

Implications of Changes in Chinese Contract Law for Foreign and Domestic Businesses

The Labour Contract Law (LCL)

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Abstract

Surviving in the Chinese business market requires significant or full comprehension of the intermingling of law and policy (Yuanming & Kho, 2010). This paper examines the potential implications and impact of the new Chinese Labour Contract Law (LCL) on foreign corporations and domestic businesses in China. The author explores the new changes in Chinese contract law originating out of provisions in the LCL and affecting employer-employee relationships. The author then outlines these major changes as they will specifically affect contractual relationships and describes and discusses how this shift in policy by the People's Republic of China (PRC) gives new powers for bargaining to individual laborers. The implications for domestic and foreign businesses operating in China are discussed. The opposition of businesses and corporations to these provisions is explored in terms of problems, challenges and opportunities, and finally, the author offers some words on the potential of the LCL in terms of success and speculated consequences.

Keywords: People's Republic of China (PRC), Labour Contract Law (LCL), European Union Chamber of Commerce in China (EUCCC), American Chamber of Commerce in Shanghai (ACCS), U.S.-China Business Council (USCBC).

Introduction

It is suspected that many foreign businesses have taken full advantage of employees and reaped significant profits, benefits, and superior rights over employees from China's loose employment labor and contract laws over the past several decades. The cheap labor which was seen as a prerequisite and major factor in China's economic rise (Karindi, 2008) will perhaps become a thing of the past as new labor contract laws give workers rights that will change their power to demand higher salaries and benefits as well as better working conditions. Previous labor laws passed by the Chinese government, for example, the Labor Law of the People's Republic of China, effective January 1, 1995, failed miserably to protect Chinese laborers and those working in China for both domestic and foreign companies. However, the recent changes in Chinese labour contract and general contract laws which began in 2008 has changed the

landscape not only for individuals, laborers or employees, but also for home-based and foreign businesses in China. Foreign entrepreneurs and businesses in China will especially be affected by the new laws which give Chinese citizens and employees or laborers more rights, especially with regard to the power to terminate or affect contractual relationships.

Law is not static by nature, but dynamic (Solomon, 2012). Contract laws are not static; they change with time and events, and they also change dependent on changes in other laws and statutes upon which they are based, or whose ideology, practice and interpretation affect contractual rights and relationships. For example, “change of terms” provisions are regarded as ubiquitous in contracts today (Watkins, 2009). The law of contracts is primarily governed by the common law with some significant areas governed by statute (Fanger & Associates, LLC, 1999). Furthermore,

The Common Law is not static, but dynamic and still growing. It is the system of rules and declarations of principles from which the judicial ideas and legal meanings or definitions are derived and it is still expanding. The growth and development of the Common Law principles are influenced by the changing conditions and requirement of the society. Public policies play a dominant role in shaping the common law principles (US Legal, Inc., 2013, p. 1).

In China, there has been gross neglect where employees’ rights under labor and contractual relationships are concerned. According to Ecker (2007) in many companies there is widespread compulsory overtime with employees working up to 14 hours a day for illegally low wages, many companies neglect to abide by employment contract provisions, and most do not provide basic medical or work injury insurance for their employees. Ecker (2007) tells us that while many foreign corporations, in complying with standards from their countries, have tried to improve labor terms and conditions, it has been a struggle in China where corporate codes of conduct and checklist auditing are not enough by themselves to strengthen workers’ rights when some corporations are unwilling to pay the real price it costs to produce a product – the problem of cheap labor fueling labor contract abuses. There are many other problems as attested to by Allard and Garot (2007) who state that other widespread labor problems in the Chinese labor market include nonpayment or irregular payment of wages, the existence of many workers without contracts lacking any guarantee of basic rights in the workplace, and severe competition clauses as well as “bond” payments to employers limited workers’ ability to change jobs.

Because of these and other widespread abuses,

China enacted in 2007 three laws that reform its labor market and amend specifically the 1994 Labor Law: the Labor Contract Law, the Law on Mediation and Arbitration of Labor Disputes, and the Labor Promotion Law. The objective was to promote “social harmony” and end widespread abuse of workers who had no contracts and hence no rights (Allard & Garot, 2010, p.1).

However, these laws seemed insufficient to address the problem of widespread labor abuse until the People’s Republic of China (PRC) made its stance known through the People’s Court in enforcing its Labor Contract Law (LCL) effective January 1, 2008, its Law on Mediation and Arbitration of Labor on May 1, 2008, and its Labor Promotion Law on January 1, 2008.

As of 2007 there was a great certainty that the global economy would experience a catastrophic downturn. One of the impacts of the global economic downturn beginning in 2008

was that it caused many in the Chinese market to face difficulties in fully performing executory contracts which had been formed prior to the crisis (Ning, Huang, & Yang, 2010). Given these difficulties, many parties to such contracts requested modification or even rescission of their contracts under the changed circumstances (Ning et al., 2010). Recognizing this and previous weaknesses in Chinese contract laws that complicated the issue, the Judicial Interpretation on Contract Law II was issued by the Supreme People's Court (SPC) to further clarify certain legal rules under current Chinese Contract Law (Ning et al., 2010). This interpretation, *Article 26 the Fundamental Change of Circumstances Provision*, has added to the power given to employees by provisions previously asserted under the LCL. According to Article 26,

After a contract is legally formed, in view of objective circumstances not anticipated by the parties when the contract was formed, not caused by force majeure nor commercial risks, and significant changes occur so that continuing the performance of the contract is unfair and inequitable to one party or the objective of the contract cannot be fulfilled, then a party or both parties may request the people's court to modify or rescind this contract. The people's court shall abide by the principle of fairness and consider the actual situations involved in this case before making a decision on modifying or revoking the contract at issue (Ning et al., 2010).

