

Legally Binding

A Summary of Labour Laws in the Greater Mekong Subregion

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Mekong Migration Network
September 2011

Members of Mekong Migration Network (MMN)

The following is the list of MMN members as of July 2011.

CAMBODIA

- Legal Support for Children & Women (LSCW)
- Cambodian Women for Peace and Development (CWPD)
- BanteaySrei
- Cambodia Human Rights and Development Association (ADHOC)
- Cambodian Women's Crisis Center (CWCC)
- Coordination of Action Research on AIDS and Mobility (CARAM) Cambodia

CHINA

- Migrant Workers Education and Action Research Centre (MWEAC)
- Association for Women's Capacity Building and Community Development in Yunnan
- Ruili Women and Children Development Centre
- Women Migrant Education Research Professional Association
- Yunnan Reproductive Health Research Association

LAO PDR

- Faculty of Social Sciences, National University of Laos
- Lao Women Union

THAILAND

- MAP Foundation
- Foundation for Education and Development (formerly Grassroots-HRE)
- Thai Action Committee for Democracy in Burma (TACDB)
- EMPOWER Foundation
- Federation of Trade Unions-Burma (FTUB)
- Foundation for AIDS Rights (FAR)
- Foundation for Women

-
- Friends of Women Foundation
 - Human Rights and Development Foundation
 - Institute for Population and Social Research (IPSR), Mahidol University
 - Maryknoll Thailand - Office for Migrants at Immigration Detention Center in Bangkok
 - The Mekong Ecumenical Partnership Program-Christian Conference of Asia (MEPP-CCA)
 - National Catholic Commission on Migration
 - Pattanarak Foundation
 - The Peace Way Foundation
 - Raks Thai Foundation
 - Shan Women's Action Network (SWAN)
 - Studio Xang
 - Young Chi Oo Workers Association (YCOWA)

VIETNAM

- Center of Research and Consultancy for Development (CRCD), Southern Institute of Social Sciences
- The Applied Social Work Center
- Education & Psychology Association -Ho Chi Minh City

Regional

- Asian Migrant Centre (AMC)

Handbook on Labour Protection in the GMS

Preface

Many of the industries in the Greater Mekong Subregion, namely Burma, Cambodia, Lao PDR, Thailand, Yunnan Province of China and Vietnam, rely heavily on the work of migrants. Despite migrant workers being the backbone of social and economic development of the Greater Mekong Subregion (GMS), they continue to be denied the protection of essential benefits and rights. Recently, there has been increased discussion among GMS governments and civil society concerning collaborating in their responses towards labour migration. In part, governments' motivation for this new approach reflects their vision of economic integration of countries in the region. On the other hand, civil society's concerns lie with the quality of life of migrants.

While the protection of the rights of migrant workers is often spoken of during such discussions, the general lack of understanding about the labour standards in the neighbouring countries in the GMS often makes it unclear exactly which labour standards the policy discussions are referring to.

It is essential to gain an understanding of the labour protections available to migrant workers according to each GMS country's national labour laws for two main reasons: firstly, to enable policy makers and advocates to have informed discussions about labour protection; and secondly, to strengthen bilateral and/or regional collaboration and coordination in promoting and protecting the rights of migrant workers.

The *Handbook on Labour Protection in the GMS* is a concise guide to understanding labour standards according to the national labour laws in the GMS countries. Labour protection has been classified into 14 key elements. Relevant international laws are also included. The Mekong Migration Network has active partners working with Burmese migrants, as well as contacts with academics and practitioners located in Burma. However, throughout this project it unfortunately proved largely impossible to find complete up-to-date information on Burmese labour laws. We understand that in recent years some efforts have been made by the Burmese government to draft new labour laws, however these laws have not yet been made public at the time of finalizing this publication. Many of the laws which are available for viewing date from the colonial period, and there is

no information available indicating whether or not these laws are still in force/ current or not. While successive military regimes have issued orders rescinding or replacing laws, it is difficult to follow these changes and permutations throughout the life-spans of these laws. For these reasons, the sections on Burma are often sadly lacking in concrete information. We apologise for this information gap, in addition to apologising particularly in the event that such laws do exist but we have been unable to locate them. It has been reported that a new labour law - signed on 11 October 2011 by President Thein Sein - contains positive elements, such as allowing workers to form unions and to strike. At the time of going to press this piece of legislation was not publicly available. If and when it becomes available, the MMN plans to upload the updated information onto its homepage.

We hope that in addition to promoting understanding of existing labour standards in the region that this handbook will also help migrant advocates to identify relevant labour laws that they can then use in responding to labour rights abuses. Readers are however encouraged to verify the current status of laws in question and to seek legal advice where necessary.

This handbook has been prepared as part of a project entitled: “Mekong Vocabulary on Labour Migration – promoting a common language understanding in the region and building a regional network for safe migration in the (GMS),” which is supported by the Toyota Foundation Asian Neighbors Program. This project aims to fill an information gap by increasing common understanding of vocabulary. As an outcome of the project the handbook *Speaking of Migration : Mekong Vocabulary on Migration* has also been published, which includes approximately 120 terms on migration issues translated into Burmese, Chinese, Khmer, Lao, Thai and Vietnamese. As a companion handbook to *Speaking of Migration*, this *Handbook on Labour Protection in the GMS* has been developed. MMN believes that all workers - including migrant workers - must be afforded equal labour protection. We hope that in the future this booklet will become a useful reference tool for those advocating for the realisation of optimum labour protection for all workers in the GMS.

The Mekong Migration Network (MMN) is a sub-regional network of civil society organisations working for the rights of migrants in the Greater Mekong Subregion. Many of our member organizations employ legally trained staff who routinely assist migrant workers pursue their labour rights through the courts. We work together for the full recognition and promotion of the human rights of all migrant workers and their families in the Mekong. The list of members is in the appendix of the handbook. For details of MMN activities, please visit www.mekongmigration.org.

Acronyms

ASEAN	Association of Southeast Asian Nations
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
GMS	Greater Mekong Subregion
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
UDHR	Universal Declaration of Human Rights

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Table of Ratification of International Conventions

International Convention	Burma	Cambodia	China	Lao PDR	Thailand	Vietnam
ICESCR		X	X	X	X	X
ICCPR		X	*	X	X	X
Migrant Workers' Convention		*				
CEDAW	X	X	X	X	X	X
CRC	X	X	X	X	X	X
ILO C1, Hours of Work (Industry)	X					
ILO C14, Weekly Rest (Industry)	X		X	X	X	X
ILO C29, Forced Labour						
ILO C30, Hours of Work (Commerce and Offices)	X	X		X	X	X
ILO C87, Freedom of Association and Protection of the Right to Organise	X	X				
ILO C106 Weekly Rest (Commerce and Offices)						
ILO C132, Holidays with Pay						
ILO C138, Minimum Age		X	X	X	X	X
ILO C153, Hours of Work and Rest Periods (Road Transport)						
ILO C156, Workers with Family Responsibilities						
ILO C158, Termination of Employment						
ILO C181, Private Employment Agencies						
ILO C182, Worst Forms of Child Labour Convention		X	X	X	X	X
ILO C183, Maternity Protection						

* = signed but not ratified

Section 1

Scope of Application of Labour Laws

Overview

Employees and employers are broadly covered by labour legislation in each of the GMS countries, with certain exceptions:

In Cambodia, labour legislation does not apply to judges of the judiciary and those employed in permanent positions in the public service.

Lao labour legislation does not apply to civil servants, military and police personnel employed in Party or State organisations, the Lao Front for National Construction and mass organisations.

In Thailand, labour legislation does not apply to Central Administration, Provincial Administration, Local Administration including Bangkok Metropolitan and Pattaya City or State Enterprises.

Vietnamese labour legislation does not apply to State employees and officials, elected and appointed officials, members of units of the people's armed forces and police force, members of public organizations, members of other political and social organizations, and members of co-operatives.

Burma (Myanmar)

Relevant Legislation

None available.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labour Law* (1997)¹

Article 1 of the *Cambodian Labour Law* states that the law:

[..] governs relations between employers and workers resulting from employment contracts to be performed within the territory of the Kingdom of Cambodia, regardless of where the contract was made and what the nationality and residences of the contracted parties are. This law applies to every enterprise or establishment of industry, mining, commerce, crafts, agriculture, services, land or water transportation, whether public, semi-public or private, non-religious or religious; whether they are of professional education or charitable characteristic as well as the liberal profession of associations or groups of any nature whatsoever. This law shall also apply to every personnel member who is not governed by the Common Statutes for Civil Servants or by the Diplomatic Statutes as well as officials in the public service who are temporarily appointed.

Article 1 also specifies that the *Labour Law* does not apply to:

- a) Judges of the Judiciary.
- b) persons appointed to a permanent post in the public service.

China

Relevant Legislation

Lao Dong Fa [Labour Law of the People's Republic of China] (Promulgated by the NPC Standing Committee, effective January 1, 1995), 1994 FAGUI HUIBIAN 91, 94 (Official Source)²

Labour Act (5 July 1994)³

Section 2 of the *Labour Act* (mirrored in Article 2 of the *Labour Law*) states that the laws contained therein apply:

[...] to all enterprises and individual economic organizations (hereafter referred to as employing units) within the boundary of the People's Republic of China, and labourers who form a labour relationship therewith. State organs, institutional organizations and societies as well as labourers who form a labour contract relationship therewith shall follow this Law.

Lao PDR

Relevant Legislation

Lao PDR *Labour Law*, 2006 (Amended)⁴

Article 6 of Lao PDR's *Labour Law* states that the law applies 'to all employees and employers who carry out activities in the labour units', in addition to 'persons working under written contracts for employment of three months or more'. The law does *not* apply to 'civil servants, military and police personnel employed in Party or State organisations, the Lao Front for National Construction and mass organisations' [Article 6].

Article 2(4) defines an employee as:

[...] a person working under the supervision of an employer while receiving compensation for work through salary or wages, benefits or other policies as regulated by laws, regulations and the employment contract.

Article 2(5) defines an employer as:

[...] a person or organisation using employees for its activities by paying salary or wages, and providing benefits and other policies to the employees as regulated by laws, regulations and the employment contract.

Thailand

Relevant Legislation

Labour Relations Act, B. E. 2518 (1975)⁵

The *Labour Relations Act* does not specify the exact scope of application of the legislation, however the *Act* does stipulate that the laws contained therein do not apply to Central Administration, Provincial Administration, Local Administration including Bangkok Metropolitan and Pattaya City or State Enterprises [Section 4].

Section 5 also defines employee as a ‘person agreeing to work for an employer in return for wages’, and an employer as ‘a person agreeing to accept an employee for work by paying him wages’.

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002, effective 1 January 2003)⁶

Article 2 of the *Labour Code* stipulates that the legislation applies to ‘all workers, and organizations or individuals utilizing labour on the basis of a labour contract in any sector of the economy and in any form of ownership’, in addition to trade apprentices, domestic servants, and other forms of labour outlined in the *Code*. Article 3 extends the scope of the *Code* to cover foreigners working for Vietnamese

companies in Vietnam, and Vietnamese citizens who work in an enterprise with foreign owned capital in Vietnam, or 'in a foreign or international organization operating in the territory of Vietnam'.

Article 4 states that the *Labour Code* does not apply to:

[...]State employees and officials, elected and appointed officials, members of units of the people's armed forces and police force, members of public organizations, members of other political and social organizations, and members of co-operatives [...].

Endnotes

- ¹ *Cambodian Labour Law*, 1997, available at http://www.gocambodia.com/laws/labor_law.asp (accessed 16/05/11).
- ² *Lao Dong Fa [Labour Law of the People's Republic of China]*, 1/01/1995, available at <http://www.usmra.com/china/Labour%20Law.htm> (accessed 16/05/11).
- ³ *Labour Act*, 5/07/1994, available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/37357/64926/E94CHN01.htm> (accessed 16/05/11).
- ⁴ *Lao PDR Labour Law* (amended) 2006, available at [http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20\(2006\)%20Eng.pdf](http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20(2006)%20Eng.pdf) (accessed 30/05/11).
- ⁵ *Thai Labour Relations Act*, 1975, available at http://thailaws.com/law/t_laws/tlaw0140_3.pdf (accessed 25/05/11).
- ⁶ *Labour Code of the Socialist Republic of Vietnam*, 23/06/1994, (amended 2 /04/2002), available at <http://www.global-standards.com/Resources/VNLaborCode1994-2002.pdf> (accessed 16/05/11).

Section 2

Employment Contracts

Overview

- **Definition:** All of the GMS countries stipulate that an employment contract is a contract agreed to by an employer and an employee (or an employee's legal representative in Lao PDR and China).
- **Oral or Written:** Cambodian legislation stipulates that employment contracts may be written or verbal, but a contract of fixed duration must be in writing. Laotian and Chinese legislation provides for written contracts only, and Vietnamese legislation states that employment contracts must be in writing, although contracts for some temporary work of under three months may be concluded orally. In Thailand, employment contracts may be written or verbal, expressed or implied.
- **Length of Obligation:** Cambodian legislation allows for employment contracts that cover a specific work on the basis of time, that are of a fixed duration or that are for an undetermined period. In China, the terms of a labour contract can be either fixed, flexible in relation to the completion of a specific amount of work as a term. Under Laotian labour legislation, the length of obligation under employment contracts may be either fixed or indefinite. Vietnamese labour legislation allows for indefinite or definite time periods in employment contracts, or covering a specific or seasonal job of less than 12 months in duration. The period of time that a contract is in force in Thailand is to be specified in the contract of employment.
- **Content:** Cambodian legislation stipulates that the content is to be agreed by both parties, whereas Laotian and Vietnamese legislation specify some particulars that must be contained in an employment

contract. In Lao PDR these include: the place of work, the work to be performed and the level of wages. In Vietnam, employment contracts must contain the following main provisions: an outline of the work to be performed, working hours and rest breaks, wages, the location of the job, the duration of the contract, conditions on occupational safety and hygiene, and information on social insurance. Similar provisions apply in China, where contracts must include information on wages, the duration of the contract, a job description, remuneration, labour disciplines, liabilities for violations of the contract, conditions for termination of the contract, the location of the workplace, and the name, place of residence and the number of the resident ID card or other valid identity document of the employee. Thai legislation states that a contract should include details about working time, holidays, sick leave, rest periods, and over-time.

- **Termination of Contract:** In Vietnam, a contract is terminated upon its expiration, where the tasks stated in the contract have been completed, where both parties agree to terminate the contract, where the employee is sentenced to serve a jail term or is prevented from performing his former job in accordance with a decision of a court, or where the employee dies or is declared missing by a court. An employment contract can be terminated by dismissal in Vietnam where a worker lacks specialised skills or is not in good health and thus cannot continue to work, or where the employer considers it necessary to reduce the number of workers in order to improve the work within the labour unit.

In Lao PDR, employment contracts may be terminated by agreement between both parties, or by one party unilaterally, provided that they give 30 – 45 days notice.

In Cambodia, a labour contract of specific duration can be terminated before the ending date if both parties are in agreement. If both of the parties fail to reach agreement, a contract of specified duration can be cancelled before its determination date only in the event of serious misconduct or acts of God. A labour contract of unspecified duration can be terminated at will by one of the contracting parties.

In China, a labour contract automatically terminates upon the expiration of its designated term, or where parties to the contract have agreed to terminate it through consultation. A labourer who intends to revoke his labour contract has to give written notice to the employing unit 30 days in advance. Employers can unilaterally revoke a labour contract with a labourer if they have proved to not be up to the requirements for recruitment during the probation period; where they have seriously violated the rules and regulations of the employing unit; where they have caused significant losses to the employing unit due to serious dereliction of duty or engagement in malpractice for selfish ends; or where the employee is being investigated for crimes.

In Thailand, a contract automatically terminates when the period specified expires without any further requirement for advance notice. Where no expiration date has been specified in the contract the employer or employee may terminate the contract by giving advance notice on or before their next pay date. The employer is also entitled to dismiss an employee without having to give them severance pay where they have been dishonest, intentionally caused loss to the employer, where there have been gross acts of negligence, neglect of duty or imprisonment.

Burma (Myanmar)

Relevant Legislation

None available.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labour Law* (1997)¹

Legal Definition

According to Article 65 of the *Cambodian Labour Law*, a labour contract ‘establishes working relations between the worker and the employer. It is subject to common law and can be made in a form that is agreed upon by the contracting parties’.

Other Relevant Definitions

Employers are considered to constitute an enterprise where they employ one or more workers, even discontinuously. Employees are defined as ‘those who are contracted to assist any person in return for remuneration, but who do not perform manual labor fully or who do so incidentally’ [Articles 2-6, *Cambodian Labour Law*].

Labourers are defined as ‘those workers who are not household servants or employees, namely those who perform mostly manual labor in return for remuneration, under the direction of the employer or his representative’ [Articles 2-6, *Cambodian Labour Law*].

Workers are defined as ‘every person of all sex and nationality, who has signed an employment contract in return for remuneration, under the direction and management of another person, whether that person is a natural person or legal entity, public or private’ [Articles 2-6, *Cambodian Labour Law*].

Oral or Written

Under *Cambodian Labour Law*, an employment contract may be written or verbal, however a contract of fixed duration must be in writing. If not, it becomes a labour contract of undetermined duration [Article 65 and 67, *Cambodian Labour Law*].

Length of Obligation

Employees may be hired for a specific job on the basis of time, either for a fixed duration or for an undetermined period of time. A labour contract signed with consent for a specific duration must contain a precise finishing date, which cannot exceed two years. It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years. Furthermore, contracts may have an unspecified date when they are drawn up in order to replace a worker who is temporarily absent; or when they are in relation to seasonal work, occasional periods of extra work or a non-customary activity of the enterprise [Articles 66 and 67, *Cambodian Labour Law*].

Content

Article 65 stipulates that the labour contract can be made in a form that is agreed upon by the contracting parties, and may be drawn up and signed according to local custom.

Suspension or Termination of Contract

The labour contract of specific duration can be terminated before the ending date if both parties are in agreement, on the condition that the agreement is made in writing in the presence of a Labour Inspector and signed by the two parties to the contract. If both of the parties fail to reach agreement, a contract of specified duration can be cancelled before its determination date only in the event of serious misconduct or acts of God. A labour contract of unspecified duration can be terminated at will by one of the contracting parties. A contract may also be suspended where an employee: leaves for military service, is sick (contract can generally only be suspended for 6 months, or until a replacement is found) or disabled as a result of a workplace accident, gives birth, is on holiday, incarcerated without later conviction, or is temporarily laid-off in accordance with internal regulations. Contracts may also be temporarily suspended where an act of God prevents one of the parties from fulfilling his or her obligations, up to a maximum of three months [Article 65, *Cambodian Labour Law*].

Collective Contracts

A collective labour agreement is signed between employers and trade union organisations/ representatives of workers or shop stewards. Collective contracts apply to employers concerned and all categories of workers employed in the establishment as specified by the collective agreement. Any provisions of labour contracts that are less favourable towards workers than the provisions in the collective labour agreement shall be nullified and must be replaced automatically by the relevant provisions of the collective agreement [Articles 96-101, *Cambodian Labour Law*].

China

Relevant Legislation

*Law of the PRC on Employment Contracts (2008)*²

*Labour Act (5 July 1994)*³

Legal Definition

Section 16 of the Chinese *Labour Act* defines an employment contract as an agreement reached between a labourer and an employing unit establishing the labour relationship and the definition of the rights, interests and obligations of each party.

Other Relevant Definitions

'Employing units' are enterprises and individual economic organisations [Section 2, *Labour Act*].

Oral or Written

Article 10 of the *Law on Employment Contracts* states:

To establish an employment relationship, a written employment contract shall be concluded. In the event that no written employment contract was concluded at the time of establishment of an employment relationship, a written employment contract shall be concluded within one month after the date on which the Employer starts using the worker.

Section 19 of the *Labour Act* also states that employment contracts should be in written form only.

Length of Obligation

The term of a labour contract shall be either fixed, flexible in relation to the completion of a specific amount of work as a term [Article 12, *Law on Employment Contracts* and Section 2, *Labour Act*].

Content

Article 17 of the *Law on Employment Contracts* stipulates that an employment contract must include the following:

- (1) the name, domicile and legal representative or main person in charge of the Employer;
- (2) the name, domicile and number of the resident ID card or other valid identity document of the worker;
- (3) the term of the employment contract;
- (4) the job description and the place of work;
- (5) working hours, rest and leave;
- (6) labor compensation;
- (7) social insurance;
- (8) labor protection, working conditions and protection against occupational hazards; and
- (9) other matters which laws and statutes require to be included in employment contracts.

In addition to the requisite terms mentioned above, an employer and a worker may agree to stipulate other matters in the employment contract, such as probation period, training, confidentiality, supplementary insurance and benefits, etc.

Furthermore, Article 3 of the *Law on Employment Contracts* states that ‘the conclusion of employment contracts shall comply with the principles of lawfulness, fairness, equality, free will, negotiated consensus and good faith’.

Suspension or Termination of Contract

Article 36 of the *Law on Employment Contracts* stipulates that ‘an Employer and a worker may terminate their employment contract if they so agree after consultations’. Article 37 goes on to state:

A worker may terminate his employment contract upon 30 days' prior written notice to his Employer. During his probation period, a worker may terminate his employment contract by giving his Employer three days' prior notice.

According to Article 38 of the same law, a worker may terminate his employment contract if his/her employer:

- (1) fails to provide the labor protection or working conditions specified in the employment contract;
- (2) fails to pay labor compensation in full and on time;
- (3) fails to pay the social insurance premiums for the worker in accordance with the law;
- (4) has rules and regulations that violate laws or regulations, thereby harming the worker's rights and interests;
- (5) causes the employment contract to be invalid due to a circumstance specified in the first paragraph of Article 26 hereof;
- (6) gives rise to another circumstance in which laws or administrative statutes permit a worker to terminate his employment contract.

Moreover, 'if an Employer uses violence, threats or unlawful restriction of personal freedom to compel a worker to work, or if a worker is instructed in violation of rules and regulations or peremptorily ordered by his Employer to perform dangerous operations which threaten his personal safety, the worker may terminate his employment contract forthwith without giving prior notice to the Employer' [Article 38, *Law on Employment Contracts*].

Pursuant to Article 39 of the *Law on Employment Contracts*, an employer may terminate an employment contract if the worker:

- (1) is proved during the probation period not to satisfy the conditions for employment;
- (2) materially breaches the Employer's rules and regulations;
- (3) commits serious dereliction of duty or practices graft, causing substantial damage to the Employer;
- (4) has additionally established an employment relationship with another Employer which materially affects the completion of his tasks with the first-mentioned Employer, or he refuses to rectify the matter after the same is brought to his attention by the Employer;
- (5) causes the employment contract to be invalid due to the circumstance specified in item (1) of the first paragraph of Article 26 hereof; or
- (6) has his criminal liability pursued in accordance with the law.

Pursuant to Article 40, an employer may terminate an employment contract by giving the worker himself 30 days' prior written notice, or one month's wage in lieu of notice, if:

- (1) after the set period of medical care for an illness or non-work-related injury, the worker can engage neither in his original work nor in other work arranged for him by his Employer;
- (2) the worker is incompetent and remains incompetent after training or adjustment of his position; or
- (3) a major change in the objective circumstances relied upon at the time of conclusion of the employment contract renders it unperformable and, after consultations, the Employer and worker are unable to reach agreement on amending the employment contract.

Article 41 additionally stipulates:

If any of the following circumstances makes it necessary to reduce the workforce by 20 persons or more or by a number of persons that is less than 20 but accounts for 10 percent or more of the total number of the enterprise's employees, the Employer may reduce the workforce after it has explained the circumstances to its labor union or to all of its employees 30 days in advance, has considered the opinions of the labor union or the employees and has subsequently reported the workforce reduction plan to the labor administration department:

- (1) restructuring pursuant to the Enterprise Bankruptcy Law;
- (2) serious difficulties in production and/or business operations;
- (3) the enterprise switches production, introduces a major technological innovation or revises its business method, and, after amendment of employment contracts, still needs to reduce its workforce; or
- (4) another major change in the objective economic circumstances relied upon at the time of conclusion of the employment contracts, rendering them unperformable.

Under Article 42 of the *Law on Employment Contracts*, an employer may not terminate the employment of a worker if she is pregnant, has sustained a work-related disease or injury, 'has been working for the Employer continuously for not less than 15 years and is less than 5 years away from his legal retirement age'.

Article 43 states:

When an Employer is to terminate an employment contract unilaterally, it shall give the labor union advance notice of the reason therefor. If the Employer violates laws, administrative statutes or the employment contract, the labor union has the right to demand that the Employer rectify the matter. The Employer shall study the labor union's opinions and notify the labor union in writing as to the outcome of its handling of the matter.

Furthermore, according to Article 44, an employment contract shall end if:

- (1) its term expires;
- (2) the worker has commenced drawing his basic old age insurance pension in accordance with the law;
- (3) the worker dies, or is declared dead or missing by a People's Court;
- (4) the Employer is declared bankrupt;
- (5) the Employer has its business license revoked, is ordered to close or is closed down, or the Employer decides on early liquidation; or
- (6) another circumstance specified in laws or administrative statutes arises.

If the employer terminates an employment contract unlawfully they are liable to pay the employee severance pay, according to Article 46.

Finally, Article 48 stipulates:

If an Employer terminates or ends an employment contract in violation of this Law and the worker demands continued performance of such contract, the Employer shall continue performing the same. If the worker does not demand continued performance of the employment contract or if continued performance of the employment contract has become impossible, the Employer shall pay damages pursuant to Article 87 hereof.

See also Sections 23, 24-26, 29 and 31 of the *Labour Act*.

Collective Contracts

Article 51 of the *Law on Employment Contracts* stipulates:

After bargaining on an equal basis, enterprise employees, as one party, and their Employer may conclude a collective contract on such matters as labor compensation, working hours, rest, leave, work safety and hygiene, insurance, benefits, etc. The draft of the collective contract shall be presented to the employee representative congress or all the employees for discussion and approval. A collective contract shall be concluded by the labor union, on behalf of the enterprise's employees, and the Employer. If the Employer does not yet have a labor union, it shall conclude the collective contract with a representative put forward by the workers under the guidance of the labor union at the next higher level.

Lao PDR

Relevant Legislation

Lao PDR *Labour Law*, 2006 (Amended)⁴

Legal Definition

Pursuant to Article 23 of the Laotian *Labour Law*, an employment contract is an agreement made between an employee and an employer or their representatives. Employees and employers must strictly comply with employment-related contractual obligations: employees must perform their duties according to their specialisation and experience, employers must assign employees to work or positions that are stipulated in the employment contract, pay them salary or wages, and ensure their legitimate interests in accordance with the employment contract and the laws.

Other Relevant Definitions

'Labour' is defined as 'the physical and intellectual abilities, and skilful expertise of human beings'. 'Employee' is defined as 'a person working under the supervision of an employer while receiving compensation for work through salary or wages, benefits or other policies as regulated by laws, regulations and the employment contract'. 'Employer' is defined as 'a person or organisation using employees for its activities by paying salary or wages, and providing benefits and other policies

to the employees as regulated by laws, regulations and the employment contract'. 'Labour' is defined as 'the production, business or service units of the economic and social sectors'. Labour market is defined as 'the demand and supply of labour in the society' [Article 2].

Oral or Written

An employment contract must be made in writing between the employer and the employee based on the principles of equality and consensus [Article 24].

Length of Obligation

An employment contract may be made either for a fixed term or for an indefinite period depending on the agreement between the employer and the employee concerned [Article 24].

Content

The employment contract must stipulate the work place, the work to be performed, the level of wages and other policies that the employees should receive [Article 23].

Suspension or Termination of Contract

Articles 18 and 19 specify that:

An employment contract may be terminated by agreement between both parties. An employment contract made for an indefinite period may be terminated by either party, provided that the other party is given at least thirty days' notice in respect of work that is primarily physical and forty-five days' [notice] for specific skilled work.

The parties to a fixed-term employment contract are required to notify each other at least 15 days prior to the expiry of such contract. Where they wish to continue to work [together], they must sign a new employment contract.

Furthermore:

An employment contract that is based on the volume of work may expire only upon the completion of such work. An employment contract shall expire on the death of the worker, but the employer shall pay compensation in accordance with the volume of work performed and other policies as regulated by the laws and regulations.

Additionally:

[...] an employment contract may be terminated by dismissal in the following circumstances: where a worker lacks specialised skills or is not in good health and thus cannot continue to work, where the employer considers it necessary to reduce the number of workers in order to improve the work within the labour unit. Where the employer finds that workers lack skills or are in poor health, the employer shall first consider assigning suitable work according to their ability and health conditions. If there is no suitable work or [the employee] is not able to perform new tasks, the employment contract may be terminated in accordance with the time periods specified in Article 28 of this law. During the period of notice, the worker shall have the right to take at least one day of leave per week to seek new work while still receiving his normal salary or wages. For the termination of an employment contract on any of the above- mentioned grounds, the employer must pay a termination allowance which is calculated on the basis of 10% of the basic monthly salary earned before the termination of work for the worker who has worked for less than three years. For workers who have worked for more than three years, the basis of calculation shall be 15%. An employee who has worked for twelve months or more shall have the right to terminate the contract before the end of the contract term with advanced notice, on the grounds of poor health, the employer has not complied with the employment contract and other benefits specified in the rules of work [Article 19].

Collective Contracts

There is no provision for collective contracts mentioned within the Lao *Labour Law*.

Thailand

Relevant Legislation

Labour Protection Act, B. E. 2541 (1998)⁵

Labour Relations Act, B.E. 2518 (1975)⁶

Legal Definition

‘Employment contract’ means a contract, whether made orally or in writing, that specifies expressly or implies that a person, called the employee, agrees to work for another person, called the employer, who agrees to pay remuneration throughout the period of employment [Section 5, *Labour Protection Act*].

Other Relevant Definitions

Section 5 of the Thai *Labour Protection Act* and Section 5 of the Thai *Labour Relations Act* contain the following definitions:

‘Conditions of employment’ means employment or working conditions, working days and hours, wages, welfare, termination of employment, or other gains received by an employer or employee relating to employment or work.

‘An employer’ is defined as ‘a person who employs an employee for monetary remuneration’ and also includes ‘a person designated by an employer to act on his behalf’.

‘An employee’ means a ‘person who is employed by an employer for remuneration, regardless of the title that he is given’.

‘A hirer’ is ‘a person who agrees to hire another to do work, wholly or partly, for his own benefit and who pays remuneration in return for the performance of that work’.

A ‘primary contractor’ means ‘a person who agrees to perform an assignment, wholly or partly, for the benefit of the hirer’.

A ‘subcontractor’ means ‘a person who contracts with a primary contractor to do work, wholly or partly, within the responsibility of the primary contractor for the benefit of the hirer, and also includes any person who contracts with a subcontractor to do work within the responsibility of the subcontractor, regardless of the extent of sub-contractual subordination’.

Oral or Written

Employment contracts may be written or verbal, expressed or implied [Section 5, *Labour Protection Act*].

Length of Obligation

Section 17 of the *Labour Protection Act* specifies that the period of time that the contract is in force is to be specified in the contract of employment.

Content

A contract should include details about working time, holidays, sick leave, rest periods, and over-time [Sections 23-27, *Labour Protection Act*].

Suspension or Termination of Contract

Section 17 of the Thai *Labour Protection Act* provides that a contract will automatically terminate when the period specified in the contract expires without any further requirement for advance notice. Section 17 further states:

Where no expiration date has been specified in the contract the employer or employee may terminate the contract by giving advance notice on or before their next pay date, to take effect as of the following pay day (however no more than 3 months notice is necessary). In terminating a contract an employer may pay the basic salary of the employee in lieu of giving notice in order to dismiss the employee immediately.

Under Section 17, the employer is also entitled to dismiss an employee without severance pay in the following circumstances:

- 1) dishonest performance of duties
- 2) intentionally causing loss to the employer
- 3) gross acts of negligence
- 4) violations of the worker's rules/regulations
- 5) neglect of duties for 3 consecutive days without reasonable cause
- 6) imprisonment, except in the case of offenses that arise from negligence or petty offenses.

Section 67 of the *Labour Protection Act* additionally states:

Where an employer terminates a contract and the employee hasn't committed any of the above offenses [pursuant to Section 119], the employer shall pay them basic pay in respect of his or her annual vacation in proportion to the number of days to which they are entitled.

Collective Contracts

Work places with more than 20 employees may have a 'working condition agreement', in writing, for a maximum period of 3 years, which specifies the following:

- 1) employment and working conditions
- 2) working days/hours
- 3) wages
- 4) welfare
- 5) termination of employment
- 6) petition/complaints procedure for employees
- 7) an amendment or renewal procedure

[Sections 10 -12, *Labour Relations Act*].

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994
(Amended 2 April 2002)⁷

Legal Definition

Under Article 26 of the Vietnamese *Labour Code*, a labour contract is an agreement between an employee and an employer covering paid work, working conditions, and the rights and obligations of each party in the labour relationship.

Other Relevant Definitions

An employee is defined as 'person of at least fifteen (15) years of age who is able to work and has entered into a labour contract'. An employer is defined as 'an enterprise, body, or organisation, or an individual who is at least eighteen (18) years of age, recruiting, employing and paying wages to an employee' [Article 6, Vietnamese *Labour Code*].

Oral or Written

An employment contract must be in writing and must be made in duplicate with each party retaining one copy. An oral agreement may be entered into in respect of certain temporary work that has a duration of less than three months, and in

respect to domestic servants. In the case of an oral agreement, the parties must comply with the provisions of the *Labour Code* [Article 28].

Length of Obligation

Article 27 provides that employment contracts may be for an indefinite term, a definite term as a period of 12-36 months, or covering a specific or seasonal job with a duration of less than 12 months.

Content

According to Article 29 of the Vietnamese *Labour Code*, employment contracts must contain the following main provisions: an outline of the work to be performed, working hours and rest breaks, wages, the location of the job, the duration of the contract, conditions on occupational health and safety, and information on social insurance.

Suspension or Termination of Contract

Employment contracts may be suspended under any of the following circumstances: where an employee is required for military service or other civic obligations as determined by the law, where an employee is detained or is held temporarily in prison, or in other circumstances as agreed by both parties.

Contracts can be terminated under the following circumstances: upon expiry of the contract, where the tasks stated in the contract have been completed, where both parties agree to terminate the contract, where the employee is sentenced to serve a jail term or is prevented from performing his former job in accordance with a decision of a court, or where the employee dies or is declared missing by a court [Articles 35-38, Vietnamese *Labour Code*].

Collective Contracts

A collective labour agreement is a written agreement between a labour collective and the employer in respect of working conditions and the utilisation of labour, and the rights and obligations of both parties in respect of labour relations. Collective contracts are to be negotiated and signed by the representative of the labour collective and the employer based on the principles of voluntary commitment and fairness, and shall be made public. Principal provisions of the collective agreement shall include undertakings of the parties in respect of employment and guarantee of employment; working hours and rest breaks; salaries, bonuses, and allowances; work limits; occupational health and safety; and social insurance for the employees [Articles 44 and 46, Vietnamese *Labour Code*].

