***Most of the foreign-invested agencies will have to wait three years until the trial is completed***

On August 29, 2010 the Tentative Measures on Administration of Sino-Foreign Travel Agencies Conducting Outbound Travel Business and the Provisional Measures on Administration of Online Trading and Related Services (the Measures) were published as the implementing rules of the State Counsel Opinion on Speeding the Development of the Travel Industry promulgated in July 2010. For the first time, the Measures allow foreign-invested travel agencies to conduct outbound travel business from China on a trial basis.

The Measures permit Sino-foreign joint venture (JV) travel agencies to provide outbound travel services – i.e., soliciting and organizing PRC residents to travel outside the PRC, including Hong Kong and Macau, but excluding Taiwan. Under the current law, foreign-invested travel agencies are not allowed to provide outbound travel services to PRC residents, even foreigners who reside in the PRC.

Note the following points:

- Only JV agencies can apply to provide outbound travel services. Wholly foreign-owned travel agencies are not yet allowed to do so.
- The Measures will be implemented only on a trial basis. Specifically, the number of JV agencies that will be approved to provide outbound travel services is strictly limited. It is, however, unclear exactly what the quota will be. The Measures allow the Travel Bureau to decide on the actual number.
- A JV agency that is approved to provide outbound travel services will be required to submit a report to the Travel Bureau that includes information about the business such as the number of people served, destinations and revenue. The government will use these reports to evaluate the trial and whether to open the market further. The trial period is three years.
- The requirements for applying for an outbound travel service license are the same as those for China-based travel agencies, i.e., the agency has been established for two years and has never been punished by a government authority for impairing a customer's legal rights and interests.

According to a public announcement from the Travel Bureau, it is now ready to accept applications. In reality, however, there are only 17 approved JV agencies so far, and not all of them have existed for two years. Therefore, participation in the trial will be quite limited. It can be expected that the number of travel agencies that are eventually granted a license

will be minimal. Most foreign-owned travel service providers will probably need to wait another three years, after the trial is completed, to be accepted into China's outbound travel market.

– Lindsay Zhu

New Judicial Interpretation on Handling Labor Disputes

Key Points:

- ***Employees shall bear the burden of proof in overtime compensation claims***
- ***Interpretation III further clarifies that certain situations shall be treated as labor disputes in the people's courts***
- ***New Measures protect employees in situations where the employer does not hold qualified legal person status***

Since the PRC Labor Contract Law and Labor Dispute Mediation and Arbitration Law went into effect in 2008, the number of labor-related cases filed with the people's courts has dramatically increased. Statistics show that PRC courts handled 295,000 labor dispute cases in 2008, an increase of 95.3 percent from the 2007 figure; the figure in 2009 was 318,600[1]. In the absence of clear instruction regarding various practical situations, the large number of cases has caused a lot of headaches for the local courts in China. In light thereof, the Supreme People's Court released its third interpretation with respect to handling labor disputes on September 13, 2010: Interpretation (III) of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases (Interpretation III), which went into effect on September 14. This article briefly introduces the highlights of Interpretation III.

Rebekah Poston, SSD Miami

Burden of Proof in Overtime Compensation Claims

Different areas in China have different judicial practices regarding the burden-of-proof principle in overtime compensation cases. For instance, Guangdong Province has adopted the principle that the employer denying overtime must disprove the overtime claimed by the employee unless the overtime occurred more than two years ago[2]. Shenzhen set up a similar rule that if the employer denies the overtime work as claimed by the employee, the employer shall bear the burden of proof[3]. To unify the practices, Interpretation III took examples from Zhejiang Province[4] by stipulating that the employee shall bear the burden of proof for the existence of overtime. However, if the employee has evidence that the employer possesses but fails to provide any evidence of the existence of overtime, the employer shall bear the adverse consequence[5]. This stipulation is easy to understand and accept as being close to the general principle in civil litigation – namely, "the burden of proof is upon the party who claims."

[1] http://www.gov.cn/jrzg/2010-09/14/content_1702505.htm

[2] Article 29, Guangdong Province's Circular of Several Issues on Application of Law of Labor Dispute Mediation and Arbitration and Labor Contract Law.
[3] Article 23, Guidance Opinion of Shenzhen Intermediate People's Court on Several Issues in the Trial of Labor Dispute Cases.
[4] Article 30, Circular of Zhejiang Province's High People's Court on Several Issues in the Trial of Labor Dispute Cases.
[5] Article 9, Interpretation III.

Enterprises have complained about increased labor costs and legal risks and have requested a more balanced system between employees and employers. This, of course, has brought challenges from those fighting on behalf of the employees, e.g., lawyers, who reiterate the unequal positions and resources of companies and employees. Some even view this as a sign of a retrogressive trend against the basic principle of labor legislation, which is to protect employees' interests to the maximum extent. Nonetheless, as the Interpretation III goes into effect, human resource departments of multinational entities shall be reminded again to keep clear records regarding employees' overtime.