According to Ning et al. (2010), there are four elements that must be present in order to establish a prima facie case so that a request may be made to a court to modify or rescind a valid contract: (a) objective circumstances exist that were not anticipated by the parties when the contract was formed; (b) the change of circumstances is not caused by force majeure; (c) the change of circumstances is not a result of a normal commercial risks; and (d) the continuing performance of the contract would be unfair and inequitable to one party or the objective of the contract cannot be fulfilled. Furthermore, in deciding whether to grant a request for modifying or revoking a contract, the People's Court will primarily consider (1) the principle of fairness and (2) the surrounding facts involved in each individual case. Against this backdrop, Chinese laborers can now draw more on contract laws to maintain current rights and seek recognition for more as these laws are complementary to the Labour Contract Law (LCL) rules and regulations.

The New Changes in China's Contract Laws

The Labour Contract Law, which covers all workers in China, changed on January 1, 2008 in an effort to address the rising number of labour disputes. The law requires that employment contracts must be put in writing within one month of employment commencing, and gives clear recourse to employees whose rights have been violated. It covers areas such as severance pay, probationary periods, lay-offs, non-compete clauses and collective bargaining (ForeignCn.com, 2010). China's new LCL represents the first overhaul in 15 years (Taft, Stettinius & Hollister, LLP, 2009). The LCL specifically builds upon previous laws by promoting a series of rights that stem from a contractual employment relationship: remuneration, social security and welfare benefits (retirement, illness or injury, work-related disabilities or occupational disease, unemployment, maternity leave), payment of overtime work and severance pay (Allard & Garot, 2010).

China has long been lacking in adequate and well-developed contractual laws in general, and labor laws were no exception. This placed employees and employers, as well as foreign businesses and their owners at varying levels of disadvantage over the past few decades in the

Chinese economy, which is rapidly changing and growing. The general purpose of the changed contract laws in China, made effective in 2008, is to ensure and protect the rights of employees (Taft, Stettinius, & Hollister LLP, 2009). The new laws were necessary and long needed because the 1995 labor laws lacked any mechanism to protect and enforce employee rights. Unlike the former laws, the new LCL assures that employees have written employment contracts with enforceable terms (Taft, Stettinius, & Hollister LLP, 2009). The new law will empower the Chinese workforce by allowing unions and worker-represented groups to review and comment on changes to company policy, such as provisions in the corporate handbook (Ecker, 2007).

In the past employees were not allowed to file claims against companies, but had had to file a grievance with the government or state-run labor unions, which would then decide whether a claim should be brought against the offending company (Ecker 2007). However, this is no longer the case and employees under LCL can independently file claims or use unions to accomplish this. The changes to the LCL have occurred in several areas and are uniquely summarized in the following paragraphs.

(1) ***Written Employment Contract:*** According to Taft, Stettinius, and Hollister LLP (2009), the LCL now requires that all employees receive a written employment contract from their employers and that employers must conclude the contract by obtaining the signatures of employees. Under the new terms developed, that became effective in 2008, the burden is on the employer to ensure that written employment contracts are concluded and signed (Taft, Stettinius, & Hollister LLP, 2009).

(2) ***Employment Term:*** Under the new LCL, the law allows for three kinds of contracts based on the employment term: fixed-term, open-ended and project-based (Taft, Stettinius, & Hollister LLP, 2009). A fixed-term contract is one which has an agreed upon termination date while an open-ended contract has no termination date. A project-based contract has a termination date based upon completion of the project or task (Taft, Stettinius, & Hollister LLP, 2009).

(3) ***Mandatory Terms of an Employment Contract:*** Under the new terms of the LCL, there are several elements required in the employment contract: name, domicile and legal representative or main person in-charge of the Employer; name, residential address and number of the resident ID card or other valid identity document number of the worker; term of the labor contract; scope of work and place of work; working hours, rest and leave; labor compensation; social insurance; and labor protection, working conditions and protection against occupational hazards (Taft, Stettinius, & Hollister LLP, 2009).

(4) ***Probation Period:*** The new LCL has reduced the length of an employee's probation period. For example, if the employment contract is for less than six months, the probation period cannot exceed one month and for employment contracts greater than a year and less than three years, the probationary period can be two months. For contracts greater than three years and open-ended, the probationary period can be six months (Taft, Stettinius, & Hollister LLP, 2009).

(5) **Training:** Employers need to be aware of how the LCL may affect various policies and programs they offer to employees, especially as part of labor contracts. For example, some employers provide professional training to employees and there are rules by the LCL governing service period and liquidated damages possible (Taft, Stettinius, & Hollister LLP, 2009).

(6) **Confidentiality and Non-Competition:** The LCL allows confidentiality provisions to be included in the employment contract. There can also be non-competition provisions included in the employment contract or confidentiality agreements. However, these shall be limited to senior management, senior technicians and individuals with confidential obligations (Taft, Stettinius, & Hollister LLP, 2009).

