Rödl & Partner

QUARTERLY ASEAN NEWSFLASH

EYE-LEVEL EXCHANGE

Issue:
Q1/2021

Latest news on law,
tax and business in ASEAN

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→ Note from the editor

Dear reader

Welcome to the Q1/2021 edition of our ASEAN Newsflash. This quarter started with the initiation of vaccination programs in many countries, giving reason for hope for some progress to overcome the global pandemic. Correspondingly, the development of the monthly business climate index of the German ifo institute indicates growing optimism among entrepreneurs, which is mainly based on a positive development in important overseas markets. Respective regional news from ASEAN appear quite diverse in this quarter. On the one hand we see ongoing positive trends of multilateralism and investment liberalization. Thailand already concluded the parliamentary ratification process of the RCEP agreement, allowing for the deposit of the instrument of ratification with the Secretary-General of ASEAN. The Kingdom further announced three new investment promotion initiatives, while Indonesia has finally issued implementing regulations to its Omnibus Law, focusing on investment facilitation. On the other hand Myanmar, which has been opening up to the world since the end of 2010 with a transitional process from military rule towards a parliamentary democracy and an increasingly open economy, has declared the state of emergency in a military coup on 1 February 2021. Amid an increasingly violent response to the country's democratic movement it needs to be seen how Myanmar´ s political situation will progress in the near future.

In light of the growing interest in the Regional Comprehensive Economic Partnership (RCEP) and the in principle version of the EU-Chinese Comprehensive Agreement on Investment (CAI), both signed in late 2020, we gladly invite you to our bi-lingual webinar where we will further discuss the impact of these treaties on foreign investment activities in the covered regions. Please click here to register for the event in English language, and here for German language.

Sincerely yours,

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→ Indonesia

Indonesia ratifies Hague Convention

On 5 January 2021, Indonesian President Joko Widodo executed the long anticipated ratification of the Hague Convention, abolishing the Requirement of Legalization for Foreign Public Documents of 1961 through Presidential Regulation No. 2 of 2021 (PR 2/2021). This follows the approach of Singapore which passed its Apostille Bill in Parliament on 2 November 2020. The Convention has 120 Contracting Parties, and has become one of the most widely applied multilateral treaties in the area of legal cooperation. It facilitates the use of public documents abroad by abolishing the need for legislation of public documents between States that has consented to be bound by this Convention. For the purposes of the Convention, legalization means the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears. Instead, the Convention replaces the legalization process with a simplified one-stop process through the issuance of an Apostille by an authority appointed by the State ("Competent Authority"). In this light PR 2/2021 seeks to improve public services and support the ease of doing business in Indonesia by simplifying the process of legalizing foreign public documents.

In general, Indonesian state authorities require foreign public documents to undergo a lengthy legalization procedure in which the document needs to be legalized by a public notary, a central state authority, ministry of foreign affairs, and a representative of the foreign state where the document will be used. These legislative requirements are considered complex, inefficient, and often costly. After the issuance of PR 2/2021, the process of legislation for foreign public documents will be more streamlined and convenient while it also upholds the same final outcome of legislation, that is the authentication of the origin of a public document executed in one State and used in another State.

It should be noted that the Convention only applies to public documents. The law of the country in which the document was issued decides whether or not a document is a public document. Typically, the documents that are considered as public documents include:

- documents emanating from an authority or an official connected with the courts or tribunals of the Contracting Party;
- administrative documents;
- notarial acts; and
- official certificates which are placed on documents signed by persons in their private capacities.

On the other hand, the Convention does not apply to documents executed by diplomatic or consular agents, and certain administrative documents on commercial or customs operations.

The Apostille does only validate the origin of the public document and the authenticity of the signature/seal in which this Legalization was done. The substance of the public document to which it applies is not certified by Apostille. The Apostille is used strictly on foreign public documents and not as the recognition of a document in the state where the document was issued.

Under the Convention, each Contracting State shall designate by reference to their official function, the authorities who are competent to issue the Apostille certificate. In Indonesia, the Competent Authority has not yet been officially designated; this will be done in technical implementing regulations which have not been issued so far.

In conclusion the issuance of PR 2/2021 will be of significance for parties seeking to use public documents issued in Indonesia in the states of Contracting Parties, and vice versa. However, as of early February 2021, the government is yet to issue implementing regulations to further stipulate the relevant technical procedures.

→ Indonesia

Omnibus Law – Main changes for Construction Services and Renewable Energy Projects

The new Indonesian job creation law, commonly known as "Omnibus Law", is effective since 2 November as Law No. 11 of 2020, issued in the State Gazette of the Republic of Indonesia No. 245 of 2020. This legal instrument aims to attract investment and stimulate the economy by i.a. harmonizing various business related laws and regulations that are deemed to be obstructive towards foreign investments. Below we will look into some significant changes in the sectors of construction, environment and renewable energies.

Construction Services

As also seen in other sectors affected by the Omnibus Law, the central government has been established as authority to set the norms, standards, procedures and criteria to be observed by regional governments in terms of overall supervision of practice and policy implementation in the construction services sector. Further implementing regulations of the changes in the sector will mainly be in form of government regulations, while previously many were either ministerial or presidential regulations.

