

**ABA Section of Labor and Employment Law**

## **Annual CLE Conference**

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**International Track: Around the World: The Global Workforce Issues**

Friday November 9, 2007 – 11:45 a.m. 1:00 p.m.

**Asia v. EU:  
Can European Employers & Workers  
Meet the Asian Challenge in an Era  
of Global Competition and Wage Pressures?**

*This session will focus on the economic and labor environment in key Asia countries and in the EU, and explore whether and how employers, employees and employee organizations in Europe can meet the challenge or perceived lower costs associated with Asia economies in the global marketplace.*

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## **Asia versus Europe: What does the EU offer to the Global Employer ? The Asian Perspective**

Thank you Mark. Good morning everyone. Thank you for inviting me to speak here today before all of you.

I will be looking this morning at giving you an Asian perspective, with a main focus on China and Japan, which would help our discussion on the challenges facing Europe in a world of globalization, more precisely from Asian countries. Although I have practiced in Japan, Hong Kong, China and other Asian countries for over 12 years, I have remained deeply European and it always amazes me how different one's perspective can be when looking at your home country from the Far East.

The term "Asia" covers a very vast area, which is not really a physical territory, but rather a cultural concept. Asia accounts now for almost 60% of the world's population. Japan is still the 2nd largest economy in the world, but China is catching up very quickly.

### **Historical Perspective.**

Asia and Europe look very different. Asian countries do not share the legacies of Greek civilization, the Roman Empire and the Christian religious heritage, which according to French writer Paul Valmy, constitute the essential elements of Europe. Asian countries share almost none of the creative heritage of the Renaissance, the philosophy of the Age of Enlightenment and the constitution of scientific thoughts. Such historical differences are essential to keep in mind to understand the differences of laws and cultures existing between the two regions, particularly in the field of human and labor relations.

From the media reports, it looks obvious that many Europeans suffer anxiety over the loss of jobs, which is often attributed to internal competition from the new EU countries (Eastern European in particular) or to global competition from Asia. Remember the deep concerns expressed by the French and Germans, about the "invasion" of Polish plumbers and nurses, who have been able to get around on their right to employment in other countries by regarding themselves as independent contractors. The actual numbers are tiny compared to the fear they have endangered, but at least we must concede to the "Poles" a good sense of humor, sending out in response to those fears a poster with such a good looking Polish plumber and nurse inviting all Europeans to come and visit Poland ! It reminds us more seriously that Europeans are all, more or less, concerned with unemployment as one of their most pressing social problem.

Topics of today are very timely wise. A lot is going on in Asia, in terms of new employment laws: critically important new labor contract laws in China, new Whistleblower Protection Law in Japan, new labor tribunal dispute system, increased oversight on wage-and-hour in Japan, etc.

I would like to discuss two main topics today :

- 1st From a social viewpoint, the labor situation in Asia is much more complex than it first appears and those labor markets, especially China, face enormous challenges;
- 2nd Labor issues are very different among Asian countries, especially if we compare the two largest economies: Japan and China.

**1. Asia also face immense HR/social challenges – although quite different from the EU.**

- *"Poverty is not socialism, to be rich is glorious"* – Deng Xiaoping 1978 → China has embarked in a very fast pace economic development, not without problems:
  - Labor costs are surprisingly rising faster than anticipated;
  - Labor shortage is also surprising; and
  - Improvement of working conditions appears as a substantial challenge.

**1.1 Labor Costs in China are increasing substantially.**

- <1> China still attracts many manufacturers looking to lower labor costs. Let's start with the obvious: average cost of labor in China = \$1/hour (compared to US \$20 in US and US \$25 in EU).
- <2> Things are changing --- increase of labor costs ... why, how is it possible?
- <3> At the end, labor costs are not the only factor for a global employer. Is this a real impact for Europe?

**Compensation structure in China.**

- Base pay
- Bonuses – at least 1 month pay or more
- Housing costs (often provided) or part is deducted from worker's pay
- Foreign companies pay an average of 30% more than State-owned companies.
- Higher safety and health standards in foreign-affiliated companies.