(7) **Termination of Employment Contract:** Both employer and employee can terminate the employment contract, but only upon the conditions set forth under the LCL (Taft, Stettinius, & Hollister LLP, 2009). According to the LCL provisions, an employer is entitled to terminate employment upon 30 days' notice to the employee, except under certain circumstances cited in the LCL such as when the employee is pregnant, suffering from occupational disease, or other severe ailments. Furthermore, the LCL requires that an employer must inform the union of any termination (Taft, Stettinius, & Hollister LLP, 2009).

An End to Employer Domination?

Contracts are not seen as binding in China as they are in other countries (ForeignCn.com 2010). However, the new LCL of 2008 is bound to change the playing field, especially for employees who can now assert their rights and seek justice for breach of contractual terms of labor and other agreements against employees or partnership businesses where labor contracts become disputed. Foreign and domestic businesses and employers in China can no longer assert total dominance over employees and take full advantage for profitability goals. They must now recognize that Chinese laborers and those working in China as employees can now use the LCL effectively to petition for and assert their rights under general contractual laws for breach, remedy to breach and any other areas the law covers.

With the new LCL there are significant penalties that can be assessed against an employer for failing to conclude written employment contracts with its employees, and the new law also gives employees support through the increased role of the trade unions (Taft, Stettinius, & Hollister LLP, 2009). Employees and disadvantaged laborers are no longer facing large corporations, foreign and domestic, operating in China, by themselves. They can now effectively utilize and apply the power of trade unions to seek better salaries, working conditions, and to address various contractual and other labor grievances. According to Taft, Stettinius, and Hollister LLP (2009), the recently developed LCL mandates that employers must consult with trade unions on matters relating to the implementation of a new rule or regulation, and that the trade unions serve as a "collective consultation mechanism" with employers to protect the rights of employees as well as to guide employees in the negotiation and performance of their employment contracts. This means that the former advantages gained by the employment contract and rule and regulation development and implementation being an employer-dominated

one is no longer possible for many companies. Chinese labors and Chinese-based employers will now have a greater say in this process through trade unions that can act as intermediaries.

There are many countries where contractual laws are not highly developed to protect parties, specifically, those recognizing and protecting employee rights. China, as a communist nation where central command dominates, stands out not only because of its extremely large population of over a billion people, but also because the country has had a history where individual rights have never been a priority, especially those of laborers. Furthermore, globalization has brought further disadvantages to Chinese laborers of both domestic and multinational or foreign corporations as competition for cheap and plentiful labor has driven down salaries and working conditions in that country. As if the Chinese market and environment for laborers was not bad enough, India, with a population of over a billion, and other people migrating into China to compete for jobs and salaries, gave employers dominance in determining the majority of the rules for hiring, as well as the working conditions available to laborers. This will no longer be the case, not only because of these new LCL rules and regulations, but also because of the general decline in world economic productivity stemming from the global recession which began in or around 2007.

Implications for Foreign Entrepreneurs and Businesses in China

The new labor laws in China will no doubt change the playing field for businesses, employers and employees, especially foreign companies from around the globe that have relocated or established bases in China to take advantage of cheap labor, loose or non-existent labor laws and the general lack of business and ethical regulations and purview by the Chinese government. "It is critical for foreign businesses which are doing business or planning to do business in China to understand China's new labor laws as well as how the overall design of the legislation operates" (Taft, Stettinius, & Hollister LLP, 2009, p.1). Allard and Garot (2010) believe that the new labor contract laws mark a major step in the direction of a more rigid labor market for China.

Foreign and domestic businesses and employers in China were, for most part, relatively unaffected by employees' grievances because grievances were hardly ever investigated or taken seriously by governments or other officials. According to Ecker (2007), most employees were reluctant to file a grievance out of fear of retaliation, and many were not even aware that they had the right to file grievances. This made abuse of workers and their rights very rampant across Chinese domestic and foreign corporations. However, this is no longer the case as there are many programs and policies in place to educate workers about their rights, and the Chinese media and several unions have made maximum efforts to ensure that laborers or employees are aware of their rights under the LCL (Becker & Elfstrom, 2010).

Under the new terms of the LCL, failure to conclude a written employment contract with an employee will cause the employer to be liable (Gallagher, Giles, Park, & Wang, 2013). Employers stand to lose much in this case in terms of money and potentially skilled labor. According to the new terms under the LCL, if no written contract is obtained from the employer within a year of commencement of work, in addition to being liable for twice the salary, the employment relationship will be deemed an open-ended contract by which the employer must abide regardless of any circumstances (Taft, Stettinius, & Hollister LLP, 2009). There are three kinds of contracts based on employment terms under the new LCL: fixed-term, open-ended, and project-based that each have implications for employers. Employers in China must be aware of

the legal consequences and handling each of these kinds of contracts. The implications for each regarding the LCL and employer practices are described below by Taft, Stettinius, and Hollister LLP (2009). From an employee perspective, an open-ended contract is most advantageous; it provides no termination date, and termination can only occur under the specific grounds enumerated under the LCL. A fixed-term contract is more advantageous to an employer, who has no obligation to renew the employment contract upon its expiration; an employee retained after two fixed-term contracts have expired, however, is deemed to have an open-ended contract. A project-based contract is more like a fixed-term contract, unless the project is likely to take a very long time (Taft, Stettinius, & Hollister LLP, 2009).

