July, 2021 No.37

This issue covers the following topics:

Malaysia

ELEMENTS ON THE LAW OF RETRENCHMENT AS RECENTLY LAID OUT BY THE COURT OF APPEAL IN MALAYSIA

マレーシアで整理解雇を行う場合の留意点について NO&T Asia Legal Review No. 26 において紹介したが、今般実際に整理解雇の適法性が争われた事案において、上訴審の判断が下された。整理解雇の適法性の判断における判断要素が詳しく示されており、実務上の指針となり得るものであることから本稿で紹介する。

Introduction

This is an update from our article in NO&T Asia Legal Review No. 26 titled "KEY ELEMENTS ON THE LAW ON RETRENCHMENT IN MALAYSIA" ("**1st Article**").

As the COVID-19 pandemic continues to have an impact on the Malaysian economy in 2021, more companies may be looking at down-sizing and taking cost-cutting measures to tackle the financial challenges posed by this unique circumstance. While the key elements of retrenchment law set out in the 1st Article should continue to be observed, the Court of Appeal had recently in ***Ng Chang Seng v. Technip Geoproduction (M) Sdn Bhd & Anor [2021] 1 CLJ 365*** ("**NCS Case**") laid out a few key legal principles that employers should take into account when undertaking a retrenchment exercise.

Facts of the NCS Case

Ng Chang Seng ("**Employee**") was an employee who worked for 13 years with Technip Geoproduction (M) Sdn Bhd ("**Company**"). The Employee was retrenched by the Company due to redundancy as part of a global-downsizing exercise, to which the Employee alleged that he was unfairly dismissed by the Company following such retrenchment exercise on the grounds that:

1. The Company did not follow the principle of last-in-first-out ("**LIFO**");

2. Foreign employees of the Company were not retrenched when they should be before him;

3. The retrenchment exercise was not genuine, as the real reason behind his dismissal was because the Company was

dissatisfied with his performance.

The Employee brought a claim to the Industrial Court which awarded the Employee with RM403,000 compensation and RM10,000 in costs, and deemed that the retrenchment exercise was not genuine as the Company was using that as an excuse to dismiss the Employee for his poor performance and insubordination due his objection to a proposed transfer to another project where he would be reporting to a person who was previously his subordinate ("**IC Award**"). The Company appealed the IC Award to the High Court and the High Court decided in favor of the Company on the ground that the retrenchment exercise was genuine ("**HC Award**"). The Employee then appealed the HC Award to the Court of Appeal.

Court of Appeal's Decision

The Court of Appeal found in favor of the Employee and set out a few principles regarding the retrenchment of employees in Malaysia:

1. **An employer must be able to prove that the employee was redundant and could not be reassigned to other projects or work**: In the NCS Case, the Company failed to prove both because other former employees of the Company who were terminated were reassigned on a contract basis to take up the Employee's job function. The Company had also continued to employ foreigners on a fixed-term contract basis. According to the Court of Appeal, this was not the proper way for the Company to down-size.

2. **Retrenchment cannot be used as a shortcut to dismiss employees for other causes:** If the Company wanted to dismiss the Employee for the aforesaid reasons, then they had to go through the proper procedures, which is separate from a retrenchment exercise.

3. **In deciding whether there was redundancy, the court will look at the employees that were retained and also the number of employees retrenched**. The Court of Appeal stated that consideration should be given as to whether the Employee ought to have been selected for retrenchment having regard to the employees in the same department as the Employee that continued to remain in employment. Based on evidence, the Company still employed eleven (11) foreigners and five (5) local employees who held similar positions as the Employee.

4. **To justify not following LIFO principle, an employer must provide clear evidence to prove that the employee does not have special skills required for the job**: The Court of Appeal in upholding the IC Award, stated that the Company had not shown it was justified not to follow LIFO or that there were special skills in the foreign and contract employees in preference to the Employee.