**Some key numbers.**

- International Trade of American Apparel and Footwear Association reported a 20% to 30% jump in labor costs in China (2006)
- Local authorities in Guangzhou (Canton) – minimum wage increase by 34% in 2006; 15% in 2007
- Basic pay, bonus, housing ...

**Few reasons.**

- Labor shortage is pushing wages up.

- Presence of migrant workers – 120 million farmers – has contributed to provide large volume of workers to feed the enormous needs in factories and construction sites in urban areas.
- Number of migrants has decreased over the past 3 to 4 years – labor supply is decreasing (due to a number of measures and events: tax incentives for farmers, increase of farming income, increase of job opportunities in the provinces (large middle-sized cities), decline of young people in farms, etc.
- Social unrest in some regions (property damage and loss of production time)

#### **Consequences :**

- Some foreign companies are revising management strategies in China
- Migration of factories inland (North of China Prosperity)
- On top of increase value of the Chinese Reminbi, the prices of consumer goods from China will increase in Europe/United States.
- Move to other counties – Vietnam comes as a very attractive destination – much cheaper labor with monthly salary of ordinary workers at 120 to 220 US\$ (Ho Chi Minh City)
  - Compared to Thailand – 160 US\$ and China (Canton) – 130 to 500 US\$

#### **Vietnam Potential.**

- 83 million people (almost same as Germany)
- One of the world's fastest growing economy
- WTO (Jan 07)
- Important base for Japanese companies – too much concentration in China and risky (political opposition) – diversification strategy to reduce dependency on China (e.g., Canon set up a large factory base in Vietnam for its ink-jet printers for exports).
- Intel – 300m\$ chip factory – largest US manufacturing investment
- Diligent and skilled workers
- Huge market – only 15% of the population have cars, refrigerators, washing machines

### **1.2 Labor Costs are not the only deciding factor for a global employer.**

- This should be heard as a good news for Europe
- Take Japan – 1st foreign investor in China <Interesting Survey of 2006> Survey of Japanese firms with International Operations by JETRO (Japan External Trade Organization):

- Political and social instability tops the lists of concerns (Philippines, Indonesia), under-developed infrastructure in India
- In China: concerns are under-developed legal system, problems with legal procedures, protection of IP.
- Therefore: If labor costs was the only factor to invest in China, global employers would rather have invested massively in Vietnam, Philippines, Indonesia.

**Importance of supply chain factors in a global economy.**

For Europe/US → Global competition is changing. The key factors become now (1) innovations, and (2) competitiveness of supply chain (this is very important to understand China "threat"). To be able to respond to clients' demand with flexibility and effectiveness, a global company needs of course to factor costs, but other deeper factors to optimize its supply chain.

**My story** - In the plane from Tokyo to Frankfurt few months ago, I was seated next to an German engineer from a large telecom company. He explained to me that their high-end network switches was manufactured in China, but they were now considering relocating back to Eastern Europe.

- Very sophisticated – custom-ordered- just in time deliveries
- Complex – 5,000 configurations, 2,000 parts from 150 suppliers around the globe
- This makes a daunting supply chain and manufacturing challenge

Chinese were not able to master this completely – Chinese workers not so good to raise problems – they do exactly what they are told to do (most of them are farmers from the countryside) – (when you discuss with a Chinese, always a "no problem" attitude)

**Other hidden costs in China.**

- plant closures – Chinese New Year (workers come from small villages)
- Lead times, missed sales, proximity to customers, political risks;
- Quality control costs – internal inspections in China, issues of internal audit (revenue recognition problems in China, problem of transparency of accounts ("tax ledger", administration ledger"), artificial increased of sales and illegal bonus payments based on inflated sales amounts)
- Tax – China is thinking about ending preferential corporate tax incentives to foreign companies : (33% domestic, 15% foreign) – What counts ? total landed cost v. total production cost.