The Business License for Construction Services (*Izin Usaha Jasa Konstruksi* or IUJK), Individual Business Registration (*Tanda Daftar Usaha Perseorangan* or TDUP), and License for Representatives of Foreign Construction Services Business (*Badan Usaha Jasa Konstruksi Asing* or "BUJKA") have now been replaced with the more general term "Business License". As the necessary implementing regulations have not yet been published, it seems not yet clear whether this newly stipulated license type is merely a change of terminology for ease of reference, or if it will be implemented as new licensing format. In addition to the Business License, the obligation for businesses to obtain the Business Entity Certificate (*Sertifikat Badan Usaha* or "SBU") is still retained in the Omnibus Law, with the central government as presiding authority in terms of the registration and certification process.

Revocation of administrative penalties

A further change concerning the BUJKA is seen in the revocation of administrative penalties imposed to representatives breaching their obligations stipulated in Law No. 2 of 2017 on Construction Services, that include, among others, fulfilling the required qualifications and licenses, forming a cooperation with national licensed construction services businesses and employment of more Indonesian than foreign workers. However, it remains again unclear for now whether the respective penalties will be regulated in any of the implementing regulations concerning the practices of the BUJKA.

Other changes relating to sanctions also include the introduction of a new administrative offense for construction workers holding the Work Competency Certificate, who failed to observe practices in accordance with national, international, or any special standards. Such workers risk to receive penalties ranging from written warnings to the revocation of their Work Competency Certificate. Service providers and/or users who grant authorization or approval of operations violating the health, safety, security and sustainability standards may also have their SBU revoked, in addition to the existing administrative penalties.

Renewable Energy Projects

In a glimpse, it can be observed that a big part of the changes made in the Omnibus Law is related to the consolidation of authority in terms of supervision and licensing of business activities in the central government, which is also seen in the energy sector. It should be noted that most provisions in the Omnibus Law refer to further implementing regulations, mainly in form of government regulations. As also seen in other sectors under the Omnibus Law, changes in the business licensing schemes are provided in both, the geothermal energy and electricity sector with the introduction of the more general term 'Business License'. Below we outline some more sector-specific changes in the geothermal energy and electricity sector, based on the amendments made to Law No. 21 of 2014 on Geothermal ("Geothermal Law") and Law No. 30 of 2009 on Electricity ("Electricity Law"), respectively.

Geothermal Law

Some obligations for business actors now appear either loosened or simplified, particularly with regard to licensing and reporting requirements. Geothermal utilization for indirect use conducted in

the waters of conservation areas no longer requires a special permit from the Ministry of Maritime Affairs and Fisheries. In addition, businesses conducting activities of geothermal utilization for direct use were previously obligated to submit a work and budgeting plan as well as a periodical activity report to the government. Such provisions are no longer included in the Omnibus Law, however we will have to monitor the upcoming implementing regulation to see whether these obligations shall still be enforced.

In terms of sanctions, an extent of leniency seems apparent in the Omnibus Law. Some violations of the Geothermal Law that were previously categorized as a criminal offense now only trigger administrative sanctions. An example is the intentional act of geothermal exploration, exploitation and/or utilization activities outside the allocated area which previously were punishable by imprisonment or fine, while the Omnibus Law only stipulates the aforementioned range of administrative penalties.

Electricity Law

As a main highlight of changes in the electricity sector appears the streamlining of business licensing schemes for different subsectors concerning electricity supply and services. Businesses supplying electricity and providing related supporting services are now only required to obtain one general Business License to carry out their business activities; the license shall be issued by the central or regional government. This general Business License term appears to consolidate the previous three separate licenses issued for the below sub-sectors of electricity business activities, i.e. (i) Business License for Electricity Supply, (ii) Operational License and (iii) Business License for Electricity Supporting Services. However, similar to other sectors, implementing legislation with details on this licensing scheme has not yet been made public. We continue to monitor the situation and will report on further changes.

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→ Indonesia

Investment under the New Presidential Regulation No. 10 of 2021

Investment Framework

Following the Omnibus Law, the President has enacted one of the implementing regulations focusing on the investment area, i.e. Presidential Regulation No. 10 of 2021 concerning Investment Business Fields ("REGULATION NO. 10/2021") on 2 February 2021, which will be effective as of 4 March 2021. Regulation No. 10/2021 has 3 (three) annexes containing the following lists:

(a) ANNEX I – prioritized business fields (with fiscal and non-fiscal facilities);

(b) ANNEX II – business fields which are allocated for or open in cooperation with cooperative, and/or micro, small and medium business (UMKM);

(c) ANNEX III – business fields which are open to investment with certain requirements.

Please note that investment may be in form of domestic investment which is fully done or owned by an Indonesian entity or citizen, or foreign investment which is owned fully or partially by foreign entities or individuals.

The REGULATION NO. 10/2021 does stipulate that all business fields are open for investment except i) business fields that are closed for investment; or ii) activities which can only be carried out by the Indonesian Government ("Government").

Below are the business activities/sectors that are closed for investment:

(a) narcotics cultivation and industry class I;

(b) all forms of gambling and/or casino activities;

(c) catching fish species listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);

(d) utilization or taking of coral and utilization or taking of corals from nature which are used for building materials/lime/calcium, aquariums, and souvenirs/jewelry, as well as live or dead coral (recent death coral) from nature;

(e) chemical weapons manufacturing industry; and

(f) industrial chemical industry and industrial ozone depleting substances

Business fields that can only be carried out by the Government are activities which are essential public services, or related to strategic defense and safety, and cannot be done or carried out in cooperation with other parties.

Business fields which are open for investment are listed in the annexes mentioned above.