International Law relating to Employment Contracts

ILO Convention 158, Termination of Employment (1982)⁸

Article 4 of ILO Convention 158 specifies that:

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Article 5 outlines the reasons that may not be used to justify termination. They include union membership, filing a complaint against an employer, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, or absence from work during maternity leave. Temporary absence from work because of illness or injury is also not a valid reason for dismissal [Article 6]. Workers should be granted an opportunity to defend themselves where they are terminated for their conduct [Article 7] and shall be entitled to appeal the decision where he or she feels it is unjustified [Article 8].

Furthermore, Article 11 states that:

A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

None of the GMS countries have ratified ILO Convention 158.

Endnotes

- ¹ *Cambodian Labour Law*, 1997, available at http://www.gocambodia.com/laws/labor_law.asp (accessed 16/05/11).
- ² *Law of the PRC on Employment Contracts*, 2008, unofficial translation prepared by Baker & McKenzie available at http://www.china-europa-forum.net/bdfdoc-138_en.html (accessed 8/06/11).
- ³ *Labour Act*, 5/07/1994, available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/37357/64926/E94CHN01.htm> (accessed 16/05/11).
- ⁴ *Lao PDR Labour Law (amended) 2006*, available at [http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20\(2006\)%20Eng.pdf](http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20(2006)%20Eng.pdf) (accessed 30/05/11).
- ⁵ *Thai Labour Protection Act*, 1998, available at <http://www.thailawonline.com/th/thai-laws/laws-of-thailand/105-labor-protection-act-be-2541-1998-.html> (accessed 25/05/11).
- ⁶ *Thai Labour Relations Act*, 1975, available at http://thailaws.com/law/t_laws/tlaw0140_3.pdf (accessed 25/05/11).
- ⁷ *Labour Code of the Socialist Republic of Vietnam*, 23/06/1994, (amended 2/04/2002), available at <http://www.global-standards.com/Resources/VNLaborCode1994-2002.pdf> (accessed 16/05/11).
- ⁸ *ILO Convention 158*, available at http://www.ilocarib.org.tt/projects/cariblex/conventions_8.shtml (accessed 7/06/11).

Section 3

Working Hours and Leaves



Burmese migrant workers packing flowers at a flower farm.
Chiang Mai, Thailand, 2009.

Overview

- **Working hours:** Cambodian, Thai and Vietnamese legislation specify that employees are permitted to work a maximum of 8 hours per day and a maximum of 48 hours per week. In China and Lao PDR the legal working hours are 8 per day and a maximum of 44 per week.
- **Days off:** Employees are entitled to a minimum of one day off per week in Cambodia, China, Lao PDR, Thailand and Vietnam.

- **Sick leave:** In Cambodia, employees are entitled to up to 6 months sick leave with a valid doctor's certificate, and in Lao PDR they are allowed up to 30 days with a certificate. Thai law allows employees to take up to 30 days sick leave with a valid doctor's certificate, and unpaid sick leave for as long as they are sick. Vietnamese law stipulates that sick leave is allowed where the employee has a doctor's certificate, and that the benefits the sick employee will receive depend on 'the working conditions and the rate and period of social insurance contribution as determined by the Government'.
- **Annual Leave:** Employees are entitled to one and a half days of annual leave per month worked in Cambodia, and in China labourers are entitled to annual leave with pay after working for more than one year continuously. In Lao PDR, workers are entitled to 15 days (18 days where the worker is engaged in strenuous physical labour) annual leave per year, and in Thailand employees are entitled to at least six days annual leave during their first year of employment and more than six days the following year. Vietnamese workers are typically entitled to 12 days annual leave, 14 days for those employed in heavy and dangerous working conditions, and 16 days for those working in extremely heavy and/or dangerous conditions.
- **Rest periods:** Vietnamese workers have the right to take at least half an hour break per day (based on an 8 hour working day), and night-shift workers may take at least 45 minutes with a 12-hour break between shifts. Laotian employees are entitled to take a 45-minute break per shift for shift work, and a break of at least 5-10 minutes after two hours of work. In Thailand, employees are entitled to a rest period of no less than one hour per day (so long as five hours have been worked consecutively) and a 20-minute break for overtime work of not less than two hours.

Burma (Myanmar)

Relevant Legislation

None available.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labour Law* (1997)¹

Working Hours (Normal)

According to Article 137 of the *Cambodian Labour Law*, employees are entitled to working hours that do not exceed a maximum of eight hours per day and a maximum of 48 hours per week.

Overtime

Article 103 stipulates that overtime should only be undertaken by an employee where it is required for exceptional or urgent jobs - paid at a rate 50 per cent higher than normal hours or 100 per cent if worked at night or on a rest day.

Days off per Week

Employees are entitled to one day off each week (Sunday in principle) as well as a rotating day off in some specific categories (Articles 147 and 148, *Cambodian Labour Law*).

Sick Leave

Labour contracts should include a provision for sick leave. An employer must give sick leave for up to six months where an employee provides a valid doctor's certificate (Articles 71-72 and 169, *Cambodian Labour Law*).

Annual Leave

Employees are entitled to one and a half days annual leave per month. Annual leave is normally given for the Khmer New Year unless a different agreement is reached between the employer and the worker (Articles 166 and 170, *Cambodian Labour Law*).

Special Leave

Cambodian labour legislation provides that special leave may be granted by the employer during an event that directly affects the worker's immediate family, which can be deducted from their annual leave if it has not already been taken (Articles 169 and 171).

Public Holidays

The Ministry in Charge of Labour issues a Prakas (ministerial order) determining the paid holidays for workers each year, pursuant to Article 161 of the *Labour Law*.

Rest Periods/Breaks

Determined by Prakas (ministerial order), pursuant to Articles 141(5) and 142 of the *Cambodian Labour Law* (1997).

China

Relevant Legislation

Lao Dong Fa [*Labour Law of the People's Republic of China*] (Promulgated by the NPC Standing Committee, effective January 1, 1995), 1994 FAGUI HUIBIAN 91, 94 (Official Source)²

Working Hours (Normal)

Employees are entitled to an average working day of no more than 8 hours, or 44 hours per week, pursuant to Article 36 of the PRC *Labour Law* (1995).

Overtime

Hours can be extended after consultation with the trade union and labourers, but generally only for one hour, or under special circumstances, up to three hours. The total extension in one month is not to exceed 36 hours. Increased wages are to be paid (150 per cent of normal wages, 200 per cent if on rest day, 300 per cent if on a public holiday). The extension of working hours is not subject to restriction when carrying out work relating to natural disasters or other accidents threatening life/health/safety, repairs that affect production or public interests and other circumstances stipulated [Article 44, *Labour Law*].

Days off per Week

Employees are entitled to at least one day off per week [Article 38, *Labour Law*].

Sick Leave

Social insurance should be established by employers so that employees can receive help and compensation when they are sick [Articles 70 and 73, and Chapter 4, *Labour Law*].

Annual Leave

Labourers are entitled to annual leave with pay after working for more than one year continuously. Specific rules on this are to be worked out by the State Council [Article 45, *Labour Law*].

Special Leave

Labourers are entitled to be paid if they take leave during periods of mourning or marriage [Articles 51 and 62].

Public Holidays

Public holidays are: New Year's Day, spring festival, International Labour Day, national day and other holidays as stipulated by laws and regulations [Article 40].

Rest Periods/Breaks

Labourers have the right to take rests, as stipulated under Article 3 of the *Labour Law*.

Lao PDR

Relevant Legislation

Lao PDR *Labour Law* 2006 (Amended)³

Working Hours (Normal)

Employees are entitled to an average work day of no more than 8 hours, or 44 hours per week, pursuant to Article 16 of the Lao PDR *Labour Law* (2007).

Working Hours for Dangerous Work (If Different from Normal Working Hours)

The permitted hours for performing dangerous work must not exceed six hours per day and 36 hours per week (for work where there is direct exposure to radiation, gas or smoke that might have an adverse effect on health; with dangerous chemicals; work in underground tunnels or at heights; work in an abnormally hot or cold environment or where there is direct use of constantly vibrating machinery [Article 16]).

Overtime

Overtime shall not exceed three hours per day or 45 hours per month, and increased wages are to be paid. Before working overtime, the employer must first consult with trade unions or employee representatives to explain why the overtime is necessary. When overtime is required for more than 45 hours per month, the employer must gain authorisation from the labour administration agency. The extension of working hours is not subject to restriction in the event of an emergency such as a natural disaster or accident [Article 48, Lao PDR *Labour Law*].

Days off per Week

Pursuant to Article 19, employees are entitled to at least one day off per week, either Sunday or as otherwise agreed.

Sick Leave

Article 20 of the Lao PDR *Labour Law* stipulates that employees are entitled to up to 30 days paid sick leave per year, with a medical certificate.

Annual Leave

Workers are entitled to 15 days (18 days worker in heavy work sector) annual leave per year [Article 21, *Labour Law*].

Special Leave

None mentioned.

Public Holidays

Public holidays are to be determined by government every year [Article 19].

Rest Periods/Breaks

Article 17 specifies that employees are entitled to take a 45-minute break per shift for shift work, and a break of at least 5-10 minutes after every two hours of work.

Thailand

Relevant Legislation

Labour Protection Act, B. E. 2541 (1998)⁴

Labour Relations Act, B. E. 2518 (1975)⁵

Working Hours (Normal)

Employees are entitled to an average work day of no more than eight hours, and a maximum of 48 hours per week, pursuant to Section 23 of the *Labour Protection Act*.

Working Hours for Dangerous Work (If Different from Normal Working Hours)

Section 23 of the *Labour Protection Act* stipulates that working hours for performing dangerous work (as prescribed in Ministerial Regulations) are limited to a maximum of seven hours per day and 42 hours per week.

Overtime

Employers are prohibited from requiring an employee to work overtime on a normal working day unless they have prior consent from the employee, except

in the case of an emergency situation. An employer is prohibited from requiring an employee to work overtime where the work may be harmful to the health or safety of the employee [Sections 24 and 31, Thai *Labour Protection Act*].

Days off per Week

Section 28 of the *Labour Protection Act* provides that employees are entitled to no less than one day off per week.

Sick Leave

Employees are entitled to sick leave for as long as they are sick, and paid sick leave for up to 30 days per year with a valid doctor's certificate [Sections 32 and 57, Thai *Labour Protection Act*].

Annual Leave

Employees are entitled to at least six days annual leave during their first year of employment and more than six days the following year [Section 30, Thai *Labour Protection Act*].

Special Leave

Special leave may be taken for the purposes of military leave (with pay), sterilisation (with pay), personal business, and vocational training [Sections 33-36 and 57-58, Thai *Labour Protection Act*].

Public Holidays

Workers must receive no less than 13 public holidays per year (selected from 16 traditional holidays, and must include May Day) [Section 29, Thai *Labour Protection Act*].

Rest Periods/Breaks

Employees are entitled to a rest period of no less than one hour per day (so long as five hours have been worked consecutively). For overtime work of not less than two hours employees are entitled to a 20-minute break [Section 27, Thai *Labour Protection Act*].

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002, effective 1 January 2003)⁶

Working Hours (Normal)

Employees are entitled to an average work day of no more than eight hours, and a maximum of 48 hours per week, pursuant to Article 68(1) of the Vietnamese *Labour Code*.

Working Hours for Dangerous Work (If Different from Normal Working Hours)

Working hours are to be reduced by 1-2 hours per day for workers who perform extremely heavy, dangerous, or toxic works as stipulated in a list issued by the Ministry of Labour, War Invalids and Social Affairs and the Ministry of Health [Article 68(2)].

Overtime

Employers and employees may conjointly agree to additional working hours, but they must not exceed four hours per day or 200 hours annually, except in special cases where overtime may be permitted for up to 300 hours annually [Articles 58 and 61].

Days off per Week

Employees are entitled to one day off (24 consecutive hours) per week, or alternatively an average of four days off per month [Article 72, Vietnamese *Labour Code*].

Sick Leave

Sick leave is allowed where the employee has a doctor's certificate. The benefits the sick employee will receive depend on 'the working conditions and the rate and period of social insurance contribution as determined by the Government' [Article 142(2)].

Annual Leave

Employees are entitled to 12 days annual leave for workers employed in normal conditions, and 14 days for those employed in a heavy and dangerous working

environment. Those employed in extremely heavy and/or dangerous conditions are entitled to 16 days annual leave. Annual leave will increase by one full day for every five years of employment [Articles 74 and 75, *Labour Code*].

Special Leave

Special leave with pay is permitted for three days in the case of marriage, one day in the event of a child's marriage, and three days in the event of the death of a parent (including a parent of the employee's spouse), spouse, or child. The employee may also negotiate for special leave without pay [Articles 78 and 79, *Labour Code*].

Public Holidays

Employees are entitled to leave on the following public holidays: the 1st of January (New Year's Day), 4 days over the Lunar New Year, the 30th of April (Victory Day), the 1st of May (Labour Day) and the 2nd of September (National Day) [Article 13, *Labour Code*].

Rest Periods/Breaks

Workers have the right to take a break of at least half an hour per day (based on an 8 hour work day), and night-shift workers may take at least 45 minutes with a 12-hour break between shifts. Female employees may take an extra 30 minutes break per day during menstruation [Articles 71(1) and (2), Article 115].

International Laws

ILO Convention 1, Hours of Work (Industry) (1919)⁷

Article 2 of ILO Convention 1 limits the working hours for employees engaged in industrial work (e.g. mines, quarries, construction, building).

Burma is the only country within the GMS to have ratified ILO Convention 1.

ILO Convention 30, Hours of Work (Commerce and Offices) (1930)⁸

Article 3 of ILO Convention 30 limits office hours to 8 hours per day and 48 hours per week, except in certain exceptional cases where it is permissible to extend working hours, provided that 'the average hours of work over the number of weeks included in the period do not exceed forty-eight hours in the week and that hours of work in any day do not exceed ten hours' [Article 6].

None of the GMS countries have ratified ILO Convention 30.

ILO Convention 132, Holidays with Pay (1970)⁹

ILO Convention 132 applies to all employed persons except seafarers [Article 2 (1)], and specifies that all employees are entitled to an annual paid holiday of at least 3 working weeks [Article 3(1) and (2)].

None of the GMS countries have ratified ILO Convention 132.

ILO Convention 106 Weekly Rest (Commerce and Offices) Convention (1957)¹⁰

Convention 106 stipulates that office workers shall be entitled to a rest period of 24 consecutive hours every seven days [Article 6(1)].

None of the GMS countries have ratified ILO Convention 106.

ILO Convention 14 Weekly Rest (Industry) Convention (1921)¹¹

Article 2(1) of ILO Convention 14 states that: 'The whole of the staff employed in any industrial undertaking, public or private, or in any branch thereof shall, except as otherwise provided for by the following Articles, enjoy in every period of seven days a period of rest comprising at least twenty-four consecutive hours'.

China, Burma, Thailand and Vietnam have ratified ILO Convention 14.

ILO Convention 153 Hours of Work and Rest Periods (Road Transport) (1979)¹²

Under Article 5(1) no wage-earning driver shall be permitted to drive continuously for more than four hours without a break.

None of the GMS countries have ratified ILO Convention 153.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) (Migrant Workers Convention)¹³

Article 25(1) of the Migrant Workers Convention stipulates that:

Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:

- (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms.

Cambodia has signed, but not ratified the Migrant Workers' Convention. None of the other GMS countries have ratified the Migrant Workers' Convention.

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)¹⁴

Article 7 of the ICESCR stipulates that:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- a) Remuneration which provides all workers, as a minimum, with:
 - a. Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - b. A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- b) Safe and healthy working conditions;
- c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Cambodia, China, Thailand and Vietnam have ratified the ICESCR.

The Universal Declaration of Human Rights (UDHR) 1949¹⁵

Article 23 of the UDHR declares that:

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Furthermore, Article 24 of the UDHR urges States to recognise that: ‘Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay’.

Although the UDHR is a non-binding document, it has important inspirational value.

Endnotes

- ¹ *Cambodian Labour Law*, 1997, available at http://www.gocambodia.com/laws/labor_law.asp (accessed 16/05/11).
- ² *Lao Dong Fa [Labour Law of the People’s Republic of China]*, 1/01/1995, available at <http://www.usmra.com/china/Labour%20Law.htm> (accessed 16/05/11).
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Box Article

Fishery Industry

Thailand is one of the biggest sea-food exporting countries in Southeast Asia, and the fishing industry requires the cheap labor of migrant workers. Most Thai workers shun work in this sector because of the perilous working environment and lack of privacy. Thailand's fishing industry is an important part of the economy and hundreds of thousands of migrant workers from neighboring countries are working in this sector. Migrants from Burma (Myanmar) and Cambodia, many undocumented, provide Thai companies with cheap, unregulated labor.

While the living conditions, health assistance, and general work environment of migrants in Thailand are already very poor and exploitative, fishery workers are even worse off. The conditions for fishermen are very poor, and they do not have suitable eating or sleeping times because they have to work in six hours cycles over a 24-hour work day. Sickness, poor nutrition, abuse and death at sea are common.

These workers are the highest single group of human trafficking victims in Thailand. Many are virtually abducted and forced out to sea after having been promised other jobs. Some of these victims have to work at sea for months at a time, without even being allowed a short shore visit. Child labor in this sector is rife. The industry even prefers children for certain tasks, partly due to the lower costs.

Because of the notoriety of the sector among migrants, fishing operators are facing labor shortages. The National Fisheries Association of Thailand (NFAT) admitted that they need 140,000 workers, but could find only half of them in 2011. Even though the Thai government's new registration process had finished in 14 July 2011, fishing operators were given until August 13 to register alien workers.

NGOs, such as MAP foundation, Foundation for AID Rights, IOM, World Vision, Foundation for Education and Development (FED), some government agencies, as well as community based organizations, are working to promote and protect the rights of fishery workers in Thailand.

Section 4

Wages



Migrant workers, working on a construction site, queuing for their wages.
Chiang Mai, Thailand, 2011.

Overview

Cambodia, China, Lao PDR, Thailand and Vietnam all have a guaranteed minimum wage.

Coverage: In Cambodia, the scope of coverage of wages includes actual wages, overtime, commissions, bonuses, indemnities, gratuities, family allowances, holiday pay, compensatory pay, maternity and disability leave, health care, travel expenses, benefits granted exclusively to help the worker do his or her job and profit sharing. In China wages must cover holidays, leave for periods of mourning and marriage, and participation in social activities in accordance with the law. In Thailand ‘basic pay’ includes holiday pay, leave for military service, sick leave,

annual leave and maternity leave. Vietnamese legislation stipulates that allowances, bonuses, movements up on the wage scale, and other incentives may be agreed in the labour contract, collective agreement, or the regulations of the enterprise.

Payment of wages: Under Cambodian legislation, wages must be paid directly to the worker in legal currency, unless otherwise agreed, and the employer may not determine how the employee uses his wages. Under Chinese legislation, wages should be paid monthly in currency and cannot be deducted or delayed without reason. In Lao PDR, labour legislation states that wages must be paid in cash, in full and on time (once a month at a fixed time). Thai legislation specifies that wages are to be paid in Thai currency, except where the employee has agreed to be paid by cheque or in a foreign currency. Payment has to be made at least once a month, unless otherwise agreed and where an employee has been dismissed, the employer must pay basic pay, overtime pay, holiday pay and holiday overtime pay to an employee entitled to receive such pay, within three days from the date of termination of the employment. In Vietnam the employer has the right to select the method of payment of wages calculated by reference to time (hours, days, weeks, or months), or on the basis of a product produced or a completed piece of work, provided that the selected method is applied for a fixed period of time and the employee is notified of the method. A Vietnamese employee whose wage is calculated by reference to hours, days, or weeks shall be paid at the end of the hour, day, or week, or such period as agreed by the parties, provided that at least one payment of wage is made every fifteen days, and an employee whose wage is calculated by reference to months shall be paid monthly or half-monthly.

Burma (Myanmar)

Relevant Legislation

None available.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labor Law* (1997)¹

Definition

The *Cambodian Labour Law* defines ‘wage’ in Article 102:

For the purposes of this law, the term “wage”, irrespective of what the determination or the method of calculation is, means the remuneration for the employment or service that is convertible in cash or set by agreement or by the national legislation, and that shall be given to a worker by an employer, by virtue of a written or verbal contract of employment or service, either for work already done or to be done or for services already rendered or to be rendered.

Minimum Wage

Article 104 states that ‘any written or verbal agreement that would remunerate the worker at a rate less than the guaranteed minimum wage shall be null and void’. The guaranteed minimum wage is ‘established without distinction among professions or jobs’ and may ‘vary according to region based on economic factors that determine the standard of living’ [Article 107]. The minimum wage is set by ministerial order and may change occasionally ‘in accordance with the evolution of economic conditions and the cost of living’ [Article 107]. Article 108 states that the following considerations should be taken into account when setting the minimum wage:

- a) the needs of workers and their families in relation to the general level of salary in the country, the cost of living, social security allowances, and the comparative standard of living of other social groups; [and]
- b) economic factors, including the requirements of economic development, productivity, and the advantages of achieving and maintaining a high level of employment.

Article 109 stipulates that minimum wages must be permanently posted in workplaces and recruitment offices.

Coverage of Wages

Article 103 outlines the scope of coverage of wages, including actual wages, overtime, commissions, bonuses, indemnities, gratuities, family allowances, holiday pay, compensatory pay, maternity and disability leave, health care, travel expenses, benefits granted exclusively to help the worker do his or her job and profit sharing.

Payment of Wages

Under Article 112 the wage must be paid directly to the worker in legal currency, unless otherwise agreed. The employer may not determine how the employee uses his wages [Article 114]. Article 115 stipulates that wages must be paid out of the employer's office or at the workplace, and 'the payment of wages in the form of alcohol or harmful drugs shall not be allowed in any circumstances'. Payments must not be made on a worker's day off [Article 115]. Under Article 116:

Laborers' wages shall be paid at least two times per month, at a maximum of sixteen-day intervals. Employees' wages must be paid at least once per month. Commissions due to sale agents or commercial representatives must be paid at least every three months. For all task-work or piecework that is to be executed for longer than fifteen days, the dates of payment can be fixed by agreement, but the laborer must receive partial payments every fifteen days and be paid in full in the week following the delivery of the work. In the event of termination of a labor contract, wage and indemnity of any kind must be paid within forty-eight hours following the date of termination of work.

In the event that wages are not paid on time, the Labour Inspector is mandated to serve notice on the employer, or to bring the matter to a competent court in order to force the employer in question to fulfill his or her obligations towards

his or her employees [Article 117]. In the event that a dispute arises as to whether or not payment has been made, the employer bears the burden of proving that he or she made the payment [Article 118]. Amounts may not be deducted from an employee's wages by the employer for any reason, except for the following [Article 127]:

1. Tools and equipment required for the work and that are not returned by the worker upon his departure;
2. Items and materials under the control and usage of the worker;
3. Amounts advanced to acquire the said items;
4. Amounts owed to the company store.

How Wages are Determined

Article 104 stipulates that: 'The wage must be at least equal to the guaranteed minimum wage; that is, it must ensure every worker of a decent standard of living compatible with human dignity'.

Under Article 106, there must be no wage discrimination based on origin, sex or age for work of 'equal conditions, professional skill and output'. In relation to task or piecework, the wage must be calculated 'in a manner that permits the worker of mediocre ability working normally to earn, for the same amount of time worked, a wage at least equal to the guaranteed minimum wage as determined for a worker' [Article 108].

Furthermore, under Article 110:

The employer shall include the commissions or gratuities, if any, when calculating remuneration for paid holiday, dismissal indemnity in the event of dismissal and for damages in the event of termination of the labor contract without prior notice, or for an abusive breach of the labor contract. The calculation is based on the average monthly commissions or gratuities previously received over a period not to exceed the twelve months of service up to the date of leave or termination of work.

Any collective agreements that authorize wage deductions are null and void however, 'the worker can authorise deductions of his wage for dues to the trade union to which he belongs. This authorisation must be in writing and can be revoked at any time' [Article 129].

China

Relevant Legislation

Lao Dong Fa [Labour Law of the People's Republic of China] (Promulgated by the NPC Standing Committee, effective January 1, 1995), 1994 FAGUI HUIBIAN 91, 94 (Official Source)²

Minimum Wage

Article 48 of the *Labour Law* states that:

The State shall implement a system of guaranteed minimum wages. Specific standards on minimum wages shall be stipulated by provincial, autonomous regional and municipal people's governments and reported to the State Council for registration. The employer shall pay labourers wages no lower than local standards on minimum wages.

According to Article 49:

Standards on minimum wages shall be fixed and readjusted with comprehensive reference to the following factors:

- (1) The lowest living costs of labourers themselves and the number of family members they support;
- (2) Average wage level of the society as a whole;
- (3) Productivity;
- (4) Situation of employment;
- (5) Differences between regions in their levels of economic development.

Coverage of Wages

Article 51 states that wages must cover holidays, leave for periods of mourning and marriage, and participation in social activities in accordance with the law.

Payment of Wages

Wages should be paid monthly in legal currency. Wages shall not be deducted or delayed without reason [Article 50].

How Wages are Determined

The employer is responsible for setting its own form of wage distribution [Article 47]. Wages should be determined based on the principle of equal pay for equal work [Article 46]. Wages should also be raised gradually in accordance with economic development. Additionally, 'the State shall exercise macro regulation and control over total payrolls' [Article 46].

Lao PDR

Relevant Legislation

Lao PDR *Labour Law* 2006 (Amended)³

Definition

Article 44 describes salary or wages as 'income that has a monetary value that the employer must pay to the employee'.

Minimum Wage

Article 46 provides that the government may set the minimum wage, which is 'aimed at securing the basic minimum living standard of the employees consistent with the level of the change in the cost of living in each period'.

Payment of Wages

Article 44 stipulates that wages may be paid 'at the beginning, middle or at the end of the month, before or after the completion of the work'. Under Article 47 wages should be paid either based on time worked (hourly, daily, monthly...) or based on the completion of a specific job or task. In the event that, 'the employer has authorised employees to bring certain work to be performed additionally outside the labour unit, wages may be paid on the basis of product output or as a lump-sum' [Article 47]. Wages must be paid in cash, in full and on time (once a month at a fixed time) [Articles 47 and 49]. The employer may also pay bonuses or benefits in addition to salary or wages [Article 47]. It is prohibited to pay wages in the form of illegal narcotics, intoxicating substances or other substances dangerous to health [Article 47]. Furthermore, in respect of wages 'paid on a per unit of products basis, or in respect of hourly work, workers shall be paid at least twice a month' [Article 49]. Employers should also consider paying wages in advance where an employee is facing difficulties or emergencies 'such as childbirth, sickness, or accidents' [Article 49].

How Wages are Determined

Article 45 stipulates that:

Employees who perform equal quantity, quality, and value of work are entitled to receive equal salary, wages or other policies without any discrimination as to race, nationality, gender, age, religion, belief, or socio-economic status.

Employers may not set wages at a level lower than the minimum wage as declared by the State, and the labour administration agency is mandated to inspect and revise wages [Article 46]. Employers may set the level of wages higher than the minimum wage declared by the State in the following situations [Article 46]: to 'achieve balance with the level of capacity and knowledge of different groups in the society or the level of payment of salary or wages in other labour units', based on 'the value of work performed', because of 'the material and moral needs' of his or employees, due to rising costs of living, or in order to cover social security benefits for employees. Additionally, 'the workers, the trade unions or workers' representatives shall also have the right to negotiate with the employer in respect of their salary or wage levels' [Article 46].

Thailand

Relevant Legislation

Labour Protection Act, B. E. 2541 (1998)⁴

Labour Relations Act, B. E. 2518 (1975)⁵

Definition

Section 5 of the *Labour Protection Act* defines 'basic pay' as:

[...] the money which the employer and the employee mutually agree is to be paid in return for work done in accordance with the employment contract during normal working hours on an hourly, daily, weekly, monthly, or other periodic basis or to be paid upon the basis of output of the employee during normal working hours.

Guaranteed Minimum Wage

Section 5 of the *Labour Protection Act* states that the ‘minimum rate of basic pay’ is the wage rate prescribed by the Remuneration Committee as a means of determining minimum basic wages.

Coverage of Wages

Section 5 of the *Labour Protection Act* states that ‘basic pay’ includes:

[...] money which the employer pays whilst the employee is on holiday or taking other leave and during which time the employee did not work but nevertheless is such in respect of which he is entitled to receive payment under this Act.

Wages include leave for the purposes of military service [Section 58], sick leave [Section 57], sterilisation [Section 57], holidays and annual leave [Section 56] and maternity leave [Section 59].

Payment of Wages

Under Section 54 of the *Labour Protection Act*, all wages are to be paid in Thai currency, except where the employee has agreed to be paid by cheque or in a foreign currency. Section 55 stipulates that wages should be paid at the employee’s work place, unless the employee has explicitly consented to being paid elsewhere or by another method.

Section 70 provides the timeframe in which wages must be paid to employees (unless otherwise agreed between the employer and employee):

Where basic pay calculated on a monthly, daily, hourly basis or at other duration of no longer than one month or on the basis of output, payment shall be made at least once a month, unless otherwise agreed upon by the employer and employee in the best interests of the employee.[...] Payment of overtime pay, holiday pay and holiday overtime pay shall be made at least once a month.

Where an employee has been dismissed, the employer ‘shall pay basic pay, overtime pay, holiday pay and holiday overtime pay to an employee entitled to receive such pay, within three days from the date of termination of the employment’ [Section 70].

How Wages are Determined

Under Section 53 of the *Labour Protection Act*:

Where the work to be performed is of the same nature, quality and quantity, the basic pay, overtime pay, holiday pay and holiday overtime pay shall be fixed paripassu [equally] by the employer regardless of whether the employee is male or female.

Furthermore, Section 56 declares that:

An employer shall pay an employee his basic pay equal to a working day's basic pay in respect of the following holidays: A weekly holiday, except for employees who receive a daily wage, an hourly wage or a wage calculated on output; A traditional holiday; Annual vacation.

According to Section 57, an employee on sick leave shall be paid basic pay for a period up to 30 days per year, and for military leave the employee will be paid basic pay for a period up to 60 days [Section 58]. Where an employee takes maternity leave they shall be paid at a rate equal to the basic pay for a normal working day for a period up to 45 days [Section 59].

Section 60 stipulates that an employer 'shall pay basic pay in respect of a holiday or day of leave in an amount equivalent to the average daily basic pay rate that the employee receives during the payment period immediately prior to his taking a holiday or day of leave'.

In regards to the calculation of overtime pay, Section 61 states that:

[...] the employer shall pay overtime at the rate of not less than one and a half times the rate of the hourly basic pay earned in normal working hours for the hours of overtime, or not less than one and a half times the rate for each unit of output on a working day for employees who receive basic pay based upon output.

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002, effective 1 January 2003)⁶

Minimum Wage

The *Labour Code* stipulates that the Vietnamese government ‘shall determine and promulgate from time to time a general minimum wage, a minimum wage for each region, and a minimum wage for each industry’, which can increase if the price index increases [Article 56].

Article 56 stipulates that the minimum wage ‘is set on the basis of the cost of living of an employee who is employed in the most basic job with normal working conditions, and includes remuneration for the work performed and an additional amount for contribution towards savings.’ The minimum wage is to be used ‘as a basis for calculation of the wages for other types of jobs’ [Article 56].

Coverage of Wages

Article 63 states that: ‘Allowances, bonuses, movements up on the wage scale, and other incentives may be agreed in the labour contract, collective agreement, or the regulations of the enterprise’.

Payment of Wages

Article 58 provides that:

- 1) An employer shall have the right to select the method of payment of wages: calculated by reference to time (hours, days, weeks, or months), or on the basis of a product produced or a completed piece of work, provided that the selected method is applied for a fixed period of time and the employee is notified of the method.
- 2) An employee whose wage is calculated by reference to hours, days, or weeks shall be paid at the end of the hour, day, or week, or such period as agreed by the parties, provided that at least one payment of wage is made every fifteen (15) days.
- 3) An employee whose wage is calculated by reference to months shall be paid monthly or half-monthly.

- 4) An employee whose wage is calculated on the basis of a product produced or a completed piece of work shall be paid in accordance with the agreement reached between the two parties: where the work to be performed is carried out over many months, the employee shall be entitled to monthly payments in advance calculated on the amount of work performed within the month.

How Wages are Determined

According to Article 55 of the *Labour Code*:

The wage of an employee shall be agreed by the two parties in the labour contract and shall be paid in consideration of rate of production, and the quality and result of the work performed. The wage of an employee must not be lower than the minimum wage stipulated by the State.

Article 56 also states that the minimum wage 'shall be used as a basis for calculation of the wages for other types of jobs'.

In relation to the calculation of overtime, Article 61 states:

1. An employee who works overtime shall be paid according to the wage unit price or wage of his current work as follows:
 - (a) On normal days, at a rate of at least one hundred and fifty (150) percent;
 - (b) On weekly days off, at a rate of at least two hundred (200) per cent;
 - (c) On holidays and paid leave days, at a rate of at least three hundred (300) per cent.

Furthermore, Article 61 stipulates that when the overtime work is performed at night-time, employees are to be paid an additional amount. Furthermore, 'where an employee is allowed time off for the additional hours worked, the employer shall only be required to pay the difference between the overtime rate and the wage as calculated according to the wage unit price or wage of the current work of normal working days' [Article 61]. Employees who work at night-time 'shall be paid an additional amount of at least thirty (30) per cent of the wage calculated according to the wage unit price or day shift wage of the current work' [Article 61(2)].

International Laws relating to Wages

ILO Convention 95, Protection of Wages (1949)⁷

Under Article 1 of ILO Convention 95, the term wages is defined as:

[...] remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered.

Article 2(2) goes on to state that:

The competent authority may, after consultation with the organisations of employers and employed persons directly concerned, if such exist, exclude from the application of all or any of the provisions of the Convention categories of persons whose circumstances and conditions of employment are such that the application to them of all or any of the said provisions would be inappropriate and who are not employed in manual labour or are employed in domestic service or work similar thereto.

Article 3(1) provides that wages ‘shall be paid only in legal tender, and payment in the form of promissory notes, vouchers or coupons, or in any other form alleged to represent legal tender, shall be prohibited’. Article 3(2) states that:

The competent authority may permit or prescribe the payment of wages by bank cheque or postal cheque or money order in cases in which payment in this manner is customary or is necessary because of special circumstances, or where a collective agreement or arbitration award so provides, or, where not so provided, with the consent of the worker concerned.

Furthermore, Article 5 stipulates that wages ‘shall be paid directly to the worker concerned except as may be otherwise provided by national laws or regulations, collective agreement or arbitration award or where the worker concerned has agreed to the contrary’; and Article 6 prohibits employers from ‘limiting in any manner the freedom of the worker to dispose of his wages’. Under Article 12, wages must be paid regularly ‘except where other appropriate arrangements exist which ensure the payment of wages at regular intervals, the intervals for

the payment of wages shall be prescribed by national laws or regulations or fixed by collective agreement or arbitration award’.

None of the GMS countries have ratified the Protection of Wages Convention.

ILO Convention 100, Equal Remuneration (1951)⁸

Article 1 of ILO Convention 100 defines remuneration as including ‘the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment’. ‘Equal remuneration’ for men and women is further defined as remuneration that does not discriminate based on sex.

Article 2 declares that:

Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

Of the GMS countries, all except Burma have ratified ILO Convention 100.

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)⁹

Article 7 of ICESCR states that:

The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - i. Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - ii. A decent living for themselves and their families in accordance with the provisions of the present Covenant.

Cambodia, China, Thailand and Vietnam have ratified the ICESCR.