5. **An employer must retrench foreign workers first before local employees unless there are reasons to justify not doing so**: The Court of Appeal referred to the Code of Conduct and reiterated that it is a principle of retrenchment in the Code of Conduct that if the retrenchment exercise is necessary, then the Company must retrench the foreign employees first. As stated above, the Company had also failed to prove that the foreign employees had special skills so as to provide justification that they should be retained over local employees.

Conclusion

Although the elements of a retrenchment exercise laid out in the NCS Case do not depart from the key elements in our 1st Article, it does provide companies with a clearer understanding of the dos and don'ts before conducting a retrenchment exercise. Another thing that has become clear is that although the Code of Conduct does not have the force of law, the court does place some importance on compliance with its provisions and this was evident in the Court of Appeal ruling in the NCS Case.

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Vietnam

DETERMINATION OF LAND PRICE IN VIETNAM

ホーチミンやハノイにおける都市鉄道の開発なども背景に、ベトナムにおける不動産開発に対しては、日系を含む海外投資家も強い関心を寄せているが、他方で、ベトナムの不動産法制は複雑に入り組んでおり、その全容を正確に理解することは容易ではない。今回は、こうしたベトナムの不動産法制のうち、国に納めるべき土地使用料などの算定に関する基本的な枠組みなどについてご紹介する。

Overview

In Vietnam, land is owned by the Vietnamese people and the State grants land use rights to land users. When the land user performs his financial obligations to the State or receives compensation from the State for relinquishing his land use rights, the land price must be determined in accordance with the rules set out under the Land Law 2013 ("***Land Law***") and its implementing Decree 44/2014, as amended by Decree 01/2017 ("***Decree 44***"). But if the land user conducts transactions with private parties, he may freely agree on the land price without needing to comply with those rules.

The Land Law and Decree 44 set out a land pricing system for land-related transactions made with the State, comprising the following types of land price:

- land price brackets ("***price brackets***"),
- land price table ("***price list***"), and
- specific land price ("***specific price***").

Under this land pricing system, the Government shall promulgate the price brackets which will be solely used as the basis for the People's Committee ("***PC***") at provincial level to publish the price list to be used in its province. The land price in the price list is applied for a limited number of cases and the specific price shall be used for many other cases. The specific price is calculated by the provincial Department of Natural Resources ("***DONRE***") and then approved by the provincial PC on a case by case basis, while the price brackets and the price list are fixed and valid for a 5-year period in normal circumstances.

Price brackets

Under Decree 44, the price brackets comprise the "minimum price" and "maximum price" for each land category and such price varies from location to location.

With respect to the land category, the Land Law provides eleven categories of land comprising of five agricultural and six non-agricultural categories. As to the location, Decree 44 sets out seven economic regions (see ***Example 1*** below). Each region has up to three types of villages and five to six grades of cities (see ***Example 1*** and ***Example 2*** below). Accordingly, the price brackets differ from each economic region, type of villages and grade of cities.

Currently, the price brackets are provided under Decree 96/2019 ("***Decree 96***") which includes eleven appendices (i.e. one appendix for each land category). For example, commercial and service land in rural areas and urban areas are stipulated under Appendices VII and X as below.

- **Example 1**: "Commercial and service land" in RURAL areas (for regions 1 to 7)

Unit: VND1,000/m²

Types of villages / Economic regions[1]	Delta village		Midland village		Mountainous village	
	Min. price	Max. price	Min. price	Max. price	Min. price	Max. price
1. The northern midland and mountainous region	40.0	6,800.0	32.0	5,600.0	20.0	7,600.0
2. The Red river delta region	80.0	23,200.0	64.0	12,000.0	56.0	7,200.0
3. The north central region	28.0	9,600.0	24.0	5,600.0	16.0	4,000.0
4. The south central coast region	32.0	9,600.0	24.0	6,400.0	20.0	4,800.0
5. The central highland region					12.0	6,000.0
6. The southeastern region	48.0	14,400.0	40.0	9,600.0	32.0	7,200.0
7. The Mekong river delta region	32.0	12,000.0				