The Annex I of this REGULATION NO. 10/2021 lists prioritized business fields with the following criteria:

(a) national strategic programs/projects;

(b) capital intensive;

(c) labor intensive;

(d) high technology;

(e) pioneer industry;

(f) export oriented; and/or

(g) research, development and innovation oriented.

The prioritized business fields may receive fiscal and non-fiscal incentives from the Government. Fiscal incentives could be in form of tax allowance, tax holiday, investment allowance and exemption of custom duties related to investment activities. While non-fiscal incentives may include ease of licensing process, supporting infrastructure, immigration service, manpower assistance and other kinds of conveniences under the prevailing laws and regulations.

Business fields which are open with certain requirements must comply with the following:

(a) investment requirement for domestic only investors;

(b) investment requirements with limitation of foreign capital ownership; or

(c) investment requirements with special license.

Several business fields (large scale business) are also open, but must be operated in cooperation with cooperatives and UMKM, such as industry of two and three wheeled vehicles, consultation service in electricity installation, building construction, rental service without option right. The complete list of these business fields can be found in ANNEX II of the REGULATION NO. 10/2021.

Other than that, notably interesting changes in the REGULATION NO. 10/2021 are as follows:

(a) distribution activity without affiliation to production is now fully open for foreign investment, except for distribution/wholesale and export of fisheries products which requires cooperation with UMKM;

(b) Commission agent service is now fully open for foreign investment. This business field has previously been allocated for domestic investors only;

(c) Retail sales is also open for foreign investment, except for i) Pharmaceutical goods and drugs for human, in pharmacy and not in pharmacy, ii) minimarket iii) retail sales not in department store, iv) footwear, v) non-alcoholic beverages vi) rice, vii) bread, pastry, cake and its kind, viii) coffee, sugar and brown sugar, ix) tofu, tempeh, and its derivatives, x) meat and processed fish, xi) other types of food which are allocated for UMKM, and xii) retail sales of alcoholic beverages and retail sales of alcoholic beverages by street vendor which require distribution network and special location.

REGULATION NO. 10/2021 provides that a limitation of foreign capital ownership will not affect existing investment business which already obtained approval/license before the Regulation was enacted, unless the new provisions are more favorable to the investors or in case the investor enjoys privilege under a bilateral agreement between the Government and the investor's state government.

Investments taking place in special economic zones are exempted from the provision for business which are open with certain requirements. Special provision is also applicable for technology-based start-up businesses in special economic zones which may carry out investment business with a total investment value of IDR 10 billion or less, excluding land and building.

REGULATION NO. 10/2021 also reiterates that in general:

(a) A foreign investor may only participate in large scale business with an investment value of more than IDR 10 billion, excluding land and building;

(b) Foreign investment must be done in form of limited liability company under Indonesian laws and domiciled in Indonesian territory, unless determined otherwise by prevailing laws.

REGULATION NO. 10/2021 effectively revokes Presidential Regulation No. 76 of 2007 on Criteria and Requirements of Preparation of Business Fields that are Closed for Investment and Business Fields that are Conditionally Open for Investment, and Presidential Regulation No. 44 of 2016 on List of Business Fields that are Closed to Investment and Business Fields that are Conditionally Open for Investment.

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→ Malaysia

Contractual obligations under the Temporary Measures for Reducing the Impact of Coronavirus Disease (Covid-19) Act 2020

The Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ("COVID Act") was gazetted and came into force on 23 October 2020. Through the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) (Extension of Operation) Order 2020, the government has extended the applicability of Part II of the COVID Act until 31 March 2021. The other provisions of the COVID Act will be in force for two years from 23 October 2020, or in accordance with the date and period in the relevant parts of the COVID Act.

The aim of the COVID Act is to provide parties with some form of temporary relief from legal obligations, as well as to protect parties who may be affected by the measures taken under the Prevention and Control of Infectious Disease Act 1988 to overcome the Covid-19 pandemic.

Parties whose contractual obligations have been affected by the government imposed Movement Control Order (currently MCO 2.0), should be aware of section 7 of the COVID Act. Section 7 provides the inability of any party or parties to perform their contractual obligation under a contract which falls under the scope of the Part II Schedule of the COVID Act due to the measures taken under the Prevention and Control of Infectious Disease Act 1988 to control or prevent the spread of Covid-19 (such as MCO 2.0) shall not give rise to the other party or parties exercising their rights under the contract.

The categories of contracts specified under Part II Schedule are as follows:

(i) Construction work contract or construction consultancy contract and any other contract related to the supply of construction material, equipment or workers in connection with a construction contract;

(ii) Performance bond or equivalent that is granted pursuant to a construction contract or supply contract;

(iii) Professional services contract;

(iv) Lease or tenancy of non-residential immovable property;

(v) Event contract for the provision of any venue, accommodation, amenity, transport, entertainment, catering or other goods or services including, for any business meeting, incentive

travel, conference, exhibition, sales event, concert, show, wedding, party or other social gathering or sporting event, for the participants, attendees, guests, patrons or spectators of such gathering or event;

(vi) Contract by a tourism enterprise as defined under the Tourism Industry Act 1992 and a contract for the promotion of tourism in Malaysia;

(vii) Religious pilgrimage-related contract.

