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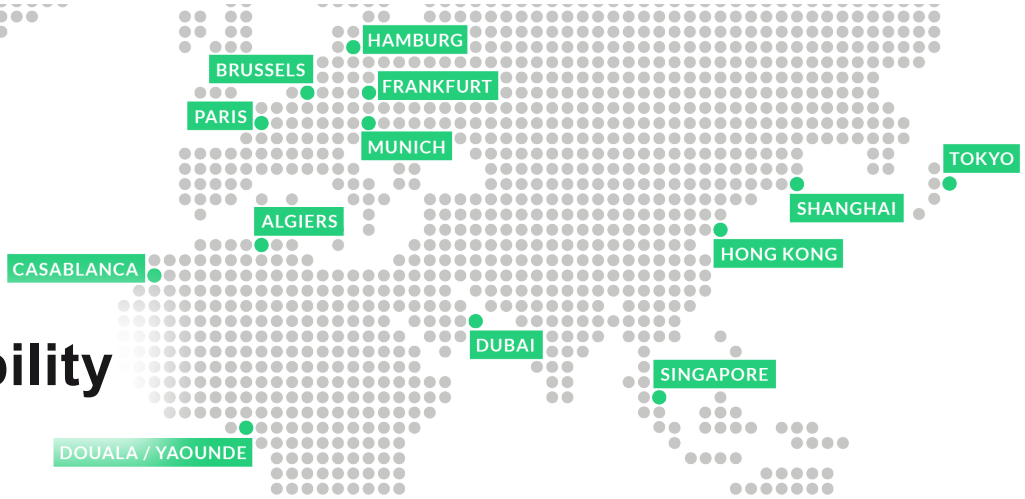

Smart News Mobility

March 2019

EUROPE

In accordance with settled case law, the European Court of Justice considers that the A1 (ex-E101) secondment certificate issued in the context of the secondment of an employee from one Member State to another is binding on the administrations and courts of the country in which the posted employee carries out his activity, even if it does not fulfil the conditions laid down in European Regulation No 1408/71 (European Court of Justice, 27 April 2017, case C-620/15).

The Court of Justice reaffirms this principle: as long as the issuing institution has not withdrawn or invalidated the certificate of secondment, it shall retain its full effect. Regardless of the opinion of the Administrative Commission for the Coordination of Social Security Systems, which, referred to in the context of the dialogue and conciliation procedure, considered that it had been wrongly issued and that it should be withdrawn (European Court of Justice, 6 September 2018, Case C-527/16).

As expected, on 6 February 2018, the European Court of Justice set, for the first time, a limit on the binding force of the A1 certificate. According to the Court, it is possible to exclude a certificate of secondment in the event of fraud duly established after a judicial investigation. In the present case, the institution of the host country had requested a review of the merits of the certificate and its withdrawal from the issuing institution, which refused without examining the elements of the judicial inquiry demonstrating the serious fraud. In this context, the host country institution may bring an action to the national court to preclude application of the A1 certificate (European Court of Justice, 6 February 2018, Case C-359/16).

Germany:
Salary/income tax for the so-called welcome bonus

If the employment contract provides for the payment of a special bonus in the event that the contract is concluded, it is taxable in Germany even before the employee residing abroad moves there.

Senior managers are sometimes entitled, upon conclusion of the contract, to a so-called "welcome bonus" to compensate for the loss of the bonus that the former employer would have awarded them. According to the judgment of the Federal Court of Finance (*Bundesfinanzhof*) I R 5/16 of 11 April 2018, published on 8 October 2018, this payment is taxable in Germany as a salary for future employment. This also applies if the employee does not yet reside in Germany at the time of payment of the bonus. There is thus a certain parallelism with the salary that is paid a posteriori. It is also attributed to the State in which the activity is carried out and may be taxed in that State.

Since 2017, compensation paid upon termination of an employment contract is also considered as ex-post salary and taxed in Germany in accordance with Art. 50d, para. 12 of the German Income Tax Act (*EstG*). They will only be treated differently if so agreed upon because of a tax treaty.
As a result, it is no longer the date of payment of remuneration that in many cases plays a decisive role in determining the law applicable to taxation, but the link with the activity in the country concerned.