Clearer Scope of Labor Disputes

In the past, local people's courts have lacked guidance on whether to treat certain situations as labor disputes they should resolve according to labor legislation. Interpretation III indicates clearly that a situation shall be treated by people's courts as a labor dispute if:

- A labor dispute arises over an employee's claim for compensation against his or her employer based on the employer's failure to complete social insurance procedures for the employee, which resulted in the employee not receiving social insurance benefits;
- A labor dispute arises over a restructuring voluntarily carried out by an enterprise; or
- An employee claims additional compensation against the employer according to Article 85 of the Employment Contract Law, which grants labor bureaus the right to order a company to pay labor remuneration, overtime pay or other economic compensation.

Clarification on Labor Disputes Involving Companies With Questionable Legal Status

In certain scenarios in the past, employees who have intended to sue a company have been unable to do so because the company did not hold qualified legal person status – e.g., because it acted without a business license or acted after its business license was revoked. To protect employees' interests in such a situation, Interpretation III stipulates that:

- If a dispute arises between an employee and an employer that has not applied for a business license, whose business license is invalidated or that continues to operate after the expiration of its term of operation, the employer or its investor shall be a litigation party; and
- If the aforementioned employer borrows the business license of other business entities by subordinating those entities or establishing some other means for operation, the employer and the lender of the business license shall be parties to the litigation. Although labor disputes are different from normal civil disputes, this stipulation could be viewed as an extension of the "piercing the corporate veil" principle to the labor area, as it excludes the possibility for investors to escape from legal liability through inappropriate use of legal entities. It also reminds companies not to lend business licenses to any other companies, regardless of the type of

contractual arrangement in place between the parties.

– Doris Chen

China Initiates Pilot Program for Overseas Deposit of Export Income

Key Points:

- ***Enterprises in four provinces may apply to open an overseas bank account for the deposit of export income***
- ***A qualified applicant has to satisfy certain conditions***
- ***An applicant must select an overseas bank to open its account for the deposit of export income, as well as a domestic bank to serve as a reporting agency***
- ***The scope of payments made from or to the overseas bank account is limited***
- ***Both the enterprises and overseas hosting banks are required to report the status of the overseas account to foreign exchange authorities in China***

With the promulgation of the Notice on Pilot Operation of Policy for Overseas Deposit of Export Income in Some Areas (Pilot Notice) by the State Administration of Foreign Exchange (SAFE) in August 2010, enterprises in four provinces in China – Beijing, Guangdong (including Shenzhen), Shandong (including Qingdao) and Jiangsu – may apply to open an overseas bank account for the deposit of export income as of October 1, 2010. The pilot program will last for one year, during which time each local branch of SAFE in the four provinces may approve the opening of such accounts for no more than 10 enterprises in its jurisdiction.

Pursuant to the Pilot Notice, to deposit export income overseas, an applicant must:

- Have a substantial scale of import and export business, with an actual need for the overseas deposit of export income;
- Be in good standing financially;
- Have no violations of foreign exchange administration regulations within the past two years;
- Have good credibility;
- In the case of a group of enterprises, have experiences and facilities with respect to fund payment or collection, or centralized management in China; and
- Meet other conditions required by SAFE and its local branches.

From an implementation perspective, an applicant must select an overseas bank to open its account for the deposit of export income, as well as a domestic bank to serve as a reporting agency with the obligation to convey to the local SAFE branch information about the flow of funds it receives from the overseas bank. It is reported that only a China-invested overseas bank or a foreign bank with approved branches in China will be qualified to host China-based companies' overseas accounts for the deposit of export income, though such restriction is not explicit in the Pilot Notice.

China-based enterprises that are approved to take advantage of the pilot program may use the

overseas bank account to collect the export income and accrued interests and other payments approved by foreign exchange authorities. In addition to being wired back to China, the funds deposited or received in the overseas account could be used to pay the cost of product trades; ancillary expenses such as commission, insurance premiums and transportation costs; expenses under overseas-contracted projects; account maintenance expenses; approved or registered capital account expenditures; and other expenses permitted by foreign exchange authorities. The Pilot Notice indicates that the funds in the account can also be used for payment under trade in services, provided that enterprises keep the tax payment receipts issued by tax authorities.

The Pilot Notice requires enterprises to submit to the local SAFE branch, at least on a monthly basis, reports stating the status of the overseas account including detailed information such as date, amount, identity of the payer/payee and customs declaration bill number (if applicable) in connection with the payments made from or to the account. In the case of any substantial loss of funds deposited overseas, enterprises must promptly inform the local SAFE branch.