- **Example 2**: Extract of "commercial and service land" in URBAN areas (for regions 1 and 2 only)

Unit: VND/m²

Economic regions	Grade of cities	Min. price	Max. price
1. The northern midland and mountainous region	I	176,000	52,000,000
	II	120,000	41,600,000
	III	80,000	32,000,000
	IV	60,000	20,000,000
	V	40.000	12,000,000
2. The Red river delta region	Special	1,200,000	129,600,000
	I	800,0000	60,800,000
	II	640,000	40,000,000
	III	320,000	32,000.000
	IV	240,000	24,000,000
	V	96,000	20,000,000
[…]	[…]	[….]	[….]

Interestingly, the price brackets for regions 2 and 6 appear to be the highest as compared to those of other regions and the price brackets for the categories of "residential land" and "commercial and service land" in urban areas of the two regions are almost equal for each land category. For instance, the maximum price per square meter for residential land and commercial and service land in the two cities of special grade (i.e. Hanoi and Ho Chi Minh City) are VND162 million (about USD7,000) and VND129.6 million (about USD5,600), respectively. However, these price brackets have been reported to be equal to only 10 - 30% of the market price.

Price List

On the basis of the price brackets, the provincial PC of each province shall publish the price list to be used in its provincial territory.

The price list is used as the basis for calculating the following payments[2]:

- land use tax; fees and charges; monetary fines payable to the State;
- land use fee ("LUF") or land rent ("LR") payable by individuals (and not entities) for his/her area below certain limit;

1 Hanoi belongs to region 2, Da Nang in region 4 and Ho Chi Minh City in region 6.
2 Other than the payments listed below, the specific price shall be used.

and

- compensation payable to the existing land users (individuals and entities) by the State in case of volunteer return of land to the State.

Under Decree 96, the price list published by the provincial PC is the maximum land price and may exceed up to 120% of the price brackets. Decree 44 also permits the price list of the provincial PC to be higher, up to 130% of the price brackets, in respect of certain lands that are located in good locations. However, based on our observation, the price list of many provinces does not seem to exceed the price brackets set out in Decree 96. As such, the land price under the price list is also in the range of 10% - 30% of the market price.

The price list comprises comprehensive tables that include, or provide the methods for calculation of, land price for most locations in a provincial territory. Like the approach used for the land brackets, the price list is determined on the basis of the land categories and the locations. However, the classification of locations is more specific. For example, according to Decision 02/2020 of the PC of Ho Chi Minh City dated 16 January 2020, the city is divided into three areas for determination of land price for agricultural land (see ***Example 3*** below). With respect of non-agricultural land, the municipal PC classified the city into three categories. The city also applies three locations according to which Location 1 is deemed to have a good location (with at least one side of road-front) as compared to Locations 2 and 3 (see ***Example 3*** and ***Example 4*** below).

- **Example 3:** The price list for "land for planting perennial trees" in Ho Chi Minh City

Unit price: VND/m²

Location	Area I	Area II	Area II
Location 1	300,000	240,000	192,000
Location 2	240,000	192,000	153,600
Location 3	192,000	153,600	122,900

- **Example 4:** Extract of price list for "residential land" in Location 1 of District 1, Ho Chi Minh City

Unit price: VND/m²

Road Name	Section		Price
	From	To	
ĐỒNG KHỞI	WHOLE ROAD		162,000,000
LÝ TỰ TRỌNG	NGÃ SÁU PHÙ ĐỔNG	HAI BÀ TRƯNG	101,200,000
	HAI BÀ TRƯNG	TÔN ĐỨC THẮNG	78,500,000
LÊ DUẨN	WHOLE ROAD		110,000,000
LÊ LỢI	WHOLE ROAD		162,000,000
LÊ THÁNH TÔN	PHẠM HỒNG THÁI	HAI BÀ TRƯNG	115,900,000
	HAI BÀ TRƯNG	TÔN ĐỨC THẮNG	110,000,000

Example 3 shows that the land price for land for planting of perennial trees in Location 1 of Area 1 is VND300,000 (about USD13) per square meter and Example 4 shows the land price for residential land with road-front of Dong Khoi Street and Le Duan Boulevard (i.e. both in Location 1 of Special Grade city) are VND162 million (about USD7,000) and VND110 million (about USD4,800) per square meter, respectively.