France :
Secondment certificate and illegal work

By four judgments of 18 September 2018, the French Criminal Chamber applied the European Court of Justice decisions on the secondment certificate (see above) by considering that the national judge cannot qualify an illegal employment offence by excluding an A1 certificate, thus reversing and aligning it with the European Court of Justice's position. Moreover, the national court may not dismiss that certificate unless the judicial inquiry has revealed that the certificate

was fraudulently obtained and that the issuing institution, before which a request for reconsideration or withdrawal was made, has failed to take into account its fraudulent nature (Cass. crim., 18 September 2018, n°13-88.631 ; n°13-88.632 ; n°11-88.040, FS-PB and n°15-80.735 ; n°15-81.316, F-D)

Profit sharing and savings schemes

Confirming its previous case law, the Supreme Court recalls that employees working abroad cannot be excluded from employee savings schemes as long as they have never ceased to belong to the company's workforce.

While the judgments in these cases deal with cases of secondment, the wording of the statement of reasons leaves little doubt that this principle applies to expatriate employees whose relationship with the employer company is certainly more distended but still existing (Cass. soc., 6 June 2018, n°Y17-14.372 to B 17-14.375, FS-PB ; Cass. soc., 20 September 2018, n°16-19.680, F-D).

Duration of expatriation

Article R. 1221-34 of the Labour Code provides that "*in the event of an employee's expatriation longer than one month, the document given by the employer to the employee mentions the duration of the expatriation*". The French Supreme Court considers that this provision does not prevent the employee to work abroad on a permanent basis (Cass. soc., 12 September 2018, n°16-18.411, FS-PB).

Brexit

Anticipating the hypothesis of an absence of deal on the Brexit, the Ministry of internal affairs has, by order dated 6 February 2019 No. 2019-76, adopted various measures relating to the entry, residence, social rights and employment of British nationals.

Repatriation after secondement abroad

The industry-wide collective bargaining agreement of 13 March 1972 for engineers and managers in the metallurgy industry provides that, on the occasion of his repatriation, the employee must be offered a position as much compatible as possible with the importance of his duties prior to his repatriation. Confirming its 2007 case law (Cass. soc., 7 March 2007, No. 05-45.6810), the French Supreme Court recalls that this provision must be interpreted as referring to the position held abroad by the employee, and not to the position he held before his departure abroad (Cass. soc., 9 janvier 2019, No. 17-24.036, F-D).

The international mobility of French people is scrutinised

At the request of the Prime Minister, the deputy for the 11th constituency of the French people established outside France has presented a report in last September in order to evaluate and make recommendations on French tax and social protection system, on simplification of access to public services and on the return to France of non-residents individuals ("International Mobility of the French, Anne Genetet, September 2018").

The conclusion is not surprising for anyone who has already been a non-resident of France: the current tax system is complex and inconsistent and the tax center of non-residents is at the end of its rope.

Among the elements of complexity, there is notably an illegible tax calculation formula for the non-residents of France, an unknown modulation mechanism of the progressive income tax scale which is source of inequality and the complex withholding tax rules which are source of long and expensive restitution procedure litigation. It is further underlined that the treatment of these specificities tax rules requires special training of the French tax administration employees who sometimes have to calcul manually the taxes in the absence of appropriate computer tools.

Among the inconsistencies elements, the restriction of the deductible expenses of non-residents, the real estate capital gains calculation and their liability to social security contributions are highlighted.
It is hoped that the recommendations, whose main purpose is to tax the non-residents individuals as the same rules applied to residents, will be heard and that the fate of the social security contributions will be definitively settled.
The points put forward in this report should not make on lose sight of the other civil and tax issues encountered by French individuals living abroad whose wealth assets have necessarily an international scope.

The departure abroad has to be anticipated and regularly reconsidered with regard to family and patrimonial aspects.