**China will continue to play a key role in the world economy but often as part of a larger global solutions – shipping manufacturing to China is not always the answer.**

**1.3 Formidable Challenges of Shortage of Labor in Asia – quite surprising.**

### **In Japan:**

- Specially skilled workers – but not only
- One of top concerns now – booming economy – Labor inspectors supervision over the overtime payment to managers and employees.
- A number of cases and consultations include issues of how to retain talents (engineers, mid-managers, marketing)

-> post-termination non-competition (validity and enforcement in Japan) - close to European legal systems and California – limitations in time, geography, payment of indemnity.

### **Even in China:**

→ Pearl River Delta (HGK), Yangtze River Delta (Shanghai)

- Economic success of coastal cities largely based on migration factor : women between 18 to 25 years old
- Gap between cities and country-side – risk of social unrest has increased – Chinese government realized that and launched a number of financial and social incentives for farmers;
- labor supply to manufacturing/ factories in coastal cities is decreasing
- Very high turnover in factories and key industries created by wage increase and labor shortage.
- It has become very competitive to retain employees at every level of production and management (Unskilled (Chinese are getting skilled very quickly) – skilled/mid level, senior management)

A real challenge for foreign companies too "talent crunch" and skills do not match demand

### **Effects of such labor shortage in China:**

- Companies are improving labor conditions with a package of incentives and benefits
  - e.g. Li & Fung (one of world's largest trading company) – going to outsource in Vietnam, Pakistan, India and paying more attention to migrant workers: e.g., building dormitory to house couples.
  - Fuzhou Plant of U.S.-based Emerson Electric: try to build employees' loyalty (air-conditioned offices, parties, free transportation, wage increases, bonuses to employees who stay more than 3 years, etc.)
- Although far from perfect (China Labor Watch – sweat shops still exist, conditions are improving) – very weak or non existent social protection in inland urban and rural areas

- Not really because of a sudden human right consciousness of Chinese employer or the foreign influence of foreign lawyers, lobbyists, etc. nothing like that, but Chinese pragmatism led by offer/demand market forces
- Prosperity is moving inland (2nd tier cities) and workers who would have moved to cities stay close to home – Wuhan, ChongJing, Hunan – growth rates

Really a shortage? Difficult to know for sure: under-reporting is common in China, issues of data transparency, etc.

**1.4 In that explosive changing of wage increase & labor shortage, another huge challenge for China is how to maintain China's competitive edge, while improving worker's rights and protection.**

→ Very heated debate over the new Labor Contract Law (Dec 24, 2006) - passed into law in June 2007

→ Huge challenge : moving a heavily-controlled contract planning economy towards a free market driven economy.

→ Abuses/China Labor Watch (Sweat Shop (Nike, Adidas)): a much need piece of legislation

1) Interesting legislative transparency

- Fierce advocacy lobbying by foreign companies and Chambers of Commerce against the legislation first drafts viewed as too pro-workers and unions
- Power of global corporations in China – almost 60% of China's exports come from foreign-affiliated companies in China

2) Contents of New Law.

- Probation period for fixed-term contracts (maximum 2 fixed-term contracts, 1 month probation for 1 year-term contract and 6 months for more than 3 years contract or non-fixed contract)
- Employment termination and severance compensation: in the case of non-renewal of fixed term contract – 30 days notice rule, severance based on contract
- Non-compete clause and penalties for employees (limitations) – better way for employers to enforce them (IP fiduciary duty or employees to acknowledge and protect such IP), penalties for employers (limitations), 2-year maximum, limitations to senior managers, technical persons, others having knowledge of commercial secrets, payment of economic compensation to employees.

3) Increased Role of Unions – ACFTU (timing and financing considerations)

- Increase leverage given to unions
- To act as employees' representative

- Will be able to negotiate and consent employers policies, regulations, and mass termination

Communist Party is pushing to unionize workers at foreign companies:

- Decline of State-owned companies – this has stripped away much of the traditional role of the Communist Party to control society
- Financing way for the Communist Party

4) Effects – wide-reaching consequences.

- Some grey areas to be clarified by practice:
  - consultation with unions on Company Rules changes?
  - How local government would implement those laws?
- More effects for domestic companies, foreigners already offered better protection (labor codes of conduct) – however, will it be enforced fairly?