The Universal Declaration of Human Rights (UDHR) 1949¹⁰

Article 23 of the UDHR provides that everyone ‘without any discrimination, has the right to equal pay for equal work’ and that everyone who works ‘has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection’.

Although the UDHR is a non binding document, it has an important inspirational value.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)¹¹

Article 25(1) of the Migrant Workers Convention stipulates that:

Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and [...] other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms.

Cambodia has signed, but not ratified the Migrant Workers’ Convention. None of the other GMS countries have ratified nor signed the Migrant Workers’ Convention.

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers¹²

Article 8 of the Declaration states that ‘pursuant to the prevailing laws, regulations and policies of the respective receiving states’, the receiving states will: ‘promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers’.

Furthermore, ASEAN member States undertake to ‘promote decent, humane, productive, dignified and remunerative employment for migrant workers’ pursuant to Article 15 of the ASEAN Declaration.

Of the GMS countries, all except China form part of ASEAN.

Endnotes

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Box Article

Domestic Work

In everyday life all people need food, washed dishes, clean clothes, and a hygienic living space. At other times in their lives they may need to take care of children, of elderly, sick or injured relatives and even their pets! These important duties undertaken by, and on behalf of, other humans from birth until death is called “domestic work”. Traditionally, the burden of performing domestic work has fallen to the women of the household. The ILO estimated in 2010 that 83% of domestic workers worldwide are female, and the remainder male.¹ Discrimination against women has thus historically led to domestic work’s economic value being overlooked and not recognised as ‘work’ under labour legislation.

The ILO estimated in 2010 that at least 21.5 million women and men work in private households across Asia, representing 41% of the world’s domestic workers worldwide.² Despite the large domestic workforce worldwide, this type of work is not covered by domestic national labour laws. Consequently, there is an absence of mechanisms that allow for the regulation of working conditions. There is also a lack of official statistics or a formal database on domestic workers in the region (due in part to registration policies, such as the registration system in Thailand which does not cover all of the occupations or types of work undertaken by migrants, impeding the collection of meaningful statistics.)

Local domestic workers are not the only ones in the workforce. Migrant domestic workers also migrate in order to find work in this sector, to meet the demands of employers in other regions around the world and/or to meet their needs for a better life, as all humans have the right to do. Human rights protection and enforcement is still lacking for both local and migrant domestic workers. The working conditions endured by domestic workers are thus often very poor - no contractual agreement entered into prior to commencement of employment, no guaranteed minimum living conditions within the employer’s house, a lack of social welfare, days off and holidays, and restrictions on movements through the confiscation of registration cards. These lead to isolation from society, as well as rendering domestic workers vulnerable to exploitation and abuse, and restricting their access to justice mechanisms.

¹ ILO, ‘Global and regional estimates on domestic workers’, p. 8.

² Ibid.

Community organisations such as SWAN, HOMENET, ANM, United for Foreign Domestic Workers' Rights are struggling to raise awareness for the acceptance of domestic work as work, and promoting the protection of domestic workers right. Another Migrant Domestic Worker Group in Chiang Mai, supported by the MAP Foundation, now has its own program broadcasting through FM99, a local community radio station, which can also be streamed through the MAP Foundation Website.

The ILO has also been engaging with governments for many years to promote domestic work as decent work and has been trying to encourage governments to ratify ILO conventions to promote the rights of domestic workers. On the 16th of June 2011, the International Labour Organisation adopted Convention 189: Decent Work for Domestic Workers at the 100th Session of the ILO Conference. It is an important step towards empowering domestic workers and encouraging governments and employers alike to recognize and protect the rights of domestic workers. The draft Convention contains provisions specifying the working and living conditions that must be adhered to, as well as guaranteeing domestic workers the right to collectively bargain. At this early stage there have been no ratifications of the Convention. It is imperative for the rights of domestic workers that Thailand and the other Mekong countries ratify and implement the Convention in domestic laws in order for ILO Convention 189 to have the greatest impact.

Section 5

Occupational Health and Safety



Burmese migrant workers working on a construction site.
Chiang Mai, Thailand, 2006.

Overview

Labour legislation in all six GMS countries contains provisions outlining the duties of employers as regards to accidents in the workplace, and occupational illnesses.

Available Burmese legislation contains limited provisions for occupational, health and safety, with the exception of work undertaken in the mining industry. Here, Burmese legislation stipulates that a Chief Inspector is responsible for inspecting the health, sanitation, safety, measures taken for the prevention of accidents, and welfare of the personnel and workers in a mine, and that the holder of a

mining permit must make provisions for safety and the prevention of accidents in a mine and their implementation, implement plans relating to the welfare, health, sanitation and discipline of personnel and workers in a mine, and must report accidents and loss of life from accidents in a mine.

In Cambodia, workers of all kinds are entitled to medical assistance (benefits in kind, medical treatment and medicament as well as hospitalization) and to all surgical assistance and prostheses deemed necessary after suffering an occupational accident. Additionally, where an occupational accident leads to death or permanent disability, compensation is to be paid to the victim or his or her beneficiaries as an annuity.

Chinese Labour Law states that workers are to be given social insurance benefits in the event that they suffer from illness, injury, or a disability caused by work-related injury or occupational disease, which must be 'timely paid in full'. Additionally, employers may not revoke labour contracts where workers have 'totally or partially lost the ability to work due to occupational diseases or injuries suffered at work' or where they are receiving medical treatment for diseases or injuries.

In Lao PDR, employers must provide appropriate help to a worker who suffers from a labour accident or occupational disease, and must pay for the cost of treatment if the employee is not a member of a social insurance scheme. Furthermore, throughout the period of medical treatment and health rehabilitation, the employee shall be entitled to receive his regular salary or wages, for a period not exceeding six months.

In Thailand, employers must provide immediate medical treatment to workers who have been injured at work, or who are suffering from an occupational disease, and that they must pay for all medical expenses, including rehabilitation.

In Vietnam, employers must bear all medical expenses incurred from the time of the first aid or emergency treatment to the completion of the medical treatment in respect of an employee who was injured in a work-related accident or contracted an occupational disease.

Burma (Myanmar)

Relevant Legislation

The State Law and Order Restoration Council, *The Prevention and Control of Communicable Diseases Law* (SLORC Law No 1/95), The 5th Waning of Taboung, 1356 M.E. (20th March, 1995)¹

The State Law and Order Restoration Council, *The Myanmar Mines Law* (The State Law and Order Restoration Council Law No 8/94), The 2nd Waxing Day of Tawthalin, 1356 M.E. (6th September, 1994)²

Preventative Measures as stipulated by Law

Article 3 of the *Prevention and Control of Communicable Diseases Law* stipulates that immunisations and health education awareness activities should be undertaken by the Department of Health in order to prevent the spread of communicable diseases.

Under, Chapter III of the *Prevention and Control of Communicable Diseases Law*, the Functions and Duties of the Health Officer, Article 5 provides:

When a Principal Epidemic Disease or a Notifiable Disease occurs in an area to which a Health Officer is assigned, he shall perform the following duties:-

- (a) inspection of the infected house, food processing industry, factory, place of work, markets and shops, other necessary houses, premises, location, buildings and causing sanitation and other necessary measures to be carried out;
- (b) causing disinfection to be carried out in the locations mentioned in sub-section (a) and of articles, clothes, utensils and other household goods in such locations;
- (c) causing disinfection to be carried out in trains, motor vehicles, aircrafts, vessels and other vehicles;
- (d) causing chlorination of wells and ponds to be carried out;
- (e) causing destruction of the vector;

- (f) causing necessary measures to be carried out against transmission of disease from Principal Epidemic Disease infected corpse;
- (g) submitting and reporting the situation concerning the Principal Epidemic Disease to the relevant authorized body or person to enable the issue of the restrictive or prohibitive order under section 14;
- (h) directing the ban or destruction of food which are unfit for human consumption;
- (i) directing the destruction of or ban on the sale of food causing or suspected of causing the spread of a Principal Epidemic Disease or the closure of the factory, mill, place of work, market or shop producing or selling such food;
- (j) inspection of water supply works and laundry services and directing closure of such places if proved to be a source of transmission.

The *Myanmar Mines Law* provides in Article 25(b) that the Chief Inspector is responsible for inspecting the health, sanitation, safety, measures taken for the prevention of accidents, and welfare of the personnel and workers in a mine.

The *Myanmar Mines Law* also provides under Article 13 that a holder of a mining permit has to abide by the following safeguards:

- (c) making provisions for safety and the prevention of accidents in a mine and their implementation;
- (d) making and implementation of plans relating to the welfare, health, sanitation and discipline of personnel and workers in a mine;
- (f) reporting of accidents, loss of life and bodily injury received due to such accidents in the mine;
- (g) submission to the inspection of the Chief Inspector and inspectors.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labour Law* (1997)³

Occupational Accident

Under Article 248 of the *Cambodian Labour Law*, an accident is considered to be occupational (work-related) where the accident:

[...] happens to a worker working, or during working hours, whether or not the worker was at fault; it is the accident inflicted on the body of the worker or on an apprentice with or without wage, who is working in whatever capacity or whatever place for an employer or a manager of an enterprise. Equally, accidents happening to the worker during the direct commute from his residence to the work place and home are also considered to be work-related accidents as long as the trip was not interrupted nor a detour made for a personal or non-work-related reason.

Occupational Illness/Disease

Article 248 states that: 'All occupational illness, as defined by law, shall be considered a work-related accident and shall be remedied in the same manner'.

Medical Treatment/Rehabilitation Expenses

Article 254 stipulates that victims of work-related accidents 'shall be entitled to medical assistance (benefits in kind, medical treatment and medicaments as well as hospitalization) and to all surgical assistance and prostheses deemed necessary after the accident'.

Article 253 provides that where an occupational accident leads to death or permanent disability, compensation is to be paid to the victim or his or her beneficiaries as an annuity. In addition, 'supplementary compensation is granted to a victim who requires constant care from another person. In the event of incapacitation, compensation shall be paid no later than the fifth day after the accident'.

Loss of Wages

Under Article 252, where an occupational accident results in the temporary incapacitation of a worker for four days or less, they are entitled to continue receiving their regular wages. Where the incapacitation runs for more than four days the employer must pay the victim or his or her beneficiaries compensation.

Furthermore, Article 252 stipulates:

The victim who intentionally causes an accident shall receive no compensation. The competent tribunal can:

- reduce the compensation if it is proved that the accident was the result of an inexcusable mistake of the victim;
- increase the compensation if it is proved that the accident was the result of an inexcusable mistake of the employer or persons acting for him in management of work.

Preventative Measures as stipulated by Law

Article 250 of the *Cambodian Labour Law* provides that ‘every manager of enterprise shall manage or have someone take all appropriate measures to prevent work- related accidents’.

China

Relevant Legislation

Lao Dong Fa [Labour Law of the People’s Republic of China]
(Promulgated by the NPC Standing Committee, effective January 1, 1995), 1994 FAGUI HUIBIAN 91, 94 (Official Source)⁴

Medical Treatment/Rehabilitation Expense

Section 73 of the Chinese *Labour Law* states that workers are to be given social insurance benefits in the event that they suffer from illness, injury, or a disability caused by work-related injury or occupational disease, which must be ‘timely paid in full’.

Additionally, Section 29 provides that employers may not revoke labour contracts where workers have ‘totally or partially lost the ability to work due to occupational

diseases or injuries suffered at work' or where they are receiving medical treatment for diseases or injuries.

Preventative Measures as stipulated by Law

Section 70 of the *Labour Law* specifies that:

The State shall develop social insurance undertakings, establish a social insurance system, and set up social insurance funds so that labourers may receive assistance and compensations under such circumstances as old age, illness, work-related injury, unemployment and child bearing.

Section 52 provides that:

The employing unit must establish and perfect the system for occupational safety and health, strictly implement the rules and standards of the State on occupational safety and health, educate labourers on occupational safety and health, prevent accidents in the process of work, and reduce occupational hazards.

Under Section 53, occupational health and safety facilities must meet standards stipulated by the State. Moreover, Section 54 provides that employers 'must provide labourers with occupational safety and health conditions conforming to the provisions of the State and necessary articles of labour protection, and provide regular health examinations for labourers engaged in work with occupational hazards'.

Workers who work in specialized operations must also be provided with specialized training pertaining to their area of work [Section 55]. Section 56 further stipulates that workers 'must strictly abide by rules of safe operation in the process of their work'. Additionally, under Section 56, labourers shall 'have the right to refuse to operate if the management personnel of the employing unit command the operation in violation of rules and regulations or force labourers to run risks in operation', as well as the right to 'criticise, report or file charges against the acts endangering the safety of their life and health'.

According to Section 57, the State will be responsible for establishing a system 'for the statistics, reports and dispositions of accidents of injuries and deaths, and cases of occupational diseases'.

Lao PDR

Relevant Legislation

Lao PDR *Labour Law* 2006 (Amended)⁵

Occupational Accidents

Article 54 of the *Labour Law* defines a labour accident as:

[...] an accident that results in injury, disability, handicap or death of workers as follows:

- During the performance of duties at the workplace or at any other place under the assignment of the employer or of a person acting on behalf of the employer;
- In a recreational area, cafeteria, or any other place within the scope of responsibility of the labour unit;
- During the commute from residence to workplace. An accident that occurs during the time the worker performs personal tasks without being assigned by the employer or its representative or occurring after completion of the assigned work, shall not be considered a labour accident.

Occupational Illness/Disease

Article 54 defines an occupational disease as ‘any disease occurring as the result of an occupation’.

Medical Treatment/Rehabilitation Expenses

According to Article 55:

The employer must provide appropriate help to a worker who suffers from a labour accident or occupational disease, [and] in addition, the employer shall pay for the actual cost of the treatment or the social security organisation shall bear the costs certified by a doctor, if such employee is a member of the organisation.

Furthermore, ‘in the event that the worker suffers from a serious labour accident or occupational disease or dies, the employer must report to the nearest labour administration agency within forty-eight hours’. Article 56 outlines the allowance to be given to victims of occupational accidents or diseases:

Throughout the period of medical treatment and health rehabilitation certified by a doctor, the employee shall be entitled to receive his regular salary or wages, but not exceeding six months. If the period exceeds six months, for each exceeded month, he shall be entitled to receive only fifty percent of his salary or wages, but [the period] shall not exceed eighteen months. For a member of the social security organisation, the social security system shall be applied. Where a worker becomes handicapped or loses any organ of the body as a result of a labour accident, or an occupational disease or dies as a result thereof, the employer shall pay an allowance to the victim or to his heirs in accordance with the laws and regulations.

Death of an Employee

Under Article 55, if an employee dies as a result of a work-related accident or illness, 'the employer shall be responsible for funeral expenses as appropriate but not less than six months' salary or wages of the deceased. Furthermore, 'if a worker dies while on assignment to another workplace, the cost of transferring his body or remains to his family shall also be borne by the employer. In addition, the heirs of the deceased have the right to receive a one-time allowance in accordance with regulations'.

Thailand

Relevant Legislation

Labour Protection Act, B. E. 2541 (1998)⁶

Workmen's Compensation Act, B. E. 2537 (1994)⁷

Occupational Accidents

'Suffering from injury' is defined under Section 5 of the *Workmen's Compensation Act* as 'physical or mental injury or death suffered by an employee as the result of work employment or in the course of protecting [the] interests of the employer or according to the commands of the employer'.

Occupational Illness/Diseases

'Sickness' is defined under Section 5 of the *Workmen's Compensation Act* as 'an illness suffered by an employee as the result of work caused by diseases incidental to the nature or the condition of the work'.

Medical Treatment/Rehabilitation Expenses

Section 13 of the *Workmen's Compensation Act* stipulates that employers must provide immediate medical treatment to workers who have been injured at work, or who are suffering from an occupational disease, and that they must pay for all medical expenses. Where rehabilitation is required, Section 15 of the same Act states that employers must also cover this expense.

Funeral Costs

Section 16 of the *Workmen's Compensation Act* provides that where death results from an occupational injury the employer is to pay the funeral expenses for the victim at a rate of 100 times the highest rate of daily minimum wages. Where there is nobody to administer the funeral the employer is to arrange it themselves [Section 17, *Workmen's Compensation Act*].

Loss of Wages

Under Section 18 of the *Workmen's Compensation Act*, where an employee suffers from an injury or illness, or disappears, the employer shall pay monthly wages directly to the employee or to their beneficiary as follows:

- (1) 60% of the monthly wages where the employee is unable to work for more than three consecutive days, with the payment to be made from the first day the employee is unable to work until and throughout the time he is unable to work but not exceeding one year;
- (2) 60% of the monthly wages where the employee has lost certain organs of the body (the various categories are outlined in ministerial regulations), for a period not exceeding 10 years;
- (3) 60% of the monthly wages where the employee becomes incapacitated or permanently disabled, for a period not exceeding 15 years; [and]
- (4) 60% of the monthly wages in case of the death of employee, for a period of 8 years.

Preventative Measures as stipulated by Law

Section 100 of the *Labour Protection Act* stipulates that there should be a Committee for Safety, Occupational Sanitation and the Working Environment within the government, which has the duties of formulating policies and implementing measures concerning occupational health and safety and working environments [Section 101, *Labour Protection Act*].

Section 103 of the *Labour Protection Act* bestows power on the Minister to issue regulations determining occupational health and safety standards that employers should follow. Under Section 104 (*Labour Protection Act*):

When a labour inspector finds that an employer has violated or has failed to comply with Ministerial Regulations issued pursuant to Section 103, the labour inspector shall have power to issue a written order requiring the employer to improve the working environment, building, premises, or correctly or properly prepare or modify machinery or equipment used by an employee in the performance of his work or which is related thereto within a prescribed period of time.

Moreover, according to Section 105 of the same Act:

When a labour inspector finds that the working environment, building, premises, machinery or equipment used by employees, create hazardous conditions for those employees, or that an employer has failed to comply with an order of the labour inspector made under Section 104, the labour inspector, with the approval of the Director-General or a person delegated by the Director-General, shall have power to order the employer to temporarily cease to operate all or part of the aforesaid machinery or equipment. When an employer is required to cease to operate machinery or equipment by order of a labour inspector made under the previous paragraph, the employer shall pay the employee an amount equivalent to his basic pay for those working days when the employee is not allowed to work up until such time as the employer has fully complied with the order of the labour inspector.

Section 107 of the *Labour Protection Act* stipulates that employers shall organise medical examinations for employees, the results of which should be forwarded to the labour inspector.

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002, effective 1 January 2003)⁸

Occupational Accidents

Under Article 105 of the Vietnamese *Labour Code*, work-related accidents are those that 'injure any bodily parts or functions of an employee, or cause the death of the employee during the process of working and closely relating to performing the work or labour activity'.

Occupational Illness/Diseases

Article 106 defines occupational diseases as those 'contracted by the employee from working in a harmful environment'. The Ministry of Health and the Ministry of Labour, War Invalids and Social Affairs are to issue a list outlining the types of occupational diseases.

Medical Treatment/Rehabilitation Expenses

Article 105 states that: 'An employee who is injured in a work-related accident must be treated immediately and be fully attended to. The employer must take full responsibility for the occurrence of the work-related accident in accordance with the provisions of the law'. Similarly, in regards to occupational diseases, Article 106 states that: 'A person suffering from an occupational disease must be fully treated and have his health examined on a regular basis with separate medical records'.

Article 107 further provides that:

- (1) A person who has become disabled as a result of a work-related accident or occupational disease shall be medically assessed for classification of his disability, or to determine the reduction in his ability to work, and shall be rehabilitated. Where the employee continues to work, he shall be employed in a job which is appropriate to his health as determined by the report of the labour medical assessment council.

- (2) The employer must bear all medical expenses incurred from the time of the first aid or emergency treatment to the completion of the medical treatment in respect of an employee who was injured in a work-related accident or contracted an occupational disease. The employee shall be entitled to the regime on social insurance for work-related accidents and occupational diseases. If an enterprise has not participated in compulsory social insurance, the employer shall be obliged to pay the employee an amount of compensation equal to the amount stipulated in the *Regulations on Social Insurance*.

Loss of Wages

Article 107 of the Vietnamese *Labour Code* stipulates that employers are to be responsible for paying compensation equal to a rate of at least 30 months' wages 'and wage allowance (if any) for an employee whose ability to work has been reduced by eighty one (81) per cent or more, or for the relatives of an employee who has died as a result of a work-related accident or occupational disease which is not caused by the fault of the employee'.

Moreover, the Article states that where an employee is at fault, 'the entitlement to payment of compensation shall be at least equal to twelve (12) months' wages and wage allowance (if any)'. Finally, Article 107 states that the Government 'shall provide for the responsibility of employers and the rate of compensation for work-related accidents or occupational diseases for employees whose ability to work has been reduced by from five to less than eighty one (81) per cent'.

Preventative Measures as stipulated by Law

Article 104 stipulates that:

Persons working in dangerous or toxic environments shall be compensated in kind and be entitled to the regime of preferential treatment in respect of working hours and rest breaks in accordance with the provisions of the law. An employer must provide employees working in poisonous or contaminated environments with personal decontamination or disinfectant facilities for use after work.

International Laws relating to Wages

ILO Convention 155, Occupational Health and Safety (1981)⁹ and Protocol (2002)¹⁰

Article 1 of the Protocol to the Occupational Safety and Health Convention states that:

- (a) the term occupational accident covers an occurrence arising out of, or in the course of, work which results in fatal or non-fatal injury;
- (b) the term occupational disease covers any disease contracted as a result of an exposure to risk factors arising from work activity.

None of the GMS countries have ratified Protocol 155.

Article 4 of the Occupational Health and Safety Convention stipulates that:

1. Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.
2. The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.

Article 7 goes on to state that:

The situation regarding occupational safety and health and the working environment shall be reviewed at appropriate intervals, either over-all or in respect of particular areas, with a view to identifying major problems, evolving effective methods for dealing with them and priorities of action, and evaluating results.

Article 9 stipulates that:

1. The enforcement of laws and regulations concerning occupational safety and health and the working environment shall be secured by an adequate and appropriate system of inspection.
2. The enforcement system shall provide for adequate penalties for violations of the laws and regulations.

Article 13 provides that:

A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice.

Article 16 stipulates:

1. Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.
2. Employers shall be required to ensure that, so far as is reasonably practicable, the chemical, physical and biological substances and agents under their control are without risk to health when the appropriate measures of protection are taken.
3. Employers shall be required to provide, where necessary, adequate protective clothing and protective equipment to prevent, so far as is reasonably practicable, risk of accidents or of adverse effects on health.

China and Vietnam have ratified ILO Convention 155 on Occupational Health and Safety.

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)¹¹

Article 7(ii) (b) stipulates that everyone has the right to safe and healthy working conditions.

Cambodia, China, Thailand and Vietnam have ratified the ICESCR.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)¹²

Article 25(1) states that migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of health and safety in the workplace.

In the GMS, only Cambodia has signed, but not ratified the Migrant Workers' Convention. None of the other GMS countries have ratified nor signed the Migrant Workers' Convention.

Endnotes

- ¹ *The Prevention and Control of Communicable Diseases Law*, available at http://www.blc-burma.org/html/Myanmar%20Law/lr_e_ml95_01.html (accessed 28/09/11).
- ² *The Myanmar Mines Law*, available at http://blc-burma.org/html/Myanmar%20Law/lr_e_ml94_08.html (accessed 18/09/11).
- ³ *Cambodian Labour Law*, 1997, available at http://www.gocambodia.com/laws/labor_law.asp (accessed 16/05/11).
- ⁴ *Lao Dong Fa [Labour Law of the People's Republic of China]*, 1/01/1995, available at <http://www.usmra.com/china/Labour%20Law.htm> (accessed 16/05/11).
- ⁵ *Lao PDR Labour Law* (amended) 2006, available at [http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20\(2006\)%20Eng.pdf](http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20(2006)%20Eng.pdf) (accessed 30/05/11).
- ⁶ *Thai Labour Protection Act*, 1998, available at <http://www.thailawonline.com/th/thai-laws/laws-of-thailand/105-labor-protection-act-be-2541-1998-.html> (accessed 25/05/11).
- ⁷ *Workmen's Compensation Act*, B. E. 2537 (1994), available at http://thailaws.com/law/t_laws/tlaw0391.pdf (accessed 17/06/11)
- ⁸ *Labour Code of the Socialist Republic of Vietnam*, 23/06/1994, available at <http://www.global-standards.com/Resources/VNLaborCode1994-2002.pdf> (accessed 16/05/11).
- ⁹ *ILO Convention 155*, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C155> (accessed 14/06/11).
- ¹⁰ *Protocol 155*, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?P155> (accessed 14/06/11).
- ¹¹ *ICESCR*, available at <http://www2.ohchr.org/english/law/cescr.htm> (accessed 3/06/11).
- ¹² *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, available at <http://www2.ohchr.org/english/law/cmw.htm> (accessed 3/06/11).

Box Article

Informal Sector

According to the ILO 50 – 60% of the urban workforce in the GMS works in the informal sector, employed in small-scale activities that are often not recognized or regulated. Many different types of work can be classified as informal work, including construction, domestic work, small-scale manufacturing, sex work, fishery work, home based work, and sub-contract work.

Usually the informal sector is more flexible, meaning greater convenience for workers with families. However, for employers, the flexibility often means a lack of standardisation of labour regulations. Informal sector work is usually labour-intensive and may not require extensive training. The relationship between the employer and employee is often unwritten and informal, with little or no appreciation of industrial relations and workers rights.

Many migrants work in the informal sector, in addition to a high number of women. Jobs associated with the work women do, ie cooking, sewing, food vending and garment manufacturing, are the least well protected forms of employment and are for the most part categorized as informal.

Furthermore, informal sector workers are often invisible to labour legislators and enforcers and workers in the informal sector find it extremely onerous to use existing labour laws for protection. Often this is because they have difficulty proving the relationship that exists between themselves and their employer, or proving that they are actually formally employed, rendering it near impossible to file a formal complaint.

This is a particular problem for domestic workers, agricultural workers and workers working in supply chains. The omission to include workers in the informal sector in labour legislation prevents them from enjoying adequate labour and social protection, impacting on their well-being .

Informal sector workers need regulated working conditions that recognize and support their flexibility, rather than punishing them for it. Different groups of informal sector workers encounter different workplace problems. However, the most common are poor lighting, lack of ventilation, excessive heat, poor housekeeping, inadequate workspace, poor work tools and workplace design, awkward posture, exposure to dangerous chemicals, lack of clean water and

other basic welfare facilities, and long working hours. Workers accept this situation because they are simply preoccupied with survival and not fully aware of workplace hazards.

No established mechanisms exist to monitor workplace injuries and illnesses in the informal sector, as they do in the formal sector. Injuries often go unreported and are settled by operators and workers, sometimes through small cash payments or termination of employment. Even for severe injuries, where they are not enrolled in a social protection scheme, workers are frequently deprived of benefits that would otherwise have been available. It is often hard to establish the relationship between work and the illness the worker might be suffering from.

Section 6

Women and Maternity Protection



Female migrant workers working on a construction site.
Chiang Mai, Thailand, 2006.

Overview

Women are entitled to 90 days of maternity leave in Cambodia, China, Lao PDR and Thailand. In Vietnam, women may take a total of four to six months maternity leave prior to and after childbirth.

Women are entitled to 100 percent paid maternity leave in China, Lao PDR and in Vietnam. In Thailand they are entitled to 100 percent paid maternity leave for up to 45 days, and under *Cambodian Labour Law*, women who take maternity leave are entitled to half of their normal wage, to be paid by the employer.

In Cambodia, China, Lao PDR and Vietnam, for one year following childbirth breastfeeding mothers are entitled to a one-hour break per day.

There are prohibitions against terminating a woman in employment because of her pregnancy in the labour legislation of Cambodia, China, Thailand and Vietnam.

Burma (Myanmar)

Relevant Legislation

None available.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labour Law* (1997)¹

Maternity Leave

Women are entitled to 90 days of maternity leave [Article 182, *Cambodian Labour Law*].

Maternity Pay

According to Article 183 of the *Cambodian Labour Law*, women who take maternity leave are entitled to half of their normal wage, to be paid by the employer.

Breast-feeding/Care Breaks

For one year following childbirth, breastfeeding mothers are entitled to a one-hour break (or two 30 minute breaks) per day [Article 184, *Cambodian Labour Law*].

Prohibition against Terminating a Female Employee because of her Pregnancy

In place as per Article 182 of the *Cambodian Labour Law*.

Alteration of Duties during Pregnancy

After maternity leave and during the first two months after returning to work, female employees are only expected to perform light work [Article 182].

Stipend/Payment upon Delivery of Child

None mentioned.

Other Protective Provisions

Enterprises employing more than 100 women are required to establish nursing rooms and day care centres for their employees. Enterprises not able to establish such facilities have to pay for the costs of childcare for their employees [Article 186].

China

Relevant Legislation

Social Insurance Law (Adopted at the 17th meeting of the Standing Committee of the Eleventh National People's Congress on October 28, 2010)²

Lao Dong Fa [Labour Law of the People's Republic of China] (Promulgated by the NPC Standing Committee, effective January 1, 1995), 1994 FAGUI HUIBIAN 91, 94 (Official Source)³

Labour Act (5 July 1994)⁴

Regulations Concerning the Labour Protection of Female Staff and Workers (1988)⁵

Under China's one child policy, first implemented in 1979 in order to control the country's birth rate, couples from the Han majority who live on the Chinese mainland are restricted from having more than one child.⁶ Rural couples, foreigners, ethnic minorities and parents who are only children themselves are exempt from the policy. As a consequence of the Family Planning Policy, women to whom this policy applies who have more than one child may not be entitled to maternity protection under Chinese law, including being unable to access benefits such as paid maternity leave.

Maternity Leave

Due to the general family planning policy of the country, late marriage (i.e. after the age of 23 years) and late child delivery (i.e. after the age of 24 or as a result of late marriage) will entitle the female employee to extra maternity leave [Article 62, PRC Labour Law].

Maternity Pay

Women are entitled to 100 percent paid maternity leave, according to Section 62 of the *Labour Act*.

Breast-feeding/Care breaks

Before the child attains one year of age, the mother is entitled to a one hour break every working day for the purposes of nursing her child [Article 9, *Regulations Concerning the Labour Protection of Female Staff and Workers*].

Prohibition against Terminating a Female Employee because of her Pregnancy

In place as per Article 29(3) of the Chinese *Labour Law*.

Alteration of Duties during Pregnancy

According to Articles 61 and 63 of the *Labour Law*, pregnant and breast-feeding should not be required to perform labour-intensive duties, or to work overtime, or at night-time.

Stipend/Payment upon Delivery of Child

Article 54 of the *Social Insurance Law* of the People's Republic of China⁷ (Adopted at the 17th meeting of the Standing Committee of the Eleventh National People's Congress on October 28, 2010) states that:

If the employing entity has paid the maternity insurance premium, its worker shall enjoy maternity insurance benefit. The spouse of the worker who is not in employment will be paid the benefit of medical fees associated with giving birth. The amount required shall be paid from the maternity insurance fund.

Maternity insurance benefits include the medical fees associated with giving birth and maternity subsidy.

Under Article 55, the medical fees associated with giving birth include:

- (1) medical fees associated with giving birth;
- (2) medical fees associated with planned birth;
- (3) fees for other items in accordance with the provisions of the laws and regulations.

Other Protective Provisions

According to Article 61 of the Chinese *Labour Law*, 'it is forbidden to engage women workers during their pregnancy in work with Grade III physical labour intensity as stipulated by the State or other work the State prevents them from doing during pregnancy'. Furthermore, 'it is forbidden to prolong the work hours of women workers pregnant for seven months or ask them to work night shifts'.

Lao PDR

Relevant Legislation

Lao PDR *Labour Law*, 2006 (Amended)⁸

Maternity Leave

Women are entitled to at least 90 days of maternity leave, 42 days of which must be taken after giving birth [Article 39, Lao PDR *Labour Law*].

Maternity Pay

Under the Laotian *Labour Law*, women are entitled to maternity pay at 100 percent of her normal wage, to be covered by their employers, or by the social security fund if her contributions have been paid in full [Article 39].

Breast-feeding/Care Breaks

In the first 12 months after giving birth female employees are entitled to a daily break of one hour in order to nurse or take care of their child, if they place their child in a nursery or bring the child to the workplace [Article 39].

Prohibition against Terminating a Female Employee because of her Pregnancy

No information available.

Alteration of Duties during Pregnancy

If a pregnant employee normally stands for long periods or carries heavy loads, then her employer must assign her different work at her normal salary (for no more than three months) [Article 39].

Stipend/Payment upon Delivery of Child

A woman worker shall, upon giving birth, be entitled to an allowance of at least 60 percent of the minimum wages to be paid by the employer or by the social security fund, if contributions to the social security fund have been fully paid. Where she gives birth to two or more children at the same time, [she] will receive an additional allowance of fifty percent of the maternity allowance. In the case of a miscarriage, which is certified by a doctor, [she] is also entitled to this allowance [Article 40].

Other Protective Provisions

In the event that as a result of giving birth a woman worker is ill, and this is certified by a doctor, she shall be authorised to take additional leave of at least thirty days with payment of 50 per cent of her salary or wages. In the event that the woman worker suffers a miscarriage, she is entitled to take leave for a certain period as determined by a doctor, and to receive normal payment of salary or wages [Article 39].

Thailand

Relevant Legislation

Labour Protection Act, B. E. 2541 (1998)⁹

Social Security Act, BE. 2533 (1990)¹⁰

Maternity Leave

Women are entitled to maternity leave of up to 90 days [Section 41, *Labour Protection Act*].

Maternity Pay

Under Thai Law, women are entitled to maternity pay at 100 per cent of her normal wage to be paid by their employer for up to 45 days, and 50 per cent paid from the social welfare fund for up to 90 days [Section 59, Thai *Labour Protection Act* and Section 67, Thai *Social Security Act*].

Breast-feeding/Care Breaks

None mentioned.

Prohibition against Terminating a Female Employee because of her Pregnancy

In place as per Section 43 of the Thai *Labour Protection Act*.

Alteration of Duties during Pregnancy

Pregnant employees who can no longer fulfil their original duties may request that their duties are temporarily changed to something more suitable (a valid medical certificate is required) [Section 42, *Labour Protection Act*].

Stipend/Payment upon Delivery of Child

Payments are made from the social welfare fund to the employee for the purposes of covering obstetric fees, medical treatment fees, childbirth fees, pharmacy and medical equipment fees, ambulance fees and nursing services fees [Section 66, Thai *Social Security Act*].

Other Protective Provisions

Employers are prohibited from requiring pregnant employees to work at night, on water vessels, to use equipment that vibrates, to operate or go on a mechanically operated vehicle, or to lift, pull or push anything over 15 KGs [Section 39, Thai *Labour Protection Act*].

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002)¹¹

Maternity Leave

Under Vietnamese law, a woman may take a total of four to six months maternity leave prior to and after childbirth, depending on the type of work and whether it is heavy, harmful or in a remote location. Where a female employee gives birth to more than one child at one time, she is entitled to an additional 30 days leave for every additional child calculated from the second child onwards. The employee may take extra leave without pay at the end of the maternity leave [Article 114].

Maternity Pay

Women who give birth are entitled to 100 per cent paid leave, taken from the social security fund, and an additional allowance of one month's wages, as long as the employee has contributed to the fund [Article 144].