The above categories of contracts specified in Part II Schedule have been amended under Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 (Amendment of Schedule) Order 2020. The amendments came into operation on 1 January 2021, including the two categories below:

(viii) Hire-purchase agreement as defined under Hire-Purchase Act 1967 or leasing contract, that has been entered into by micro enterprises, B40 or M40 class of persons as specified in the Inland Revenue Board of Malaysia database, as the case may be, for the following vehicles:

(a) motor vehicles as classified under Section 5 of the Road Transport Act 1987;

(b) goods or public service vehicle

1. in relation to Peninsular Malaysia, has the meaning assigned to it in the Land Public Transport Act 2010; or

2. in relation to Sabah, Sarawak and Federal Territory of Labuan, has the meaning assigned to it in the Commercial Vehicles Licensing Board Act 1987; or

(c) tourism vehicle

1. in relation to Peninsular Malaysia, has the meaning assigned to it in the Land Public Transport Act 2010; or

2. in relation to Sabah, Sarawak and Federal Territory of Labuan, has the meaning assigned to it in the Tourism Vehicles Licensing Board Act 1999; and

(ix) Credit sales contract under the Consumer Protection Act .

Recommendation

Companies should ascertain whether the COVID Act is relevant to their contractual obligations and seek legal advice for an assessment.

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→ Malaysia

Update to the Malaysian Transfer Pricing Regime

Updates to Transfer Pricing Guidelines

The Malaysian Inland Revenue Board ("IRB") has updated Chapter XI (Documentation) of the Transfer Pricing Guidelines to stipulate a shorter timeframe for taxpayers to submit Transfer Pricing Documentation upon request by the IRB.

The Transfer Pricing Guidelines previously specified that taxpayers are to make their Transfer Pricing Documentation available within 30 days upon the IRB's request. This has now been shortened to 14 days. The new deadline applies to transfer pricing audit cases that commence on or after 1 January 2021.

Power to Disregard Structures

Effective 1 January 2021, a new Section 140A(3A) has been introduced into the Malaysian Income Tax Act to empower the Director General of Inland Revenue ("DGIR") to disregard any structure adopted by a person if: (a) the economic substance of that transaction differs from its form; or (b) the form and substance of that transaction are the same but the arrangement made in relation to the transaction, viewed in totality, differs from those which would have been adopted in an arm's length situation.

The DGIR shall make adjustments to the structure of that transaction as they consider fit to reflect the structure that would have been adopted by an independent person dealing at arm's length, having regard to the economic and commercial reality.

Previously, the DGIR has only been empowered to disregard and make adjustments to any structure adopted for transfer pricing purposes. This new provision does provide the DGIR with broader powers to disregard structures.

Surcharge on Transfer Pricing adjustments and disregarded structures

Effective 1 January 2021, a surcharge of up to 5 per cent of the total transfer pricing adjustment will be imposed whether or not the adjustment results in additional tax payable. The surcharge will be treated as tax payable for the purpose of tax payment and recovery of the tax payment by civil suit.

Previously, where transfer pricing adjustments were made by the DGIR, the taxpayer has only been subject to a penalty if the transfer pricing adjustments resulted in additional tax payable.

Penalty for Failure to Furnish Transfer Pricing Documentation

Effective 1 January 2021, a new Section 113B has been introduced in the Malaysian Income Tax Act, imposing a penalty of between MYR20,000 – MYR100,000, or imprisonment of up to 6 months, or both if prosecuted in court; or if there is no prosecution, a penalty of between MYR20,000 – MYR100,000.

Previously, taxpayers which fail to provide transfer pricing documentation to the IRB are not subject to a specific penalty.

Double Tax Agreement between Malaysia and Cambodia ("MY – KH DTA") enters into Force

The MY – KH DTA entered into force on 28 December 2020 after having been signed on 3 September 2019.

The main points of the MY – KH DTA are as follows:

1. PERMANENT ESTABLISHMENT

- A building site, construction or installation project, or supervisory activities which last for more than 9 months;
- Furnishing of services for a period or periods aggregating to more than 183 days within any 12 month period;
- Activities (including operation of substantial equipment) for exploitation of natural resources for a period or periods aggregating to more than 183 days within any 12 month period; or
- Operation of substantial equipment (excluding those for exploitation of natural resources) for a period or periods aggregating to more than 183 days within any 12 month period.

2. WITHHOLDING TAX RATES

Withholding tax for payments of interest, royalty, and technical fees will be capped at 10 per cent.

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→ Philippines

Economic Outlook

The Covid-19 pandemic hit the global economy hard, and the Philippines was no exception to that. According to the International Monetary Fund, the global economy contracted at -3.5 per cent in 2020. The Philippines on one hand thankfully made it through 2020 largely without overwhelmed hospitals, and with until date "only" 547,255 cases and 11,507 covid related deaths in a population of 106 million people. On the other hand, one of the world´ s longest and strictest lockdowns/quarantine measures took a toll on the Philippine people and economy. In 2020, the country capped its worst year in record as GDP plunged -9.5 per cent. Despite various global, financial and environmental crisis, the first recession in 22 years.co

However, based on various analysts, the economy is expected to rebound to its old strength in 2021. For example, the Asian Development Bank forecast for 2021 is maintained at +6.5 per cent growth, assuming for public investment to pick up and for the global economy to gradually recover. Hopes rest primarily on the introduction of vaccination programs (the Philippines is expected to begin by mid of 2021 over a period of 3-5 years), the gradual opening of the economy (e.g. strict travel and mobility restrictions have recently been significantly lowered), steady growth and return of consumer confidence (banking on the infamous resilience of the Philippine people), low inflation and a continuation of the massive infrastructure investment (that the Philippines started already pre-pandemic and which was further ramped up by the Bayanihan (Recovery) Acts).

