

Application of China's New Civil Code to Employment Relationships

The Civil Code of the People's Republic of China ("**Civil Code**") has come into force as of 1 January 2021. Certain provisions of the new Civil Code could also be applied when dealing with individual employment relationships – as special civil legal relationships. We hereby summarize some examples below for your kind reference.

Civil Code vs. Labour Contract Law

According to Article 92 of the Legislation Law, where special legal provisions are inconsistent with general legal provisions enacted by the same legislative body, the special provisions shall apply; where new provisions are inconsistent with old provisions, the new provisions shall apply.

Regarding the individual employment relationships, in general the Civil Code should be deemed a general law and a new law, while the Labour Contract Law a special law and an old law. However, the Civil Code provisions are not completely new and comprise plenty of existing legal provisions and judicial interpretations. Therefore, when dealing with individual employment relationships, the application of specific provisions of both Laws in individual cases has to be determined based on the specific legal issues, provisions and concrete circumstances concerned.

Minor employees

Pursuant to Articles 18, 19 and 145 of the Civil Code, establishment of an employment relationship with a minor employee (e.g. a young talent), who is at least sixteen but under eighteen years old and whose main source of income is not his/her own work income, should either be represented, agreed or approved by his/her agent ad litem (e.g. parents). Otherwise, the validity of such employment relationship could be affected due to the limited contractual capacity of the minor employee.

Termination of employment contract due to employer's early dissolution

Pursuant to Article 44 Item 5 of the Labour Contract Law, an employment contract shall end due to the employer's decision on early dissolution. However, in practice, courts have ruled differently on the specific timing of employer's dissolution and the consequent ending of employment contracts: being the date of rendering dissolution resolution, or the date of constitution of the liquidation group, or even the date of employer's deregistration.

Now Article 69 Item 2 and Article 106 Item 2 of the Civil Code could be applied to clarify this issue. Pursuant to both provisions, a legal person is dissolved when its supreme decision-making body makes the decision on dissolution; an unincorporated organization is dissolved when its investors or founders make the decision on dissolution. Therefore, the termination of employment contracts due to employer's dissolution should be upon the making of dissolution decision but neither upon liquidation nor upon deregistration of the employer. Nonetheless, for evidentiary purposes, a written termination notice stating the termination date, reasons and steps before and after the termination should be issued to the employee concerned.

Sham transaction null and void

In practice, there were cases where the employer arranged employees to sign sham employment contracts with local staffing agencies such that their social insurance contributions can be made in the location where they are working but not where their real employer is registered. For applying for work visa

and permit, some Chinese host entities also entered into sham local employment contracts with seconded foreign employees although they are in fact hired by the foreign home entities.

Pursuant to Article 146 of the Civil Code, sham transactions shall be deemed null and void. The above-mentioned measures, if being deemed as sham transaction from the employment perspective, would not only jeopardize their validity, but also might give rise to other civil, administrative and/or even criminal liabilities of the involved parties.

Statute of limitations for litigation and arbitration

Pursuant to Article 196 Items 1 and 4 and Article 995 Sentence 2 of the Civil Code, if the right of personality (e.g. privacy and personal information of the employees) is infringed, the victim's (e.g. employee's) right to request for cessation of infringement, removal of obstruction, elimination of danger, elimination of impact, restoration of reputation and apology, shall not be subject to the provisions of the statute of limitations.

In addition, according to Articles 197 and 198 of the Civil Code, the statute of limitations for litigation and arbitration are mandatory provisions and indispensable by private agreement (e.g. cannot be shortened or extended). A prior waiver of the benefit of the statute of limitations (e.g. by an employee) is invalid.

Employer contract as form terms

Articles 496, 497, 498 and 506 of the Civil Code provide for the definition of form terms, the obligations of the provider to draw attention to and explain the terms significantly affecting the other party, invalid form terms and the interpretation of form terms.

When an employer uses pre-drafted employment contracts, confidentiality agreements, training and service term agreements, non-competition agreements, service invention agreements, agreement on amendments to employment contracts and mutual termination agreements for repeated uses without consultation and negotiation with the employees, such contracts and terms might be deemed form terms. In such case, among others the employer should fulfil the statutory obligations to draw the employees' attention to and explain the terms significantly affecting them. Otherwise, the employees may assert that such terms do not constitute a part of the relevant contract. They do not need to apply

to a court or an arbitral tribunal for revocation of such terms, as was the case in the past.

Timely exercise of rescission right

Pursuant to Article 564 Paragraph 2 of the Civil Code, where laws do not provide for or the parties do not agree upon a time limit for the exercise of the right to rescind a contract, and the rescission right holder does not exercise such right within one year after he/she/it has known or should have known about the cause for rescission or within a reasonable time period after being urged by the other party to do so, the said right shall be extinguished.

While there is no specific legal provision on the time limit for exercising the right to rescind an employment contract until now, the above-mentioned time limit set by the Civil Code might be referred to for terminating employment contracts. In practice, we recommend exercising the rescission right as quickly as possible to avoid being forfeited and causing the impression of tacit consent, approval or even waiver.

Protection of Personality Rights

Pursuant to Part IV of the Civil Code (Article 989 and the following provisions), in practice employers should pay special attention not to infringe the right to life, body, health, name, portrait, reputation, honour, privacy and personal information of the employees in the performance of employment contracts. The relevant measures taken by the employer must be legal, justified and necessary. Their purpose, approach and scope should be kept transparent. A written consent of the affected employee to the relevant measures should be obtained either through individual agreements, employment contracts or at least by means of valid company rules such as employee handbooks that apply to the employees affected.

Employer's vicarious liability

Pursuant to Article 1191 of the Civil Code, if an employee causes injury and/or damage to others when performing his/her work duties, his/her employer shall assume tort liability and may (only) seek recourse from the employee who acted intentionally or with gross negligence. Whether this limitation for seeking recourse should also apply to the legal representative or an agent of the employer, remains unclear. The relevant provisions of the Civil Code (e.g. Articles 62, 164 and 170) do not explicitly provide for such limitation.

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Your Experts



Dr. Guang Li, LL.M.
Salary Partner, Munich
+49 89 21038 262
g.li@taylorwessing.com



Heather Jiang
Associate, Shanghai
Lawyer's Qualification (China)
+86 21 6247 7247
h.jiang@taylorwessing.com



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