Breast-feeding/Care Breaks

Vietnamese Law stipulates that female employees nursing a child under the age of 12 months may take a break of 60 minutes everyday with full pay [Article 115 (3)].

Prohibition against Terminating a Female Employee because of her Pregnancy

In place as per Article 113(3) of the *Labour Code*.

Alteration of Duties during Pregnancy

A female employee who is employed in heavy work and is in her seventh month of pregnancy shall be either transferred to lighter duties or entitled to work one hour less every day and still receive the same wage [Article 115(2)].

Stipend/Payment upon Delivery of Child

None mentioned.

Other Protective Provisions

Where a pregnant employee has a medical certificate that states that her unborn foetus may be harmed by continuing to work she may unilaterally end her labour contract without having to pay compensation to the employer. Employees who are seven months or more pregnant shall not be required to work at night-time, overtime or in distant locations. Enterprises with a high number of female employees must help set up day care centres and kindergartens, or must help pay some of the costs borne by employees in regards to nursing and schooling. Female employees may take paid leave from the social welfare fund or paid by the employer for the following: to attend pregnancy examinations; to carry out family planning programs, to have medical treatment as a consequence of suffering a miscarriage, to attend to a sick child under seven years of age, or to adopt a newborn baby. Where another person looks after the sick child instead of the mother, the mother shall still be entitled to social insurance benefits [Articles 112, 115(2), 116(2) and 117 of the *Labour Code*].

Maternity Protection under International Law

ILO Convention 183, Maternity Protection (2000)¹²

Article 3 of ILO Convention 183 stipulates that:

Each Member shall, after consulting the representative organizations of employers and workers, adopt appropriate measures to ensure that pregnant or breastfeeding women are not obliged to perform work which has been determined by the competent authority to be prejudicial to the health of the mother or the child, or where an assessment has established a significant risk to the mother's health or that of her child.

Furthermore, the Convention states that upon production of a medical certificate, women who have given birth are entitled to no less than 14 weeks of maternity leave [Article 4(1)]. This includes a compulsory period of 6 weeks leave after childbirth [Article 4(4)].

Article 6 states that cash benefits should be provided to women who are absent from work on maternity leave 'at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living'.

Article 8 provides that it is unlawful to dismiss a female employee during or after her maternity leave 'except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing'. Furthermore, Article 8 states that: 'the burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer'.

Under Article 8(2), a woman 'is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave'. Article 9(1) stipulates that: 'each Member shall adopt appropriate measures to ensure that maternity does not constitute a source of discrimination in employment, including [...] access to employment'.

Finally, under Article 10, women who have given birth should be provided with daily rest periods or a reduction in work hours for the purposes of breastfeeding her child. These rest breaks are to be counted as working time and 'remunerated accordingly' [Article 10(2)].

None of the GMS countries have ratified ILO Convention 183.

Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) (1979)¹³

Article 2 of CEDAW condemns discrimination against women in all its forms. Article 11(2) elaborates that in order to prevent discrimination against women, states parties shall take appropriate measures to, amongst other things, 'prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave', to introduce maternity leave with pay, to 'encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities', and to 'provide special protection to women during pregnancy in types of work proved to be harmful to them'.

Article 12 also provides that appropriate measures should be taken to ensure that women have access to health care services, including family planning services and other services 'in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation'.

All of the GMS countries have ratified CEDAW.

ILO Convention 156, Workers with Family Responsibilities (1981)¹⁴

Article 3 of ILO Convention 156 urges States to ensure that national policy enables persons with family responsibilities the capacity to work without discrimination and 'without conflict between their employment and family responsibilities'.

Furthermore, Article 5 states that: 'All measures compatible with national conditions and possibilities shall further be taken a) to take account of the needs of workers with family responsibilities in community planning; (b) to develop or promote community services, public or private, such as child-care and family services and facilities'. Article 7 provides that states should enable workers with family responsibilities 'to become and remain integrated in the labour force, as well as to re-enter the labour force after an absence due to those responsibilities'. Finally, Article 8 prohibits termination of employment for reasons related to family responsibilities.

None of the GMS countries have ratified ILO Convention 156.

ILO Resolution Concerning the Promotion of Gender Equality, Pay Equity and Maternity Protection (2004)¹⁵

The Resolution calls on all governments to ‘eliminate all forms of gender discrimination in the labour market and to promote gender equality between women and men and to dismantle barriers which prevent women from obtaining economic autonomy through their labour market participation on an equal footing with men’.

Endnotes

- ¹ *Cambodian Labour Law*, 1997, available at http://www.gocambodia.com/laws/labor_law.asp (accessed 16/05/11).
- ² *Social Insurance Law*, 28/10/2010, unofficial translation, available at <http://www.grandfieldlaw.com/en/newsdetail.asp?ProductID=351&CategoryID=25> (accessed 26/08/11).
- ³ *Lao Dong Fa [Labour Law of the People’s Republic of China]*, 1/01/1995, available at <http://www.usmra.com/china/Labour%20Law.htm> (accessed 16/05/11).
- ⁴ *Labour Act*, 5/07/1994, available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/37357/64926/E94CHN01.htm> (accessed 16/05/11).
- ⁵ *Regulations Concerning the Labour Protection of Female Staff and Workers*, 1988, available at <http://www.nwccw.gov.cn/?action-viewnews-itemid-140638> (accessed 20/10/2011).
- ⁶ Information Office of the State Council Of the People’s Republic of China, August 1995, Beijing, *Family Planning in China White Paper*, official translation available at <http://www.china.org.cn/e-white/familypanning/index.htm> (accessed 20/10/11).
- ⁷ *Social Insurance Law*, 28/10/2010, unofficial translation, available at <http://www.grandfieldlaw.com/en/newsdetail.asp?ProductID=351&CategoryID=25> (accessed 26/08/11).
- ⁸ *Lao PDR Labour Law (amended) 2006*, available at [http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20\(2006\)%20Eng.pdf](http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20(2006)%20Eng.pdf) (accessed 30/05/11).
- ⁹ *Thai Labour Protection Act*, 1998, available at <http://www.thailawonline.com/th/thai-laws/laws-of-thailand/105-labor-protection-act-be-2541-1998-.html> (accessed 25/05/11).
- ¹⁰ *Thai Social Security Act (1990)*, available at http://thailaws.com/law/t_laws/tlaw0391.pdf (accessed 6/06/11).
- ¹¹ *Labour Code of the Socialist Republic of Vietnam*, 23/06/1994, (amended 2 /04/2002), available at <http://www.global-standards.com/Resources/VNLaborCode1994-2002.pdf> (accessed 16/05/11).
- ¹² *ILO Convention 183*, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C183> (accessed 8/06/11).
- ¹³ *CEDAW*, 1979, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (accessed 8/06/11).
- ¹⁴ *ILO Convention 156*, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C156> (accessed 8/06/11).
- ¹⁵ *ILO Resolution on the Promotion of Gender Equality, Pay and Maternity Protection*, available at <http://www.ilo.org/gender/> (accessed 8/06/11).

Section 7

Child Labour

Overview

In Cambodia, Vietnam and Thailand, the minimum age for employment is 15 years, and in China it is 16 years, except where government authorities provide approval for minors to work in certain industries, including literature, art, physical culture, and special crafts.

In Burma, it is prohibited to employ or permit a child to perform work that is hazardous to their life, health, or moral character, or to work with alcohol. It is also prohibited to make use a child to beg, or in pornographic cinema, video, or photography, to allow a girl child under guardianship below the age of 16 to earn a livelihood by prostitution, or to require imprisoned children or youth to undertake rigorous labour whilst in prison.

In Cambodia, children between the ages of 12 and 15, and in Thailand those between 13 and 15, are permitted to perform light work. In Lao PDR an employer may employ children who are at least fourteen years of age and less than eighteen years of age, provided that they do not work for more than eight hours a day and are not employed in sectors involving the performance of heavy work or that are dangerous to their health.

In Cambodia, minors of less than eighteen years old cannot be employed in underground mines or quarries. Similarly, in China juvenile workers are prohibited from working down mine shafts, from doing work that is poisonous or harmful, or from doing any other dangerous work that they should avoid.

In Lao PDR, those under the age of 18 are not allowed to work in all types of mining, in production activities that use chemicals, explosives or toxic substances, in work involving the handling of human corpses, to do overtime work, to work

in environments with excessive noise pollution, to work in places that serve alcohol or with gambling facilities, or to work at night from 10 pm to 5 am.

In Thailand, children below the age of 18 years are prohibited from performing dangerous work such as rolling and stamping metal, or work dealing with unsafe chemicals and poisonous microorganisms. Children below the age of 18 years are also strictly prohibited from working in certain establishments such as gambling centres, slaughterhouses, dance clubs, or venues where liquor is served. An employer should not ask a child employee below 18 years to work overtime or on holidays.

In Vietnam, it is prohibited to employ junior workers in heavy or dangerous work, work requiring contact with toxic substances, or work that will have adverse effects on a child's personality.

Burma (Myanmar)

Relevant Legislation

*The Child Law (Law No. 9/93)*¹

Types of Work Prohibited

Article 65 stipulates:

Whoever commits any of the following acts shall, on conviction be punished with imprisonment for a term which may extend to 6 months or with fine which may extend to kyats 1000 or with both:-

- (a) employing or permitting a child to perform work which is hazardous to the life of the child or which may cause disease to the child or which is harmful to the child's moral character;
- (b) [...] employing or permitting the child to work in the business which trades in alcohol.

Article 66 further provides:

Whoever commits any of the following acts shall, on conviction be punished with imprisonment for a term which may extend to 2 years or with fine which may extend to kyats 10,000 or with both: -

- (a) neglecting knowingly that a girl under his guardianship, who has not attained the age of 16 is earning a livelihood by prostitution;
- (c) employing a child to beg for his personal benefit; failing to prevent a child under his guardianship from begging; making use of the child in any manner in his livelihood of begging;
- (f) using the child in pornographic cinema, video, television photography.

Additional Protective Measures

Article 24 states:

- (a) Every child has -
 - (i) the right to engage in work in accordance with law and of his own volition-
 - (ii) the right to hours of employment, rest and leisure and other reliefs prescribed by law;
- (b) The Ministry of Labour shall protect and safeguard in accordance with law to ensure safety of children employees at the place of work and prevention of infringement and loss of their rights.

Article 52 provides that an officer in charge of a prison will not ('in respect of a child or youth who has been sentenced to imprisonment') employ him in rigorous labour.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labour Law* (1997)²

Minimum Age of Employment

Article 177(1) of the *Cambodian Labour Law* (1997) stipulates that the minimum allowable age for paid employment in Cambodia is 15 years, however children between the ages of 12 and 15 may be employed to do light work based on the following conditions: that the work is not hazardous to their health or mental and physical development [Article 177(4)(A)], that the child receives adequate instruction and training [Article 177(3)], and so long as the work does not affect their regular school attendance or their participation in guidance programs and vocational training opportunities [Article 177(4)(b)].

Working Hours

Article 175 of the *Cambodian Labour Law* (1997) provides that children under the age of 18 may not perform night work, except where the Ministry in Charge of Labour provides a special dispensation for a child over the age of 16 to perform night work due to the nature of the industry in which the child wishes to work (i.e. one that must operate day and night). The Ministry in Charge of Labour in

consultation with the Labour Advisory Committee is also mandated to determine the maximum number of hours or work authorised for children aged between 12 and 15 via ministerial order (a *Prakas*) [Article 177(5)].

Types of Work Prohibited

Minors of less than eighteen years old cannot be employed in underground mines or quarries [Article 174].

Additional Protective Measures

Lists of working children below the age of 18 must be kept by employers and submitted to the labour inspector. These children must have their guardians' consent in order to work. Furthermore, the labour inspector can request a physician to examine children, in order to ensure their work is not beyond their physical capabilities. In orphanages and charitable institutions, vocational training for children under the age of 14 must not exceed three hours per day. Finally a record of children's working conditions in orphanages must be submitted to the labour inspector every year [Articles 179 – 181].

China

Relevant Legislation

Lao Dong Fa [*Labour Law of the People's Republic of China*] (Promulgated by the NPC Standing Committee, effective January 1, 1995), 1994 FAGUI HUIBIAN 91, 94 (Official Source)³

Labour Act (5 July 1994)⁴

Jinzhi Shiyong Tonggong Guiding [*The Provisions on the Prohibition of Using Child Labour*] (Promulgated by the State Council, effective April 15, 1991, amended October 1, 2002, effective December 1, 2002), 2002 FAGUI HUIBIAN 1210 (Official Source)⁵

Minimum Age of Employment

The recruitment of young people under the age of 16 is prohibited under Article 15 of the *Labour Law* and Articles 4-7 of the *Provisions on the Prohibition of Using Child Labour*, except where government authorities provide approval for minors to work in certain industries, including literature, art, physical culture, and special crafts. The child's right to compulsory education must not be adversely affected.

Article 2 of the *Provisions on the Prohibition of Using Child Labour* (hereafter referred to as the *Child Labour Provisions*) defines a child labourer as a juvenile or child under the age of 16 years who is engaged in a working relationship with a unit or an individual and who is working for economic income, or who ‘engages in labour under sole proprietorship’. The following fall outside of the category of child labour under Article 2 of the *Child Labour Provisions*: ‘juveniles or children under 16 years old who participate in family chores, labour courses organised by their schools, and auxiliary labour activities that do not harm their physical and psychological health and are not beyond their physical capacity and which are permitted by the people’s government of the province, autonomous region or municipality’.

Working Hours

The People’s Republic of China does not have a law that specifies different working hours for children over other labourers. Section 36 of the *Labour Act* [Article 36 of the *Labour Law*] specifies that labourers shall work for no more than 8 hours a day and 44 hours a week on average. Section 38 of the *Labour Act* [Article 38 of the *Labour Law*] provides that workers should be given one day off per week.

Types of Work Prohibited

No juvenile workers shall be employed to engage in work down mine shafts, to do work that is poisonous or harmful, or to do any other dangerous work that they should avoid, pursuant to Article 15 of the *Labour Law*, and Section 63 of the *Labour Act*. Using child labour without government approval may result in a RMB 5,000 (equivalent to about USD660) fine per child worker, per month employed.

Additional Protective Measures

Article 7 of the *Child Labour Provisions* stipulates that ‘parents or other custodians shall not permit their children or juveniles under custody under 16 years old to engage in child labour’. Article 10 of the *Child Labour Provisions* further provides that any department or individual that employs child labour in contravention of the labour provisions will bear the cost of sending the child back to their home, and that any costs incurred by a child labourer who becomes ill or disabled as a result of working shall be paid by the employer. Article 11 of the *Child Labour Provisions* also states that employers shall pay compensation to any child labourers who become sick or disabled as a result of work, including compensation to the family of a child labourer in the event of his or her death.

Lao PDR

Relevant Legislation

Lao PDR *Labour Law* 2006 (Amended)⁶

Minimum Age of Employment

Article 41 of the amended *Labour Law* provides that ‘an employer may employ children who are at least fourteen years of age and less than eighteen years of age, provided that they do not work for more than eight hours a day and are not employed in sectors involving the performance of heavy work or that are dangerous to their health’.

Working Hours

Children under 18 are not permitted to work for more than eight hours a day or at night-time [Article 41].

Types of Work Prohibited

The following types of work are prohibited for those under the age of 18, under Article 41 of the amended *Labour Law*:

- All types of mining;
- Production activities that use chemicals, explosives or toxic substances;
- Work involving the handling of human corpses;
- Overtime time;
- Work in environments with excessive noise pollution;
- Work in places that serve alcohol or with gambling facilities;
- Work at night from 10 pm to 5 am.

Additional Protective Measures

The Lao *Labour Law* does not provide any additional protective measures that pertain specifically to children. However, Article 42 lists certain protective measures that employers must adhere to in regards of all employees, including: taking necessary measures to ensure the safety and hygiene of workers; providing labourers with occupational health and safety training; and arranging for workers to undergo a medical examination at least once a year.

Thailand

Relevant Legislation

*Labour Protection Act, B.E. 2541 (1998)*⁷

Minimum Age of Employment

The minimum age for employing a child is 15 years [Section 44]. Children between the ages of 13 and 15 are permitted to perform light work.

Working Hours

An employer is required to give a child employee a rest period of one hour for every four hours he or she has worked [Section 46]. An employer should not ask a child employee below 18 years of age to work overtime or on holidays [Section 48]. Additionally, children are not permitted to work at night between the hours of 10 pm and 6 am, unless special permission is granted by the Director-General [Section 47].

Types of Work Prohibited

Pursuant to Section 49, children below the age of 18 years are prohibited from performing dangerous work such as rolling and stamping metal, or work dealing with unsafe chemicals and poisonous microorganisms. Children below the age of 18 years are also strictly prohibited from working in certain establishments, such as gambling centres, slaughterhouses, dance clubs, or venues where liquor is served.

Additional Protective Measures

Where a child under the age of 18 years has been employed, the employer must: 'notify the labour inspector within 15 days of the date when the child commences work, prepare a record of employment conditions that should be kept on the premises, and notify the labour inspector in the case of the dismissal of a child employee within seven days of termination of employment' [Section 45].

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002)⁸

Law on Child Protection, Care and Education, Socialist Republic of Vietnam, 15 June 2004 (No. 25/2004/QH11)⁹

Minimum Age of Employment

Article 120 provides that: 'Employment of persons under the age of fifteen (15) years is prohibited, except in a number of trades and occupations stipulated by the Ministry of Labour, War Invalids and Social Affairs'.

Working Hours

The working hours of a junior worker shall not exceed seven hours per day or 42 hours per week. An employer shall only be permitted to employ junior workers for overtime or nightshift work in trades and occupations stipulated by the Ministry of Labour, War Invalids and Social Affairs [Article 122].

Types of Work Prohibited

Article 121 states that: 'an employer shall only be permitted to employ a junior worker in jobs which are suitable to the health of the junior worker to ensure the development and growth of the worker's body, mind, and personality'. It is therefore prohibited to employ junior workers in heavy or dangerous work, work requiring contact with toxic substances, or work that will have adverse effects on a child's personality.

Article 7(7) of the Vietnamese *Child Protection Law* additionally provides that: 'Abusing child labour, employing children for heavy or dangerous jobs, jobs in exposure to noxious substances or other jobs in contravention with the provisions of the labour legislation' is strictly prohibited.

Additional Protective Measures

Article 120 provides that: 'In trades and occupations where the employment of persons under the age of fifteen (15) years for work, training, or apprenticeship is permitted, there must be approval of and monitoring by the parents or guardian'. Article 119 specifically prohibits the abuse of junior workers (under the age of 18), and further stipulates that employers must maintain 'separate

records containing the full names, dates of birth, current employment positions, and regular health reports of the junior workers', to be produced upon request by a labour inspector.

Child Labour under International Law

The Convention on the Rights of the Child (1990)¹⁰

Article 1 of the Convention on the Rights of the Child (CRC) defines a child as a human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier.

Article 32 of the CRC further provides that:

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous, or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
 - (a) Provide for a minimum age or minimum ages for admission to employment;
 - (b) Provide for appropriate regulation of the hours and conditions of employment; [and]
 - (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

All of the GMS countries have ratified the CRC.

ILO Conventions 138 and 182¹¹

The ILO Minimum Age Convention, 1973 (No. 138) and the 1999 Worst Forms of Child Labour Convention (No. 182) define child labourers as those under the age of 12 working in economic activities, children aged between 12 and 14 years who are performing more than light work, and 'all children engaged in the worst forms of child labour – in which they are enslaved, forcibly recruited, prostituted, trafficked, forced into illegal activities or exposed to hazards'.¹²

Article 2 of the ILO Minimum Age Convention, 1973 (No. 138) provides that the minimum age for any type of employment is 15 years, and for employment or work that may jeopardise the health, safety or morals of young people, the minimum age requirement increases to 18 years [Article 3]. Article 7 further stipulates that national laws may permit those aged between 13-15 years to perform light work, so long as it is not likely to harm their health or development, and will not affect their attendance at school or participation in vocational training.

Of the GMS countries, all except Burma have ratified ILO Conventions 138 and 182.

Endnotes

- ¹ The Child Law (Law No. 9/93), 1993, unofficial translation available at http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=MMR (accessed 28/09/11).
- ² *Cambodian Labour Law*, 1997, available at http://www.gocambodia.com/laws/labor_law.asp (accessed 16/05/11).
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- ⁶ *Lao PDR Labour Law* (amended) 2006, available at [http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20\(2006\)%20Eng.pdf](http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20(2006)%20Eng.pdf) (accessed 30/05/11).
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- ⁸ *Labour Code of the Socialist Republic of Vietnam*, 23/06/1994, (amended 2 /04/2002), available at <http://www.global-standards.com/Resources/VNLaborCode1994-2002.pdf> (accessed 16/05/11).
- ⁹ *Law on Child Protection, Care and Education*, Socialist Republic of Vietnam, 15 June 2004 (No. 25/2004/QH11), unofficial translation available at <http://www.hsph.harvard.edu/population/trafficking/vietnam.child.04.doc> (accessed 28/10/11)
- ¹⁰ *Convention on the Rights of the Child*, 1990, available at <http://www2.ohchr.org/english/law/crc.htm#art32> (accessed 12/05/11).

- ¹¹ *ILO Minimum Age Convention*, 1973 (No. 138), available at <http://www2.ohchr.org/english/law/ageconvention.htm> (accessed 16/05/11); and *ILO Worst Forms of Child Labour Convention*, 1999 (No. 182), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (accessed 16/05/11).
- ¹² *UNICEF Child Protection Information Sheet, Child Labour*, available at http://www.unicef.org/protection/files/Child_Labour.pdf, p. 1 (accessed 16/05/11). For the definition of the 'worst forms of child labour' see Article 3 of the *ILO Worst Forms of Child Labour Convention*, 1999 (No. 182), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (accessed 16/05/11).

Section 8

Collective Bargaining



Migrant workers working in a fishing net factory who joined a protest.
Khon Kaen, Thailand, 2010.

Overview

Collective agreements: Cambodia, China, Thailand and Vietnam all have legislation that allows employees to conclude collective contracts with employers.

Cambodian legislation specifies that a collective agreement must be signed by an employer or group of employers or one or more organisations who are acting as representatives for the employer/s, and on the other hand, one or more trade unions that act as representation for the employees. Chinese legislation specifies that: 'Collective contracts shall be signed by and between the trade union on behalf of the employees and the employer. In an enterprise that has not yet set

up a trade union, such contracts shall be signed by and between representatives recommended by workers and the enterprise' [Article 33 of the Chinese Labour Law].

In Thailand, agreements must be negotiated and signed by representatives of the employees (elected by a minimum 15% of the workforce) and employers (the representative of the employer must be a director, shareholder, regular employee or Committee member) [Section 13, *Labour Relations Act*]. In Vietnam, a collective agreement must be negotiated and signed by the representative of the labour collective and the employer based on the principles of voluntary commitment and fairness, and must be made public.

In Vietnam, a collective agreement may run for a period of one to three years, except where an enterprise has signed an agreement for the first time, in which case it may be for less than one year. In Thailand a collective agreement should not exceed three years, and similarly in China a collective contract should run for one to three years.

Strikes: In Vietnam, the labour collective has the right to strike where conciliation at the labour arbitration council level has failed. Similarly, in Thailand employees may strike where conciliation fails. Laotian legislation strictly prohibits workers or their representatives from calling a work stoppage in a wide variety of situations. In China, the right to strike was removed from the Constitution in 1982, and the revised *Trade Union Law* does not use the term 'strike' (*bagong*) but instead refers to instances of 'work stoppages' (*tinggong*) and 'go-slows' (*daigong*). In Cambodia, the right to strike and to implement a lockout are guaranteed. These rights can be exercised by one of the parties to a dispute in the event of rejecting the arbitral decision.

1. Collective Agreements

Burma (Myanmar)

Relevant Legislation

None available.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labour Law* (1997)¹

Definition/Purpose

Article 96 of the *Cambodian Labour Law* sets out the scope and purpose of collective bargaining agreements in Cambodia, stating that:

The purpose of the collective agreement is to determine the working and employment conditions of workers and to regulate relations between employers and workers as well as their respective organizations. The collective agreement can also extend its legally recognised roles to trade union organizations and improve the guarantees protecting workers against social risks.

Interaction with National Legislation and Contractual Agreements

Article 98 of the *Cambodian Labour Law* provides that collective bargaining agreements may offer terms that are more favourable in effect towards workers than those contained in the national labour legislation. In the event that a labour contract negotiated between an employer and employee contains terms that are less favourable to the employee than those contained in an extant collective

bargaining agreement, they will be nullified immediately and replaced with the provisions of the relevant agreement [Article 98]. Collective agreements must not contravene public order provisions as outlined in the national legislation.

Negotiation and Signing of Collective Agreements

Cambodian legislation specifies that a collective agreement must be signed by an employer or group of employers, or one or more organisations who are acting as a representative for the employer/s, and on the other hand, one or more trade unions that act as representation for the employees [Article 96]. Article 96 provides that during transitional periods where a trade union representative does not exist to act on behalf of workers, then the collective agreement may be negotiated instead between the employer and the 'shop stewards who have been duly elected as per the conditions of Section 3, Chapter XI' of the *Labour Law*.

Implementation and Duration of Collective Agreements

Article 96 stipulates that collective bargaining agreements may be either for a specified or unspecified term. In the case where the duration of the agreement is defined, the *Cambodian Labour Law* stipulates that it must not exceed three years and that it shall remain in effect following the expiration of the time period unless cancelled (a period of three months notice is required before cancellation). Where the duration of the agreement is undefined, it may also be cancelled, however the party who seeks to cancel the agreement will continue to be bound by its terms for a period of one year after notification of intention to cancel is received. The notice of cancellation 'does not prevent the agreement from being implemented by the other signatories'.

Content

Collective agreements must set out the exact scope of their application. According to Article 96, the agreement may cover 'an enterprise, a group of enterprises, an industry or branch of industry, or one or several sectors of economic activities'. Moreover, the *Labour Law* specifies that the collective agreement must apply to 'all employers concerned and all categories of workers employed in the establishments as specified by the collective agreement' [Article 97]. Finally, Article 98 stipulates that the terms contained in the agreement may be more favourable to workers than provided for in national legislation.

China

Relevant Legislation

Lao Dong Fa [Labour Law of the People's Republic of China] (Promulgated by the NPC Standing Committee, effective January 1, 1995), 1994 FAGUI HUIBIAN 91, 94 (Official Source)²

Labour Act (5 July 1994)³

Provisions on Collective Contract (2004)⁴

Law of the PRC on Employment Contracts (2008)⁵

Content

Article 33 of the *Labour Law* provides that ‘the employees of an enterprise as one party may conclude a collective contract with the enterprise as another part on labour remunerations, work hours, rests [sic] and leaves [sic], labour safety and sanitation, insurance welfare treatment, and other matters’. [See also Article 3 of the *Provisions on Collective Contract*]. Section 33 of the *Labour Act* also adds that Occupational Health and Safety may form part of the collective agreement.

Article 51 of the *Law on Employment Contracts* stipulates:

After bargaining on an equal basis, enterprise employees, as one party, and their Employer may conclude a collective contract on such matters as labor compensation, working hours, rest, leave, work safety and hygiene, insurance, benefits, etc.

Interaction with National Legislation and Individual Contractual Agreements

Section 35 of the *Labour Act* [as well as Article 6 of the *Collective Contract Provisions*] stipulates that:

Collective contracts concluded in accordance with the law shall have binding force to both the enterprise and all of its staff and workers. The standards on working conditions and labour payments agreed upon in labour contracts concluded between individual labourers and the enterprise shall not be lower than those as stipulated in collective contracts.

Article 5 of the *Collective Contract Provisions* highlights that regulations and rules of relevant State provisions must be followed when conducting collective consultation.

Negotiation and Signing of Collective Agreements

Article 51 of the *Law on Employment Contracts* stipulates:

The draft of the collective contract shall be presented to the employee representative congress or all the employees for discussion and approval. A collective contract shall be concluded by the labour union, on behalf of the enterprise's employees, and the Employer. If the Employer does not yet have a labour union, it shall conclude the collective contract with a representative put forward by the workers under the guidance of the labour union at the next higher level.

Article 33 of the *Labour Law* specifies that the draft collective agreement:

[...] shall be submitted to the workers' representative assembly or all the employees for discussion and passage. Collective contracts shall be signed by and between the trade union on behalf of the employees and the employer. In an enterprise that has not yet set up a trade union, such contracts shall be signed by and between representatives recommended by workers and the enterprise.

This is supported by Section 33 of the *Labour Act*, and Article 37 of the *Collective Contract Provisions*, which states:

After a draft collective contract or special collective contract has been adopted by the employees' representative meeting or the employees' meeting it shall be signed by the chief representatives of both parties in collective consultation.

Furthermore, Article 5(2) - (5) of the *Collective Contract Provisions* outlines the principles that must be followed during the negotiation of collective bargaining agreements:

- 1) mutual respect and consultation on an equal level basis
- 2) act in good faith and cooperate on the basis of fairness
- 3) the lawful rights and interests of both parties shall be taken into account; and
- 4) no extreme action shall be taken.

Implementation and Conclusion of Collective Agreement

Section 33 of the Chinese *Labour Act* provides:

A collective contract shall be concluded by the trade union on behalf of the staff and workers with the enterprise; in enterprise where the trade union has not yet been set up, such contract shall be also concluded by the representatives elected by the staff and workers with the enterprise.

Section 34 provides for the entry into force of the collective agreement:

A collective contract shall be submitted to the labour administration department after its conclusion. The collective contract shall go into effect automatically if no objections are raised by the labour administration department within 15 days from the date of the receipt of a copy of the contract.

Article 38 of the *Collective Contract Provisions* stipulates:

The term of a collective contract or special collective contract shall be one to three years in general and shall immediately be terminated when the term expires or when the conditions for termination agreed upon by both parties arise.

Within three months prior to the expiration of the term of the collective contract or special collective contract either party may request to the other party for a renewed conclusion or extension.

Lao PDR

Relevant Legislation

None available.

Thailand

Relevant Legislation

Labour Relations Act, B.E. 2518 (1975)⁶

Definition/Purpose and Content

Pursuant to Sections 10 and 11 of the *Labour Relations Act*, work places with more than 20 employees may have a 'working conditions agreement', in writing that specifies the following:

- 1) employment and working conditions
- 2) working days/hours
- 3) wages
- 4) welfare
- 5) termination of employment
- 6) petition/complaints procedure for employees
- 7) an amendment or renewal procedure

Negotiation and Signing of Collective Agreements

Agreements must be negotiated and signed by representatives of the employees (elected by a minimum of 15 per cent of the workforce) and employers (the representative of the employer must be a director, shareholder, regular employee or committee member) [Section 13, *Labour Relations Act*]. The agreement must be in writing and displayed within three days of reaching agreement in an openly visible location for a minimum of 30 days [Section 18, *Labour Relations Act*]. The employer will furthermore register the agreement with the Director-General within 15 days of it being made [Section 18].

Implementation and Duration

Section 12 of the *Labour Relations Act* specifies that the time frame of working conditions agreements can be negotiated between employees and employers, but it should not exceed three years. If no time period is specified in the document then it will be deemed to run for a period of one year, and if no further negotiation is entered into upon expiration of this time then it will be deemed to run for a further year.

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002)⁷

Definition/Purpose and Content

Article 44 of the Vietnamese *Labour Code* defines a collective agreement as a written agreement ‘between a labour collective and the employer in respect of working conditions and utilisation of labour, and the rights and obligations of both parties in respect of labour relations’. Article 46(2) goes on to state that:

The principal provisions of the collective agreement shall include undertakings of the parties in respect of employment and guarantee of employment; working hours and rest breaks; salaries, bonuses, and allowances; work limits; occupational safety and hygiene; and social insurance for the employees.

Interaction with National Legislation and Individual Labour Contracts

The Vietnamese *Labour Code* encourages the creation of collective agreements with more favourable conditions than those contained in national legislation [Article 44]. Additionally, ‘the terms and conditions of the collective agreement must not be inconsistent with the provisions of the laws on labour and other provisions of the law’ [Article 44]. Article 48(1) provides for the partial invalidation of agreements where only some provisions contained therein are not consistent with national laws.

In regards to individual labour contracts and their interaction with collective agreements, the Vietnamese *Labour Code* states:

Where the rights stipulated in a signed labour contract of an employee are less favourable than those provided for in the collective agreement, the respective terms of the collective agreement must be complied with. All labour regulations within the enterprise must be amended so that they are consistent with the provisions of the collective agreement.

Negotiation and Signing of Collective Agreements

Article 44 stipulates that a collective agreement 'shall be negotiated and signed by the representative of the labour collective and the employer based on the principles of voluntary commitment and fairness, and shall be made public'. Article 45 elaborates on this by specifying that the representative of the labour collective who signs the collective agreement should be the director of the executive committee of the trade union organisation (or a person authorised to do so in writing by the director), and that the representative of the employer should be the director of the business ('or a person authorised in accordance with the charter of the enterprise or authorised in writing by the director of the enterprise'). Moreover, 'a collective agreement shall only be signed if the negotiated content of such agreement is approved by more than fifty (50) per cent of the members of the labour collective in the enterprise' [Article 45(3)].

Implementation and Duration

Article 47(2) of the *Labour Code* stipulates that:

The collective agreement shall become effective as from the date agreed by both parties and recorded in the agreement; in the absence of such agreement, the collective agreement shall become effective from the date of signing.

The *Labour Code* provides that a collective agreement may run for a period of one to three years, except where an enterprise has signed an agreement for the first time, in which case it may be for less than one year [Article 50]. Amendments to the agreements may only be made after three months has passed in respect to an agreement of less than one year, and six months for a one to three year collective agreement [Article 50].

Furthermore, Article 51 provides:

Prior to the expiry of a collective agreement, both parties may negotiate the extension of the duration of the existing collective agreement, or enter into a new agreement. Where the collective agreement expires during the negotiation process, it shall continue to be effective and binding. If the negotiations between the parties are still inconclusive three months after the expiry of the agreement, the collective agreement shall automatically become invalid.

2. Labour Disputes

Burma

Relevant Legislation

None available.

Cambodia

Relevant Legislation

*Cambodian Labour Law (1997)*⁸

Types of Disputes

Individual Disputes

Article 300 states that:

An individual dispute is one that arises between the employer and one or more workers or apprentices individually, and relates to the interpretation or enforcement of the terms of a labour contract or apprenticeship contract, or the provisions of a collective agreement as well as regulations or laws in effect.

Collective Disputes

Article 302 states that:

A collective labour dispute is any dispute that arises between one or more employers and a certain number of their staff over working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardize the effective operation of the enterprise or social peacefulness.

Resolution of Disputes

Individual disputes may first be referred to a preliminary conciliation overseen by the labour inspector of the relevant province or municipality prior to any judicial action being taken as per Article 300 of the *Labour Law*. Article 301 stipulates that on receipt of the complaint, the labour inspector will attempt to conciliate the matter between the parties bearing in mind any relevant laws, labour contracts and/or collective agreements that may apply to the parties in question. An official hearing will be held within three weeks of the complaint being received by the labour inspector, the results of which the inspector will annotate in an official report, as per Article 301. Parties may bring representation to the hearing, and any agreement reached during the hearing is enforceable by law. In the event that conciliation is not reached, a complaint may be filed in a court of competent jurisdiction within two months of the date of the hearing.