On a personal note, I am a little skeptical whether the Philippines may bounce back to their comparably high economic growth on a pre-pandemic level in 2021, while I have no doubt that the Philippines will return to their old and unprecedented stable and high pre-pandemic growth levels and beyond in the years to come.

Regardless of what may be laying ahead, particularly in the areas related to infrastructure projects, the Business Process Outsourcing sector and the recruitment of qualified personnel, we see (again) a steady inflow of new or continuous investment. Being already one of the leading countries globally in terms of business process outsourcing, the Philippines may potentially become (in this area) one of the beneficiaries of the "new normal".

→ Philippines

CREATE Tax Reform

On 3 February 2021, after years of deliberations (please refer to the various updates we provided on this topic), the Philippine Congress ratified the reconciled version of its bicameral conference committee on the "Corporate Recovery and Tax Incentives for Enterprises" (CREATE) Act. The act is now up for the President of the Philippine´ s signature before it will take effect.

The final version aims at promoting the recovery of businesses negatively affected by the pandemic, and to attract new investment. It will be the largest fiscal stimulus program for enterprises in the country's history. Furthermore, it ends the uncertainty caused by the legislative process, as to which extend the corporate income tax will be lowered, the impact on existing fiscal incentives and new tax benefits available to companies in the Philippines, the effective dates etc.

Assuming the act will be signed into the law as it is, the key features of the CREATE bill will be as follows:

Taxes

- Lowered corporate income tax rate from 30 per cent to 25 per cent;
- Lowered Corporate Income Tax from 30 per cent to 20 per cent for micro, small & medium

businesses, with a net taxable income below 5 Million PHP, or total assets below 100 Million PHP;
- Reduction of minimum Corporate Income Tax from 2 per cent to 1 per cent from July 2020 to June 2023.

Fiscal Incentives

- Up to 17 years of incentives for exporters and for “critical” domestic market enterprises, which will be defined by the National Economic and Development Authority (NEDA); including 4-7 years of tax holidays and up to 10 years of a Special Corporate Income Tax rate of 5 per cent;
- Up to 12 years of incentives for other domestic market enterprises (i.e. 4-7 years of income tax holidays and up to 5 years of enhanced deductions).

We will provide a summary as soon as the final version has been signed into law.

→ Philippines

Social Security Contribution Hike

Based on the Social Security Act 2018 and the Universal Health Care Law 2018, the social security premium payment for the Philippines Social Security System (SSS) and PhilHealth Insurance Corporation (PhilHealth) were scheduled for an automatic increase starting 1 January 2021.

However, the President of the Philippines sought suspension of the rate increase to ease the burden of Filipinos financially affected by the pandemic. A public debate arose and is still ongoing, whether due to the pandemic these social security agencies would require the additional funds from the rate increase to deal with the significant additional expenses caused by the pandemic, or whether the Filipino people would be better off without the increase. From a regulatory perspective, the challenge is that the legislative implementation of the adjusted contribution rates may – strictly speaking – only be rolled back by a law itself. In this regard, various bills were filed in Congress to amend the law and/or to give the President of the Philippines the power to suspend the rate hikes. However, until date these laws have not yet passed Congress and taken effect.

With regard to PhilHealth, its President and Chief Executive Officer released a statement on 5 January 2021, announcing that despite the regulatory challenges described above, PhilHealth would follow the call of the President of the Philippines and suspend the rate increase until Congress passes a law.

SSS on the other hand did not suspend the rate increase and opposes the current political discussion on the bills filed in Congress to suspend the increase.

This topic needs to be continuously monitored for the latest development of companies´ and employees’ statutory obligations regarding their (correct) contributions premiums to SSS and PhilHealth.

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→ Singapore

Electronic Transactions Act

In Singapore, the Electronic Transactions Act ("ETA") governs digital transactions and provides the framework for secure electronic signatures. The ETA recognises electronic signatures as the equivalence of wet ink signatures. Electronic records are also given legal validity under the ETA. Certain documents and transactions are, however, excluded from the scope of the ETA provisions that give legal validity to electronic signatures.

On 1 February 2021, the Electronic Transactions (Amendment) Bill (the "ETA Bill") was passed in Parliament to amend the Electronic Transactions Act, and to also make consequential and related amendments to the Bills of Lading Act, Cap. 384, and the Contracts (Rights of Third Parties) Act, Cap. 53B. The effect of the ETA Bill is that the United Nations Commission on International Trade Law (UNICITRAL) Model Law on Electronic Transferable Records is now adopted under the ETA.

Trade Documents

Previously, the following items were excluded from the scope of the ETA under its First Schedule:

> "Item 2: Trade documents such as negotiable instruments, documents of title, bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts."

With the amendment to the ETA, electronic Bills of Lading ("eBLs") can be created and shall have legal effect and validity equivalent to that of physical bills of lading. In tandem with the amendments to the ETA to digitalize trade documents, the Singapore Government is also implementing TradeTrust, a digital utility comprising a set of global standards and frameworks that will provide proof of authenticity of documents and enable transfer of title through open source software. The eBLs, together with the TradeTrust system will mean that there will be faster processing of trade documentation, lower costs and lower risks of fraud. All these will facilitate Singapore's journey towards digitalization of global trade.

The ETA Bill is likely to have a significant and positive impact on Singapore's maritime and trade hub status in the world.