Because the LCL rewards employees who work longer for an employer, employers must be careful how they manage these employees, especially when it comes to dismissal and other disputes. For example, an employee who has worked for 10 consecutive years with an employer, or who has completed two fixed-term contracts with the employer, is automatically entitled to have an open-ended contract (Taft, Stettinius, & Hollister LLP, 2009). This means that employers have literally lost the privilege of solely determining the fate of their long-term employees and must be prepared to face the consequences when they dismiss them; oftentimes, the consequence is in terms of the potential for paying far more in compensation or damages than they would to employees with shorter employment tenure. While the LCL changes require certain mandatory elements, they do not bar employers from including other matters in the employment contract to cover issues such as probation periods, training, and confidentiality and non-compete terms (Taft, Stettinius, & Hollister LLP, 2009).

Employers must understand that the probationary periods granted under the LCL mean cutting into their profits or earnings as under the LCL employers are required to pay employees' wages during the probation period. This wage requirement cannot be determined according to the employer's discretion, but must comply with a specified LCL requirement that the wages may not be less than the lowest wage for the same position or 80% of the wages provided for in the employment contract; whichever is lower (Taft, Stettinius, & Hollister LLP, 2009). Not all of the new LCL regulations are bad for employers though as the LCL allows employers to enter into a training agreement with the employee stipulating a service period. In the event the employee terminates the service period early, the employer can claim liquidated damages against the employee. Damages serve the purpose of protecting both reliance and restitution (Farnsworth, Young, Sanger, Cohen, & Brooks, 2008). Liquidated damages include training costs, travel costs and direct expenses (Taft, Stettinius, & Hollister LLP, 2009). While the LCL allows for confidentiality provisions to be included in the employment contract as well as non-competition and other agreements, employers must understand that under the LCL they must pay employees compensation on a monthly basis during the period of non-competition, deemed not to exceed two years. Furthermore, the minimum compensation will vary depending upon local regulations, and injunctive relief cannot grant employers an exception to this.

When it comes to terminating employees, the LCL requires conformance to several rules which if not followed, can create problems for employers. For example, if the employee terminates the employment contract due to the employer being in breach of the LCL, the employee will not be subject to liquidated damages. However, if the employer terminates the contract due to the employee's fault, then the employer can seek liquidated damages from the employee. Additionally, termination of the employment contract by the employer leads to severance payment for the employee. The LCL dictates that the usual rate of severance payment is one month of pay for each year of service up to 12 years (Taft, Stettinius, & Hollister LLP,

2009). Allard and Garot (2010) believe that the severance payments which the new law carefully defines for the first time will now enter into companies' labor cost calculations, and thus create higher costs for employers. Allard and Garot (2010) argue that some small businesses in the Chinese market have already claimed that this requirement for severance pay has caused labor costs to rise between 8% and 20% for small businesses.

One of the new requirements of the LCL is that all employers must maintain a written employee handbook setting out the basic rules and regulations of employment (ChinaLawBlog.com, 2007). Without an employee handbook, employers will be unable to terminate employees as LCL stipulates that "the failure to maintain an employee handbook means that an employer will effectively be unable to discharge employees for cause, since 'cause' must be determined with reference to the employee handbook" (ChinaLawBlog.com, 2007, p.1). According to ChinaLawBlog.com (2007), the new law greatly limits the use of term contracts and probationary periods which were previously popular ways used by employers to avoid existing labor law penalties. Where under previous Chinese labor contract law, an employee could be discharged either at the expiration of a term contract or for cause, this practice is no longer possible under the LCL as the employer is permitted to enter into a maximum of two term-contracts with the employee.

Challenges, Problems, and Opportunities

According to Taft, Stettinius and Hollister LLP. (2009) the impact of the new law is unclear as it remains to be seen how the new LCL will be enforced by the different local labor authorities in China, as the country has various levels of political corruption, for example, high incidents of bribery (McFarlane & Cooper, 2011), and other political, social and economic factors that affect enforcement. Taft, Stettinius, and Hollister LLP. (2009) are certain that the new law will definitely affect foreign companies with employees in China, and therefore recommend that they review their existing employment contracts and HR policies to determine if these are in compliance with the new LCL and Implementing Regulations.

The new LCL can result in significant problems for noncompliance. For example, employers who fail to abide by the LCL face administrative fines, awards of double wages and liability for actual damages (ChinaLawBlog.com, 2007). With the new provisions of the LCL, employees are now able to have greater control over the working conditions and assert rights and powers they were recently deprived of. This can result in many avoidable law suits and financial losses for companies that do not understand and apply LCL in their contractual labor relations since "virtually every violation of the law gives the employee the right to sue the employer for penalties and damages in the local employment arbitration bureau or in the local courts" (ChinaLawBlog.com, 2007, p.1).

The problem of costs to employers is perhaps the major motivation for foreign and domestic companies operating in China to become truly concerned about the new law. According to Allard and Garot (2010), costs for companies will be raised by the lengthening of the dismissal process under the new law. Under the LCL, before making mass dismissals, companies are now required to begin a one month consultation with workers' representatives over the terms of the agreement, and to wait for official approval in some regions. This introduces new legal costs and will ensure that companies pay additional months of salary before any adjustments can take place. This is not good for companies that are keen on cutting costs and originally entered the Chinese labor market for this purpose. This also explains why some corporations are

opposing the LCL. According to the Institute for Global Labour and Human Rights (2007) before the new labor and contract laws took effect in 2008, there was a corporate campaign to lessen the effectiveness of China's LCL. This, the Institute argues, contradicts the justification that corporations have often given for their support of public policies that encourage them to invest in China. Furthermore, it also demonstrates that many of these corporations, both U.S. and European, are not keen about supporting labor rights that will decrease their profits or change the dynamics of an abundant and cheap labor market.