In regards to collective disputes, where a formal settlement procedure is not specified in a collective agreement, the dispute may be communicated to the labour inspector – who may also initiate conciliation proceedings of his own volition where he/she has not received notification from the relevant parties to the dispute [Article 303].

Article 305 states that ‘conciliation shall be carried out within fifteen days from the designation by the Minister in Charge of Labour. It can be renewed only by joint request of the parties to the dispute’. Furthermore, during the period of conciliation the parties in question must ‘abstain from taking any measure of conflict’ and must attend all meetings as scheduled by the conciliator [Article 306]. Any agreement reached has ‘the same force and effect of a collective agreement between the parties and the persons they represent’ [Article 307]. Where an agreement fails to be reached a report will be sent to the Minister in Charge of Labour within 48 hours of the conclusion of the conciliation proceedings [Article 308] who may then refer the dispute on to the Council of Arbitration [Article 310].

The Council of Arbitration [Article 312]:

[...] legally decides on disputes concerning the interpretation and enforcement of laws or regulations of a collective agreement. [...] The Council of Arbitration has considerable power to investigate the economic situation of the enterprises and the social situation of the workers involved in the dispute. The Council has the power to make all inquiries into the enterprises or the professional organizations, as well as the power to require the parties to present any document or economic, accounting,

statistical, financial, or administrative information that would be useful in accomplishing its mission. The Council may also solicit the assistance of experts. Members of the Council of Arbitration must keep professional confidentiality regarding the information and documents provided to them for examination, and of any facts that come to their attention while carrying out their mission. All sessions of the Council of Arbitration shall be held behind closed doors.

The Council must issue a decision within fifteen days of hearing the case. The parties have the right to appeal the decision to the Minister in writing within eight days of receiving notification of the decision [Article 313]. If there is no appeal then the decision will be implemented immediately [Article 314].

China

Relevant Legislation

Lao Dong Fa [Labour Law of the People's Republic of China] (Promulgated by the NPC Standing Committee, effective January 1, 1995), 1994 FAGUI HUIBIAN 91, 94 (Official Source)⁹

Labour Act (5 July 1994)¹⁰

*Law of the People's Republic of China on Mediation and Arbitration of Labour Disputes, 2007*¹¹

Trade Union Law of the People's Republic of China (Adopted 3 April 1992)¹²

Types of Disputes Recognised

Article 2 of the *Law of the People's Republic of China on Mediation and Arbitration of Labour Disputes, 2007* (hereafter referred to as the *Law on Labour Disputes*) outlines the types of disputes that are covered by the relevant Chinese legislation. These include disputes arising in relation to [Article 2]:

- (1) the negotiation of labour relations;
- (2) the conclusion, performance, alteration, cancellation or termination of labour contracts;

- (3) the hiring, firing, resignation or severance of employees;
- (4) the negotiation of working hours, holidays, social insurance, welfare benefits, training and occupational health and safety issues;
- (5) medical expenses for injuries sustained by an employee whilst working and compensation claims;
- (6) other labour disputes as prescribed by law.

Resolution of disputes

Article 22 of the *Trade Union Law of the People's Republic of China* stipulates:

If an enterprise or public institution has, in violation of the provisions of labour laws and regulations, infringed, as follows, upon the labour rights and interests of the employees, the trade union shall represent the employees to negotiate with the enterprise or public institution and request the enterprise or public institution to take measures for corrections; the enterprise or public institution shall deliberate and handle the case, and reply to the trade union; if the enterprise or public institution refuses to make corrections, the trade union may ask the local people's government to handle the case according to law:

- (1) pocketing part of the employees' wages;
- (2) failing to provide labour safety and health conditions;
- (3) extending the labour time arbitrarily;
- (4) infringing upon the special rights and interests of female employees and underage employees; and
- (5) other serious infringements upon the labour rights and interests of the employees.

China's *Labour Law* stipulates that in the event of a labour dispute the parties concerned may nominate to either receive mediation or arbitration (by a labour dispute arbitration committee, which is to include representatives of both the employer/s and employees, and trade union representatives), to go to the people's court, or to have the matter settled through private consultation [Articles 77, 79 and 80, *Labour Law*, Sections 77 and 79, *Labour Act*, Article 5, *Law on Labour Disputes*]. Labour disputes will be settled 'according to the principles of justice, fairness, and promptness so as to safeguard the legitimate rights and interests of the parties involved in these disputes in accordance with law' [Article 78, *Labour Law*, also see Section 78, *Labour Act*, Article 3, *Law on Labour Disputes*]. (Please refer to the *Law on Labour Disputes* for detailed information on the procedural requirements and functions of mediation and arbitration bodies.)

Article 82 of the *Labour Law* specifies that:

The party that asks for arbitration shall file a written application to a labour dispute arbitration committee within 60 days starting from the date of the occurrence of a labour dispute. Generally speaking, the arbitration committee shall produce a ruling within 60 days after receiving the application. The parties involved shall implement arbitration rulings if they do not have any objections to these rulings.

Where a party objects to the arbitration committee's ruling it may apply to have the matter heard by a people's court within 15 days of notification of the ruling [Article 83, *Labour Law* and Sections 79 and 83, *Labour Act*]. Where a party fails to fulfil the terms of the ruling the other party may obtain an injunction from the court [Article 83, *Labour Law* and Section 83, *Labour Act*].

Disputes arising from the negotiation of a collective agreement shall be handled through private consultation with the parties concerned, with the involvement of the labour administrative department if necessary. Where private consultation fails the dispute may be brought to a labour dispute arbitration committee, and finally to a people's court [Article 84, *Labour Law* and Section 84, *Labour Act*].

Article 8 of the *Law on Labour Disputes* also outlines the mandate of the labour administration department of local level governments in conjunction with trade unions and enterprise representatives to establish labour relation tripartite mechanisms to 'jointly study and resolve major issues of labour disputes'.

Lao PDR

Relevant Legislation

Lao PDR *Labour Law* 2006 (Amended)¹³

Definition/Purpose

Article 61 defines labour disputes as those arising where an employer and their employees cannot reach consensus on an issue relating to labour. Article 61 further states that labour disputes are to be divided into two categories:

1. 'Disputes concerning the implementation of the Labour Law, internal regulations of the labour unit, labour regulations, employment contracts, and other legislation relating to labour';
2. 'Disputes relating to benefits, which refers to disputes relating to claims by employees for new rights and benefits which they request their employer to provide'.

Resolution of Disputes

Under Article 62:

If a worker, trade union or workers' representative makes a claim against the employer who has acted in violation of the Labour Law, internal regulations of the labour unit, labour regulations, [or] the employment contract, the employer or its authorised representative must consider and resolve the problem in reasonable time. During the consideration of the claim, the worker may propose that the trade union or workers' representatives also participate. Where the parties reach an agreement in relation to the claim in whole or in part, a memorandum of the agreement must be prepared and signed by the parties and a witness to certify their acknowledgment. Such memorandum must be sent to the labour administration agency and the trade union or workers' representatives within five days from the date the memorandum is signed.

In the event that the employer fails to resolve the problem, the worker may request that the labour administration agency resolves the dispute [Article 63]. Moreover, 'where the labour administration agency cannot resolve or can resolve only part [of the dispute] within fifteen days, the party that is not satisfied with the resolution has the right to file a claim with the people's court for adjudication' [Article 63].

Thailand

Relevant Legislation

Labour Protection Act, B. E. 2541 (1998)¹⁴

Labour Relations Act, B. E. 2518 (1975)¹⁵

Types of Disputes Recognised

Section 123 of the *Labour Protection Act* allows for disputes concerning entitlement to any sum of money that an employer has failed to pay to be submitted to the labour inspector. The *Labour Relations Act* provides for the resolution of disputes that arise in relation to the negotiation of a 'working condition agreement' (a collective bargaining agreement) [Section 21].

Resolution of Disputes

Section 124 of the *Labour Protection Act* provides that the labour inspector shall investigate complaints in regards to non-receipt of payment within 60 days of receiving the complaint. Where the inspector finds that the employee (or his or her statutory heir in the case of death) is entitled to money he or she shall issue an order requiring payment by the employer within 15 days. If the employer or employee is dissatisfied with the order they may institute legal proceedings within 30 days, otherwise the order becomes final [Section 125, *Labour Protection Act*].

Under Section 22 of the *Labour Relations Act*, a dispute that arises from the negotiation of a collective agreement will be referred on to the conciliation officer who will attempt to resolve the dispute within five days of receiving notice of the dispute. If the dispute is not resolved in this timeframe the parties may agree to appoint a labour dispute arbitrator, the employer may decide to institute a lock-out, or the employees may choose to strike [Sections 22, 26-29 and Chapter 3, *Labour Relations Act*]. If the labour dispute concerns rail, telecommunications, electricity, water supply, hospitals or oil production industries, the Minister will have the power to have the dispute adjudicated by the Labour Relations Committee [Section 23, *Labour Relations Act*]. The parties will have seven days to appeal the Committee's decision, and if no appeal is made within this timeframe, its order is final and binding [Section 23, *Labour Relations Act*]. The Minister may also have a dispute heard by the Labour Relations Committee where he or she ordains that the disruption might cause an adverse effect on public order, morality or the economy. The Labour Relations Committee's decision in regards to a dispute of this nature will be final and conclusive [Section 24].

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002)¹⁶

Types of Disputes Recognised

Article 157 of the Vietnamese *Labour Code* recognises two varieties of labour dispute: individual and collective. The *Code* describes a labour dispute as: ‘a dispute about rights and benefits relating to employment, wages, incomes, and other labour conditions; about performance of the labour contract and the collective agreement; and about issues which arise during a training or apprenticeship period’.

Resolution of Disputes

Article 158 of the *Labour Code* stipulates that labour disputes are to be resolved according to the following principles:

1. Direct negotiation and conciliation between the disputing parties at the place where the dispute arises.
2. Conciliation and arbitration on the basis of mutual respect of rights and benefits, respect of general social benefits, and compliance with the law.
3. A labour dispute must be resolved publicly, objectively, in a timely manner, quickly, and in compliance with the law.
4. The trade union organisation of the enterprise and the representative of the employer must participate in the resolution process of the labour dispute.

Should the conciliation fail then the labour dispute is to be referred on to a labour dispute resolution body [Article 159]. The labour dispute resolution body may request the parties to the dispute to provide documents or other evidence, and may call on an expert or witnesses to give testimony [Article 161]. The labour dispute resolution bodies mandated to hear disputes are labour conciliatory councils and people’s courts.

Resolution of Individual Labour Disputes: The labour conciliatory council of the enterprise in question will commence conciliatory proceedings within seven days of being notified of an individual labour dispute [Article 164]. Both parties must be present at conciliation meetings. A resolution shall be proposed and if accepted by both parties a settlement will be reached. However, in the event that conciliation fails, or in the event that a disputing party is absent at conciliation meetings two times in a row without proper reason, a non-settlement statement will be issued by the labour conciliation body, and one or both of the parties may request the matter to be heard by a people's court. The people's court is also mandated to hear certain types of labour disputes at first instance, including disputes relating to compensation payouts and disputes relating to unilateral terminations of contracts [Article 166(2)].

Resolution of Collective Labour Disputes: Labour conciliatory councils, provincial labour arbitration councils and the people's court are mandated to resolve collective labour disputes [Article 168]. If conciliation fails at conciliatory council level then it may be referred on to the provincial labour arbitration council, which has ten days to commence proceedings after receiving the request [Article 171]. Representatives of both parties must be present during the hearing [Article 171]. Where parties are unable to reach a resolution the labour arbitration council may make a decision [Article 171(3)]. If either of the parties is unhappy with the decision they may appeal the decision to the people's court [Article 172]. If the labour collective is unhappy they may also choose to strike [Article 172].

3. Strikes

Burma

Relevant Legislation

None available.

Cambodia

Relevant Legislation

*Cambodian Labour Law (1997)*¹⁷

Definition

Article 318 of the Cambodian Labour Law describes a strike as ‘a concerted work stoppage by a group of workers that takes place within an enterprise or establishment for the purpose of obtaining the satisfaction for their demand from the employer as a condition of their return to work’.

Rights

Article 319 states that:

The right to strike and to a lockout are guaranteed. It can be exercised by one of the parties to a dispute in the event of rejecting the arbitral decision.

Article 320 elaborates that the right to strike ‘can also be exercised when the Council of Arbitration has not rendered or informed of its arbitration decision within the time periods prescribed in Chapter XII’, as well as ‘when the union representing the workers deems that it has to exert this right to enforce compliance with a collective agreement or with the law’ and in order to ‘defend the economic and socio-occupational interests of workers’.

Procedures

Prior to a strike: Article 323 provides that: 'A strike shall be declared according to the procedures set out in the union's statutes, which must state that the decision to strike is adopted by secret ballot'. Furthermore, prior notice of intention to strike must be given at least seven working days before any action is taken [Article 324]. The notice must contain the demands of the party who is striking, and must also be sent to the Ministry in Charge of Labour [Article 324].

Additionally, under Article 327:

If the strike affects an essential service, namely an interruption of such a service would endanger or be harmful to the life, safety, or health of all or part of the population, the prior notice mentioned in Article 324 shall be extended to a minimum of fifteen working days.

Regulations/Limitations

A strike must be peaceful [Article 330], and threats or coercion to strike are prohibited [Article 331]. Labour contracts are suspended during strikes and salaries will not be paid [Article 332]. Workers will be guaranteed reinstatement to their position at the end of the strike [Article 332]. Furthermore, an employer 'is prohibited from imposing any sanction on a worker because of his participation in a strike. Such sanction shall be nullified and the employer shall be punishable by a fine in the amount set in Article 369 of Chapter XVI' [Article 333]. An employer is additionally prohibited from hiring new workers during the strike to replace those striking, 'except to maintain minimum service provided for in Articles 326 and 328 if the workers who are required to provide such service do not appear for work. Any violation of this rule obligates the employer to pay the salaries of the striking workers for the duration of the strike' [Article 334].

Article 321 specifies that a strike:

[...] cannot be exercised when the collective dispute results from the interpretation of a juridical rule originating from the existing law, or the collective agreement, or the rule relating to an arbitral decision accepted by the concerned parties. It also cannot be exercised for the purpose of revising a collective agreement or reversing an arbitral decision accepted by the parties, when the agreement or the decision has not yet expired.

The Labour Courts are mandated to decide whether or not a strike is illegal, and if it is, then strikers must return to work within forty-eight hours of the finding [Article 337].

China

Relevant Legislation

*Trade Union Law of the People's Republic of China (2001)*¹⁸

The International Trade Union Confederation states that, 'the right to strike was removed from the Constitution in 1982, and the revised trade union law does not use the term "strike" (*bagong*) but instead refers to instances of "work stoppages" (*tinggong*) and "go-slows" (*daigong*)' [Article 27].

Lao PDR

Relevant Legislation

*Lao PDR Labour Law 2006 (Amended)*¹⁹

Article 65 of the Lao PDR *Labour Law* prohibits workers, employers or their representatives from calling a strike in the following scenarios:

- In the event of a labour dispute relating to the implementation of laws and regulations and relating to benefits;
- When both parties have agreed to meet for consideration and resolution of the disputes;
- During the process of the resolution of unresolved matters relating to workers and employers by the labour dispute resolution committee;
- During the settlement of the labour dispute by the people's court.

The article further states:

Any person or organisation which is directly or indirectly involved and has [directly or indirectly] incited workers, employers or their representatives to stop work either verbally or through material or financial support that causes damage to the workers or employers or social order, shall be punished in accordance with the laws.

In its 2008 annual survey of trade union rights the International Trade Union Confederation states:

The 2006 Labour Law strictly prohibits workers or their representatives from calling a work stoppage in a wide variety of situations. Neither workers and their representatives, nor employers, can call for a work stoppage in cases of disputes regarding implementation of the labour law or regulations, or a dispute over workers' benefits under the law. Work stoppages are also forbidden if the matter is the subject of negotiations in which both sides have agreed to participate, or while the dispute is under consideration by the labour authorities, or in the labour disputes settlement procedure of the People's Court. Persons or organisations involved either "directly or indirectly" in a stoppage, or who "verbally or materially incites workers" to conduct a stoppage "thus causing damage ... or social disorder" are punishable under law. The right to strike is further restricted by dissuasive penalties. The penal code provides for between one and five years' imprisonment for those who join an organisation that encourages protests, demonstrations and other actions that might cause "turmoil or social instability".

Thailand

Relevant Legislation

Labour Relations Act, B. E. 2518 (1975)²⁰

Definition

According to Section 5 of the *Labour Relations Act*, a strike means a cessation of work on behalf of employees due to a labour dispute.

Rights

Under Section 22 employees may strike where conciliation fails.

Procedures

The party striking must give the other party notice of their intention to strike at least 24 hours prior to taking action [Section 34].

Regulations/Limitations

Employers or employees may not strike under any of the following scenarios: where a demand relating to a labour dispute has not been submitted to the other party; where a party to a labour dispute has already fulfilled its obligations as per an agreement/decision issued by a conciliation officer; or where the matter is under the consideration of the labour relations committee or labour dispute arbitrators [Section 34]. Employees may be ordered back to work by the Minister where he/she is of the opinion that the strike may have an adverse effect on the economy, or on public order and security [Section 35(2)].

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002)²¹

Rights

Under Article 172 of the Vietnamese *Labour Code*, the labour collective has the right to strike where conciliation at the labour arbitration council level has failed.

Procedures

Article 173(2) of the Vietnamese *Labour Code* states that:

The decision to strike shall be made by the executive committee of the trade union of the enterprise after obtaining the approval, by sealed votes or signatures, of more than half of the number of employees in the labour collective. The executive committee of the trade union of the enterprise must nominate a maximum of three representatives to present the request of the labour collective to the employer and, at the same time, to notify the body in charge of State administration of labour of the province or city under central authority and the provincial trade union confederation in writing. The request and notice must clearly outline the matters in dispute, the matters proposed to be resolved, the agreement to strike of the employees (by votes or by signatures), and the commencement time of the strike.

Regulations/Limitations

Article 173(3) prohibits the destruction of any machinery, equipment or assets of the enterprise, or any other act that violates public order and safety during a strike. Strikes are prohibited at institutions that serve the public, or that are essential to the national economy, security or defence [Article 174]. Furthermore, strikes that do not arise from a collective labour dispute or that are outside ‘the scope of an enterprise’ are considered illegal [Article 176]. The people’s court and the Standing Committee of the National Assembly may make a decision as to the resolution of the strike [Articles 177 and 179]. Finally, ‘any act of victimization of or revenge on a person participating in or organizing a strike is strictly prohibited’ and anybody who forces another strike or interferes with the right to strike may be liable to administrative penalty or criminal liability [Article 178].

Collective Bargaining and Trade Disputes under International Law

ILO Convention 98, Right to Organise and Collective Bargaining Convention (1949)²²

Article 1 of ILO Convention 98 states:

- (1) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
- (2) Such protection shall apply more particularly in respect to acts calculated to:
 - (a) make the employment of a worker subject to the condition that he/she shall not join a union or shall relinquish trade union membership;
 - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Of the GMS countries, only Cambodia has ratified ILO Convention number 98.

ILO Convention 154, Convention concerning the Promotion of Collective Bargaining (1981)²³

Article 2 provides:

For the purpose of this Convention the term “collective bargaining” extends to all negotiations which take place between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more workers’ organisations, on the other, for:

- (a) Determining working conditions and terms of employment; and/or
- (b) Regulating relations between employers and workers; and/or
- (c) Regulating relations between employers or their organisations and a workers’ organisation or workers’ organisations.

Article 5 further states:

1. Measures adapted to national conditions shall be taken to promote collective bargaining.
2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:
 - (a) Collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;
 - (b) Collective bargaining should be progressively extended to all matters covered by sub-paragraphs (a), (b) and (c) of Article 2 of this Convention;
 - (c) The establishment of rules of procedure agreed between employers’ and workers’ organisations should be encouraged;
 - (d) Collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules;
 - (e) Bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

None of the GMS countries have ratified ILO Convention 154.

ILO Convention 87, Freedom of Association and Protection of the Right to Organise Convention (1948)²⁴

Article 2 states that:

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3 further stipulates that:

- (1) Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
- (2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Additionally, Article 4 prohibits the dissolution of workers' and employers' organisations administrative authority, and Article 11 urges members of the Convention to 'take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise'.

Only Cambodia and Burma have ratified ILO Convention 87.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)²⁵

Article 26 of the Migrant Workers' Convention states that:

1. States Parties recognize the right of migrant workers and members of their families:
 - (a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;
 - (b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;
 - (c) To seek the aid and assistance of any trade union and of any such association as aforesaid.

Of the GMS countries, only Cambodia has signed, but not ratified the Migrant Workers' Convention. None of the other GMS countries have ratified the Migrant Workers' Convention.

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)²⁶

Article 8 of the ICESCR states that:

1. The States Parties to the present Covenant undertake to ensure:
 - (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations;
 - (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
 - (e) This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

Cambodia, China, Thailand and Vietnam have ratified the ICESCR.

International Covenant on Civil and Political Rights (ICCPR) (1966)²⁷

Article 22 of the ICCPR, similarly to the ICESCR, states:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Cambodia, Lao PDR, Thailand and Vietnam have ratified the ICCPR. China has signed but not ratified the ICCPR. Burma has neither signed nor ratified the ICCPR.

The Universal Declaration of Human Rights (UDHR) 1949²⁸

Article 23(4) of the UDHR declares that: 'Everyone has the right to form and to join trade unions for the protection of his interests'.

Endnotes

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- ⁴ *People's Republic of China, Collective Contract Provisions*, 2004, available at <http://www.asianlii.org/cn/legis/cen/laws/pocc373/> (accessed 19/10/2011).
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- ⁶ *Thai Labour Relations Act*, 1975, available at http://thailaws.com/law/t_laws/tlaw0140_3.pdf (accessed 25/05/11).
- ⁷ *Labour Code of the Socialist Republic of Vietnam*, 23/06/1994, (amended 2/04/2002), available at <http://www.global-standards.com/Resources/VNLaborCode1994-2002.pdf> (accessed 16/05/11).

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- ¹² *Trade Union Law of the People's Republic of China*, 03/04/1992, (amended 27/10/2001), available at <http://www.laborhr.com/article6269.aspx> (accessed 26/08/2011)
- ¹³ *Lao PDR Labour Law* (amended) 2006, available at [http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20\(2006\)%20Eng.pdf](http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20(2006)%20Eng.pdf) (accessed 30/05/11).
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- ¹⁵ *Thai Labour Relations Act*, 1975, available at http://www.thailaws.com/law/t_laws/tlaw0140_3.pdf (accessed 25/05/11).
- ¹⁶ *Labour Code of the Socialist Republic of Vietnam*, 23/06/1994, (amended 2 /04/2002), available at <http://www.global-standards.com/Resources/VNLaborCode1994-2002.pdf> (accessed 16/05/11).
- ¹⁷ *Cambodian Labour Law*, available at http://www.gocambodia.com/laws/labor_law.asp (accessed 16/05/11).
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- ¹⁹ *Lao PDR Labour Law* (amended) 2006, available at [http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20\(2006\)%20Eng.pdf](http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20(2006)%20Eng.pdf) (accessed 30/05/11).
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- ²² *ILO Convention 98*, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098> (accessed 2/06/11).
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Box Article



Participants of the WE Get Together organised by the MAP Foundation.
Chiang Mai, Thailand, 2011.

Workers in Special Economic Zones

Special Economic Zones (SEZs) exist in many countries around the world. In the Greater Mekong Subregion (GMS), as elsewhere, the term SEZ generally refers to an area where national trade laws either do not apply or are relaxed, with the aim of attracting greater inward investment. SEZ regulations have often included restrictions on trade union activity, together with incentives for potential investors, such as exemptions on import duties for machinery and tax exemptions for fixed periods. In addition, SEZs frequently focus exclusively on export processing and factory-based production networks. Typically SEZs are located in border areas or at other times they occupy strategic locations in terms of accessing ports and other trade routes.

It has more often than not been the case that workers in SEZs have had to endure low wages, long working hours, substandard living conditions, lack of enforcement of occupational health and safety standards, and restrictions of their right to join or form independent trade unions. To highlight this, the Shenzhen SEZ in southern China's Guangdong Province, which has been considered a model SEZ by many GMS countries, including Burma, has seen a series of high profile industrial conflicts in recent years. The city has grown from a small fishing village into a manufacturing hub of 8 million workers over the space of 30 years. This

phenomenal growth has been founded on a steady supply of cheap labour from rural China, who have by and large had to endure poor working conditions and low wages.

Looking at the experiences of long established SEZs such as Shenzhen, the pressure of competition in newly liberalised markets has tended to suppress wages and limit the unionization of workers to meet the demands of transnational corporations. This asserts negative pressure on labour rights and working standards. Although the GMS countries do not officially exclude workers in the SEZs from the protection offered under relevant labour laws, enforcement can become an issue when there is limited access by workers to form or join independent trade unions and/or for independent trade unions to freely operate in SEZs.

Despite such points of concern, a number of developments in the GMS offer a degree of optimism. For example, the improved logistics provided by 'one-stop service centers' in the Cambodian SEZs established along their borders, have streamlined administrative procedures for cross-border migrants, potentially a positive step for documented migrants. In addition, SEZs along Laos' borders have become focal points for labour protection mechanisms, possibly leading to improved, and decentralised, labour protection procedures. Labour NGOs and migrant rights organisations should closely monitor labour conditions in the SEZs within the GMS to ensure that labour laws are implemented and that the independent trade unions can gain legitimate access.

Section 9

Trade Unions



Domestic workers participating in the Women Exchange Programme organised by the MAP Foundation. Mae Sod, Thailand, 2010.

Overview

While legislation exists in the majority of the Mekong countries permitting the formation and activities of trade unions, the level of independence and freedom varies greatly between countries.

In Burma, labour unions, farmer unions and student unions were banned under the rule of General Ne Win, who seized state power in 1962. Furthermore, organisations that ‘attempt, instigate, incite, abet or commit acts that may in any way disrupt law and order, peace and tranquility, or safe and secure communications’; or ‘disrupt the regularity of state machinery’ have been also banned.¹ However, the new Labour Organisation Law passed on 11 October 2011 allows workers to form trade unions with a minimum of 30 workers being members.

In Cambodia it is illegal for an employer to interfere with a trade union. Additionally, employers in Cambodia are forbidden from taking into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal.

In China, the State has to protect the legal rights and interests of trade unions. Reciprocally, Chinese trade unions have to represent and safeguard the legitimate rights and interests of labourers, and independently conduct their activities in accordance with the law. Chinese labour legislation also gives trade unions many responsibilities including mobilising workers to care for the State and observe labour disciplines, investigating problems in relation to infringements of the legal rights and interests of workers, assisting and providing guidance to workers signing labour contracts, representing workers in signing collective contracts, participating in mediation workshops, and putting forward views and intervening in regards to Occupational Health and Safety issues.

There is no protection for independent trade unions in Lao PDR, since labour unions must be affiliated with the government. Unions have the right to sign collective employment contracts but there is no compulsion on the part of the employer to bargain. Laotian labour legislation defines the role of the union as promoting mediation and resolution, rather than the defence and furtherance of the rights and entitlements of workers.

Labour unions in Thailand can strike on behalf of its members without legal repercussion, can make demands, conduct negotiations and enter into agreements regarding the activities of its members, can manage and carry out activities for the benefit of its members, can provide advice and welfare services and may collect membership fees for membership of the union. Employers are prohibited from interfering with trade unions in Thailand or from and from firing an employee because of their membership of the union.

According to Vietnamese labour legislation, employees have the right to form, join, or participate in union activities, however in reality workers are not free to organise or join unions of their choosing, and unions must operate under the Communist Party. Nevertheless, labour laws stipulate that employers must not interfere with the establishment and activities of the trade union, and that employees must not be prejudiced because of their membership or participation in a trade union.

Burma (Myanmar)

Relevant Legislation

Law relating to the Formation of Organisations, SLORC Law No. 6/88 of September 30, 1988²

In Burma, labour unions, farmer unions and student unions were banned under the rule of General Ne Win, who seized state power in 1962.³

Definition/Legal Basis

Article 2(a) of the *Law relating to the Formation of Organisations* states:

[...] an organisation means an association, society, union, party, committee, federation, group of associations, front, club and similar organisation that is formed with a group of people for an objective or a programme either with or without a particular name.

Forming a Trade Union

Article 3 provides:

- (1) Organisations shall apply for permission to form to the Ministry of Home and Religious Affairs according to the prescribed procedure.
- (2) Organisations that have already been formed shall apply within thirty days from the promulgation of this Law.
- (3) Organisations that are not permitted shall not form or continue to exist and pursue activities.

Furthermore, Article 5 states:

- (a) The following organisations shall not be formed, and if already formed shall not function and shall not continue to exist:
- (b) Organisations that are not permitted to register under The Political Parties Registration Law, 1988 or if permitted to register, the registration[s] of which have been cancelled by the Multi-party Democracy General Elections Commission;

- (c) Organisations that attempt, instigate, incite, abet or commit acts that may in any way disrupt law and order, peace and tranquillity, or safe and secure communications;
- (d) Organisations that attempt, instigate, incite, abet or commit acts that may effect [sic] or disrupt the regularity of state machinery.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labour Law* (1997)⁴

Definition/Legal Basis

Article 266 states: 'Professional organisations of workers are called "workers' unions". Professional organizations of employers are called "employers' associations"'.

Membership

Article 271 states that 'all workers, regardless of sex, age, nationality, are free to be a member of the trade union of their choice'. Article 273 also provides that members are free to withdraw from the union at any time.

Unions' Rights/Roles

Article 274 provides that trade unions have civil status, giving them the right to sue in court, to acquire personal property and to enter into a contract. Under Article 267, unions have the right 'to draw up their own statutes and administrative regulations, as long as they are not contrary to laws in effect and public order; to freely elect their representatives and to formulate their work programme'.

Protection of Trade Union Freedom

Article 266 outlines the right to form a trade union, stating:

Workers and employers have, without distinction whatsoever and without prior authorisation, the right to form professional organisations of their own choice for the exclusive purpose of studying, promoting the interests, and protecting the rights, as well as the moral and material interests, both collectively and individually, of the persons covered by the organisation's statutes.

Additionally, Article 279 stipulates:

Employers are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal.

Article 280 further provides:

Acts of interference are forbidden. In the senses of the present article, acts of interference are primarily measures tending to provoke the creation of worker organisations dominated by an employer or an employers' organisation, or the support of worker organisations by financial or other means, on purpose to place these organisations under the control of an employer or an employers' organisation.

Finally, Article 281 states that: 'All employers are forbidden to deduct union dues from the wage of their workers and to pay the dues for them'.

China

Relevant Legislation

Lao Dong Fa [Labour Law of the People's Republic of China] (Promulgated by the NPC Standing Committee, effective January 1, 1995), 1994 FAGUI HUIBIAN 91, 94 (Official Source)⁵

The Trade Union Law of the People's Republic of China (Adopted 3 April 1992)⁶

Definition/Legal Basis

Article 2 of the *Trade Union Law* stipulates that trade unions are 'mass organisations formed by the working classes of their own free will'.

Membership

Article 3 of the *Trade Union Law* provides:

All workers doing physical or mental work in enterprises, public institutions and government organs within Chinese territory who earn their living primarily from wages shall have the right to participate in and form trade union organisations pursuant to the law, regardless of their nationality, race, sex, occupation, religious beliefs or level of education.

Unions' Rights/Roles

The *Trade Union Law* attributes trade unions with numerous rights and responsibilities, including organising and educating workers to exercise their democratic rights [Article 5], safeguarding the interests of workers [Article 6], mobilising workers to care for the State and observe labour disciplines [Articles 8 and 9], organising workers to 'launch socialist labour emulation campaigns, develop mass rationalisation proposals, technological reform and technological cooperation activities, improve work productivity rates and economic performances and develop society's productive forces' [Article 8], putting forward views [Article 16], investigating problems 'in relation to infringements of the legal rights and interests of workers' [Article 16], assisting and providing guidance to workers signing labour contracts [Article 18], representing workers in signing collective contracts [Article 18], participating in mediation workshops [Articles 20 and 21], supporting a worker through legal proceedings [Articles 21 and 22], putting forward views and intervening in regards to OHS issues [Articles 23 and 24], participating 'in investigations into an accident resulting in a fatality or injury or other problems seriously endangering the health of workers. It may suggest resolutions to the relevant authorities, as well as have the right to require the pursuit of the liability of the administrative leaders directly responsible and other responsible parties' [Article 24], and negotiating with authorities in regards to stop work or slow down measures [Article 25].

Protection of Trade Union Freedom

Article 4 of the *Trade Union Law* provides: 'The State shall protect the legal rights and interests of trade unions and any infringement of these rights and interests shall be prohibited'. Section 7 of the *Labour Law* also provides that labourers have the right to participate in and organise trade unions in accordance with the law. Trade unions 'shall represent and safeguard the legitimate rights and interests of labourers, and independently conduct their activities in accordance with the law'.

Lao PDR

Relevant Legislation

Lao PDR *Labour Law* 2006 (Amended)⁷

Trade Union Act (2007)⁸

Definition/Legal Basis

Trade unions are defined in the *Trade Union Act* as ‘mass organisations in the political system of the democratic centralism unified leadership [sic] under the Lao People’s Revolution Party’.

Membership

The International Trade Union Confederation (ITUC) states:

The 2007 Trade Union Act defines membership of the trade union as workers from various sectors who have been “registered as members of trade unions in the Party’s and State’s organs, the Lao Front for National Construction, mass organisations and labour units”. Civil servants employed in state administrative organs, and employees in state enterprises still constitute the overwhelming majority of the LFTU’s members.

Unions’ Rights/Roles

According to the ITUC:

The Trade Union Law defines the status, rights and obligations, as well as the system, structure and financial management of trade unions at all levels in Laos thus failing to accord the right to determine their own structure, rules, administration or activities. Article 11 of the law recognises the right of the union to sign collective employment contracts but there is no compulsion on the part of the employer to bargain. Part IX of the law deals with the settlement of disputes. Article 44 defines the role of the union as promoting mediation and resolution rather than the defence and furtherance of the rights and entitlements of workers.

The article further states:

The Lao PDR Constitution actually says that the LFTU's role is "to unite and mobilise all ... people for taking part in the tasks of national defence and construction." Article 30 of the 2007 Trade Union Law prohibits union members from organising an "illegal group, gathering, or protest and acts" that are found to damage not only the union but also the interests of the State or the collective interest.

Protection of Trade Union Freedom

There is no protection for independent trade unions in Lao PDR, since '[l]abour unions must be affiliated with the government sanctioned Lao Federation of Trade Unions (LFTU), which operates as a mass organisation directly controlled by the sole political party, the LPRP'.⁹

Thailand

Relevant Legislation

Labour Relations Act, B. E. 2518 (1975)¹⁰

Definition/Legal Basis

Section 5 of the *Labour Relations Act* defines a labour union as 'an organisation of employees established pursuant to this Act'.

Membership

Pursuant to Section 88, 'persons who have the right to establish a labour union must be employees working for the same employer, or employees in the same description of work (whether or not they work for the same employer, *sui juris* and of Thai nationality'.