### **China - Other Important Social Labor Laws**

2004 – Rules of Minimum Wages

- Expand protection for workers/ to migrant and part-time workers
- Right of provinces, regions to get minimum standards according to local conditions.

## **2. Labor issues are very different among Asian countries, especially if we compare the two largest economies: Japan and China.**

### **1) Current critical Employment and HR topics in Japan.**

- Terminations – No concept of "employment at-will" – very difficult to discuss poor performance, doctrine of abusive dismissals developed by courts
- More loyalty than in China – "Toyota for life" – in China (Shanghai) : "you are a loser if you don't get the best out of a deal"
- Key issues of overtime – wage and time audit for our clients – labor inspections of foreign companies. Difficult distinction of OT eligible and Non-OT eligible employees, exempt v. non-exempt employees/managers; no "white-collar" exemption, role of labor standard inspectors, etc.
- Health problems – Japanese work very long hours (like many Asians) – problem of *Karoshi* (death by over work), employer's duty of care (Dentsu case, 1 M US damage awarded to

parents of the victim).

- A rather mature labor market – quite sophisticated
  - New Labor Dispute Tribunal (April 2006) (Prof Sugeno of Tokyo University – Influenced by the French "*Conseil du Prudhommes*" – 3 panel members – 1 judge (3 months, 3 hearings) (introducing specialized labor courts)
  - Whistleblower Protection Law (April 2006) (Kushioka – Tonami case) + pre-litigation case (in-house lawyer working for a Japanese subsidiary of US company, claims filed on hot lines, retaliation, timing, settlement)

## 2) Interesting aspects of Japanese Labor Market, compared to the EU:

Very high labor costs and high protection of regular employees, but some flexibility in the labor market for non-regular employees (part-timers, fixed-term employees, etc.) (explains very low unemployment rate):

- More senior workers employed to maintain some "social status" – low skilled jobs
- Young – "*Arbaito*" - no probation period, flexibility in dismissals (24 hour convenience stores)

### More mobility within the workplace:

- Large Japanese companies often have constant switch job system where an employee could start for 5 years in a marketing department, then move to finance, international division, etc. This system enables the employees to know a broad range of service and functions within the company and be able to adapt quickly to permanent changes of job requirement. Globalization implies such mobility and adaptability.

## 3) Some similarities among labor markets in Asia.

There are two main areas where similarities exist and improvements are still necessary.

### 1st - Diversity & discriminations issues, particularly in the perceived role of women in the work place and managerial positions.

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- China – height discrimination situations (not expressly banned by law) – effort to put the Nation's "best face" forward in the global economy – Chinese ministries have turned out applicants for height and aesthetical reasons (Bank of China case (no trial yet – 5.6 Feet minimum height requirement).
- Sexual discriminations – China
  - Many provinces have a set of laws, and some provinces have created fines for employers that are discriminating women at hiring.

- Japan – sexual harassment and hostile environment behaviors are prohibited by law, and internal investigations are on the rise. Courts define contractual duty for employees to prevent sexual harassment and power harassment situations; but cultural and social environment make difficult for women to report such behaviors + amount of awarded damages rather low = still a major hurdle

## **2nd - Problem of Enforcement of Laws in Asia.**

- Chinese economy is driven by the "*quanxi*" network of interpersonal contacts among business people and government officials:
  - a. e.g. China – non utilization of overtime in violation of China's Labor Laws - role of local government – 44-hour/ week but extension possible (maximum of 36h/month). But in most suppliers of foreign branches have obtained permissions (factory by factory) through private connections with Local Labor Inspection office to work more - up to 86 hours of overtime
- Japan – Weak powers of labor inspectors – No EEOC equivalent like in the US – sanctions rather limited. At the same time, however, LSOs enjoy a rather discretionary power in overtime audits, managers definition in wage-and-hour inspections, etc.

<b>Conclusive Remarks</b>
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The amusing view is that, although Europe often feels threatened by Asia, you may remember a French woman Prime Minister in the 80s, Mrs. Edith Cresson, who compared the Japanese like "ants" because of their hard working behavior ! In fact, many Asian countries people dream about becoming like European societies with their renowned quality of life, social welfare for everyone, fashion, industries, talents, creativity, innovation, etc.