Lasting Power of Attorney

The Lasting Power of Attorney ("LPA") allows a donor to appoint a donee to make medical and financial decisions on the donor's behalf in the event that the donor becomes mentally incapacitated. Currently, the lasting power of attorney is excluded from the scope of the ETA under its First Schedule.

> "Item 3: The creation or declaration of trust or power of attorney."

This item 3 will be deleted when the legislative and administrative frameworks supporting the electronization of LPAs are ready to be implanted.

The Ministry of Social and Family Development will soon table the Mental Capacity (Amendment) Bill in Parliament to allow LPAs to be made and registered electronically. With the amendment, LPAs can be made and registered electronically through a new electronic system administered by the Office of the Public Guardian ("OPG") Online. The time taken to register an LPA is expected to be reduced to an average of eight working days after a three-week mandatory working period. Currently, the LPA takes about three weeks before it is registered (in addition to the three-week mandatory waiting period). Upon a donor losing mental capacity, donees may make a request to the OPG for an electronic copy of the LPA to be sent to any transacting third party (e.g. banks). The digitalization of LPAs will mean greater convenience for people who wish to make LPAs. Third parties will also have greater confidence in transacting with donees as they will receive the most updated electronic copy of the LPA from the OPG.

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→ Thailand

Investment Promotion

The Thai Board of Investment (BOI) has announced additional investment incentives to promote investment in Thailand. The new measures aim to supplement the economic recovery efforts. Three new initiatives aiming at sizable investments, digital improvement, and developments of south Thailand have been announced:

- Projects with investments of THB 1 billion (approx. EUR 27.6 million) in targeted industries realized within 12 months from receiving the investment promotion are eligible to an additional deduction of Corporate Income Tax at a rate of 50 per cent for a period of five years. Note that the additional tax deduction is on top of any granted tax exemption and deduction. Interested investors have to apply within 2021;
- Projects investing in artificial intelligence, machine learning, and IT-based big data analytics by the end of 2022 may receive a Corporate Income Tax deduction of 50 per cent for three years. Interested investors should review if any planned upgrades could qualify for the promotion;
- The BOI has long targeted Thailand's south for economic developments. Now, the BOI has extended the existing application period for eligible investment in the five southern provinces (Narathiwat, Pattani, Yala, Songkhla, Satun) where investors may receive up to eight years of Corporate Income Tax exemption, and additional five years of 50 per cent Corporate Income Tax reduction. Recently, Thailand encourages investments in biomass in the south. Thus, a general investment promotion for renewable energies could be bundled with a promotion for general development of south Thailand.

→ Thailand

Reduction of Social Security Contributions

As a covid-relief measure, the government has announced reduced employer and employee contributions to the social security fund under the Regulation on Determination of Contributions to the Social Security Fund (No. 2) B.E. 2564 (2021), signed on 4 February 2021.

For the period of February and March 2021, the contributions will be lowered as follows:

- Employer contribution reduced to 3 per cent (from 5 per cent, capped at THB 750); and
- Employee contribution reduced to 0.5 per cent (from 5 per cent, capped at THB 750).

Companies in Thailand should instruct their respective payroll teams accordingly.

→ Thailand

Transfer Pricing

End of January 2021, the Revenue Department has published notification No. 400 regarding income tax. The notification is effective for accounting periods starting 1 January 2021, and describes the methods and conditions used by the Revenue Department to evaluate whether transactions between related parties are comparable to transactions between unrelated parties.

The notification prescribes that transactions between related parties have to be assessed by an appropriate method, whereby the

generally accepted methods by the OECD are recognized as follows:

- Comparable Uncontrolled Price
- Resale Price
- Cost Plus
- Transactional Net Margin
- Transactional Profit Split
- Alternate Pricing (in case no other method is applicable)

Note that the Revenue Department does not consider any method to be inherently more appropriate than the others: The circumstances of a transaction determine which method is appropriate. In essence, transactions can be assessed by any method if it allows for a fair comparison to transactions between unrelated parties.
The notification further outlines special requirements for intercompany services as well as transactions regarding intangible property.

All companies in Thailand should consider creating sufficient transfer pricing documentation if they engage in intercompany transactions, especially if your entity in Thailand has total revenues of at least THB 200 million or more in a given accounting period. In this case, you have to provide a disclosure form with the annual tax returns.

→ Thailand

Direct Aid to Employees

On 15 February, the Cabinet approved a proposal to offer direct financial aides to employees insured under section 33 of the Social Security Act as additional relief. Eligible employees have to meet the following requirements:

- Thai nationality;
- insured under section 33 SSA;
- not holder of a welfare card;
- deposits do not exceed THB 500,000 as of 31 December 2020; and
- registration via a website and downloading the government-provided application (Pao-Tang).

Eligible persons will receive THB 4,000, paid in installments of THB 1,000 via the government application. Companies should consider directing employees to the relief measure.

→ Thailand

Value Added Tax on Foreign Digital Services – Amendment Revenue Code

Thailand is one of ASEAN's leading countries to offer clear regulations for businesses regarding digital assets such as cryptocurrencies and tokens. Thailand has legalized the issuing process of coins and the operations of digital asset businesses such as exchanges, brokers, and dealers under the Emergency Decree on Digital Asset Businesses B.E. 2561 (2018) and various subsequent notifications. Digital asset businesses are subject to license requirements and oversight.

Now, as an additional measure to protect investors, the Securities and Exchange Commission has extended the list of Digital Asset Business Operators to include *Digital Asset Advisory Services* and *Digital Asset Fund Manager*. Business Operators falling under the definition will be required to file applications for licensing with the SEC. Unlicensed business operations will be subject to fines and other measures of enforcement.