The tax point of view

Tax regime for employees posted abroad: the employer's certificate is sufficient to justify the commercial prospecting activity

In a judgment dated 26 October 2018 (Conseil d'Etat, 10th Chamber, 26 October 2018, No. 412525), the Conseil d'Etat specified that the exercise of a commercial prospecting activity abroad, likely to give the taxpayer (the employee) an exemption from income tax on the wages received in respect of that activity (Article 81 A of the Tax code), is properly documented by the production of a certificate from the employer indicating that the seconded employee has carried out a commercial prospecting activity. It is not necessary for the said certificate to specify the concrete actions taken by the person concerned in the countries where he had stayed, contrary to what the judge of appeal considered (CAA Versailles, 7th Chamber, 18 May 2017, No. 15VE03516), which is sanctioned for an error of law.

AFRICA

Morocco :

The Moroccan Supreme Court has reversed the long-awaited case law by foreign employees in Morocco and by the expatriate associations that have been working on this issue for many years

Indeed, by a decision No. 1/936 dated 16 October 2018, which confirms another decision rendered in July, the highest Moroccan court decided that the Foreign Employment Contract (CTE) is no longer automatically a fixed-term contract, and consequently, that the abusive termination of this type of contract may now lead to the allocation of the damages provided for by the Labour Code in the event of termination of a permanent contract.

As a reminder, the situation of foreign workers in Morocco was particularly unfavourable insofar as this administrative document, which was mandatory to remain in the country and subject to the administration's visa for a limited period of one to two years, was the reference employment contract for Moroccan judges. They considered that since the CTE was valid for a limited period of time, the foreign employee's employment relationship with a Moroccan entity was subject to the legal regime of a fixed-term contract. Consequently, the compensation due in the event of termination was equal to the remaining salaries due until the expiry of the visa of the said CTE, despite the fact that most of these employees also signed a contract detailing their working conditions (such as their remuneration and benefits, their duties and the duration of their contract), and this generally for an indefinite period.

The Supreme Court justified its decision by simply recalling that the cases allowing the use of a fixed-term contract were exhaustively listed in Article 16 of the Labour Code and that the conclusion of a CTE was not provided for.

In addition, two other principles were identified: the reminder that obtaining a visa on the CTE is an obligation of the employer and that the absence of a visa granted by the Ministry of Labour does not lead to the invalidity of the contract.

ASIA

Hong Kong :

Extension of statutory maternity leave and paternity leave: strengthening pro-family elements of the employment regulatory regime in Hong Kong

End of 2018, the government of Hong Kong announced that it will increase maternity leave from 10 to 14 weeks. Each employee entitled to the paid statutory maternity leave will be allowed to take four additional weeks paid at 80% of her average daily wages subject to a cap of HKD 36,822 per employee (such cap may be adjusted in the future). Employers will be able to apply to the government for reimbursement of the additional four weeks' statutory maternity leave pay. The government will have to draft the legal instrument to give effect to these proposed changes and intends to introduce a bill to amend the current legislation to the Legislative Council by end of 2019.

As regards to paternity leave, the Employment (Amendment) (No.3) Ordinance 2018 comes into operation on 18 January 2019 and extends the duration of paternity leave from 3 to 5 days.

Reinstatement or re-engagement of employee after unreasonable and unlawful dismissal

Where an employee has been unreasonably and unlawfully dismissed on or after 19 October 2018 (date of entry into force of the Employment (Amendment) (No.2) Ordinance 2018) and the employee makes a claim for reinstatement or re-

engagement, the Labour Tribunal may make an order for reinstatement or re-engagement without the need to secure the employer's agreement if the Tribunal considers that such an order is appropriate and practicable. Alternatively, the Labour Tribunal may make an award of terminal payments to be payable by the employer to the employee as it considers fair and appropriate. An employee may also be awarded compensation up to a maximum of HKD 150,000. Previously, such order for reinstatement or re-engagement could only be made with the mutual consent of the employer and the employee. If the employer eventually does not reinstate or re-engage the employee as required by the order, the employer shall pay to the employee a further sum, amounting to three times the employee's average monthly wages and subject to a cap of HKD 72,500. A dismissal is unlawful and unreasonable if the employee is dismissed by the employer other than for a valid reason (valid reasons include the conduct of the employee, the capability or qualifications of the employee for performing his work) and the dismissal is in contravention of the law (for example, the dismissal of a pregnant woman without a valid reason).