With the rapid development of Asia, in the near future, both EU & Asia will face exactly the same important global challenges:

- Social problems : aging in Japan, health care burden, immigration and population transfers, etc.
- Sustainable environment, quality-life in urbanized world, global warming and energy needs, etc.
- Work & life balance, family values, place of women in society, etc.

Asia would then look at Europe (and the US) for answers.

From Asia, the question my Asian friends often ask me is whether the EU has great ambitions to become a superpower or not, whether it sees itself creating a new international order. The great hope is so present in today's China. Without such willingness to tackle seriously certain rigidity in current EU (including a number of outrageous "acquired rights" situations), but also to inspire the people, the young, the corporations in Europe of a new "European Dream", there is not

much a chance for Europe in tomorrow's world of globalization:

#### Immigration:

How certain Europe would succeed to lower the unemployment rate of young and immigrants – 25% in France and Germany for immigrants ? We all know that the less regulated US labor market is far better at integrating the workforce at the lower end of the scale. Without jobs, integration of immigrants fails and so does their connection to the past of the society.

#### Comfortable Life:

Europeans love their 5 / 6-week vacations – who wouldn't? High taxes on income and sales gave them free education, free health care, state pensions and unemployment insurance – such life style may be under threat.

#### Labor Flexibility:

In Europe, there is an inverse relationship between employment protection and unemployment levels. Social costs should be lowered to hire and allow more competition, more labor mobility, more job creation; How can a French worker refuse to relocate 50 km from his previous job while a Chinese or an American is ready to travel thousands of km to find a job.

#### Reforms are not impossible:

Britain, Ireland and Scandinavia enjoy a lower unemployment rate and higher growth rates!

#### EU Inhibitions:

Although I am deeply pro-European as a confederation of people and cultures, the EU is probably not the best institutional platform to deal with globalization. It has become way too large, too divided, and too bureaucratic.

EU should find its best "social model" among its diversity :

- Nordic model: Sweden, Denmark, Finland, Netherlands – high social protection system and public welfare but substantial flexibility in labor market with strong unions and high wages
- Anglo-saxon Model: Ireland/UK – social assistance of last resort, work unions, unregulated labor markets
- Rhine Model: Austria, France, Belgium, Germany – social insurance for unemployed, strong employment protection, powerful unions and collective bargaining
- Mediterranean Model: Italy, Spain and Greece – high levels of benefits for unions, early retirement age, heavy labor market regulations

#### **China is evolving too.**

They want to become more selective toward foreign businesses, giving priority to foreign companies in high-tech industries → real challenge for EU lies there. This is the greatest story in China: How are they going to move out of the lower-end stuff – the toys, textile and sporting goods?

**But cultural and mentalities are still very different with the "Old Europe"...**

- Helping your own people v. Mai Ban (do not betrayed your clan)
- Saving face
- Its never hurts to ask
- Don't trust anyone – impact of cultural revolution
- If I don't take advantage of him, other people will anyway!
- Let's get even with the Westerners (opium war)
- Why follow the rules if others don't - taking a subway in Shanghai
- What does a contract mean to the Chinese? Starting of a long relationship. (we can amend that clause all the time, after contract is signed).

**EU/Europe have not said their last words.**

- Very high labor productivity levels in some countries – France, Norway, Belgium.
- Europe has many qualities in the global world:
  - Responsiveness, flexibility, problem solving capabilities, quick turn-around
  - Creativity, innovation, quality of engineering schools
  - Skilled workers – high level of education
- Global competition is changing ("Blue Oceans strategy") – not only a cost-based economy where Asian countries have a competitive edge: "Skype", "Blackberry" (innovation and patents), "Cirque de Soleil" (creativity and marketing), large infrastructure and energy projects (e.g., new generation of super-nuclear power factories (EPR in Finland (Areva), etc.) that cannot be copied easily, etc.
- Human Capital formation – the long term therapy
  - EU has to strengthen its comparative advantage in skill-intensive sectors by improving qualifications of workers.

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