On the other hand, the overseas hosting bank is obliged to report relevant account information periodically to the foreign exchange authorities in China via the domestic bank that serves as the reporting agency. These reports must be specified in the service agreement among the foreign hosting bank, the domestic reporting bank and the enterprise. If a foreign hosting bank fails to perform its reporting obligation, SAFE and its local branches may require relevant enterprises to close their accounts with the bank.

SAFE and its local branches will review the information received from the enterprises and their overseas hosting banks to ensure the authenticity of the transactions made through the overseas accounts, and when necessary, may require enterprises to submit additional supporting documents. If any abnormality is discovered, SAFE and its local branches may conduct on-site inspections. For that purpose, enterprises must maintain the contracts, vouchers and receipts pertinent to the payments made from or to overseas accounts for five years.

– Ryan Chen

New Rules on the Use of Land for Real Estate Development

Key Points:

- ***Local authorities must jointly determine annual plans for land use and development for residential real estate***
- ***Local authorities must administer land grants for residential real estate more strictly***

The Ministry of Land and Resources and the Ministry of Housing and Urban-Rural Development of the PRC promulgated the Notice on Further Strengthening the Administration of Land Use and Development for Real Estate (the Notice) on September 21, 2010, which is the second rule on the same topic in 2010. The purpose of the Notice is to

implement assignments provided by the Notice on Resolutely Curbing the Soaring of Housing Prices in Some Cities, issued by the State Council on April 17, 2010. The key points of the Notice are as follows.

Annual Plan of Land Use and Development for Residential Real Estate

The Notice requires that local housing and urban-rural development authorities and local land and resources authorities jointly determine annual plans for land use and development for residential real estate, and release the land supply plan, time order of land supply and conditions of parcels of land to the public to guide market expectations. Such plans must ensure that 70 percent of the land supply will be reserved for indemnificatory housing, low-cost housing renovation, and small and midsize common commercial housing. If the land supply for these housing categories has not reached 70 percent, local authorities shall not supply any land for large and high-end housing. Further, the Notice points out that the development of large and high-end housing must be strictly limited. The floor area ratio of residential real estate must be larger than 1:1.

Grant of Land for the Development Residential Real Estate

To strengthen the administration of the land grant, the Notice stipulates the following rules:

- Local authorities must provide the planning, construction and usage criteria for each parcel of land to be granted. Such parcels of land must be granted individually; they may not be combined with other parcels of land for the purposes of the grant. This rule prohibits local authorities from splitting one large parcel of land into several parcels for potential developers.
- The ownership of land to be granted must be clear and legally indisputable. If the removal of existing housing and related compensation have not been completed, the associated land (undeveloped land) may not be granted. In practice, some developers participate in the removal of housing so that they may have a chance to obtain land earlier than others. According to this rule, this approach would no longer be acceptable.
- After a parcel of land is granted, no party shall modify the planning and construction conditions of the parcel. If the developer requests a modification to the planning or construction conditions and therefore fails to commence construction as scheduled, the local land and resources authority must withdraw the parcel of land and restart the bidding, auction or listing procedures for the land grant. Construction for residential real estate development projects must commence within one year of the date of delivery of the land specified in the allocation letter or land grant contract, and the construction must be completed within three years of the commencement date.
- When bidding for the land, the bidder must ensure that the deposit used for the land bid is not a bank loan, shareholder's loan, entrusted loan or raised fund. The bidder must also provide a reference letter issued by the financial institution.

- The land and resources authority must prohibit enterprises that have committed any of the following violations of laws or regulations from purchasing new land before the violation case is closed and relevant problems have been resolved: (i) forgery of official government documents and conducting land transactions illegally; (ii) illegal transfer of land use rights; (iii) keeping land idle for longer than one year; or (iv) developing real estate without complying with the provisions of land grant contracts.

Conclusion

This Notice – together with the notices on individual income tax and deeds in connection with real estate transactions, and policies on bank loans for housing issued at the end of September 2010 – is a part of a series of policies designed to curb the rise in housing prices and facilitate healthy development of the real estate market. Whether these policies will be effective is uncertain for now.

– Olivia Zhan

Articles, Publications and Other Media

Doris Chen (Shanghai) was quoted in an article on the *Business China* website.

Amy L. Sommers was profiled in *她们的中国梦*, a book highlighting the success stories of 12 Western businesswomen in China.

Past Events

The Squire Sanders Shanghai office held a complimentary session for China-based in-house counsel of multinational companies on the US Foreign Corrupt Practices Act (FCPA) and antibribery compliance in China on September 15, 2010. **Weiheng Jia** and **Lesley Li** led the discussion in Mandarin Chinese in the boardroom of the Shanghai office.

David A. Hayden, counsel in the Squire Sanders Los Angeles office, gave a presentation at the 2010 China Enterprise Council (CEC) Annual Conference, "Navigating the Opportunities and Challenges of Incoming Chinese Business," on September 19, 2010. Mr. Hayden's history of involvement in Asia includes having established, in 1980, the Beijing office of Squire Sanders, which was one of the first non-China-based law firms to open an office in China.