As a result of the fear that improved employee rights would cause to companies in the form of higher costs through the newly developed LCL, the European Union Chamber of Commerce in China (EUCCC) and the American Chamber of Commerce in Shanghai (ACCS), the two largest foreign investors organizations in China, submitted recommendations and opinion papers on the Draft Labour Contract Law to the Legal Affairs Committee of the Standing Committee of the National People's Congress (Institute for Global Labour and Human Rights, 2007) before the law took effect. The American Chamber of Commerce in Shanghai represents over 1,300 corporations, including 150 Fortune 500 companies, such as Dell, Ford, General Electric, Microsoft and Nike, while the European Union Chamber of Commerce in China represents more than 860 members. Both bodies criticized the proposed LCL at the time, arguing that if the laws were implemented there would be an increase in labor costs resulting in many companies moving their production lines to countries outside of China. They also argued that the laws would have negative effects on China's investment environment by reducing employment opportunities for the country's people and labor force (Institute for Global Labour and Human Rights, 2007). These arguments clearly show that while the LCL has successfully passed and Chinese laborers are being educated on the new law, these two bodies and their members along with the U.S.-China Business Council (USCBC), which was present at the meeting and representing 250 U.S. companies doing business across all sectors in China, will be slow in recognizing employees' rights and fully embracing these provisions. This implies that the Chinese government will have to rigorously and strictly embrace these provisions to see any significant positive impact in the working conditions of Chinese laborers.

According to the Institute for Global Labour and Human Rights (2007), foreign corporations fought against the very aspects of the proposed LCL that would ameliorate some of China's most blatant labor problems in several ways: (1) *Contract Protections for All Workers*: foreign corporations want to maintain the current system which creates a large underclass of workers with no security and no rights; (2) *Collective Bargaining with Employees*: the new law provides for negotiations over workplace policies and procedures, layoffs, health and safety, and firings with a union or an employee representative, and foreign corporations opposed this as they demand unilateral authority, not negotiation; (3) *Freedom to Change Jobs*: non-compete agreements prevent workers from changing jobs easily if they have access to proprietary knowledge as determined by an employer. Knowledge transfer is essential for economic growth and employees can oppose this because of perceptions of competition; (4) *Technology Advancement and Transfer*: some corporations argued that the new labor laws would seriously affect the individual technology innovation of the Chinese enterprises and thus multinational corporations would not introduce their advanced technology; (5) *Limited Probationary Periods*: before the new laws corporations in China were able to set probationary periods unilaterally, often for an entire year, thus keeping people in a highly precarious employment status. However, the new law sets standards for probationary periods of from one to six months depending on the type of the job, and corporations are arguing that a longer probationary period is justified,

because one to six months is not long enough to provide sufficient time for enterprises to examine and acquire new staff; (6) *Payment for Training*: under current labor contract law, employees sign a separate contract that allows companies to recover any training costs if a worker terminates his or her employment. However, the new law limits the costs employers can recover and many employers are not pleased about this as they can experience losses; (7) *Severance Payments*: under the new labor laws the LCL encourages stable employment by requiring employers to provide severance pay to workers whose contracts end, but not to those whose contracts are renewed. Corporations argue that this provision is most unreasonable; (8) *A Pathway from Temporary to Permanent Work*: Chinese companies employ a large number of temporary workers hired through temp agencies and this helps companies to avoid the protections and commitment that come with standard employment. Under the new law, temp agency workers would become permanent employees after one year of employment at a client firm, thus reducing the number of insecure, contingent jobs. Many corporations argue that this provision of the LCL impedes the right of the employer to find the best person for the job and will reduce the flexibility of human resource allocation; (9) *A Fair System for Lay-offs*: corporations frequently lay off workers at their own discretion. However, under the new proposals, corporations would have to lay people off on the basis of seniority. Many corporations view this as undesirable as they will be stuck with employees who are potentially unproductive; and (10) *Senior-Based Lay-offs*: many corporations view the seniority-based lay-off provision as discriminatory against new hires or new laborers (Institute for Global Labour and Human Rights, 2007).

Karindi (2008) understands why these corporations would present such arguments and opposed certain provisions in the LCL. She argues that the implementation of the new labor contract laws were likely to influence the cost of labor for foreign corporations, thereby making production in China more expensive and forcing many businesses there to close their doors and return to their homelands or relocate elsewhere. This, corporations argue would be a negative impact of the LCL provisions for the Chinese laborers and economy as whole. These corporations have argued that the strict provisions of the LCL which act against employers interests will limit employers' flexibility and create higher production costs in China and force foreign firms to reconsider investing in the country. They further argue that this will reduce China's competitiveness and its reputation as an ideal place for foreign investments (Karindi, 2008).

The LCL provisions and regulations that have been put into place to guarantee Chinese laborers more rights and remedies to violation of labor contracts, employer maltreatment and other disputes also have some good opportunities for employers. Employers can now use these standards to do away with what were previously "grey areas" in labor laws that sometimes resulted in great disadvantages to companies. Furthermore, they can view LCL as an opportunity to improve working conditions and benefits, and hence employee satisfaction and productivity. Worker satisfaction has been linked to increased productivity and organizational effectiveness (Buitendach & de Witte, 2005). Several studies have given credence to the belief that "Satisfied workers are productive workers" because job satisfaction can have a positive effect on performance, if it increases effort e.g. by reducing employee shirking and superfluous on-the-job activities (Böckerman & Ilmakunnas, 2010), which consequently increases productivity levels of workers. China, similar to many Third World nations, has lacked adequate recognition and protection of individual employee rights and the LCL can give foreign companies the opportunity to more effectively transfer and apply their home-country, company culture and

rules where the LCL has similarities. This can mean less time and effort in devising new rules for the Chinese labor market as well as less time spent in court and dealing with legal claims, which are expected to increase as soon as many Chinese workers or employees see opportunities in the LCL for monetary and other rewards through claims filed against employers.