Unions' Rights/Roles

Section 98 provides that labour unions may make demands, conduct negotiations and enter into agreements regarding the activities of its members, may manage and carry out activities for the benefit of its members, may provide information services for its members, can provide advice and welfare services and may collect membership fees for membership of the union. Where a labour union causes

a strike for the benefit of its members they shall not be liable for criminal or civil charges [Section 89].

Protection of Trade Union Freedom

Section 121 of the *Labour Relations Act* provides that no employer shall:

- (1) terminate the employment or act in any manner which may make it unbearable for an employee, a representative of the employee, a director of a labour union or a director of a labour federation to continue working due to the fact that the employee or labour union calls for a rally, files a complaint, submits a demand, participates in a negotiation, institutes a lawsuit or acts as a witness or submits evidence to the competent officials under the law on labour protection or to the registrar, conciliation officer, labour dispute arbitrator or Labour Relations Committee under this Act or to the Labour Court, or due to the fact that the employee or labour union are preparing to do so;
- (2) terminate the employment or act in any manner which may make it unbearable for an employee to continue working due to the fact that such employee is a member of a labour union;
- (3) obstruct the employee from being a member of the labour union or cause the employee to resign from membership of the labour union, or give or agree to give money or property to the employee or officer of the labour union in lieu of the refusal to apply for membership, or to admit the applicant to membership of the labour union or in lieu of the resignation from the labour union;
- (4) obstruct the operation of the labour union or labour federation or obstruct the exercise of the right of the employee in applying for membership of the labour union; or
- (5) illegally interfere with the operation of the labour union or labour federation.

Furthermore, under Section 122, no person shall:

- (1) compel or threaten the employee, directly or indirectly, to be a member of the labour union or to resign therefrom; or
- (2) do any act which may cause the employer to act in violation of Section 121.

Finally, Section 123 stipulates:

- (1) During the enforcement of the working conditions agreement or award, no employer shall dismiss the employee, representative of the employee or director, member of the sub-committee or member of the labour union or the director or member of the sub-committee of the labour federation who is related to the demand, provided that such person:
- (2) is not dishonest in the discharge of duty or intentionally commits a criminal offence against the employer;
- (3) does not wilfully cause damage to the employer;
- (4) does not violate the regulations, rules or lawful orders of the employer after a written warning or caution has been given by the employer. If there is a serious circumstance, such warning or caution may not be made. In this regard, the aforesaid regulations, rules or orders shall not be made with a view to obstruct such person from doing any act related to the demand;
- (5) does not unreasonably neglect his/her duty for three consecutive days; and
- (6) does not perform any act which encourages, assists or induces any person to violate the working conditions agreement or award.

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002, effective 1 January 2003)¹¹

Law on Trade Unions (2008)¹²

Definition/Legal Basis

None available.

Membership

According to Article 7(2) of the *Labour Code*, 'an employee shall have the right to form, join, or participate in union activities in accordance with the *Law on Trade Unions* in order to protect his legal rights and benefits'. However, according to the ITUC:

Workers are not free to organise or join unions of their choosing. The Law on Trade Unions sets out that trade unions operate “under the leadership of the Communist Party of Vietnam” (CPV). Moreover, any union formed must be approved by and affiliated with the Vietnam General Confederation of Labour (VGCL) and operate under its umbrella. Similarly, the Statutes of the Vietnamese Trade Unions adopted at VGCL’s 9th Congress in 2003 also clearly state the trade unions are under the CPV’s leadership. The VGCL works under the close supervision and effective control of the Party and is a core member of the Vietnam Fatherland Front.¹³

Unions’ Rights/Roles

Article 156 of the *Labour Code* stipulates:

The Vietnam General Confederation of Labour and trade unions at all levels shall participate with State bodies and representatives of employers in discussing and resolving issues relating to labour relations; shall have the right to establish employment service agencies, trade training centres, aid funds, legal consultancy centres, and other establishments for the mutual welfare of employees, and other rights in accordance with the provisions of the *Law on Trade Unions* and this Code.

Furthermore, according to Article 181(3) ‘The Vietnam General Confederation of Labour and trade unions at all levels shall participate in the supervision of State administration of labour in accordance with the provisions of the law’. Article 173(2) outlines that decisions to strike must be taken in collaboration with the executive committee of the trade union ‘after obtaining the approval, by sealed votes or signatures, of more than half of the number of employees in the labour collective’. Trade unions may also participate in the resolution process of trade disputes pursuant to Article 158(4). Finally, Article 87(3) states: ‘When examining and dealing with a breach of labour rules, the concerned party and a representative of the executive committee of the trade union of the enterprise must be present for participation’.

Protection of Trade Union Freedom

Article 153(1) stipulates: ‘Any act which obstructs the establishment and activities of the trade union at an enterprise is strictly prohibited.’ Article 154(3) further provides that: ‘The employer must not prejudice an employee because he has formed, joined, or participated in the activities of a trade union organisation. The employer must not apply economic pressures or other measures to interfere with the organisation and activities of trade unions’.

Forming/Registering a Trade Union

Under the *Labour Code*, 'a union must be formed by the local or industry trade unions within six months of the establishment of any new enterprise with ten employees or more'.¹⁴

International Laws relating to Trade Unions

ILO Convention 87, Freedom of Association and Protection of the Right to Organise (1948)¹⁵

Article 2 provides: 'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation'.

Article 3(1) similarly intimates that workers' and employers' organisations, 'shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.' Additionally, under Article 3(2): 'The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof'. Administrative authorities are prohibited from dissolving or suspending trade unions under Article 4(4), and under Article 11, states that have ratified the convention undertake to 'take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise'.

Of the GMS countries, only Cambodia has ratified ILO Convention 87.

Endnotes

¹ *Law relating to the Formation of Organisations, SLORC Law No. 6/88, 30/09/1988*, available at http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=MMR&p_classification=02&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY (accessed 28/09/11).

² *Ibid.*

³ Kyaw Thein Kha, Burma Rejects Labor Application, *The Irrawaddy*, 24/06/2010, available at http://www.irrawaddy.org/print_article.php?art_id=18796 (accessed 12/10/2011).

⁴ *Cambodian Labour Law, 1997*, available at http://www.gocambodia.com/laws/labor_law.asp (accessed 16/05/11).

⁵ *Lao Dong Fa [Labour Law of the People's Republic of China]*, 1/01/1995, available at <http://www.usmra.com/china/Labour%20Law.htm> (accessed 16/05/11).

- ⁶ *Trade Union Law of the People's Republic of China*, 03/04/1992, (amended 27/10/2001), available at <http://www.unhcr.org/refworld/docid/4da3154d2.html> (accessed 19/10/2011).
- ⁷ *Lao PDR Labour Law* (amended) 2006, available at [http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20\(2006\)%20Eng.pdf](http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20(2006)%20Eng.pdf) (accessed 30/05/11).
- ⁸ International Trade Union Confederation, *2008 Annual Survey of Violations of Trade Union Rights - Laos*, 20/11/2008, available at <http://www.unhcr.org/refworld/docid/4c52ca832d.html> (accessed 19/07/2011).
- ⁹ Ibid.
- ¹⁰ *Thai Labour Relations Act*, 1975, available at http://thailaws.com/law/t_laws/tlaw0140_3.pdf (accessed 25/05/11).
- ¹¹ *Labour Code of the Socialist Republic of Vietnam*, 23/06/1994, (amended 2/04/2002), available at <http://www.global-standards.com/Resources/VNLaborCode1994-2002.pdf> (accessed 16/05/11).
- ¹² *Law on Trade Unions*, 2008, available at http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=VNM&p_classification=02&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY (accessed 12/10/2011).
- ¹³ International Trade Union Confederation, *2009 Annual Survey of Violations of Trade Union Rights - Vietnam*, 11/06/2009, available at <http://www.unhcr.org/refworld/docid/4c52cabe23.html> (accessed 19/07/2011).
- ¹⁴ International Trade Union Confederation, *2009 Annual Survey of Violations of Trade Union Rights - Vietnam*, 11/06/2009, available at <http://www.unhcr.org/refworld/docid/4c52cabe23.html> (accessed 19/07/2011).
- ¹⁵ *ILO Convention 87* available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (accessed 19/07/11).

Section 10

Dismissal

Overview

Cambodian legislation stipulates that employees with contracts of unspecified duration cannot be dismissed without a valid reason relating to their aptitude or behaviour, and employees with fixed term contracts can only be canceled before its termination date in the event of the serious misconduct or acts of God. Employers are liable to pay an employee compensation in the event of unfair dismissal.

According to the Chinese *Labour Law*, employers who dismiss an employee unfairly will be liable to pay compensation to that employee. It is unlawful to dismiss an employee who has totally or partially lost the ability to work due to occupational diseases or injuries suffered at work, who is undergoing medical treatment for diseases or injuries, or who is pregnant, breast-feeding or on maternity leave.

The Laotian *Labour Law* specifies that termination of an employment contract is considered to be unlawful where the employer terminates a labour contract: without a valid reason or through an abuse of power, or where the employer breaches the employee's fundamental rights or breaches their contractual obligations towards the employee. Employers are liable to pay an employee compensation in the event of unfair dismissal.

Thai legislation prohibits an employer from terminating an employment contract on the grounds that the employee is a member of a trade union, and if an employee has been accused of a transgression, the employer may not suspend the employee from work until an investigation has been carried out. Employers are liable to pay an employee compensation in the event of unfair dismissal. An employer is entitled to dismiss an employee without having to give them

severance pay in the following circumstances: dishonest performance of duties, intentionally causing loss to the employer, gross acts of negligence, violations of the worker's rules/regulations, neglect of duties for three consecutive days without reasonable cause, imprisonment, except in the case of offenses that arise from negligence or petty offenses.

In Vietnam it is unlawful to dismiss an employee who is suffering from an occupational illness or work-related injury and is being treated for this, or an employee on annual leave or another form of permissible leave. Where an employer unlawfully terminates a labour contract they must re-employ the employee and pay them compensation, or else give them a severance allowance in the event that they do not wish to return to work.

Burma (Myanmar)

Relevant Legislation

None available.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labour Law* (1997)¹

Unlawful Termination, Damages and Compensation

Under Article 74 of the *Cambodian Labour Law*, in regards to contracts of unspecified duration: 'no layoff can be taken without a valid reason relating to the worker's aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment or group'. In regards to fixed term contracts, Article 73 provides that: 'If both parties do not agree, a contract of specified duration can be canceled before its termination date only in the event of serious misconduct or acts of God'. The article goes on to stipulate:

[...] premature termination of the contract by the will of the employer alone for reasons other than those mentioned in paragraphs 1 and 2 of this article entitles the worker to damages in an amount at least equal to the remuneration he would have received until the termination of the contract.

Article 77 elaborates:

The termination of a labour contract at will on the part of the employer alone, without prior notice or without compliance with the prior notice periods, entails the obligation of the employer to compensate the worker the amount equal to the wages and all kinds of benefits that the worker would have received during the official notice period.

Article 89 outlines the amount that is to be given to a worker who has been unfairly dismissed:

- 1) Seven days of wage and fringe benefits if the worker's length of continuous service at the enterprise is between six and twelve months.
- 2) If the worker has more than twelve months of service, an indemnity for dismissal will be equal to fifteen days of wage and fringe benefits for each year of service. The maximum of indemnity cannot exceed six months of wage and fringe benefits. If the worker's length of service is longer than one year, time fractions of service of six months or more shall be counted as an entire year. The worker is also entitled to this indemnity if he is laid off for reasons of health.

Article 90 also specifies that in addition to an indemnity for dismissal, an employee may claim damages from the employer in instances of constructive dismissal where the latter, 'through his evil actions, pushed the worker into ending the contract himself. If the employer treats the worker unfairly or repeatedly violates the terms of the contract, he also has to pay indemnities and damages to the worker'.

Furthermore, Article 91 provides that damages may be claimed (in addition to compensation in lieu of prior notice and the dismissal indemnity) where a labour contract has been terminated by either party without valid reason. The worker, however, 'can request to be given a lump sum equal to the dismissal indemnity. In this case, he is relieved of the obligation to provide proof of damage incurred' [Article 91]. The damages are to be decided by a competent Court, and determined based on:

[...] local custom, the type and importance of the services rendered, the worker's seniority and age, the pay deductions or payments for a retirement pension, and, in general, on all circumstances that can justify the existence and the extent of the harm incurred.

China

Relevant Legislation

Lao Dong Fa [Labour Law of the People's Republic of China] (Promulgated by the NPC Standing Committee, effective January 1, 1995), 1994 FAGUI HUIBIAN 91, 94 (Official Source)²

Unlawful Termination, Damages and Compensation

Under Sections 28 and 29 of the Chinese *Labour Law*, employers who dismiss an employee unfairly, for instance under these circumstances: where they have 'totally or partially lost the ability to work due to occupational diseases or injuries suffered at work'; where they are receiving medical treatment for diseases or injuries, or where they are pregnant, breast-feeding or on maternity leave, will be liable to pay compensation to that employee.

Section 30 additionally specifies:

The trade union of an employing unit shall have the right to air its opinions if it regards as inappropriate the revocation of a labour contract by the unit. If the employing unit violates laws, rules and regulations or labour contracts, the trade union shall have the right to request reconsideration. Where the labourer applies for arbitration or brings in a lawsuit, the trade union shall render him support and assistance in accordance with the law.

Lao PDR

Relevant Legislation

Lao PDR *Labour Law* 2006 (Amended)³

Unlawful Termination, Damages and Compensation

Article 33 of the Laotian *Labour Law* specifies that termination of an employment contract is considered to be unlawful where:

- The employer terminates a labour contract without a valid reason;
- The employer terminates the employment contract through an abuse of power, or directly or indirectly forces the worker to terminate the contract;
- The employer breaches the employee's fundamental rights; or
- The employer breaches their contractual obligations towards the employee.

Article 33 further states:

An employee whose employment contract has been terminated without justification has the right to request reinstatement to his former post, or to be assigned to other appropriate work. In the event that the employer does not reinstate the employee or the employee has stopped work, the employer shall pay an allowance to that employee based on the duration of his work, where he shall be paid 15 per cent of his basic monthly salary received before termination for each month of work, for the employee who has been employed less than three years, and 20 per cent for the employee who has been employed for more than three years.

Thailand

Relevant Legislation

Labour Protection Act, B. E. 2541 (1998)⁴

Labour Relations Act, B. E. 2518 (1975)⁵

Unlawful Termination, Damages and Compensation

The *Labour Relations Act* prohibits an employer from terminating an employment contract on the grounds that the employee is a member of the trade union [Section 121]. Furthermore, under Section 116 of the *Labour Protection Act*, if an employee has been accused of a transgression, the employer may not suspend the employee from work until an investigation has been carried out. Section 118 of the *Labour Protection Act* outlines the calculation of severance pay based on the length of time an employee has been with the employer. Additionally, an employer is required to give advance notice of termination when terminating a contract. Under Section 121 of the *Labour Relations Act*:

Where an employer fails to give advance notice to an employee of his termination, or gives advance notice but shorter than that specified in the previous paragraph, in addition to the severance pay payable [...] [the employer shall] also pay special severance pay, equal to 60-day pay at the most recent rate of basic pay that the employee has received, or equal to the basic pay received for the last 60 days in the case of an employee who receives his basic pay based upon his output.

An employer is entitled to dismiss an employee without having to give them severance pay in the following circumstances:

- 1) dishonest performance of duties
- 2) intentionally causing loss to the employer
- 3) gross acts of negligence
- 4) violations of the worker's rules/regulations
- 5) neglect of duties for 3 consecutive days without reasonable cause
- 6) imprisonment, except in the case of offences that arise from negligence or petty offences.

Where an employer terminates a contract and the employee hasn't committed any of the above offences [pursuant to Section 119 of the *Labour Protection Act*], the employer shall pay them basic pay in respect of his or her annual vacation in proportion to the number of days to which they are entitled. Finally, Section 123 of the *Labour Relations Act* states:

Where an employer violates or fails to comply with those provisions that concern entitlement to any sum of money under this Act and the employee wishes to have a competent official proceed under this Act, the employee has the right to submit a complaint in the form prescribed by the Director-General to the labour inspector for the locality in which the employee works or in which the employer is domiciled. In a case concerning entitlement to any sum of money under this Act, if the employee dies, the statutory heir has the right to submit a complaint to the labour inspector.

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994
(Amended 2 April 2002, effective 1 January 2003)⁶

Unlawful Termination, Damages and Compensation

Article 39 outlines the circumstances under which the unilateral termination of a labour contract is considered to be unlawful. These include where the employee is suffering from an occupational illness or work-related injury and is being treated for this and where the employee is on annual leave or another form of permissible leave. Furthermore, as stipulated under Article 111(3):

An employer is prohibited from dismissing a female employee or unilaterally terminating the labour contract of a female employee for reason of marriage, pregnancy, taking maternity leave, or raising a child under twelve (12) months old, except where the enterprise ceases its operation. During pregnancy, maternity leave, or raising a child under twelve (12) months old, a female employee shall be entitled to postponement of unilateral termination of her labour contract or to extension of the period of consideration for labour discipline, except where the enterprise ceases its operation.

Article 155(4) further provides:

When an employer decides to retrench or to terminate unilaterally the labour contract of an employee who is a member of the executive committee of the trade union of the enterprise, the approval of the executive committee of the trade union of the enterprise must be obtained. Where the employee is the chairman of the executive committee of the trade union of the enterprise, the approval of the immediately superior trade union organisation must be obtained.

Under Article 41, where an employer unlawfully terminates a labour contract he/she must:

[...] re-employ the employee for the position stipulated in the signed contract and must pay compensation equal to the amount of wages and wage allowances (if any) for the period the employee was not allowed to work, plus at least two months' wages and wage allowances (if any).

In the event that the employee does not wish to return to work, they shall be given a severance allowance pursuant to Article 42 of the *Labour Code* ('equal to the aggregate amount of half of one month's wages for each year of employment plus wage allowances (if any)'). Where the employer does not wish to re-employ the employee and the employee is in agreement, then 'in addition to the compensation provided for in the first paragraph of this clause and the allowance stipulated in article 42 of this *Code*, the two parties shall agree on an additional amount of compensation for the employee for the purpose of termination of the labour contract'. If an employee unlawfully terminates the contract then they will not be able to claim a severance allowance and must additionally pay the employer: 'compensation equal to half of one month's wages and wage allowances (if any)' [Article 41(2)]. Furthermore, under Article 41(3), 'Where an employee unilaterally terminates the labour contract, he shall be liable for payment of compensation for costs of training (if any) in accordance with the provisions of the Government'.

Finally, pursuant to Article 41(4):

Where a labour contract is unilaterally terminated in breach of the provisions on giving advance notice, the party in breach shall pay compensation to the other party in a sum equal to the wages which would otherwise have been paid to the employee for those days not notified.

International Laws relating to Unlawful Dismissal

ILO Convention 158, Termination of Employment (1982)⁷

Article 4 of ILO Convention 158 specifies that:

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Article 5 outlines the reasons that may not be used to justify termination. They include union membership, filing a complaint against an employer, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, or absence from work during maternity leave. Temporary absence from work because of illness or injury is also not a valid reason [Article 6]. Workers should be allowed the opportunity to defend themselves where they are terminated for their conduct [Article 7] and shall be entitled to appeal the decision where he or she feels it is unjustified [Article 8].

Furthermore, Article 11 states that:

A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

None of the GMS countries have ratified ILO Convention 158.

Endnotes

- ¹ *Cambodian Labour Law, 1997*, available at http://www.gocambodia.com/laws/labor_law.asp (accessed 16/05/11).
- ² *Lao Dong Fa [Labour Law of the People's Republic of China]*, 1/01/1995, available at <http://www.usmra.com/china/Labour%20Law.htm> (accessed 16/05/11).
- ³ *Lao PDR Labour Law (amended) 2006*, available at [http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20\(2006\)%20Eng.pdf](http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20(2006)%20Eng.pdf) (accessed 30/05/11).
- ⁴ *Thai Labour Protection Act, 1998*, available at <http://www.thailawonline.com/th/thai-laws/laws-of-thailand/105-labor-protection-act-be-2541-1998-.html> (accessed 25/05/11).
- ⁵ *Thai Labour Relations Act, 1975*, available at http://thailaws.com/law/t_laws/tlaw0140_3.pdf (accessed 25/05/11).
- ⁶ *Labour Code of the Socialist Republic of Vietnam, 23/06/1994*, available at <http://www.global-standards.com/Resources/VNLaborCode1994-2002.pdf> (accessed 16/05/11).
- ⁷ *ILO Convention 158*, available at http://www.ilocarib.org.tt/projects/cariblex/conventions_8.shtml (accessed 7/06/11).

Box Article

Reality Check!

We hope that this booklet will provide a useful reference tool for readers to quickly familiarize themselves with existing labour standards in any one country in the Mekong, or to compare labour standards in different countries, as well as an advocacy tool to upgrade and standardise working conditions in the countries of the Mekong. However, we dare not leave you with the impression that because comprehensive labour laws exist, that workers routinely receive their protection, and are living and working comfortably. Unfortunately, this is not the case in any of the countries of the Mekong. The reality is much more harsh. The labour laws are good on paper, however that is often where they stay. There remain a major problems when it comes to implementation and this increases exponentially in relation to migrant workers.

In some instances, labour laws are not well implemented due to a lack of information, trained personnel or equipment. In others, a lack of implementation stems from the conflict of interest that arise when Trade Unions are controlled directly or indirectly by the government and do not want to confront the government when a labour dispute arises. In particular, there exists a bad case of 'labour rights blindness' as far as migrant workers are concerned: blatant abuses happen for all to see, but are largely ignored.

Workers throughout the region face similar problems, including underpayment of wages, unfair dismissal, excessive working hours, exposure to hazardous working conditions, and a lack of qualified doctors to diagnose occupational diseases and illnesses. This list could go on; and ironically, it would appear remarkably similar to the index of our book.

Nonetheless, we still have faith that the law can be effective, that there can be increased political will to protect the lives of the millions of people, often young people, who work in manual labour and the service industry in the Mekong. However, at the same time we also know that it is not enough to place our trust purely in the law and that a more holistic approach is needed to improve labour conditions.

Thus, we work to increase the implementation and efficiency of labour laws by working together with trade unions, and by bringing migrant and host workers together to lobby for freedom of association and the right to collective bargaining.

We also call for greater technical advice to be offered to governments so that they can ensure compliance with labour legislation. We hope that different departments concerned with labour rights will work in greater cooperation and coordination for the benefit of workers' rights. We also see a place for increased capacity building of labour inspectors, and an increased budget that would see a greater number of labour inspectors employed.

We will also continue to work at the grassroots level with migrant workers to inform them of their labour rights, so that they are empowered to advocate for increased implementation of existing labour laws across the Mekong.

Section 11

Vocational Training



The MAP Foundation's Community Centre for Migrant Workers.
Chiang Mai, Thailand, 2008.



Traffic Law Training for Migrant Workers.
Chiang Mai, Thailand, 2010.

Overview

Chinese labour legislation provides that the State is responsible for taking measures through various channels to expand vocational training undertakings, in order to develop the professional skills of employees, to improve their qualities, and to raise their employment capabilities and work abilities. Employers/enterprises should also establish a system for vocational training under Chinese legislation.

The Labour Advisory Committee is listed as the Government Agency in charge of overseeing vocational training regulations in Cambodia, with the mission to 'study problems related to labour, the employment of workers, wages, vocational training, the mobility of labor force in the country, migrations, the improvement of the material and moral conditions of workers and the matter of labor health and safety' [Article 357 of the *Cambodian Labour Law*].

The Laotian *Labour Law* specifies that the labour administration agency is the relevant government agency in charge of overseeing and organising vocational training, and ‘developing labour skills while encouraging and coordinating with different concerned sectors, including State and private sectors throughout society’ is the labour administration agency [Article 9 of the Laotian *Labour Law*]. Employers are also legally obliged to train employees in Cambodia in order to update their qualifications and skill-levels, with the aim that they will become skilled workers with specialised skills.

Thai labour legislation simply stipulates that an employee is entitled to ‘take leave for training or development of his knowledge and skills in accordance with the rules and procedures prescribed by Ministerial Regulations’, and that employers who are also acting as the training providers must continue to abide by the rules of the employment contract and relevant laws [Section 36 of the Thai *Labour Protection Act*].

In Vietnam, the Government is authorised to formulate policies and measures to provide vocational training ‘in order to create favourable conditions for employees to find work or be self-employed’ [Article 17(4) of the Vietnamese *Labour Code*]. Businesses and organizations are permitted to establish trade training centres, however these are subject to Government control and oversight.

Burma (Myanmar)

Relevant Legislation

None available.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labour Law (1997)*¹

The Labour Advisory Committee is the listed government agency responsible for overseeing vocational training regulations, with the mission to [Article 357]:

[...] study problems related to labour, the employment of workers, wages, vocational training, the mobility of the labour force in the country, migrations, the improvement of the material and moral conditions of workers and the matter of labour health and safety.

With regards to child labour, Article 177(3) stipulates that the Ministry in Charge of Labour, in consultation with the Labour Advisory Committee:

[...] can authorise the generation of occupation or employment for adolescents aged fifteen years and over on the condition that their health, safety, or morality is fully guaranteed and that they can receive, in the corresponding area of activity, specific and adequate instruction or vocational training.

Article 180 additionally specifies that: ‘In orphanages and charitable institutions in which primary education is given, occupational or vocational training for children less than fourteen years old must not exceed three hours per day’.

In regards to apprenticeships, Article 51 states:

The apprenticeship contract is one in which a manager of an industrial or commercial establishment, an artisan or craftsman agrees to provide or is entrusted with complete, methodical and professional training to another person who contracts, in return, to work for him as an apprentice under the conditions and for a time period that have been agreed upon. This time period cannot exceed two years.

Article 56 further provides that once his or her vocational skill training is adequate, the apprentice is no longer an apprentice but a worker.

China

Relevant Legislation

*Labour Act (5 July 1994)*²

Section 66 stipulates:

The State shall take various measures through various channels to expand vocational training undertakings so as to develop professional skills of labourers, improve their qualities, and raise their employment capability and work ability.

This is elaborated upon in Section 67, where it states:

People's governments at various levels shall incorporate the development of vocational training in the plans of social and economic development, encourage and support all enterprises, institutional organisations, societies and individuals, where conditions permit, to sponsor all kinds of vocational training.

Section 68 further specifies that employers/enterprises should establish a system for vocational training, 'raise and use funds for vocational training in accordance with the provisions of the State, and provide labourers with vocational training in a planned way and in the light of the actual situation of the unit'.

Those employed in technical professions must receive pre-job training [Section 68], and pursuant to Section 69:

The State shall determine occupational classifications, set up professional skill standards for the occupations classified, and practise a system of vocational qualification certificates. Examination and verification organisations authorised by the Government are in charge of the examination and verification of the professional skills of labourers.

Lao PDR

Relevant Legislation

Lao PDR *Labour Law*, 2006 (Amended)³

The Laotian *Labour Law* specifies that the Government agency in charge of overseeing and organising vocational training, and ‘developing labour skills while encouraging and coordinating with different concerned sectors, including State and private sectors throughout society’ is the Labour Administration Agency [Article 9].

Article 8 stipulates that ‘the building and development of labour skills are conducted in various forms: learning in the schools, training in labour skills development centres, on-the-job training, study tours, exchanging lessons and other activities in the promotion of labour skills’.

Article 2(3) defines the upgrading of labour skills as ‘the professional upgrading of workers who already have basic labour skills to supply the demands of the labour market that are expanding in each period’.

Employers are legally obliged to train employees in order to update their qualifications and skill levels, with the aim that they will become skilled workers with specialised skills [Article 10]. In return, employees are responsible for advancing their learning and developing their skill sets. Article 10 further states:

All labour units shall establish and implement a plan under which they set aside an annual dedicated fund of 1 per cent from the annual salary or wages reserve fund of the employees to cover expenses for training and

upgrading of professional qualifications both within the country and abroad for workers under their responsibility. In the event that a labour unit cannot itself implement the building and development of labour skills, such labour unit shall transfer such fund to the national fund for the building and development of labour skills.

Article 11 builds on the State's obligations vis-à-vis vocational training, stating:

The State has a policy to create a fund for the building and development of labour skills. The sources of the fund are:

- The State budget, by deducting 1.5 per cent of the annual salary tax of the employees;
- Funds of labour units that are not able to build and develop labour skills by themselves[;] such labour units shall contribute 1 per cent of the annual salary or wages reserve fund of the employees[;] such fund is a direct fund of the labour unit and shall not be deducted from the salary or wages of the employees;
- Other funds mobilised from domestic and foreign sources.

The management and use of such fund for building and development of labour skills is determined by specific regulations.

Article 12 stipulates that the standard of labour skills refers to '[...] the [level of] quality determined, tested and adopted in the building and development of labour skills, and to the level of skills of employees in each professional sector', and that these shall be determined by the State and the committee on the standard of labour skills. The employer is then responsible for acknowledging the State-sanctioned standard of labour skills in determining the salary, wages and position of employees.

Article 3(7) stipulates that Laotian citizens who travel abroad to work should receive vocational training prior to departure.

Finally, Article 42 states:

The employer shall furthermore ensure that workers acquire sufficient knowledge of the rules relating to their own safety and health and shall organise training courses on those issues. The measures mentioned above shall be free of charge to workers.

Thailand

Relevant Legislation

Labour Protection Act, B. E. 2541 (1998)⁴

Skill Development Promotion Act, B.E.2545 (2002)⁵

Section 36 of the Thai *Labour Protection Act* stipulates that an employee is entitled to 'take leave for training or development of his knowledge and skills in accordance with the rules and procedures prescribed by Ministerial Regulations'.

Section 21 of the *Skill Development Promotion Act* provides that during training courses, 'the training provider who is also the employer still has to abide by the law, rules, and employment contract'. Furthermore, Section 21 states:

In case the training activity is held with the request of the employee and in written agreement, the employer may arrange training after the employee's regular working hours or on holidays with wages paid not less than the regular wage rate according to the actual number of hours spent in such training.

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002, effective 1 January 2003)⁶

Article 17(1) states:

Where, as a result of organisational restructuring or technological changes, an employee who has been employed in the business for a period of twelve (12) months or more becomes unemployed, the employer shall have the responsibility to re-train and assign the employee to a new job; if a new job cannot be created, the employer must pay an allowance for loss of work equivalent to the aggregate amount of one month's wages for each year of employment, but no less than two months' wages.

Furthermore, under Article 17(4), the Government is authorised to formulate policies and measures to provide vocational training 'in order to create favourable conditions for employees to find work or be self-employed'.

Article 20(2) provides that 'an enterprise, organisation, or individual satisfying the conditions stipulated by law shall be permitted to establish trade training centres. The Government shall promulgate provisions on the establishment of trade training centres'. Trade training centres must be registered and must pay tax. They may collect fees and must operate in accordance with the provisions of trade training as specified by law [Article 21(1)].

Under Article 21(2):

Trade training centres which cater for war invalids, injured soldiers, the disabled, and ethnic minorities; those which are located in areas of high unemployment and retrenchment; and those which teach traditional trades in factories or at home shall be considered for tax exemption or reduction.

Article 22 stipulates that the age limit for students attending a trade training centre under an apprenticeship is 13 years, 'except in the case of trades in respect of which the Ministry of Labour, War Invalids and Social Affairs determines otherwise, and must be sufficiently healthy to satisfy the requirements of the trade'.

Article 23 outlines the responsibilities of employers in regards to the provision of vocational training:

- (1) A business enterprise shall be responsible for arranging improvement of the trade skills of its employees and for re-training employees who are assigned to other jobs within the enterprise.
- (2) A business enterprise which recruits apprentices or trainees for a fixed period specified in the apprenticeship or training contract shall not be required to register, but shall be prohibited from collecting fees. The training or apprenticeship period shall be included in the employment period of an employee of the enterprise. Where a trainee or an apprentice directly produces or participates in the production of products for the enterprise during his training or apprenticeship period, he shall be paid a wage at a rate agreed between the two parties.

Articles 24(1) and 24(2) stipulate that written or oral contracts must accompany trade training, the main contents of which must include ‘the objective of the training programme, the venue, the fee, the duration, and the amount of compensation for breach of contract’.

Article 25 specifies that: ‘Enterprises, organisations and individuals are strictly prohibited from exploiting workers for self-interest motives, or enticing or compelling an apprentice or trainee to carry out illegal activities, in the name of apprenticeship programmes or trade training’.

Pursuant to Article 110(1):

State bodies shall be responsible for the expansion of various forms of training which are favourable to female workers in order to enable women to gain an additional skill or trade and to facilitate the employment of female workers suitable to their biological and physiological characteristics as well as their role as a mother.

Furthermore, Article 126 provides that those training centres that cater specifically to disabled persons ‘shall be provided with initial assistance in the form of buildings, schools, classes, furniture, equipment, and tax exemptions and low interest loans’.

Article 135a(1) (b) stipulates that workers going abroad for the purposes of employment are to be provided with pre-departure training and orientation. The specifics regarding the training of export labour are to be arranged by the Government [Article 135b].

According to Article 102, employers are responsible for organising training in regards to OHS, appropriate preventative and responsive measures in regards to health and safety, and hygiene regulations. Employers are also responsible for training junior workers [Article 121]. Finally, according to Article 140(1), the Government is mandated to ‘make detailed provisions on the re-training of unemployed workers [...]’.

International Laws relating to Training

ILO Convention 142, Human Resources Development (1975)⁷

Article 1(1) of ILO Convention 142 stipulates that states parties to the Convention shall 'adopt and develop comprehensive and co-ordinated policies and programmes of vocational guidance and vocational training, closely linked with employment, in particular through public employment services'. According to Article 1(2), these policies and programs must take account of employment needs, economic, social and cultural development, and 'the mutual relationships between human resources development and other economic, social and cultural objectives'. Furthermore, Article 1(5) sets out the objective of these policies, which is 'to encourage and enable all persons, on an equal basis and without discrimination whatsoever, to develop and use their capabilities for work in their own best interests and in accordance with their own aspirations [...]'.

Under Article 3(1), States Parties to the Convention are obliged to gradually extend their vocational training systems, 'with a view to ensuring that comprehensive information and the broadest possible guidance are available to all children, young persons and adults, including appropriate programmes for all handicapped and disabled persons'. These policies and programmes should be formulated and implemented with the help of workers' organisations [Article 5], and should cover 'the choice of occupation, vocational training and related educational opportunities, the employment situation and employment prospects, promotion prospects, conditions of work, safety and hygiene at work, and other aspects of working life [...] [Article 3(2)].

None of the GMS countries have ratified ILO Convention 142.

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers⁸

Article 7 of the Declaration states that receiving states will:

Facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate and in accordance with the legislation of the receiving state, provided that they fulfill the requirements under applicable laws, regulations and policies of the said state, bilateral agreements and multilateral treaties.

Of the GMS countries, all except China form part of ASEAN.