The following Squire Sanders lawyers gave presentations at the 3rd World Medical Tourism & Global Healthcare Congress, which took place September 22-24 in Los Angeles:

- **Scott A. Edelstein** – "Provider Contracting With International Insurance Companies"
- **Lisa G. Han** – "Structuring Medical Tourism Agreements in China"
- **Ann J. LaFrance** – "EU Data Protection Rules: Recent Developments and Trends Impacting Your Healthcare Business"

As part of the American Conference Institute's 5th FCPA Boot Camp in California, **Amy Sommers** and **David A. Saltzman** co-presented the post-boot camp workshop "Overcoming FCPA Compliance Challenges in China" on 29 September. This workshop addressed the FCPA landscape in China, local antibribery laws, the impact of recent FCPA decisions and compliance programs.

Amy Sommers gave a presentation on FCPA compliance in China during the October 13-15, 2010 meeting of The Conference Board's Council of Senior International Attorneys in New York. Ms. Sommers presented "Strategies for FCPA Compliance in China: Practical Perspectives for Facing Serious Challenges."

Amy Sommers participated in the American Health Lawyers Association Webinar "Domestic and International Restrictions Affecting Your International Healthcare Transaction" on October 20. The program provided an

overview of US laws affecting international transactions and discussed how the laws and cultures of other countries, particularly in Asia and Latin America, affect those transactions.

Lesley Li attended the 4th China-Latin America Countries Business Summit held on October 21 in Chengdu. Two articles authored by Squire Sanders lawyers – "China-Chile Free Trade Agreement" and "Company Law Reform of Dominica Republic" – were included in the official publication for the summit.

Upcoming Events

James V. Dick, **Thomas T. Liu** and **Charles F. Donley** will present an aviation antitrust seminar in Shanghai on November 9, 2010. The seminar will provide China-based airlines with an introduction to US antitrust laws and an overview of the application of these laws to the international aviation industry.

On November 18, 2010 **Amy Sommers** will be a featured speaker in the morning session "Tackling Corruption – A Practical Guide to Help Enhance Economic Sustainability" at the American Chamber of Commerce in Shanghai's Sixth Annual Corporate Social Responsibility (CSR) Conference and Awards Ceremony. Ms. Sommers' session will feature best practices, case studies and practical tools for anticorruption initiatives in China. Other topics at the conference include communicating CSR to stakeholders, selecting an NGO partner, corporate engagement in disaster preparedness and building an educational program into a CSR portfolio.

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

CHINA UPDATE

Squire Sanders Contacts

BEIJING

Sungbo Shim
James M. Zimmerman
Song Zhu

Squire, Sanders & Dempsey L.L.P.
25th Floor, North Tower, Suite 2501
Beijing Kerry Centre
1 Guanghua Road
Chaoyang District
Beijing 100020
People's Republic of China

+86.10.8529.6998

SHANGHAI

Daniel F. Roules
Amy L. Sommers
Rainer Burkardt
Zhaoyang Li

Squire, Sanders & Dempsey L.L.P.
Suite 1207, 12th Floor
Shanghai Kerry Centre
1515 Nanjing Road West
Shanghai 200040
People's Republic of China

+86.21.6103.6300

HONG KONG

James S. Tsang
Nicholas Chan
Francis Li

Squire, Sanders & Dempsey
24th Floor, Central Tower
28 Queen's Road Central
Central, Hong Kong
Hong Kong SAR, China

+852.2509.9977

TOKYO

Steven S. Doi
Ken Kurosu

Squire Sanders Miki Yoshida
Gaikokuho Kyodo Jigyo Horitsu Tokkyo Jimusho
Ebisu Prime Square Tower, 16F
1-1-39 Hiroo
Shibuya-ku, Tokyo 150-0012
Japan

+81.3.5774.1800

Beijing
Bratislava
Brussels
Budapest
Caracas
Cincinnati
Cleveland
Columbus
Frankfurt
Hong Kong
Houston
Kyiv
London
Los Angeles
Miami
Moscow
New York
Palo Alto
Phoenix
Prague
Rio de Janeiro
San Francisco
Santo Domingo
São Paulo
Shanghai
Tallahassee
Tampa
Tokyo
Tysons Corner
Warsaw
Washington DC
West Palm Beach

Independent Network Firms:
Beirut
Bogotá
Bucharest
Buenos Aires
La Paz
Lima
Panamá
Riyadh
Santiago

www.ssd.com

The information in this bulletin was compiled by the China offices of Squire, Sanders & Dempsey L.L.P.

This newsletter provides free information on certain aspects of the Chinese legal environment and does not constitute legal advice.