While there will be many claims against all types of employers arising from the new LCL regulations, it can be speculated that there will probably be more claims against Chinese foreign employers than local employers as the nature of cultural ethnocentrism could potentially impact the tendency toward claims. Ecker (2007) seems to agree with this by arguing that with employees now acting as enforcement agents, every company will be open to increased action and no other area of the new law is likely to cause more litigation than the changes to regulations governing China's labor contracts. On a more general level, Allard and Garot (2010) believe that if the new LCL laws are consistently enforced, they could cause higher inflation or lower employment, and pressures toward a dual labor market, aggravating inequalities in China and leading foreign investors to select different approaches to hiring. Allard and Garot (2010) are speculating on the impact of the new labor contract laws on China's labor market and multinational corporations as stemming from the idea of labor market rigidities. Thus, they remark,

Experience with rigid labor markets in both developed and developing countries suggest that the changes set in motion by the 2007 law in China could have numerous effects on the local economy, which could influence the hiring strategies of multinational investors (p. 534).

Several of the negative impacts of the new labor laws include (1) the dualization of the labor market due to more outsourcing of tasks to staffing firms and greater temporary and part-time employment within the limits permitted by the law; (2) higher labor costs due to longer and more cumbersome adjustment processes; (3) greater power to collective bargaining units; and (4) either more layoffs if the economy turns downward, or higher wage inflation if it overheats (Allard & Garot, 2010, p. 535). Allard and Garot (2010) argue that all of these changes could have a negative impact on current or potential foreign investors in China.

Strategic Responses to the Labour Contract Law (LCL)

Taft, Stettinius, and Hollister LLP (2009) believe that employers should think about strategies to respond effectively and adapt themselves to the new LCL in order to be successful in the Chinese business and labor markets. One recommendation to avoid liability for failing to conclude a written contract by terminating a reluctant employee before the 30 day period recommended by the LCL has expired, is for the employer to secure evidence such as an acknowledgement signed by the employee on or before the end of the 30 day period (Taft, Stettinius, & Hollister LLP, 2009). It will be essential for the employer to prove that an employee was aware that termination could result from not signing the employment contract within 30 days of commencement in order to avoid liability and paying the restitution deemed due under breach or culpability where the LCL has ruled. Furthermore, employers can significantly alleviate negative impacts such as the increase in the number of grievances and claims filed by employees by developing programs and policies to significantly improve worker satisfaction and benefits. This may require offering better packages to laborers and developing an employee-friendly culture and policies.

Employers must develop higher ethical principles and policies in dealing fairly with Chinese laborers. This will gain them some leverage in effectively addressing situations where employees' grievances and claims pose a threat to productivity and profitability. Another effective strategy in gaining leverage against the potential perceived undesirable and negative impacts of the provisions arising out of the LCL is to formulate cooperative agreements with the People's Republic of China (PRC), the People's Court or other important local and national enforcement and employee-interest bodies in improving employee working conditions and protecting employee rights. This will not only build a positive image and reputation for companies as law-abiding and compliant, but also as organizations that value employee rights and well-being. Cooperation with communities and making provisions for employees in some areas of social needs will also enhance an image of fairness and compliance in concert with the Chinese communist government's ideal behind devising the LCL – that of building a more harmonious society.

Given that the new law requires contracts in writing, as well as company's handbook setting out policies and procedures, foreign and domestic multinationals and businesses operating in China should proactively engage in development of such programs as part of building company value. These policies and procedures must not only be worker-friendly, but must strive to mirror the established provisions as closely as possible, while written in compliance with existing government and community expectations. Finally, having employee training programs that adequately build skills and develop worker satisfaction and morale will also lessen the potential for significant increases in employee claims and grievances arising out of the new labor contract laws. Some companies have taken the ultimate strategic response to the new legal changes in China's contract laws affecting the workplace and the workforce; they have essentially bailed out of the Chinese market as rising labor costs and dissatisfaction with the rising number of claims drive them to lose profitability and cheap labor. They do not see themselves as functioning competitively in a market dominated by millions of Chinese laborers, and which was previously an employer-dominated, rule making terrain.

Implications of LCL Enforcement and Applications

The implications of the new labor contract laws in China are immeasurable but certain, and Karindi (2008) as well as Allard and Garot (2010) have so far pointed to the impact on labor costs. That is, the new provisions of the LCL seeking to protect employees have driven up labor costs for both domestic and foreign corporations operating in China. One other thing that is certain is that it will be extremely difficult to enforce the provisions of the Labour Contract Law (LCL) because of several factors: (1) opposition from large corporations and their agent representative bodies such as the American Chamber of Commerce in Shanghai (ACCS), the European Union Chamber of Commerce in China (EUCCC), and the U.S.-China Business Council (USCBC); (2) continuing failure of workers to assert their rights and file claims and grievances because of fear of retaliation; (3) lack of adequate legal oversight and inadequacy of the current justice system, given its resources, to address problems and challenges as they emerge; (4) the managerial difficulty of dealing with so many employees and corporations given the country's population and the size of its labor force; (5) the existence of a rigid bureaucracy with multiple levels of consultation to address issues and problems with the LCL and general contracts; and (6) the costs, resources and time that will be needed to educate employees as well

as to deal with the number of cases that will potentially emerge as more and more employees file grievances.