Digital Asset Advisory Service Provider refers to the direct or indirect provision of advice on the value of a digital asset or the suitability of investments in digital assets or trading and exchanging of digital assets for a fee or other compensation. If the advice is provided in connection with other licensed businesses (i.e., operating an exchange or a brokerage), the business will not be considered a Digital Asset Advisory Service.

Digital Asset Fund Manager refers to the management of funds or advertising to the public to manage funds in connection with digital assets.

→ Thailand

Cannabis and hemp

End of 2019, Thailand legalized certain parts of cannabis and hemp plants by removing them from the scope of the Narcotics Act. However, the cultivation, importation, production, and processing remain subject to various regulations and license requirements under various laws (depending on the type of product as well as the processing step). Thus, the production and handling of products from cannabis and hemp for medical or other purposes is currently limited to authorized growers and research facilities.

Interested investors should carefully review the relevant laws and regulations as most activities (namely growing plants) require permission, and violations are punishable as severe crimes. Notably, recreational cannabis remains prohibited under the Narcotics Act as a serious offense.

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→ Vietnam

New labor regulation – Decree 145/2020/ND-CP

Following our Legal Update issued in January 2020 on Labor Code (which is effective as of 01 January 2021), this Legal Update shall introduce the significant changes stipulated in the newly issued Decree 145/2020/ND-CP of the Government dated 14 December 2020 detailing and guiding a number of articles of the Labor Code on employment conditions and employment relation (“Decree 145”). The Decree 145 will take effect as from 01 February 2021.

Key Issues

Labor Management

Decree 145 in more detail governs the obligations of employers with regard to labor management.

In particular, within 30 days after commencing their operation, an employer must establish a labor management book at the location of their headquarters, branch or representative office. The labor management book must contain basic information about the employees, i.e. their full name, gender, date of birth and nationality; place of residence; citizen's identity card or people's identity card or passport serial number; technical qualifications or vocational skills level; working location, type of labor contract, date of commencing the job, social insurance contribution; wages, wage level and wage increases; number of days of annual leave; number of overtime hours; apprenticeship or practical training, fostering and improvement of vocational skills, labor discipline and liability for material loss; occupational accidents and diseases, date and reason for termination of labor contract. The employer is responsible for setting out such information as from the date any employee commences work, and to update these immediately upon any change. He is obliged to manage and use it, and to present the labor management book to the State Administrative Agency for Labor and to any other relevant agency upon request in accordance with the prevailing law. We note that this is not a new regulation. but the same as has been valid under the Labor Code 2012. However, under Decree 145, the employer is more flexible to choose the form of labor management book, either in written or electronic form.

In addition to that, the employer must submit a report on the employment of a worker within thirty (30) days after the commencement date, and to report any labor changes during the

operational process to the specialized management agency for labor under the provincial people's committee on semi-annually basis (prior to 5 June and 5 December), and also notify same to the social insurance agency.

Labor contract with enterprise managers

The new Labor Code 2019 governs that an employer and an employee may agree on a probation period of up to 180 days in case of the position being enterprise manager, pursuant to the Law on Enterprises. "Enterprise manager" as defined under the Law on Enterprises means a manager of a private enterprise or a manager of a company, comprising the owner of the private enterprise, unlimited liability partners, the chairman of the members' council, members of the members' council, the chairman of the company, the chairman of the board of management, members of the board of management, the director or general director, and individuals holding other managerial positions as stipulated in the charter of the company.

In case of a unilateral termination either by the employer or the enterprise manager employee, the terminating party must send an advance notice of at least 120 days for an indefinite-term labor contract or a labor contract with a term of 12 months or more, or at least a period equal to a quarter of the term for a labor contract with a term of less than 12 months.

Severance allowance and job-loss allowance

In general cases of termination of labor contract, the employer must pay a severance allowance of ½ monthly salary for each working year to employees who have worked for the company for a full 12 months or more when the labor contract is terminated, except for one of the following cases:

(i) The employee satisfies the conditions for entitlement to a pension on retirement age as prescribed in the Labor Code and in the law on social insurance;

(ii) The employee arbitrarily leaves the job [gives up his or her job] without a satisfactory explanation for a period of at least five (5) consecutive working days:

(iii) The employee is disciplined by dismissal;

(iv) The employee illegally unilaterally terminates the labor contract.

In case the labor contract of the employee is terminated due to restructuring, change of technology and economics reasons, or in case of merger and acquisition, the employer must pay job-loss allowance of 1 month for each working year, but not less than 2 months to employees who have worked for the company for a full 12 months or more.

The period of employment as the basis used to calculate the due amount of severance payment or job-loss allowance comprises the total time period the employee actually worked for the employer (including the probation period) minus any time during which the employee participated in unemployment insurance. This is a new point in the Decree 145 to reaffirm the calculation of probation period as working time for the calculation of severance allowance or job-loss allowance, compared to the old regulations provided in Decree 148/2018/ND-CP.

Labor discipline and liability for material loss and damage

Decree 145 governs the issuance of internal labor rules (ILR) with more clarity. In particular, an employer with 10 employees or more is obliged to issue and register an ILR in writing, while an employer with less than 10 employees is not required to issue an ILR in writing, but must agree on the contents of labor discipline and liability for material loss and damage in the labor contract.