Specific Price

The specific price is used for the following purposes of calculation:

- LUF or LR payable to the State (other than cases being eligible to use the price list or cases being subject to auction);
- land use right value in case of equitization of State-owned enterprises; and
- compensation payable to existing land users in case of land resumption by the State.

In other words, if the case is not qualified to apply the price list, the determination of the specific price shall be used. To ensure matching with the market price, Decree 44 provides the following five land valuation methods for determination of the specific price:

	Valuation method	Purposes of application	Conditions of application
1.	Direct comparison	to determine land price for a particular plot of land by analyzing prices for unoccupied plots of land with similar purposes, locations, profitability, infrastructure, area, shape, legitimacy that have been sold on the market through transfer or auction.	when comparable plots of land are already sold on the market through transfer or auction.
2.	Subtraction	to determine land price of a land plot with property attached to land by subtracting value of the property attached to land from total value of the real estate (including land value and value of the property attached to land).	when there is sufficient data on price of the real estates (including land and assets), which are similar to the land plot, already sold through transfer or auction.
3.	Income-based	to determine land price by dividing the average annual net income from a land unit by average annual interest rate of 12-month term deposit on the pricing date at a state-owned commercial bank of which the deposit interest rate is highest in that province.	where the plot of land of which income and land use costs are already determined.
4.	Surplus-based	to determine the price of the land with development potential as a result of changes of zoning or land use purposes by subtracting the total estimated costs from the total estimated revenue of the real estate.	when the total estimated revenue and expenses can be determined.
5.	Adjustment coefficient	to determine land price by multiplying the adjustment coefficient with the price list promulgated by the provincial PC.	applied in the following two cases (Case 1 and Case 2 as defined and discussed below).

Based on the collected information, and subject to the conditions for applying land valuation methods, the competent authority shall select an appropriate land valuation method. Where necessary, a combination of the land valuation methods can be applied to check, compare and decide on land prices. To start a method, the DONRE may by itself determine, or hire one or a number of qualified valuation companies to advise, the land price. Once the specific price is determined or advised by DONRE/valuation company, it must be appraised by the Land Price Appraisal Council ("***LPAC***") of the province and finally approved by the province PC.

The determination of the specific price shall result in a price several times higher than the price set out in the price list. But since most investors who are subject to the specific price are entitled to deduct certain compensation costs paid to the existing occupants against the LUF/LR payable to the State, the actual payment of the LUF/LR is less than the specific price.

Adjustment Coefficient (Method 5)

To simplify the procedure for those land lots with a relatively small value, Decree 44 provides two special cases where the provincial PC may apply the method of adjustment coefficient (i.e. method 5) by (i) publishing the adjustment coefficients on an *annual basis* ("***Case 1***") or (ii) approving the same on a *case by case basis* ("***Case 2***").

Case 1 is used for calculation of the lump sum LUF/LR payable to the State for land lots with relatively small value[3]. In

3 Land value (based on the price list) of less than VND30 billion (about USD1.3 million) for Ha Noi, Ho Chi Minh City, Hai Phong, Da Nang and Can Tho, VND20 billion (about USD870,000) for other provinces and VND10 billion (about USD435,000) for mountainous provinces.

addition, Case 1 may be used for calculation of annual payment of LR in the event of rent adjustment in accordance with the land lease as well as determination of staring price for auction of land lease with annual payment of LR.