The above problems are further complicated by questions as to whether the Chinese authorities can maintain consistent interpretation and application of the new law (Yuanming & Kho, 2010). They argue that “the impact of this law will depend on how diligently and uniformly the Chinese government (at the central and local levels) enforces it, and how the government chooses to interpret the law” (p. 1). It is difficult in any territory or nation to implement, apply and interpret new laws or regulations and China, by virtue of its geographical size and population, is no ordinary country. It will take massive efforts for the Chinese government to effectively enforce the LCL provisions across regions and provinces, especially given other existing problems in business relationships such as political corruption, bribery, and a general lack of ethics (McFarlane & Cooper, 2011). Challenges will include educating a large workforce and large employer base on the new laws and requirements. Other than the above issues and challenges, there are also some general imperfections in the administration of contracts in China. For example, when the effectiveness of a contract is subject to government approval, the contract party in charge of the approval process can often prevent the contract from becoming effective, if it no longer wishes to be bound by it (Herrmann & Tian, 2009). In the long run the effectiveness of the LCL and its provisions may depend on how much employees are willing to fight for and assert their rights in the face of existing working conditions, the transition from an employee-dominated, rule-making market to a market where workers now have new rights and privileges, and how swiftly and effectively the People’s Court address and resolve contract labor law problems.

While the Chinese government sees the new labor laws as essential in protecting laborers and meeting its goal of building a more harmonious society, many corporations have already expressed deep resentment. Karindi (2008) in fact tells us that numerous foreign companies have already closed their businesses in China while others are contemplating abandoning the economy all together. In the long-term she predicts that in the next several years or decades, there will be significant evidence of whether the trade-offs between economic and socially desirable impacts were worth, especially given current changes in the global economy and an orientation toward refocusing on national sustainability.

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English Abstract

Implications of Changes in Chinese Contract Law for Foreign and Domestic Businesses

The Labour Contract Law (LCL)

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Abstract

Surviving in the Chinese business market requires significant or full comprehension of the intermingling of law and policy (Yuanming & Kho, 2010). This paper examines the potential implications and impact of the new Chinese Labour Contract Law (LCL) on foreign corporations and domestic businesses in China. The author explores the new changes in Chinese contract law originating from provisions in the LCL and affecting employer-employee relationships. The author then outlines these major changes as they will specifically affect contractual relationships and describes and discusses how this shift in policy by the People's Republic of China (PRC) gives new powers for bargaining to individual laborers. The implications for domestic and foreign businesses operating in China are discussed. The opposition of businesses and corporations to these provisions is explored in terms of problems, challenges and opportunities, and finally, the author offers some last thoughts on the potential of the LCL in terms of success and speculated consequences.

Keywords: People's Republic of China (PRC), Labour Contract Law (LCL), European Union Chamber of Commerce in China (EUCCC), American Chamber of Commerce in Shanghai (ACCS), U.S.-China Business Council (USCBC).

German Abstract*

Implications of Changes in Chinese Contract Law for Foreign and Domestic
Businesses: The Labour Contract Law (LCL)

Implikationen der Veränderungen im chinesischen Vertragsrecht für ausländische und nationale Unternehmen: The Labour Contract Law (LCL)

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Zusammenfassung

Das Überleben im chinesischen Markt erfordert die signifikante oder vollständige Erfüllung der vorgegebenen Gesetzen und Regeln. (Yuanming & Kho, 2010). Dieses Paper untersucht die potentiellen Implikationen des neuen chinesischen „Labour Contract Law (LCL)“ auf ausländische und nationale Unternehmen in China. Der Autor betrachtet die neuen Änderungen im chinesischen Vertragsrecht, welche aus den Vorgaben des LCL entstanden sind und die Arbeitgeber-Arbeitnehmer-Beziehung beeinflussen. Im Anschluss wird vorgestellt, wie die zentralen Veränderungen insbesondere die Vertragsgestaltung beeinflussen und es wird beschrieben und diskutiert, wie diese Veränderung in den Vorgaben der Volksrepublik China (VR China) neue Macht für die Tarifverhandlungen von einzelnen Arbeitnehmern geben kann. Die Implikationen für nationale und ausländische Unternehmen in China werden diskutiert. Der Gegensatz von Unternehmen und diesen Vorgaben wird hinsichtlich der Probleme, Herausforderungen und Chancen untersucht und schließlich werden einige Überlegungen hinsichtlich des Potentials der LCL für den Erfolg und die Konsequenzen dargestellt..

Keywords: Volksrepublik China (VR China), Labour Contract Law (LCL), European Union Chamber of Commerce in China (EUCCC), American Chamber of Commerce in Shanghai (ACCS), U.S.-China Business Council (USCBC).