Are termination payments chargeable to salaries tax?

In the case of *Poon Cho Ming, John v Commissioner of Inland Revenue [2018] HKCA 297*, the Court of Appeal clarified that a termination payment made for some other reason than from an office of employment is usually not chargeable to salaries tax. In the above case, the employee obtained under a separation agreement signed with his employer a sum in lieu of a possible discretionary bonus which he was eligible to under his contract of employment and acceleration of the vesting schedule for some share options previously granted to him. It was held by the Court of Appeal that the gains were not chargeable to salaries tax as they constitute consideration to induce the employee to enter into the separation agreement (and avoid litigation, as well as bad public image of the employer), and did not arise from his contract of employment.

Further tax deductions under salaries tax to people who purchase eligible health insurance products for themselves or their relatives under the Voluntary Health Insurance Scheme (Inland Revenue (Amendment) (No. 8) Ordinance 2018)

Starting from 1 April 2019, taxpayers who purchase eligible health insurance products for themselves or their relatives under the VHIS can claim deductions for VHIS premiums paid up to HKD 8,000 per insured person for insurance policies procured for the benefit of the taxpayer and all specified relatives, which cover the taxpayer's spouse and children, and the taxpayer's or his/her spouse's grandparents, parents and siblings.

Immigration update: Official change in policy for same sex dependant visas

Following the decision on 4 July 2018 *QT v Director of Immigration* (which we covered in our previous newsletter), the government has announced an official change in Hong Kong's immigration policy in relation to same-sex dependant visas. From 19 September 2018, a person who has entered into a same-sex civil partnership, same-sex civil union, same-sex marriage, opposite-sex civil partnership or opposite-sex civil union outside Hong Kong will become eligible to apply for a dependant visa / entry permit for entry into Hong Kong.

Singapore:

The Singapore Ministry of Manpower ("MOM") has announced on 5 March 2018 important upcoming changes to the Employment Act ("EA") which is Singapore's main labor law. It provides for basic terms and working conditions for all Singapore-based employees, subject to limited exceptions. These amendments were approved by the Singapore Parliament on 20 November 2018 and will come into effect on 1 April 2019.

Extension of EA Scope

Currently, the EA does not cover the managers and executives whose monthly basic salary is above S$4,500. The amendments will remove this salary cap, and the EA will cover all employees, including all professionals, managers, executives and technicians.

Exceptions will remain for public servants, domestic workers, seafarers and those who are covered by separate, sector-specific legislation.

The core employee benefits in the EA will be extended to all employees including foreigners, and cover an additional 430,000 professionals, managers and executives.

These core employee benefits are related to days of annual leave (minimum 7), 11 paid public holiday, 14 days of paid sick leave and 60 days of paid hospitalization leave, timely payment of salary, maternity protection and childcare leave, statutory protection against wrongful dismissal, right to preserve existing terms and conditions for

employment transfer, resulting from sale of business and business restructuring.

Extension of beneficiaries: Additional protection for working hours, mandatory rest days and overtime pay

The additional protections concerning the number of hours of work and mandatory rest days as well as overtime pay (together known as “Part IV of the EA”) will be extended to more workers by way of an increase of the monthly salary cap.

The monthly basic salary cap will be raised to S$ 2,600 (from S$ 2,500 now) for non-workmen.

For purposes of calculation of overtime pay, the monthly salary cap for non-workmen will also be raised to S$ 2,600 (from S$ 2,250 presently).

There will be no change for workmen earning a monthly salary up to S$ 4,500. They will continue to benefit from the additional protection of Part IV of the EA.

Dispute Resolution: Jurisdictional changes

Currently, all salary-related disputes are mediated at the Tripartite Alliance for Dispute Management (“TADM”), unresolved claims are heard at the Employment Claims Tribunals (“ECT”), and wrongful dismissals are heard by the MOM.

Under the new provisions of the EA, wrongful dismissals will be shifted over to the TADM and ECTs together with salary-related claims to provide both employers and employees with “one-stop service”.

The whole LPA-CGR avocat mobility team is at your disposal should you need further information.

A « Mobility team » to advise you all over the world

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