Case 2 is used for calculation of compensation payable to existing land users in the event of land resumption by the State and there is not sufficient information to use other four land valuation methods discussed above. To facilitate the preparation of compensation plans (which must be discussed with the affected land users and approved by the competent authority before land clearance), the PC of Ho Chi Minh City also publishes the adjustment coefficients (on an annual basis) to be used for calculation of the initial land price for the purpose of collecting opinions from the affected land users.

Based on our observation, the adjustment coefficients for Case 1 are several times smaller than those for Case 2. For example, the adjustment coefficients applicable for 2020-2021 in Ho Chi Minh City are 1.5 – 2.5 (mostly for non-agricultural land) for Case 1, and 4 – 13 (for non-agricultural land) and 10 – 35 (for agricultural land) for Case 2.

As discussed above, the land price for these cases is determined by multiplying the relevant adjustment coefficient with the price list promulgated by the provincial PC.

Conclusion

The price list is available for calculation of payments in certain limited cases (with a small amount payable to the State or the existing land user, as the case may be). Whereas, the process of determination of a specific price (through one of the five land valuation methods mentioned above) must be implemented for many other cases.

Based on our experience, the process of determination of a specific price (except the method of adjustment coefficient) is a complex process that often takes significant time of the investors and the competent authorities.

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Philippines

DRAFT GUIDELINES ON ARBITRATION OF INTRA-CORPORATE DISPUTES

2019 年に施行された改正会社法では、企業間の紛争を仲裁によって解決することを奨励する内容の法改正がなされていたが、それを実施するためのガイドラインの草案が先月フィリピン証券取引委員会より公表された。本稿ではこのガイドラインの内容について紹介する。

Overview

When Republic Act No. 11232 or the Revised Corporation Code of the Philippines (the "**RCC**") became effective on 23 February 2019, among the significant amendments introduced by such legislation was to encourage corporations to adopt arbitration as a means of resolving intra-corporate disputes.

To implement such relevant provisions, the Securities and Exchange Commission ("**SEC**") released on June 23, 2021 a draft of the Guidelines on Arbitration of Intra-Corporate Disputes for Corporations ("**Draft Guidelines**") for public comments.

Arbitration of Intra-Corporate Disputes

As described under the RCC and defined under Draft Guidelines, intra-corporate disputes refers to those involving the rights and obligations of corporations, its directors or trustees, officers, and shareholders or members arising from the implementation of the articles of incorporation or by-laws, or from intra-corporate relations (e.g., between the corporation and its shareholders or officers, or among shareholders themselves, etc.). It excludes disputes involving the interest of third parties or criminal offenses.

When an arbitration agreement is in place in a domestic corporation's articles of incorporation, by-laws or in a separate agreement, the RCC and the Draft Guidelines provides that intra-corporate disputes shall be referred to arbitration after compliance with pre-agreed alternative forms of dispute resolution, such as negotiation or mediation under the arbitration agreement.

While Republic Act No. 8799, or the Securities Regulation Code vests original and exclusive jurisdiction of cases involving intra-corporate disputes with the Regional Trial Courts designated as special commercial courts, the RCC promotes referral to arbitration by providing that, when an intra-corporate dispute is filed with the courts, the courts shall dismiss the case before the termination of the pre-trial conference, if it determines that an arbitration agreement is written in the corporation's articles of corporation, by-laws, or in a separate agreement.

Key Points of the Draft Guidelines

1. Scope

Aside from reinforcing the provisions of the RCC, notably the Draft Guidelines enumerates the applicable circumstances and procedures by which the SEC may exercise authority to appoint arbitrators tasked to resolve intra-corporate disputes.

2. Conditions for applicability

In order for the Draft Guidelines to apply, certain conditions must be satisfied which include that:

(a) The arbitration agreement does not expressly state that the seat or place of arbitration is other than the Philippines.

In relation to this, note that under the Draft Guidelines, the seat or place of arbitration shall be presumed to be the Philippines unless the arbitration agreement states otherwise.

(b) The arbitration agreement includes the prescribed minimum provisions.