Except for the basic contents required for an ILR according to the Labor Code 2012, Decree 145 added new requirements with regard to the content of an ILR. The latter must now include regulations on the prevention of sexual harassment and fighting at workplace; procedures and orders for handling any acts of sexual harassment. In addition, the employer has to regulate the temporary transfer of employees to other positions in their ILR.

To be more specific, the employer´ s regulations regarding sexual harassment at workplace laid out in the ILR or in an appendix attached to the ILR, need to include the following basic contents:

(i) Strictly prohibit any act of sexual harassment at workplace;

(ii) Govern in detail and particular on acts of sexual harassment that may happen with respect to the nature and characteristic of job and workplace;

(iii) Responsibilities, terms and procedures for the internal handling of acts of sexual harassment at workplace, including responsibilities, terms and procedures for denunciations, complaints and other relevant regulations.

(iv) Forms of labor discipline to be applicable to a person conducting an act of harassment,

or a person blamable of denunciation or of lodging a false claim with respect to nature and severity of the violation.

The employer is obliged to implement and monitor the implementation and to organize a proper publication of the regulations on the prevention of sexual harassment and fighting at workplace. When complaints or denunciations about sexual harassment appear at the workplace, the employer must take immediate action to handle the incident and to take measures to protect the confidentiality, honor, reputation and dignity, safety of the victims of sexual harassment, as well as of complainants, accusers and the accused.

Specific regulations applicable to female employees | responsibilities regarding gender equality

Decree 145 regulates a number of benefits in relation to specific health care for female employees. These are in particular:

(i) During periodic check-ups, female employees are entitled to have an obstetrics examination;

(ii) During her menstruation, a female employee is entitled to a fully-paid break of thirty (30) minutes every day (at least for 3 days) in the working hours; during the period of nursing a child under twelve (12) months of age, a female employee is entitled to a fully-paid break of sixty (60) minutes every day in the working hours. If the employee does not want to take break during the period and the employer agrees, the employee must be entitled to additional wage for the breaks not taken, while this time is not considered as overtime working;

(iii) The employer is encouraged to install a milking and milk storage room, depending on the actual conditions at workplace, the demand of female employees and the capacities of the employer. The employer is obliged though to install such milking and milk storage room if he has 1,000 female employees or more;

(iv) The employer must ensure to have sufficient bathroom and toilet capacities for the employees´ use in accordance with further guidance from the Ministry of Health;

(v) The employer is obliged to ensure gender equality in recruitment, labor, bonus, training and promotion programs.

Briefly, Decree 145 does not contain much new regulations but mainly focuses on further clarification of a number of regulations of the new Labor Code 2019. It is important to note that a company with less than 10 employees must stipulate regulations regarding labor discipline in their labor contracts, while a company with 10 employees or more must have an ILR in writing. In case an ILR is available, the company further needs to provide regulations about the prevention of sexual harassment and fighting in the form of an appendix to their ILR. In addition, the maximum total of overtime working hours is increased from 30 hours/month to 40 hours/months and should also be updated in the ILR.

Rödl & Partner Vietnam accompanies and assists clients of all kinds in their labor matters and business activities in Vietnam.

Employee conferences | promulgation of democratic regulations at grassroots level

For the implementation of democratic regulations at workplace, the employer must publicly communicate the following information to the employees:

(i) The employer’s business performance;

(ii) Internal labor rules, wage scale, wage table, productivity norms, other rules and policies of the employer relating to the employees’ interests, duties and responsibilities;

(iii) Collective bargaining agreements entered into by the employer;

(iv) Establishment and use of funds for reward and welfare, and other funds to which the employees contribute (if any);

(v) Payment of trade union fee, payment of social insurance, health insurance, unemployment insurance premiums;

(vi) Implementation of rewards and commendations; disciplinary actions, settlement of complaints and denunciations relevant to employees' rights, duties and interests.

The employer has to cooperate with the organization representing the labor collective at grassroots level (if any) (i.e. grassroots trade union or organization of employees at the company) and group representative for discussion at workplace (if any) to organize an annual employee conference in the form of plenary conferences or conferences of deputies.

The employer is obliged to promulgate democratic regulations at grassroots level in order to implement regulations in dialogue with the workforce, and implement workplace democracy. The employer must, prior to promulgation or amendment of the democratic regulations, consult the opinion of the organization representing the labor collective at grassroots level (if any) (i.e. grassroots trade union or organization of employees at the company) and group representative for discussion at workplace (if any). In case there are opinions offered by an internal employee representative organization with which the employer do not concur, explanation must be provided. The internal workplace democratic regulations must be made publicly available to the employees.

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→ Upcoming Events

RCEP and CAI – New Perspectives for European Investors in ASEAN and China?

With the RCEP and CAI currently being on everyone´ s lips, we would like to invite you to share some insight with us and to discuss your expectations with regard to these important agreements on the verge of ratification. How will RCEP and/or CAI likely effect your individual business development and investment perspectives?

We would like to not only share some professional insight with you, but to also enter into a lively discussion on your personal views and expectations. The session will be offered in English and German – please pick the language and/or date that suit you best:

OUR EXPERT SPEAKERS WILL BE:

MARKUS SCHLUETER
Attorney at Law
Partner
Head of Rödl & Partner ASEAN-Pacific Desk

CHRISTINA GIGLER, LL.M.
Attorney at Law
Senior Associate
Head of Legal Rödl & Partner Beijing

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IN ENGLISH
3 MARCH 2021
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