Endnotes

- ¹ *Cambodian Labour Law*, 1997, available at http://www.gocambodia.com/laws/labor_law.asp (accessed 16/05/11).
- ² *Labour Act*, 5/07/1994, available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/37357/64926/E94CHN01.htm> (accessed 16/05/11).
- ³ *Lao PDR Labour Law* (amended) 2006, available at [http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20\(2006\)%20Eng.pdf](http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20(2006)%20Eng.pdf) (accessed 30/05/11).
- ⁴ *Thai Labour Protection Act*, 1998, available at <http://www.thailawonline.com/th/thai-laws/laws-of-thailand/105-labor-protection-act-be-2541-1998-.html> (accessed 25/05/11).
- ⁵ *Skill Development Promotion Act*, 2002, available at http://library.dsd.go.th/dsdinfor/pagedata/ebookdoc/010400000016_0.pdf (accessed 24/0811).
- ⁶ *Labour Code of the Socialist Republic of Vietnam*, 23/06/1994, available at <http://www.global-standards.com/Resources/VNLaborCode1994-2002.pdf> (accessed 16/05/11).
- ⁷ *ILO Convention 142*, available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (accessed 16/08/11).
- ⁸ *The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*, 2007, available at <http://www.asean.org/19264.htm> (accessed 20/10/2011).

Section 12

Recruitment

Overview

In Cambodia, the Ministry of Social Affairs, Labour and Veterans Affairs is in charge of managing and sending local workers to work abroad. Any person looking for employment in Cambodia can request to be registered with the Placement Office of the Ministry in Charge of Labor or with the Employment Office of his province or municipality. Additionally, as at November 2010, there were 32 private recruitment agencies operating with a license from the Cambodian Government to recruit, train and send Cambodia migrant workers abroad.

In China, the China International Contractors Association (CHINCA)-China Overseas Employment Agency Association is a state funded organisation legally authorised by the Chinese Ministry of Commerce to manage and issue licenses to all employment agencies involved with overseas deployment of Chinese nationals. Job introduction agencies run by private individuals, other organisations and individuals who have not obtained such licences shall not be allowed to engage in providing intermediary services. For employment of foreigners within China, Chinese labour legislation stipulates that a post that is to be filled by a foreigner must be one of special need that cannot be filled by a domestic candidate.

In a 2008 factsheet on Lao PDR, the ILO stated that there are nine recruitment agencies operating in the country, six of which are privately run, and three of which are state-owned. The sending of Laotian workers to work abroad has to be done selectively, in accordance with regulations, and with the authorisation of the labour administration agency. All recruitment agencies that supply labour either domestically or internationally have to be authorised by the labour administration agency. While employers may hire foreign workers as required, the Laotian *Labour Laws* state that they should give preference to Laotian citizens where possible, particularly persons who are being targeted by poverty alleviation programs.

In Thailand, any person wishing to employ an alien in his business in the Kingdom may submit an application on behalf of the alien to the Director-General or official entrusted by the Director-General. Foreigners must have a place of residence in Thailand and have permission to stay in the country not as a tourist in order to be granted an employment permit. Thai workers can work overseas where an overseas employment licensee registers with the Central Registration office. Overseas licensees may request permission from the Registrar to enrol job-seekers in advance.

The Vietnamese *Labour Code* states that the Ministry of Labour, War Invalids and Social Affairs is mandated to carry out State administration of employment service agencies. The Government oversees the establishment and operation of employment service agencies. These have a duty to provide consultancy services, to introduce employment to workers, to supply and recruit labour at the request of employers, and to collect and provide information on the labour market. Vietnamese citizens who are aged eighteen (18) years or over, who have the ability to work, who voluntarily agree and satisfy all other standards and conditions in accordance with Vietnamese laws and the laws and requirements of the foreign party may work in a foreign country. Overseas recruitment agencies must have an operating permit issued by a competent body in charge of State administration of labour.

Burma (Myanmar)

Relevant Legislation

None available.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labour Law* (1997)¹

The Government of Cambodia, *Sub-Decree 57 on Sending Khmer Migrants to Work Abroad* (1995)²

The Government of Cambodia, *Sub-Decree 190 on The Management of the Sending of Cambodian Workers Abroad Through Private Recruitment Agencies* (2011)³

Government Agencies in charge of Monitoring Recruitment Practices

Employment of Cambodian Nationals Overseas

Article 2 of the Cambodian Government's *Sub-Decree Number 57* (1995) ("*Sub-Decree 57 on Sending Khmer Migrants to Work Abroad*") stipulates:

The sending of Khmer workers to work abroad and the management [of] these workers is under the competence of the Ministry of Social Affairs, Labour and Veterans' Affairs. The Ministry of Social Affairs, Labour and Veterans' Affairs can permit through the ministerial order (PEAKAS), any company to take Khmer workers for working overseas. If necessary, the Ministry of Social Affairs, Labour and Veterans' Affairs shall issue furthermore the rule implementing in questions. The Ministry of Social Affairs, Labour and Veterans' Affairs shall cooperate with the Ministry of Interior in complying with formalities such as issuing passports for the

workers, and with the Ministry of Foreign Affairs and International Cooperation in monitoring them.

Article 5 of *Sub-Decree 190* also states:

The Ministry of Labour and Vocational Training shall be the competent ministry to manage the sending of Cambodian workers abroad in cooperation with the Ministry of Foreign Affairs and International Cooperation and the Ministry of Interior.

There are thus a total of four ministries tasked with managing the labour migration of Cambodian citizens overseas, in addition to two Inter-Ministerial Committees that are also involved with labour migration issues. These are the Ministry of Labour and Vocational Training (MoLVT), the Ministry of Interior, the Ministry of Foreign Affairs and International Cooperation, and the Council of Ministers. The Inter-ministerial Committees are the Inter-Ministerial Working Group for Implementation of the Memorandum of Understanding (MOU) with Thailand, and the Inter-Ministerial Taskforce for Migration (IMTM).⁴

The *Sub-Decree* 'considers the ministry in charge (now MoLVT) as the providing party and a recruitment company/agency as the receiving party'.⁵ There are two other legal documents relating to labour migration in addition to *Sub-Decree 57*:

[...] Prakas 108 issued in May 2006 on "Education of HIV/AIDS, Safe Migration and Labour Rights for Cambodian Workers Abroad" and Sub-decree 70, issued in July 2006 on "The Creation of the Manpower Training and Overseas Sending Board". The latter is designed to specifically regulate sending workers to Korea.⁶

The ILO states that according to the Cambodian Government's *Sub-Decree 52* and MoVLT's Declaration No 062/07, the responsibilities of the Department of Labour and Manpower include:

- 1) Study and propose measures to develop and protect employment
- 2) Manage, issue work permits, work books, and provide working visas to Cambodian workers in-country and overseas
- 3) Check and issue work permits, work books, to foreigners working in the Kingdom of Cambodia
- 4) Prepare legal procedures on all measures to be implemented and monitored

- 5) Set up Employment Offices in Provincial/Municipal Departments of Labour and Vocational Training
- 6) Develop statistics on employment and manpower in-country and overseas for all levels of economic activities
- 7) Prepare regulations on the management of foreigners working in the Kingdom of Cambodia and on the management of Cambodian labour and workers who migrate to work overseas
- 8) Manage foreigners working in the Kingdom of Cambodia and Cambodian workers overseas in cooperation with concerned ministries in the case that many Cambodian workers request labour assistance
- 9) Seek employment markets for Cambodian labour to work overseas
- 10) Implement other duties given by the Ministry.⁷

The Department of Employment and Manpower (DEM) is mandated to oversee 'both out- and in-labour migration as well as employment in the country. It manages the registration and sending of Cambodian migrant workers and issues work permits to foreign workers in Cambodia'.⁸

Employment within Cambodia

Article 258 of the *Cambodian Labour Law* states that: 'Any person looking for employment can request to be registered with the Placement Office of the Ministry in Charge of Labour or with the Employment Office of his province or municipality'. Employers should notify the Placement Office of the Ministry in Charge of Labour or the provincial or municipal Employment Office when they have vacancies requiring the placement of new staff.

Types of Agencies and Regulations

Employment of Cambodian Nationals Overseas

Sub-Decree 190 on 'The Management of the Sending of Cambodian Workers Abroad Through Private Recruitment Agencies' stipulates under Article 6 that: 'Any agency recruiting Cambodian workers to work abroad shall obtain an authorisation for free according to the *PRAKAS* of the Ministry of Labour and Vocational Training except otherwise specified by other regulations'. As of November 2010, there were 32 private recruitment agencies operating with a licence from the Cambodian Government to recruit, train and send Cambodian migrant workers abroad.⁹

Article 7 of *Sub-Decree 190* states:

To obtain authorisation, the recruitment agencies shall fulfil the following requisite conditions:

- a) Have an office with clear address and sufficient staff, office materials, communication and transportation means;
- b) Have a training center with appropriate size, which consists of:
 - a building equipped with materials and equipment for vocational and language training to meet the standard skills and demand of the job market and for pre-departure orientation training in accordance with the guidelines;
 - proper accommodation and dining areas that ensure good health, sanitation and safety; and
 - internal rules to be recognized by the Ministry of Labor and Vocational Training.
- c) Have language teachers to provide language training that meets the skills standards and demand of the worker receivers;
- d) Enter into a contract with the Ministry of Labour and Vocational Training on the duty and procedures of job placement service operation;
- e) Deposit a guaranty money properly according to the guidelines as stipulated in *Articles 8 and 10* of this *Sub-Decree*; and
- f) Have a permanent representative in the receiving country.

According to Article 13 of *Sub-Decree 190*:

The recruitment agencies shall cooperate with the Ministry of Labour and Vocational Training and the Ministry of Foreign Affairs and International Cooperation to explore and research the demand of workforce and job skills in order to create employment opportunities for the Cambodian people.

Employment within Cambodia

At the moment, there are no recruitment agencies that operate in recruiting Cambodian workers inside the country. However, the *Cambodian Labour Law* (1997) mandates the MoLVT (Placement Office) to place and recruit workers.

Article 258 of the *Cambodian Labour Law* stipulates:

Any person looking for employment can request to be registered with the Placement Office with the Ministry in Charge of Labour or with the Employment Office in his/her province or municipality. All employers are required to notify the placement office with the Ministry in Charge of

Labour or with the Employment Office in his/her province or municipality of any vacancies in his/her enterprise or any new need for personnel. An employer can directly recruit workers for his/her enterprise, but he/she must meet the requirement mentioned in Article 21 of this law.

Recruitment Procedures, Fees and Regulations

Employment of Cambodian Nationals Overseas

Article 1 of *Sub-Decree 57* provides:

In order to access the higher standard of living and to upgrade vocational skills, and generate the national revenue the Royal Government allows the sending of Khmer workers to work abroad while the domestic labour market is unable to absorb totally the unemployed and under employed persons. Khmer workers of both sexes of at least 18 years of age, who have submitted their application forms for the job to the Ministry of Social Affairs, Labour and Veterans' Affairs, are considered to be candidates for selecting and sending to work abroad.

According to Article 3 of *Sub-Decree 57*, candidates for overseas employment can be of either sex, must be over 18 years of age, and must submit an application form for a job to the Ministry of Social Affairs, Labour and Veterans' Affairs. Article 5 specifies that the main criteria must be set out by the receiving party in a proposal/request for employees, including the date of commencement and termination of the work, location of the job, salary and other benefits, the numbers of workers and the skills required, and the transportation of workers to and from the workplace.

Article 5 of *Sub-Decree 57* then stipulates:

After receiving the proposal, the providing party shall reply to the receiving party within 45 days stating whether the workers can be totally or partly provided or cannot be provided, or if it is needed to discuss in greater detail. The receiving party shall reply to the providing party within 30 days stating whether all or a proportion of the workers are needed. If the deadline of 30 days is exceeded and there is no further discussion, the providing party considers that the receiving party is no longer interested in those workers.

If permission is granted to the receiving party then they shall deposit guarantee money equivalent to an amount of USD 100,000 into the account of the providing party [Article 7, *Sub-Decree 57*; Article 8, *Sub-Decree 190*]. Failure to do so will render the permission null and void. This guarantee money may be used to pay workers where the employer fails to do so. The deposit will be returned to the receiving party when the employment contract is 'achieved definitively' [Article 7, *Sub-Decree 57*].

Article 22 of *Sub-Decree 190* states:

All advertisements of the recruitment agencies shall be appropriate and comprehensive according to the facts regarding selection requirements, working conditions and benefits to be entitled during the employment without lying or cover-up.

An employment contract is then to be drafted in both Khmer and either French or English, signed by the workers and receiving party, and authorised by the labour inspector [Articles 11 and 12, *Sub-Decree 57*]. The contract must not exceed a period of two years and must contain clear details of the names and addresses of each party, the workers' salary and allowances, date of commencement and termination of work, hours of work, holidays, leave, transportation, social security, required skills, location of work, and the provision of accommodation, medical care, meals and clothing [Article 9, *Sub-Decree 57*].

Article 21 of *Sub-Decree 190* declares:

The recruitment agencies shall be responsible for the working conditions and living conditions before recruiting workers for overseas work such as types of work, workplace, working hours, skills, salary, benefits, health insurance, accommodation, transport, security and safety within the working and accommodation areas.

Article 14 of *Sub-Decree 57* specifies that prior to an employee leaving to work overseas, the providing party and receiving party must conduct a training course on the system of work in the receiving country, and the life-style, customs, laws and traditions of the host country. According to Article 15 of *Sub-Decree 57*, each worker will be taxed by the Cambodian Government. Recruitment agencies in Cambodia are also responsible for filling out the relevant application forms and providing a health check up if required for Cambodian nationals going overseas to work, per Article 19 of *Sub-Decree 190*.

Article 16 of *Sub-Decree 57* stipulates that the providing party will send officials from time to time to monitor the implementation of the employment contract, the expenses of which must be borne by the receiving party. Additionally, Article 18 of *Sub-Decree 57* states that the date of the repatriation of the workers shall be jointly agreed by the receiving and providing parties and, ‘the receiving party shall notify the sending party within 45 days before the real date of the repatriation of the workers’.

Article 26 of *Sub-Decree 190* stipulates:

When the employment contracts of the workers expire and are not to be renewed, the recruitment agencies shall make proper arrangements for the repatriation of workers by officially notifying the embassy or representative mission of the Kingdom of Cambodia to the receiving country and the Ministry of Labour and Vocational Training at least 30 (thirty) working days prior to each repatriation by clearly specifying the number and names of workers, and the time and border gates where the workers will cross.

Furthermore, Article 27 of *Sub-Decree 190* provides that recruitment agencies ‘shall provide appropriate services in order to ensure that workers return to the Kingdom of Cambodia safely’. Finally, pursuant to Article 20 of *Sub-Decree 57*, any person who sends Khmer workers to work overseas in violation of *Sub-Decree 57* will be committing an offence and be liable to punishment in accordance with existing law.

Employment within Cambodia

Article 259 of the *Cambodian Labour Law* specifies that: ‘No employer is required to accept a worker who has been referred to him by the Placement Office. The priority for accepting certain categories of workers will be determined by special provisions and regulations’. Article 260 also prohibits Placement Office personnel from demanding or accepting ‘any payment whatsoever for the placement of a worker’.

Article 263 additionally stipulates that: ‘Enterprises of any kind and professionals such as lawyers, bailiffs, and notaries who need to recruit staff to work in their profession must appeal to Cambodians as a first priority’.

Employment of Foreign Labourers / Labour within Cambodia

Pursuant to Article 261 of the *Cambodian Labour Law*, foreign workers must possess a valid work permit and employment card issued by the Ministry in Charge of Labour. They must also meet the following conditions:

- Employers must beforehand have a legal work permit to work in the Kingdom of Cambodia; must have legally entered the Kingdom of Cambodia; must possess a valid passport; must possess a valid residency permit;
- These foreigners must be fit for their job and have no contagious diseases. These conditions must be determined by a *Prakas* (ministerial order) from the Ministry of Health with the approval of the Ministry in Charge of Labour.

Article 261 states: ‘The work permit is valid for one year and may be extended as long as the validity of extension does not exceed the fixed period in the residency permit of the person in question’. Under Article 262 a work permit may be revoked by the Ministry in Charge of Labour where the holder is competing with Cambodian job seekers, or where ‘the holder is unemployed for more than one month or is hired by another employer’.

The Ministry in Charge of Labour, ‘shall issue a *Prakas* for the issuance of work permits and employment cards to foreign workers’ and a joint *Prakas* of the Ministry in Charge of Labour and the Ministry of Economics and Finance ‘shall set the rate of the fee for issuing such work permits and employment cards’ [Article 262]. According to Article 264, the maximum allowable percentage of foreign workers who can be employed in each enterprise at any one time shall be determined by ministerial order based on these three categories: office personnel, specialised personnel and non-specialised personnel. Furthermore, each enterprise is also required to justify ‘during the entirety of its existence, that each of the three categories of personnel specified above include at least the minimum percentage of workers of Cambodian nationals as already provided’ [Article 264]. However, in exceptional cases, Article 265 permits the percentage of foreigners to be exceeded above the limit set by ministerial order in order to allow the employment of specialists ‘indispensable to the operation of the enterprise’.

China

Relevant Legislation

Lao Dong Fa [Labour Law of the People's Republic of China] (Promulgated by the NPC Standing Committee, effective January 1, 1995), 1994 FAGUI HUIBIAN 91, 94 (Official Source)¹⁰

Rules for the Administration of Foreigners in China (Promulgated January 22, 1996)¹¹

Law of the People's Republic of China on the Promotion of Employment (Adopted at the 29th Meeting of the Standing Committee of the Tenth National People's Congress on August 30, 2007)¹²

Government Agencies in charge of Monitoring Recruitment Practices

Employment of Chinese Nationals Overseas

The China International Contractors Association (CHINCA)-China Overseas Employment Agency Association is a state-funded organisation legally authorised by the Chinese Ministry of Commerce to manage and issue licences to all employment agencies involved with overseas deployment of Chinese nationals. Job introduction agencies run by private individuals, other organisations and individuals who have not obtained such licenses shall not be allowed to engage in providing intermediary services.¹³

Employment within China

Article 35 of the *Law of the People's Republic of China on the Promotion of Employment* states:

People's governments at or above the county level shall establish a sound system to provide public services for employment, set up public service agencies for employment and provide the following services to the workers gratis.

Furthermore, Article 40 of the *Law of the People's Republic of China on the Promotion of Employment* stipulates that the following conditions must be met by job placement services:

- (1) having a definite charter and rules of management;
- (2) having fixed premises, office facilities and a certain amount of start-up funds, which are essential to the business;
- (3) having a certain number of full-time staff members armed with the appropriate professional qualifications; and
- (4) other conditions prescribed by laws and regulations.

Employment of Foreign Labourers/Labour within China

Article 6 of the *Rules for the Administration of Foreigners in China*, stipulates that a post that is to be filled by a foreigner must be one of special need that cannot be filled by a domestic candidate.

Article 7 of the *Rules for the Administration of Foreigners in China* specifies the conditions that must be fulfilled by a foreigner seeking employment in China. They must be:

- (1) 18 years of age or older and in good health;
- (2) with professional skills and job experience required for the work of intended employment;
- (3) with no criminal record;
- (4) a clearly-defined employer; and
- (5) with valid passport or other international travel document in lieu of the passport (hereinafter referred to as the "Travel Document").

Article 8 of the *Rules for the Administration of Foreigners in China* provides that foreigners must obtain a valid employment visa, and may only commence employment in China after they have also obtained an employment permit for foreigners (prepared and issued by the Ministry of Labour), as well as the foreigner residence certificate.

Article 9 of the *Rules for the Administration of Foreigners in China* stipulates the categories of persons who are exempt from the requirement to obtain an employment licence and permit. These include:

- (1) foreign professional technical and managerial personnel employed directly by the Chinese government or those with senior technical titles or credentials of special skills recognized by their home or international technical authorities or professional associations to be employed by Chinese government organs and institutions and foreigners holding Foreign Expert Certificate issued by China's Bureau of Foreign Expert Affairs;

- (3) foreign workers with special skills who work in offshore petroleum operations without the need to go ashore for employment and hold “Work Permit for Foreign Personnel. Engaged in the Offshore Petroleum Operations in the People’s Republic of China”; and
- (4) foreigners who conduct commercialised entertaining performance with the approval of the Ministry of Culture and hold a “Permit for Temporary Commercialised Performance”.

Pursuant to Article 11 of the *Rules for the Administration of Foreigners in China*, employers wishing to hire foreign labour must fill out an application form and submit the form to the trade authorities for approval, in addition to the following documents:

- (1) curriculum vitae of the foreigner to be employed;
- (2) letter of intention for employment;
- (3) report of reasons for employment;
- (4) credentials of the foreigner required for the performance of the job;
- (5) health certificate of the foreigner to be employed; and
- (6) other documents as required by regulations

Once the approval has been granted [Article 12 of the *Rules for the Administration of Foreigners in China*]:

[...] the employer shall take the application form to the labour administration authorities of the province, autonomous region or municipality directly under the central Government or the labour administration authorities at the prefecture and city level where the said employer is located for examination and clearance. The labour administration authorities described above shall designate a special body (hereinafter referred to as the “Certificate Office”) to take up the responsibility of issuing the Employment Licence. The Certificate Office should take into consideration the opinions of the competent trade authorities and the demand and supply of the labour market, and issue the Employment Licence to the employer after examination and clearance.

Article 13 of the *Rules for the Administration of Foreigners in China* stipulates that: ‘The examination and approval by the competent trade authorities is not required for foreign-funded enterprises to employ foreigners, and such enterprises may submit their applications directly to the Certificate Office of the labour administrative authorities for the Employment Licence, bring with them the

contract, articles of association, certificate of approval, business licence and the documentation referred to in Article 11 of these *Rules*'.

As per Article 14 of the *Rules for the Administration of Foreigners in China*, 'Employers with permission to employ foreigners shall not send the Employment Licence nor the letter of visa notification directly to the foreigners to be employed, and they must be sent by the authorised unit'. Furthermore, Article 15 of the *Rules for the Administration of Foreigners in China* provides that foreigners with permission to work in China, 'should apply for employment visas at the Chinese embassies, consulates and visa offices, bringing with them the Employment Licence issued by the Ministry of Labour, the letter or telex of visa notification sent by the authorised unit and [their] valid passport or Travel Document'.

Within 15 days of receiving the foreign worker's completed application, the employer should take the worker to receive his employment permit [Article 16, *Rules for the Administration of Foreigners in China*]. After receiving their employment permit foreigners will have 30 days to apply for a residence certificate [Article 17, *Rules for the Administration of Foreigners in China*]. The validity of the residence certificate may depend on the validity of the employment permit.

Article 18 of the *Rules for the Administration of Foreigners in China* stipulates:

The employer and its foreign employee should, in accordance with law, conclude a labour contract, the term of which shall not exceed five years. Such contract may be renewed upon expiration after the completion of the clearance process in accordance with *Article 19* of these *Rules*.

Accordingly, under Article 19 of the *Rules for the Administration of Foreigners in China*, the foreign worker's employment permit will cease to be effective when the labour contract expires or is terminated. If renewal is required, 'the employer should, within thirty days prior to the expiration of the contract, submit an application to the labour administration authorities for the extension of the terms of employment, and after approval is obtained, proceed to go through formalities for the extension of the Employment Permit'. Following on from this, Article 21 of the *Rules for the Administration of Foreigners in China* stipulates:

After the termination of the labour contract between the foreign employee and his employer, the employer should promptly report it to the labour and public security authorities, return the Employment Permit and the residence certificate of the said foreigner, and go through formalities for his exit from China.

Article 22 of the *Rules for the Administration of Foreigners in China* provides that foreign workers shall receive wages no lower than the minimum wage in their locality. Under Article 25 of the *Rules for the Administration of Foreigners in China*, foreigners who have had their residency status revoked due to a violation of Chinese law will have their labour contracts terminated and employment permits withdrawn.

Lao PDR

Relevant Legislation

Lao PDR *Labour Law* 2006 (Amended)¹⁴

Government Agencies in Charge of Monitoring Recruitment Practices

The Labour Administration Agency is comprised of the Ministry of Labour and Social Welfare, the labour and social welfare divisions of each province and city, and the labour and social welfare offices in each district and municipality [Article 66, *Labour Law*]. According to Article 67, the Ministry of Labour and Social Welfare is responsible for administering ‘Lao workers working within the country and abroad, and foreign workers working in the Lao PDR, in collaboration with the Ministry of Foreign Affairs, the Ministry of Security, and other sectors at central and local levels, as necessary’. The Ministry of Labour and Social Welfare is additionally responsible for administering and inspecting the activities of recruitment agencies.

The provincial and city level labour and social welfare divisions are mandated to ‘administer Lao workers working [in] country and abroad, and foreign workers working in Lao PDR, in collaboration with other relevant sectors within its locality as assigned by the Ministry’ [Article 68]. Furthermore, pursuant to Article 69, the labour and social welfare office of each district or municipality is mandated to: ‘collaborate with other offices and organisations in the building and developing of labour skills, job placement and administration of labour’.

Types of Agencies and Regulations

In a 2008 factsheet on Lao PDR, the ILO stated that there are nine recruitment agencies operating in the country, six of which are privately run, and three of which are state-owned. The ILO stated that all are subject to the same regulations.¹⁵

Recruitment Procedures

Employment of Laotian Nationals Overseas

According to Article 14, the sending of Laotian workers to work abroad will be done selectively, in accordance with regulations, and with the authorisation of the labour administration agency. All recruitment agencies that supply labour either domestically or internationally have to be authorised by the labour administration agency.

Employment within Laos

Article 13 stipulates that job-seekers are to register with the Labour Administration Agency or with legally approved job placement enterprises.

Article 3 outlines the principles that must be adhered to by employers and job-seekers, including:

1. Employers must use Lao workers; if it is necessary to use foreign workers, approval from the labour administration authority must be obtained;
2. Employers must acknowledge and facilitate employees to participate as members of lawful mass organisations, and other social organisations within its labour unit;
3. Employees that wish to go abroad shall receive training in the necessary general knowledge and obtain permission from the labour administration authority.

Measures ensuring Compliance with the Law and Labour Protection

Liaison with the Ministry of Labour and Social Welfare should be sought during the planning and execution of a labour-based programme, not only for the purpose of controlling the working conditions but also to emphasise its advisory role.¹⁶

Employment of Foreign Labourers/Labour

Article 25 specifies that while employers may hire foreign workers as required, they should give preference to Laotian citizens where possible, particularly persons who are being targeted by poverty alleviation programmes. The Article further states:

In the case of necessity, the labour unit may accept foreign employees but they must be a select group and be approved by the Labour Administration Agency. Such acceptance shall be in the following proportions:

- For physical labourers, it is permitted to accept not more than 10 per cent of the number of total employees in that labour unit;
- For workers having intellectual expertise to work, it is permitted to accept not more than 20 per cent of the number of total employees in that labour unit.

In the case of necessity, the import of foreign labour may exceed the proportions mentioned above, but approval from the government must be obtained. Foreign workers shall only be permitted to enter and work in Lao for a restricted period and have the obligation to transfer expertise to Lao workers. The State will not allow foreign workers to work or engage in professions that are reserved for Lao citizens. The list of reserved professions is defined in separate regulations.

Thailand

Relevant Legislation

Employment and Job Seeker Protection Act, B.E. 2528 (1985)¹⁷

Alien or Foreign Employment Act, B.E. 2521 (1978)¹⁸

Government Agencies in charge of Monitoring Recruitment Practices

Employment within Thailand

Section 6 of the *Employment and Job Seeker Protection Act* (hereafter referred to as the *Employment Act*) stipulates that a Central Employment Registration Office is to be established under the control of the Department of Employment. The person in charge of this office will be the Central Employment Registrar.

Furthermore, Section 7 indicates that an Employment Office is also to be established under the auspices of the Department of Employment and Ministry of Labour and Social Welfare, mandated to help people to find work.

Recruitment Procedures

Employment within Thailand

Under the *Employment Act*, Section 8 stipulates that a job seeker must be issued with a licence in accordance with ministerial regulations. Section 9 defines the requirements for a job seeker to be issued with a domestic employment licence, including:

- (1) being of Thai nationality;
- (2) being not less than twenty years of age;
- (3) not being a licensee of the employment licence;
- (4) not being under a suspension period in the case where the employment licence of a licensee has been suspended;
- (5) not being a licensee whose employment licence has been revoked;
- (6) not being an incompetent or quasi-incompetent;
- (7) not being, or not formerly, a person of bad behaviour or defective morals;
- (8) not being a director, partner or manager of the juristic person who is a licensee of the employment licence;
- (9) not being a director, partner or manager of the juristic person whose employment license has been revoked or is under appeal;
- (10) not having been sentenced by a final judgment of the Court or any legitimate order to a term of imprisonment for any offence of dishonesty, subjected to the provisions of laws, the element thereof or any offence under this Act; and
- (11) giving money to the registrar as security for the execution of this Act in an amount as prescribed by the ministerial regulations, which shall not be less than one hundred thousand baht.

Section 15 stipulates:

A domestic employment licensee shall register the employees and agents with the registrar in accordance with the rules, procedure and conditions as prescribed by the ministerial regulations, and shall keep the register thereof which is made in the form as determined by the Director-General at the office in order to be examined by the job seekers during the working hours. An employee and agent shall not be an employee or agent of

another domestic employment agency simultaneously [...] A license granted to any domestic employment licensee shall cover the registered employees or agents of such licensee.

Section 16 specifies that security of not less than 50, 000 baht (in cash, bond or letter of guarantee from a bank), must be paid to the registrar by the Thai recruitment agency submitting a request for registration. This security can be used to compensate job seekers where the domestic employment agency violates the provisions of the *Employment Act* in such a way that damage is inflicted on a job seeker. Section 23 specifies that domestic employment licensees must conclude employment contracts with job seekers, in a form prescribed by the Director-General.

Section 26 provides that: 'No domestic employment licensee shall demand or receive any money or property from a job seeker other than a service charge or expense'. This is elaborated upon under Section 27, where it is stipulated that service charges may only be charged once the job seeker has received their first payment of wages.

Section 28 provides:

In the case where a job seeker fails to get a job as stipulated in the employment contract, earns wages less than the amount stipulated in the employment contract or gets a job which is not stipulated in the employment contract, a domestic employment licensee shall arrange for such a job seeker to go back to the office or temporarily go to the office where the licensee concluded the employment contact with such job seeker. In this case, the licensee shall be responsible for travel expenses, accommodation and the meals of the job seeker and shall return the service charge and fees received under *Section 27* to the job seeker. A job seeker shall have to give a written notice to the registrar under *Section 25 (2)* within fifteen days as from the date such arrangement was made. In the case where a job seeker refuses to go back or agrees to earn a wage less than the amount stipulated in the employment contract, or gets a job which is not stipulated in the employment contract, a domestic employment licensee shall not arrange for a job seeker to go back. In this case, a licensee shall have to give a written notice to the registrar under paragraph one.

Measures ensuring Compliance with the Law and Labour Protection

Employment of Thai Nationals Overseas

Section 30 of the *Employment Act* states: 'No person shall undertake the overseas employment for a job seeker, except where the licence is granted by the registrar. The application for, and the issuance of, a license shall be in accordance with the rules, procedure and conditions as prescribed by the ministerial regulations'.

Section 31 outlines the procedures and requirements for a recruitment agency to be able to recruit workers to work overseas, stating:

The applicant for the overseas employment licence shall be a limited company or public limited company and shall have the qualifications and not be under the prohibitions as follows:

- (1) its registered and paid up capital shall be prescribed by the ministerial regulations, but shall not be less than one million Baht;
- (2) its capital belongs to shareholders of Thai nationality for not less than three-quarters of the total capital, and the number of shareholders of Thai nationality shall not be less than three-quarters of the total number of the shareholders;
- (3) not being a licensee of the employment licence;
- (4) not being under a suspension period in the case where the employment licence of a licensee has been suspended;
- (5) not being a licensee whose employment license has been revoked;
- (6) its manager having the qualifications and not being under the prohibitions as prescribed under *Section 9*; and
- (7) giving money to the registrar as security for the execution of this *Act* in an amount as prescribed by the ministerial regulations which shall not equal less than five hundred thousand baht.¹⁹

According to Section 35, overseas employment licensees may request permission from the registrar to enrol job seekers in advance.

Section 36 stipulates:

In sending a job seeker to work abroad, the overseas employment licensee shall act as follows:

- (1) submit, prior to sending a job seeker to work abroad, the employment contract which is concluded by and between the overseas employment licensee or its agent and a job seeker, together with conditions of hire of services which are concluded

- by and between the overseas employer or its authorised agent and a job seeker as well as other evidence as notified by the Director-General, to the Director-General for consideration;
- (2) organise for a job seeker to have a medical examination in accordance with the rules and procedures, and at the infirmary, as notified by the Director-General;
 - (3) organise for a job-seeker to have skills testing in accordance with the rules as notified by the Director-General of the Department of Skills Development;
 - (4) organise for a selected job seeker who has passed skills testing to get training in laws, customs and traditions of the country in which the job seeker is going to work, including working conditions, at the Central Employment Registration Office, Provincial Employment Registration Office or other institutions as notified by the Director-General;
 - (5) submit a list specifying the name and work place of a job seeker, together with a copy of the employment contract to the Central Employment Registrar within seven days as from the departure date of a job seeker;
 - (6) notify, in writing and together with a list specifying name and work place of a job seeker, the Thai Labour Office of the country where a job seeker is working for information within fifteen days as from the arrival date of a job seeker. In the case where there is no Thai Labour Office in such country, such notification shall be made, within the aforesaid period, to the Royal Thai Embassy or the Royal Thai Consulate to such country or the Royal Thai Embassy or the Royal Thai Consulate or other persons having duty in taking care of Thai nationals in such country; and
 - (7) report to the Central Employment Registrar by the tenth day of the following month in the case where there is a job-seeker who fails to go to work abroad under the employment contract. [...] The report under (7) shall be made in the form as determined by the Director-General.

Section 37 specifies that the overseas employment licensee who concludes an employment contract with a job seeker should remit money to a fund for every job seeker hired, 'in accordance with the rules, procedure, period of time and rates as prescribed by the ministerial regulations. Such rates may be varied upon [...] country or region [...]'.

Section 38 stipulates that overseas employment agencies may not accept service fees from job seekers in advance. They may only be collected after employment commences.

Section 39 states that in the event that a job-seeker arrives in the country of employment but is not given a job as stipulated in the employment contract, the overseas employment licensee will act as follows:

- (1) arrange for such a job-seeker to go back to Thailand and be responsible for travel, accommodation, meals and other necessary expenses to such job seeker until he or she arrives in Thailand; and
- (2) notify, in writing, the Thai Labour Office to such country for information within fifteen days. In the case where there is no Thai Labour Office to such country, such notification shall be made to the Royal Thai Embassy or the Royal Thai Consulate to such country or the Royal Thai Embassy or the Royal Thai Consulate or other persons having duty in taking care of Thai nationals in such country. A copy of such notification shall also be sent to the Central Employment Registration Office.

Section 40 specifies that where a job seeker arrives in the host country but their wages, job position or other benefits are different to what was promised in their employment contract, the job-seeker may request the recruitment agency to arrange their return to Thailand, or alternatively they can choose to accept the different conditions. In the event that a job seeker returns to Thailand under Section 40, Section 41 stipulates that the recruitment agency may request that the Director-General compensate them from the remittance fund, in an amount equal to half of the expenses that they incurred in mobilising and ensuring the return of the job seeker. The Article then states:

If the Director-General is of the opinion that the circumstances in which a job-seeker fails to secure a job, wage, position or other benefits as stipulated in the employment contract were not caused by any fault of the licensee and the licensee has tried his or her best to get the job seeker a job, wage, position or other benefits as stipulated in the employment contract or the licensee has tried his/her best to arrange a job seeker to go back to Thailand as soon as possible, the Director-General shall have an order to pay compensation from the fund to the licensee.