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Spanish Abstract*

Implications of Changes in Chinese Contract Law for Foreign and Domestic
Businesses: The Labour Contract Law (LCL)

Implicaciones para extranjeros y autóctonos de los cambios en la ley de contratos china

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Resumen

Sobrevivir en el mercado de negocios Chino requiere una significativa o completa comprensión de la entremezcla de ley y política (Yyuanming & Kho, 2010). Este artículo examina las implicaciones potenciales y el impacto de las nueva Ley de contratos de Trabajo China (LCL) para empresas extranjeras y negocios domésticos en China. El autor explora los nuevos cambios en la ley de contratos China originando desde provisiones en la LCL y afectando a las relaciones empresario-empleado. El autor describe los principales cambios según afectarán específicamente a las relaciones contractuales y describe y expone cómo este avance en política de la República Popular China (PRC) da nuevos poderes para negociar con trabajadores individuales. Se exponen las implicaciones para el desarrollo de negocios extranjeros y autóctonos. La oposición de empresas y negocios a dichas disposiciones se explora en términos de problemas, retos y oportunidades, y finalmente, el autor ofrece unas últimas reflexiones sobre el potencial de la LCL en términos de éxito y consecuencias posibles.

Palabras clave: República Popular China (PRC), Ley de Contratos de Trabajo (LCL), Cámara de Comercio en China de la Unión Europea (EUCCC), Cámara de Comercio en Shangai Americana (ACCS), Consejo de Negocios U.S.-China (USCBC)

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Arabic Abstract*

Implications of Changes in Chinese Contract Law for Foreign and Domestic
Businesses: The Labour Contract Law (LCL)

ابعد التغييرات في قانون التعاقد الصيني للتجارة المحلية و
الأجنبية : قانون التعاقد مع العمال

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المخلص

البقاء في سوق الاعمال الصينية يتطلب فهم كبير أو كامل من الاختلاط بين القانون والسياسة (يوان مينغ و خو، 2010). تبحث هذه الورقة آثار وتأثير قانون عقد العمل الصينية الجديدة (LCL) على الشركات الأجنبية والمؤسسات التجارية المحلية في الصين. ويستكشف المؤلف التغييرات الجديدة في أحكام قانون العقود الصينية من المنشأ والتي تمس العلاقات ما بين الموظفين و الموظفين. ثم يوضح المؤلف هذه التغييرات الرئيسية وتأثيرها على وجه التحديد على العلاقات التعاقدية، و يصف ويناقش كيف أن هذا التحول في السياسة يعطي جمهورية الصين الشعبية (PRC) سلطات جديدة للمساومة للعمال الفرديين . وتناقش الآثار المترتبة على الشركات المحلية والأجنبية العاملة في الصين. و يتم أيضاً استكشاف المعارضة من الشركات والمؤسسات لهذه الأحكام من حيث المشاكل والتحديات والفرص، وأخيراً، فإن المؤلف يقدم بعض الأفكار حول آخر إمكانيات LCL من حيث النجاح والاثار المترتبة على ذلك.

الكلمات الدالة: جمهورية الصين الشعبية؛ قانون التعاقد مع العمال؛ غرفة تجارة الاتحاد الاوروبي في الصين؛ غرفة التجارة الامريكية في شنغهاي؛ مجلس الاعمال الامريكي- الصيني

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Italian Abstract*

Implications of Changes in Chinese Contract Law for Foreign and Domestic
Businesses: The Labour Contract Law (LCL)

Implicazioni di cambiamenti riguardanti leggi contrattuali per imprese nazionali e straniere

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Abstract

La sopravvivenza al mercato cinese richiede una approfondita comprensione degli aspetti legislativi e normativi (Yuanming & Kho, 2010). Questo studio esamina le implicazioni dell'impatto della Nuova Legge sui Contratti di Lavoro (LCL) riguardanti imprese estere e nazionali. L'autore esplora i nuovi cambiamenti nella legge che si sviluppa da aggiornamenti nella LCL e che hanno un impatto sul rapporto collaboratore e datore di lavoro. L'autore inquadra i cambiamenti principali e evidenzia come questi cambiamenti dalla Repubblica Popolare Cinese diano nuovi poteri di negoziazione ai lavoratori. Viene approfondito ciò che questo implica per imprese domestiche e straniere. L'opposizione delle imprese a questi nuovi aspetti normativi viene approfondita in termini di problemi, opportunità e sfide. Poi l'autore fornisce alcune considerazioni in relazione al possibile successo del LCL e le relative conseguenze.

Keywords: Repubblica Popolare Cinese (PRC), Legislazione Contrattuale Lavorativa (LCL), Camera di Commercio Europea in Cina (EuCCC), American Chamber of Commerce in Shanghai (ACCS), U.S. China Business Council (USCBC)

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Chinese Abstract*

Implications of Changes in Chinese Contract Law for Foreign and Domestic
Businesses : The Labour Contract Law (LCL)

中国合同法改革对国内外企业的影响 中国劳动合同法 (LCL)

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摘要

在中国企业生存需要法律 and 政策的混合作用有深刻和全面的理解(Yuanming & Kho, 2010)。本文研究中国新劳动合同法 (LCL) 在外国公司和本国企业的潜在影响。作者探讨了中国合同法中源自旧合同法规定的和影响劳动关系的新改革。随后, 作者概述了合同关系有特别影响的重大改革, 并描述和评估了中国的某些政策改革如何影响工人来新的定价能力。本文就某些改革在运营的外国及中国企业的影进行了, 同时也探讨了企业和公司某些新规定的反意义, 包括潜在的, 挑战和机遇。最后作者对中国新合同法的潜力, 其成功和可能的后果, 提供了最后的几点想法。

关键词: 中华人民共和国 (PRC); 劳动合同法 (LCL); 中国欧盟商会 (EUCCC); 上海美国商会 (ACCS); 美中贸易全国委员会 (USCBC)

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