For arbitration agreements to be enforceable under the Draft Guidelines, it should indicate the (i) number of arbitrators, (ii) designated independent third party who will appoint the arbitrator(s), (iii) procedure for the appointment of arbitrator(s), and (iv) period within which the arbitrator(s) should be appointed by the designated independent third party.

The parties are deemed to have agreed on an appointment procedure if the arbitration agreement provides for the application of a set of arbitration rules that include an appointment procedure and a designated appointing authority, or the arbitration agreement expressly provides an appointment procedure, which requires the parties' designated independent third party to appoint the arbitrator(s).

For arbitration agreements that do not meet the foregoing, the arbitration shall instead proceed under the Alternative Dispute Resolution Act (Republic Act No. 9285 or the "**ADR Act**") and its implementing rules if the seat or place of arbitration is the Philippines, or under the relevant arbitration law if the seat or place of arbitration is outside the Philippines.

3. How the SEC may exercise authority to appoint arbitrators

For cases where the Draft Guidelines are applicable, if the designated independent third party fails to appoint arbitrator(s) in the manner and within the period specified by the arbitration agreement, a party to the arbitration may make a written request to the SEC to appoint the arbitrators, following the procedure outlined therein.

In evaluating such request, the SEC will allow the other party to provide written information relevant thereto, and will consider factors such as the nature of the dispute, identity and nationality of the parties to the arbitration agreement, suggestions of the parties themselves, including objections to the appointment of an arbitrator. The SEC may decline to appoint an arbitrator if parties are able to give reason why no arbitrator should be appointed, or if the SEC is satisfied that no arbitrator should be appointed (e.g., the dispute is not an intra-corporate dispute).

If the SEC will proceed to grant the request, the Draft Guidelines provide that the appointment will be from among arbitrators accredited by the SEC or the Office for Alternative Dispute Resolution established under the ADR Act, or organizations accredited by both government agencies. Should circumstances exist that give rise to doubts as to the impartiality and independence of the arbitrators appointed by the SEC, the parties are allowed to challenge the appointment of such arbitrator(s) under the Draft Guidelines.

4. Powers of the Arbitral Tribunal

The arbitral tribunal constituted under the Draft Guidelines shall have the power to rule on its own jurisdiction and on questions relating to the validity of the arbitration agreement. It shall also have the power to grant interim measures necessary to ensure enforcement of the award, prevent a miscarriage of justice, and protect the rights of the parties. Further, the powers of the arbitral tribunal under the ADR Act shall apply insofar as they are not inconsistent with the RCC and the Draft Guidelines.

Parties may wish to note that under the ADR Act, an arbitral tribunal may order interim measures of protection or modification such as a preliminary injunction directed against a party, appointment of receivers or detention, preservation, inspection of property that is the subject of the dispute in arbitration. Either party may also seek assistance from the courts in implementing or enforcing the interim measures ordered by an arbitral tribunal.

5. Finality and enforcement of the arbitral award

A final arbitral award shall be executory after the lapse of fifteen (15) days from receipt of such award by the parties and shall be stayed only by the filing of a bond or the issuance by the appellate court of an injunctive writ. For the execution of the final arbitral award, the Special Rules of Court on Alternative Dispute Resolution (A.M. No. 07-11-08-SC), or such other prevailing rules will apply, insofar as they are not inconsistent with the RCC and the Draft Guidelines.

Conclusion

Arbitration is gaining ground as a primary mode of resolving commercial disputes. Once the Draft Guidelines are finalized, it will add to the existing legal framework and procedural rules which already support and promote the

effectiveness of arbitration as an alternative means of dispute resolution in the Philippines. As parties consider dispute resolution mechanisms for their commercial agreements relating to the Philippine matters, arbitration should be actively considered as it provides parties a means to achieve efficient, confidential and final resolution to their disputes, instead of protracted litigation.

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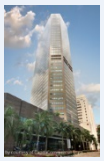

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