Finally, Section 63 authorises competent officials to stop job-seekers from travelling outside of Thailand where they believe that the job seeker does not in fact have the required skills or experience to fulfill the job description.

Employment of Foreign Labourers/Labour

According to Section 7 of the *Alien or Foreign Employment Act*

[...] an alien may engage in any work which is not prohibited by the Royal Decree issued under section 6 only upon receipt of a permit from the Director-General or official entrusted by the Director-General except an alien who is permitted to enter the Kingdom for temporary stay under the law on immigration in order to engage in the work which is of necessity and urgency for a period not longer than fifteen days, but such alien may engage in the work after he has notified the Director-General or official entrusted by the Director-General in writing in the forms prescribed by the Director-General.

Section 8 further stipulates:

Subject to the law on immigration, any person wishing to employ an alien in his business in the Kingdom may submit an application on behalf of the alien to the Director-General or official entrusted by the Director-General. The Director-General or official entrusted by the Director-General may issue a permit to an alien under paragraph one only after the entry into the Kingdom of such alien.

Section 11 specifies that a foreigner must have a place of residence in Thailand and have permission to stay in the country not as a tourist in order to be granted an employment permit.

Section 15 allows for the renewal of work permits, stating:

Before a permit has expired and if the holder of the permit wishes to continue working, he shall apply for a renewal of the permit with the registrar prior to the expiration thereof. In such a case, the applicant for renewal of the permit may continue working until the registrar issues an order refusing the renewal of the permit. Each renewal of permit shall be valid for one year, except:

- (1) the renewal of permit under *Section 13(3)* shall be valid for the period not more than the extension which the holder has been permitted to stay in the Kingdom;
- (2) the renewal of permit under *Section 13(4)* shall be valid for thirty days each time unless such alien has been permitted to stay in the Kingdom under the law on immigration for a definite period which is longer than thirty days in which case the renewal of permit shall

be for such period which he has been permitted to stay in the Kingdom, but not longer than one year.

Pursuant to Section 21 of the *Alien or Foreign Employment Act*, the holder of a work permit shall not engage in any type of work other than that listed on their permit, and may only change the locality of their place of work after obtaining permission from the registrar.

Section 22 states: 'No person shall employ an alien who has no permit nor employ him in the work which is of different description or condition from that specified in the permit'.

The following costs are associated with foreign workers being employed in Thailand:

- (1) Work permit each year, costing 1,000 baht each
- (2) Renewal of a permit or extension of working period each year 1,000 baht each
- (3) Permit substitute 300 baht each
- (4) Permission for changing work or locality or place of work 500 baht each

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002, effective 1 January 2003)²⁰

Government Agencies in charge of Monitoring Recruitment Practices

Article 18(3) of the Vietnamese *Labour Code* states that the Ministry of Labour, War Invalids and Social Affairs is mandated to carry out State administration of employment service agencies.

Types of Agencies and Regulations

Employment within Vietnam

Article 18(3) of the Vietnamese *Labour Code* stipulates:

1. An employment service agency shall have a duty to provide consultancy services, to introduce employment to workers, to supply and recruit labour at the request of employers, and to collect and provide information on the labour market, and other duties as provided by law. The Government shall provide for the conditions and procedures for establishment and operation of employment service agencies.
2. An employment service agency shall be permitted to collect fees, be considered for tax reduction or exemption by the State, and organise trade training in accordance with the provisions of Chapter III of this Code.

Recruitment Procedures, Fees and Laws

Employment of Vietnamese Nationals Overseas

Article 134 of the Vietnamese *Labour Code* states:

1. The State encourages enterprises, bodies, organisations and individuals to search and expand the labour market in order to create employment in foreign countries for Vietnamese employees in accordance with the law of Vietnam, the law of the foreign country, and international treaties to which Vietnam is a signatory or participant.
2. Vietnamese citizens who are aged eighteen (18) years or over, who have the ability to work, who are voluntary and satisfy all other standards and conditions in accordance with Vietnamese laws and the laws and requirements of the foreign party may work in a foreign country.

Article 134a(1) – (4) lists the ways that Vietnamese citizens may be sent overseas to work. These include under contracts for tender or specific projects overseas, to fill a labour gap according to the terms of a contract signed between a Vietnamese citizen and a foreign party, to work under investment projects abroad, or other forms as stipulated by law.

Article 135(1) stipulates that recruitment agencies must have an operating permit issued by a competent body in charge of State administration of labour. Article 135(2) outlines the following responsibilities and rights of recruitment agencies ('labour export enterprises'):

- (a) To register labour export contracts with the competent body in charge of State administration of labour;
- (b) To exploit the market and enter into contracts with foreign parties;
- (c) To publicise the criteria and conditions for recruitment and the interests and obligations of workers;
- (d) To recruit workers directly and not to collect recruitment fees from workers;
 - To organise training and orientation education for workers prior to departure for work abroad in accordance with law;
- (e) To enter into contracts with workers for working abroad; to organise for workers to go abroad and return to Vietnam in accordance with the signed contracts and the provisions of the law;
- (g) To collect fees for labour export directly and to make payment to the labour export assistance fund as stipulated by the Government;
- (h) To manage and protect the interests of workers during the period of working abroad under their contracts in accordance with the laws of Vietnam and the law of the foreign country;
- (i) To pay compensation for damage to workers caused by the breach of the contract by the enterprise;
- (k) To initiate action to claim compensation for damage caused by the breach of the contract by the worker;
- (l) To complain to the authorised State body against breaches of the laws in the field of labour export.

Under Article 135(3), 'An enterprise sending Vietnamese workers to work abroad for implementation of tender contracts, contracts for specific works or investment projects abroad must register the contracts with the competent State body [...]'. Article 135(4) further provides that the Government 'shall make detailed provisions on workers working abroad pursuant to a contract and not through an enterprise'.

Workers travelling abroad have the following rights and obligations, pursuant to Article 135a(1):

- (a) To be provided with information relating to labour policies and laws, conditions for recruitment, rights and obligations of workers working abroad;
- (b) To be provided with training and orientation education prior to departure for work abroad;
- (c) To enter into and perform the contract correctly;

- (d) To ensure the interests under the signed contract in accordance with the laws of Vietnam and the law of the foreign country;
- (e) To comply with the laws of Vietnam and the law of the foreign country, and to respect the customs and traditions of the foreign country;
- (f) To enjoy consular and judicial protection;
- (g) To pay fees for labour export;
- (h) To complain, denounce or initiate an action to the authorised body of the State of Vietnam or of the foreign country against breaches of the labour export enterprise and the foreign employer;
- (i) To pay compensation for damage caused by a breach of the contract; and
- (j) To receive compensation for damage caused by a breach of the contract by the enterprise.

Article 132 stipulates:

1. Foreign invested enterprises may directly recruit Vietnamese employees or may do so through an employment service agency, and must notify the list of recruited employees to the local body in charge of State administration of labour. Where a Vietnamese is unable to satisfy the requirements for work which requires highly technical or management skills, an enterprise shall be permitted to employ a percentage of foreign employees for a certain period provided that training plans and programmes are established in order to enable Vietnamese workers to do such work within a short period of time and to replace foreign employees as stipulated by the Government.
2. International or foreign bodies and organisations and foreign individuals in Vietnam may recruit Vietnamese and foreign employees in accordance with regulations of the Government.
3. The minimum wage which applies to a Vietnamese employee in cases stipulated in *Article 131* of this *Code* shall be determined and declared by the Government after consultation with the Vietnam General Confederation of Labour and the representative of the employer.
4. Working hours, rest breaks, occupational safety and hygiene measures, social insurance, and resolution of labour disputes in the case of an enterprise or organisation and other cases stipulated in *Article 131* shall be in accordance with the provisions of this *Code* and other relevant legal instruments.

Measures ensuring Compliance with the Law and Labour Protection

Employment of Vietnamese Nationals Overseas

Article 135c of the Vietnamese *Labour Code* stipulates:

1. Illegal recruitment and sending of workers to work abroad is strictly prohibited.
2. Enterprises, organisations or individuals abusing labour export to recruit, train and organize the sending of workers to work abroad illegally shall be dealt with in accordance with the provisions of the law and shall pay compensation to workers if they cause damage.
3. Workers abusing the opportunity to work abroad for other purposes shall be dealt with in accordance with the provisions of the law and shall pay compensation if they cause damage.

Employment of Foreign Labourers/Labour

Article 131 of the Vietnamese *Labour Code* provides that foreign labourers and foreign enterprises working in Vietnam shall be subject to, and protected by, the same labour laws as Vietnamese citizens.

Article 133(1) provides:

A foreigner who works for an enterprise, organization, or individual in Vietnam for three months or more must obtain a working permit issued by the body in charge of State administration of labour of the province or city under central authority; the duration of the labour permit shall be in accordance with the term of the labour contract but shall not exceed thirty six (36) months and may be extended at the request of the employer.

Finally, under Article 133(2):

A foreigner who works in Vietnam shall be entitled to all rights and benefits, and be subject to all obligations, stipulated by the law of Vietnam, except in cases where the provisions of an international treaty to which the Socialist Republic of Vietnam is a signatory or participant provides otherwise.

International Laws relating to Recruitment

ILO Convention 181, Private Employment Agencies (1997)²¹

ILO Convention 181 replaced ILO Convention 96 on Fee-Charging Employment Agencies, (Revised) (1949) in 1997.

Article 1(1) of Convention 181 defines private employment agencies as:

[...] any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

- a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;
- b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a “user enterprise”) which assigns their tasks and supervises the execution of these tasks;
- c) other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers’ organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.

Under Article 4 of Convention 181:

Measures shall be taken to ensure that the workers recruited by private employment agencies providing the services referred to in Article 1 are not denied the right to freedom of association and the right to bargain collectively.

Furthermore, Article 5(1) stipulates:

In order to promote equality of opportunity and treatment in access to employment and to particular occupations, a Member shall ensure that private employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability.

According to Article 7, 'Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers'. Article 8(2) further provides that: 'Where workers are recruited in one country for work in another, the Members concerned shall consider concluding bilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment'.

Article 10 also provides that:

The competent authority shall ensure that adequate machinery and procedures, involving as appropriate the most representative employers and workers' organisations, exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies.

None of the GMS countries have ratified either Convention 181 or Convention 96.

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers²²

Article 13 of the *Declaration* states that sending States will:

Set up policies and procedures to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad as well as repatriation and reintegration to the countries of origin.

Article 14 further states that sending States will:

Establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies.

Finally, Article 16 stipulates that ASEAN member countries will: 'Establish and implement human resource development programmes and reintegration programmes for migrant workers in their countries of origin'.

Of the GMS countries, all except China form part of ASEAN.

Endnotes

- ¹ *Cambodian Labour Law*, 1997, available at http://www.gocambodia.com/laws/labor_law.asp (accessed 16/05/11).
- ² Sub-Decree 57 on Sending Khmer Migrants who Work Abroad, 1995 available as an appendix to Sophal, Chan, *Review of labour migration management, policies and legal framework in Cambodia* / Chan Sophal ; ILO/Japan Project on Managing Cross-border Movement of Labour in Southeast Asia ; ILO Regional Office for Asia and the Pacific. - Bangkok: ILO, 2009 xi, 44 p. (ILO Asia-Pacific working paper series), pp. 37-40.
- ³ *Sub-Decree 190 on The Management of the Sending of Cambodian Workers Abroad Through Private Recruitment Agencies*, 2011, available at http://caramcambodia.org/uploads/subdecree190%20on%20management%20of%20sending%20workers%20abroad_eng.pdf (accessed 20/10/2011).
- ⁴ Chan, *Supra*, pp. 11-12.
- ⁵ *Ibid*, p. 6.
- ⁶ *Ibid*.
- ⁷ *Ibid*, p. 13.
- ⁸ *Ibid*, p. 14.
- ⁹ List of recruitment agencies in Cambodia issued by the Department of Employment and Manpower of the Ministry of Labour and Vocational Training (MOLVT 11/2010)
- ¹⁰ *Lao Dong Fa [Labour Law of the People's Republic of China]*, 1/01/1995, available at <http://www.usmra.com/china/Labour%20Law.htm> (accessed 16/05/11).
- ¹¹ *Rules for the Administration of Foreigners in China*, 22/01/1996, available at http://www.gov.cn/english/2005-08/29/content_27366.htm (accessed 28/06/11).
- ¹² *Law of the People's Republic of China on the Promotion of Employment*, 2007, available at http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471590.htm (accessed 28/06/11).
- ¹³ *China Employment Agency Association* webpage, available at <http://www.china-labor.net/> (accessed 10/10/2011).
- ¹⁴ *Lao PDR Labour Law (amended) 2006*, available at [http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20\(2006\)%20Eng.pdf](http://www.na.gov.la/docs/eng/laws/soc_cult/Labour%20(2006)%20Eng.pdf) (accessed 30/05/11).
- ¹⁵ *Labour Migration from Lao People's Democratic Republic: A Fact Sheet*, pp. 3-4, available at <http://www.ilo.org/> (accessed 1/07/11).
- ¹⁶ *Strategy Document for a Labour-based Road Works Programme in Lao PDR: Lao People's Democratic Republic*, International Labour Organization, 1996, available at http://www.ilo.org/public/english/employment/recon/eiip/download/lao_strategy.pdf (accessed 18/06/2011).
- ¹⁷ *Employment and Job Seeker Protection Act*, 1985, available at <http://www.thailawonline.com/en/thai-laws/laws-of-thailand/205-employment-and-job-seeker-protection-act-be-2528-1985.html> (accessed 30/06/11).
- ¹⁸ *Alien or Foreign Employment Act*, 1978, available at <http://www.thailandlawonline.com/Laws/foreign-employment-working-of-aliens-act.html> (accessed 31/06/11).

¹⁹ *Employment and Job Seeker Protection Act*, Supra.

²⁰ *Labour Code of the Socialist Republic of Vietnam*, 23/06/1994, (amended 2/04/2002), available at <http://www.global-standards.com/Resources/VNLaborCode1994-2002.pdf> (accessed 16/05/11).

²¹ *ILO Convention 181*, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C181> (accessed 1/07/11).

²² *The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*, 2007, available at <http://www.asean.org/19264.htm> (accessed 20/10/2011).

Section 13

Social Security



Migrant workers from Burma exercising at Ban 30, MAP Foundation.
Chiang Mai, Thailand, 2010.

Overview

The Cambodian National Social Security Fund (NSSF) scheme explicitly provides for the following benefits:

- (1) Pension
- (2) Survivor's benefit
- (3) Injury/Disability benefit

The Cambodian NSSF comprises a health and social action fund for the prevention of occupational accidents and diseases, vocational rehabilitation and retraining, the compilation of research and statistics and vocational health and safety campaigns. Additionally, the fund is to be used to facilitate co-operation and

dialogue with private and public organisations working in the health and social action areas. Employers and workers are required to make compulsory contributions to the NSSF.

In China, the basic pension insurance premiums are paid jointly by employing entities and workers. Chinese labour legislation states that workers will receive social insurance benefits in the following circumstances:

- (1) retirement;
- (2) illness or injury;
- (3) disability caused by work-related injury or occupational disease;
- (4) unemployment; and
- (5) at child birth.

In China the surviving family of insured labourers who die are entitled to receive subsidies under the scheme.

In Lao PDR, employers and employees are both required to participate in the compulsory social security scheme. Lao legislation stipulates that insured persons, their spouses and their children under the age of 18 years are entitled to receive health care benefits, in addition to the following benefits:

- (1) Death/ funeral benefit
- (2) Health care
- (3) Temporary loss of working capacity/sickness benefit
- (4) Maternity benefit
- (5) Occupational accident or disease benefit
- (6) Permanent loss of working capacity benefit
- (7) Retirement pension
- (8) Survivors' benefit
- (9) Child Allowance
- (10) Unemployment benefit

In Thailand, the Government, an employer and an insured person contribute equally to the Fund at the rate prescribed by the Ministerial Regulations for the payment of benefits relating to injury, sickness, invalidity, death and maternity. An insured person is entitled to receive the following benefits:

- (1) injury or sickness benefits;
- (2) maternity benefits;
- (3) invalidity benefits;
- (4) death benefits;
- (5) child benefits;
- (6) old-age benefits;
- (7) unemployment benefits

In Vietnam compulsory contributions must be paid by an employer and employee where the employee works under a fixed term contract. Contributions are made on a voluntary basis only where the employee is under a definite fixed term labour contract with a duration of less than three months, or is in a seasonal job. Benefits under the Social Security scheme include:

- (1) Illness
- (2) Work-related Death or injury
- (3) Survivor's
- (4) Maternity
- (5) Pension

Burma (Myanmar)

Relevant Legislation

None available.

Cambodia

Relevant Legislation

The Government of Cambodia, *Social Security Law (1997)*¹

Management of Fund

Article 3 of the Cambodian *Social Security Law* stipulates that the social security scheme is under the management of the National Social Security Fund (the NSSF).

Coverage

Article 4 of the *Social Security Law* stipulates:

The persons covered by the Social Security Schemes in this law, regardless of nationality, race, sex, belief, religion, political opinion, national extraction, social origin, membership of a trade union or activity in a trade union are:

- All workers defined by the provisions of the Labour Law, if those persons perform work in the territory of the Kingdom of Cambodia for the benefit of an employer or employers, regardless of nature, form and validity of the contract done or kind and amount of the wage received by the person thereof.
- State workers, public workers and all personnel not governed by the Common Statute for Civil Servants or by the Diplomatic Statute as well as officials who are temporarily appointed in the public service.

- Trainees and apprentices [...].
- Self-employed persons [...].
- Seasonal or occasional workers [...].

Compulsory/Voluntary Contributions

Pursuant to Article 6, employers and workers must make compulsory contributions to the NSSF, the exact terms and procedures of which are to be determined by Sub-Decree and ministerial order [see also Article 23]. Furthermore, Article 5(1) states that any person who has contributed to the scheme for a period of six consecutive months, and who no longer fulfils the conditions for joining the NSSF and making compulsory contributions, may choose to continue his or her membership on a voluntary basis (so long as the decision to do so is made within the first three months after the termination of compulsory membership).

Health Insurance/Medical Care

Article 24(1) (a) specifies that the NSSF comprises a health and social action fund for the prevention of occupational accidents and diseases, vocational rehabilitation and retraining, the compilation of research and statistics, and in order to fund vocational health and safety campaigns. Additionally, the fund is to be used to facilitate co-operation and dialogue with private and public organisations working in the health and social action areas [Article 24(1) (b)].

Benefits included under the Social Security Scheme

The Cambodian NSSF scheme explicitly provides for the following benefits:

- Pension [Articles 7 – 9]
- Survivor’s benefit [Articles 10-11 and 20]
- Injury/Disability benefit [Articles 12 – 19]

China

Relevant Legislation

Labour Act (5 July 1994)²

Social Insurance Law of the People's Republic of China (Adopted at the 17th Meeting of the Standing Committee of the Eleventh National People's Congress on October 28, 2010)³

Management of Fund

Section 70 of the *Labour Act* stipulates that the State is responsible for establishing a social insurance system. Section 74 of the Chinese *Labour Act* further states:

The agencies in charge of social insurance funds shall collect, expend, manage and operate the funds in accordance with the stipulations of laws, and assume the responsibility to maintain and raise the value of those funds. The supervisory organisations of social insurance funds shall exercise supervision over the revenue and expenditure, management and operation of social insurance funds in accordance with the stipulations of laws. The establishment and function of the agencies in charge of social insurance funds and the supervisory organisations of social insurance funds shall be stipulated by laws.

This is supplemented by Section 76 of the *Labour Act*, which provides:

The State shall develop social welfare undertakings, construct public welfare facilities, and provide labourers with conditions for taking rest, recuperation and rehabilitation. The employing unit shall create conditions so as to improve collective welfare and raise welfare treatment of labourers.

Coverage

Article 10 of the *Social Insurance Law of the People's Republic of China* provides:

Workers shall participate in basic pension insurance and the basic pension insurance premiums shall be paid jointly by the employing entities and the workers. Sole proprietors who are not employed, non-full time practitioners and other workers in flexible employment who have not participated in the basic pension insurance in the employing entities may

participate in basic pension insurance and pay the basic pension insurance premiums on their own. Measures for the pension insurance of civil servants and staff governed by the civil servant laws shall be prescribed by the State Council.

Compulsory/Voluntary Contributions

Section 72 of the *Labour Act* provides:

The sources of social insurance funds shall be determined according to the categories of insurance, and an overall pooling of insurance funds from the society shall be introduced step by step. The employing unit and labourers must participate in social insurance and pay social insurance premiums in accordance with the law.

Moreover, Section 75 of the *Labour Act* stipulates that the State shall 'encourage the employing unit to set up supplementary insurance for labourers according to its practical situations. The State shall advocate that labourers practise individual insurance in [the] form of [a] savings account'.

Health Insurance/Medical Care

Under Article 23 of the *Social Insurance Law*:

Workers shall participate in basic medical insurance for workers. The employing entities and the workers shall jointly pay the basic medical insurance premiums in accordance with the provisions of the State. Sole proprietors who are not employed, non-full time practitioners and other workers in flexible employment who have not participated in the basic medical insurance in the employing entities may participate in basic medical insurance and pay the basic medical insurance premiums on their own.

Furthermore, the *Social Insurance Law* stipulates that the State is responsible for establishing and improving the co-operative rural medical system [Article 24] and the basic medical insurance system for urban residents [Article 25]. Article 25 further states:

The basic medical insurance for urban residents involves a combination of personal payment of premium and government subsidy. The portion of premiums that need to be paid by the individuals having minimum living

security, the disabled losing capacity for work and elderly above 60 years old and minors in low-income families will be subsidised by the government.

Article 26 of the *Social Insurance Law* provides:

The standards for benefits under basic medical insurance for workers, new rural cooperative medical insurance and basic medical insurance for urban residents shall be implemented in accordance with the provisions of the State.

Finally, according to Article 27 of the *Social Insurance Law*:

If the cumulative premium payment period reaches the period stipulated by the State at the time the individual participating in basic medical insurance for workers reaches the statutory retirement age, he/she will no longer pay basic medical insurance premium after he/she retires and may enjoy basic medical insurance benefits in accordance with the provisions of the State. If the cumulative premium payment period has not reached the period stipulated by the State, he/she may continue to pay the premium until reaching the period stipulated by the State.

Benefits included under the Social Security Scheme

Section 73 of the *Labour Act* provides that workers will receive social insurance benefits in the following circumstances:

- (1) retirement;
- (2) illness or injury;
- (3) disability caused by work-related injury or occupational disease;
- (4) unemployment; and
- (5) at child birth.

Section 73 further states that: ‘the survivors of the insured labourers shall be entitled to subsidies for survivors in accordance with the law’.

Lao PDR

Relevant Legislation

*Decree No. 207/PM regarding the Social Security Regime for Employees in Enterprises*⁴

*Law on Health Care, 2005 (No. 09/NA) (Promulgated by Decree No. 139/PDR on 9 December 2005)*⁵

Management of Fund

Article 14 of the *Social Security Decree* provides that the Social Security Fund in Lao PDR is an autonomous fund, exempted from taxes and charges by the Government. Article 6 of the *Social Security Decree* further stipulates that the Social Security Organisation (SSO), the body in charge of researching and implementing policies related to social security, is a juridical entity under the auspices of the Minister of Labour and Social Welfare.

Coverage

Article 3 of the *Social Security Decree* specifies that the *Social Security Decree* applies to ‘employees of state-owned enterprises, private enterprises, joint enterprises in the sectors of industry, agriculture, services, and other businesses’. Moreover, the *Decree* applies to ‘employers employing 10 or more employees and shall apply [to] labour units with less than 10 employees only when such labour units are branches of a larger labour unit’. Finally, Article 3 of the *Social Security Decree* provides:

Where labour units with 10 employees have already secured insurance policies, and the number of employees is reduced thereafter, such labour units shall remain under the Social Security System as provided under this Decree.

The *Social Security Decree* does not apply to civil servants, members of the military and police, diplomats and employees of diplomatic missions, employees of international organisations in Laos, foreign citizens employed in Laos, Lao citizens employed overseas for 12 months or more, school and university students, practising medical students or other trainees who do not receive wages from employers [Article 4, *Social Security Decree*].

Compulsory/Voluntary Contributions

Article 2 of the *Social Security Decree* stipulates that employers and employees are both required to participate in the compulsory social security scheme and 'may not enter mutual agreements for the purpose of avoiding their participation [in] the social security system'. Those employees and employers outside of the compulsory system may apply to participate in it. Article 15 of the *Social Security Decree* lists the sources of revenue for the fund as follows [see also Article 17]:

1. Contributions from employers and employees.
2. Contributions from voluntarily insured persons.
3. Interest or fines from delayed payment of contributions or breaches or regulations and laws.
4. Revenues from investment.

Article 18 of the *Social Security Decree* states that contributions to the fund are to be obtained from wages or salaries. The proportion of contributions is to be determined by the Board of Directors, but the total contributions from employees must not exceed 50 per cent of overall contributions.

Health Insurance/Medical Care

Article 21 of the *Social Security Decree* provides those persons receiving retirement pensions, survivors' benefits and illness/invalidity benefits shall pay contributions to the Health Insurance Fund 'each month in an amount equal to the payments performed by any other insured parties to such fund'. Under Article 24 of the *Social Security Decree*, retirees, pensioners, invalid persons and surviving family members are entitled to medical care without limitation.

Article 22 of the *Social Security Decree* stipulates that insured persons, their spouses and their children under the age of 18 years are entitled to receive health care benefits. The article qualifies the restriction on the eligibility of children over the age of 18 years by stipulating that if they are permanently disabled then they are eligible to receive the benefits for life. Additionally, children who pursue full-time studies are eligible to continue receiving medical care benefits until they reach the age of 25. In order to be eligible to receive medical care benefits insured persons must have contributed to the fund for at least three months within the last twelve months [Article 23, *Social Security Decree*].

Benefits included under the Social Security Scheme

Article 5 lists the benefits covered by the *Social Security Decree*:

1. Death/funeral benefit
2. Health care
3. Temporary loss of working capacity, sickness benefits
4. Maternity benefits
5. Occupational accident or disease
6. Permanent loss of working capacity
7. Retirement pensions
8. Survivors' benefit
9. Children of insured persons
10. Unemployment benefits

Thailand

Relevant Legislation

Social Security Act, B. E. 2533 (1990)⁶

Social Welfare Promotion Act, B. E. 2546 (2003)⁷

Management of Fund

Under Section 7 of the *Social Security Act*, the Minister of Labour and Social Welfare is mandated to oversee and implement the *Act*.

Coverage

The *Social Security Act* applies to employees over the age of 15, and to those over 60 who have been continuously employed under this *Act* [Section 33].

Section 4 of the *Social Security Act* stipulates that the *Act* does not apply to:

1. public officials, permanent employees, daily temporary employees and hourly temporary employees of Central Administration, Provincial Administration and Local Administration but excluding monthly temporary employees;
2. employees of foreign governments or international organisations;
3. employees of employers who have offices in the country and are stationed abroad;

4. teachers or headmasters of private schools under the law on private schools;
5. students, nurse students, undergraduates or interning physicians who are employees of schools, universities or hospitals;
6. other activities or employees as may be prescribed in the Royal Decree.

Compulsory/Voluntary Contributions

Section 46 of the *Social Security Act* specifies:

The Government, an employer and an insured person under section 33 each shall pay contributions equally to the fund at the rate prescribed in the Ministerial Regulations for payment of benefits relating to injury, sickness, invalidity, death and maternity, but the contributions thereof shall not exceed the rate of contributions appended to this Act.

Health Insurance/Medical Care

None available.

Benefits included under the Social Security Scheme

Section 54 of the *Social Security Act* provides that an insured person is entitled to receive the following benefits:

- (1) injury or sickness benefits;
- (2) maternity benefits;
- (3) invalidity benefits;
- (4) death benefits;
- (5) child benefits;
- (6) old-age benefits;
- (7) unemployment benefits except for an insured person under section 39.

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002, effective 1 January 2003)⁸

Management of Fund

Article 150 stipulates that the social insurance system is to be established and organised by the Vietnamese Government in conjunction with the Vietnam General Confederation of Labour.

Coverage

Social insurance applies to ‘employees under definite term labour contracts with a duration of three months or more and under indefinite term labour contracts’ [Article 141(1)].

Compulsory/Voluntary Contributions

Article 140(2) provides that ‘forms of compulsory or voluntary social insurance shall apply to entities and businesses on a case by case basis in order to ensure employees receive benefits from an appropriate social insurance’.

Article 141 further states:

1. Compulsory forms of social insurance shall apply to enterprises, bodies and organisations which employ employees under definite term labour contracts with a duration of three months or more and under indefinite term labour contracts. In such enterprises, bodies and organisations, the employer and the employee must make contributions to social insurance funds in accordance with the provisions of article 149 of this Code and the employee shall be entitled to social insurance benefits and allowances in the event of illness, work-related accidents and occupational disease, pregnancy, retirement, and death.
2. In respect to an employee who works under a definite term labour contract with a duration of less than three months, in seasonal jobs, social insurance contributions shall be included in the wage paid by the employer in accordance with regulations of the Government in order to enable the employee to participate in social insurance on a voluntary or self-funding basis. Where the employee continues to work

or enters into a new labour contract upon expiry of the duration of a labour contract, compulsory social insurance shall apply in accordance with the provisions of clause 1 of this article.

Article 149(1) outlines the contribution sources for the social insurance fund as the following:

- (a) The employer shall contribute a sum equivalent to fifteen (15) per cent of the total balance of the wages fund;
- (b) Each employee shall contribute five per cent of his wage;
- (c) The State shall contribute and assist with additional funds to ensure the implementation of social insurance regimes for employees;
- (d) Profits generated from the funds;
- (e) Other sources.

Benefits included under the Social Security Scheme

- Illness [Article 142]
- Work-related death [Article 143(2)] or injury [Article 143(1)]
- Survivor's [Article 146(2)]
- Maternity [Article 144]
- Pension [Article 145]

Article 140(1) also states:

The State shall stipulate policies on social insurance in order to expand and improve gradually the material security of an employee, to take care of and recover the health and stabilise the life of an employee and his/her family when the employee falls ill, becomes pregnant, reaches retirement age, dies, becomes injured in a work-related accident, contracts an occupational disease, becomes unemployed, suffers from misfortunes, or suffers from other problems. The Government shall make detailed provisions on the re-training of unemployed workers, the rates of unemployment insurance premiums and the conditions for and amounts of unemployment allowances; and the establishment, management and use of an unemployment insurance fund.

International Laws relating to Social Security

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)⁹

Article 9 of the ICESCR states that: ‘The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance’.

Of the GMS countries, Cambodia, China, Thailand and Vietnam have ratified the ICESCR.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)¹⁰

Article 27 of the Migrant Workers’ Convention provides:

1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.
2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.

Cambodia has signed, but not ratified the Migrant Workers’ Convention. None of the other GMS countries have ratified the Migrant Workers’ Convention.

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers¹¹

Article 7 of the Declaration states that receiving states will:

Facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate and in accordance with the legislation of the receiving state, provided that they fulfill the requirements under applicable laws, regulations and policies of the said State, bilateral agreements and multilateral treaties

Of the GMS countries, all except China form part of ASEAN.

Endnotes

- ¹ *Cambodian Social Security Law*, available at <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwecam.htm> (accessed 5/07/11).
- ² *Labour Act, 5/07/1994*, available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/37357/64926/E94CHN01.htm> (accessed 16/05/11).
- ³ *Social Insurance Law of the People's Republic of China, 2010*, unofficial translation available at <http://www.grandfieldlaw.com/en/newsdetail.asp?ProductID=351&CategoryID=25> (accessed 26/08/11).
- ⁴ *Decree No. 207/PM regarding the Social Security Regime for Employees in Enterprises, 1999*, available at http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=LAO&p_classification=15&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY (accessed 16/05/11).
- ⁵ *Law on Health Care, 2005 (No. 09/NA)*, available at http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=LAO&p_classification=15&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY (accessed 16/05/11).
- ⁶ *Thai Social Security Act, 1990*, available at <http://www.thailawforum.com/database1/social-security-act.html>, (accessed 6/07/11).
- ⁷ *Thai Social Welfare Promotion Act, 2003*, available at <http://www.lawreform.go.th/lawreform/images/th/legis/en/act/2003/28746.pdf> (accessed 6/07/11).
- ⁸ *Labour Code of the Socialist Republic of Vietnam, 23/06/1994, (amended 2/04/2002)*, available at <http://www.global-standards.com/Resources/VNLaborCode1994-2002.pdf> (accessed 16/05/11).
- ⁹ *ICESCR*, available at <http://www2.ohchr.org/english/law/cescr.htm> (accessed 3/06/11).
- ¹⁰ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, available at <http://www2.ohchr.org/english/law/cmw.htm> (accessed 3/06/11).
- ¹¹ *The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 2007*, available at <http://www.asean.org/19264.htm> (accessed 20/10/2011).

Box Article

Sex Workers

Sex workers make a huge economic and social contribution to the Greater Mekong Subregion (GMS) countries. In line with the common definitions of “work” in the GMS – sex work is work. Sex workers have an employer, an income, a workplace, work hours, a work uniform, work tools and work duties. None of the GMS labor laws specifically exclude sex workers. This means there is already a space in existing labor regulation framework to include sex workers, providing the same protections and benefits afforded to other workers.

Since 2009, the UN, led by Secretary General Ban Ki Moon, has urged countries to repeal laws that criminalize sex work. The ILO Recommendation 200 on HIV and Work issued in 2010 does not exclude sex workers, recognizing sex workers as workers with equal rights to the same benefits and protections as all other workers.

Sex worker organizations such as TOP, Burma Phoenix, China, Women’s Network for Unity, Cambodia, and EMPOWER Foundation, Thailand along with their sisters in Lao PDR and Vietnam work towards this goal.

Section 14

Forced Labour

Overview

The requisition of forced labour by private individuals, companies or associations is illegal and an offence under the existing laws of the Union of Myanmar. However, Burmese legislation stipulates that the State can requisition work where it is of direct interest to the community.

Cambodian Labour legislation stipulates that forced or compulsory labor is absolutely forbidden. This law applies to everyone, including domestics or household servants and all workers in agricultural enterprises or businesses.

Chinese labour legislation states that labourers may revoke their labour contract at any time if they have been forced to work by the employer through means of violence, threat or deprivation of personal freedom in violation of law. Furthermore, an employer who forces employees to work by means of deprivation of personal freedom is liable to imprisonment and a fine.

Laotian and Vietnamese labour legislation also prohibit the use of labour by any form of force.

Burma (Myanmar)

Relevant Legislation

Order Supplementing Order No.1/1999, 2000, SLORC¹

The *Order* states that requisition of forced labour is illegal and an offence under the existing laws of the Union of Myanmar. Article 2 further stipulates:

When the responsible persons have to requisition work or service for purposes mentioned in Clause 1(b) of this Supplementary Order the following shall be complied:-

- (a) The work or service shall not lay too heavy a burden upon the present population of the region.
- (b) The work or service shall not entail the removal of workers from their place of habitual residence.
- (c) The work or service shall be important and of direct interest for the community. It shall not be for the benefit of private individuals, companies or associations.
- (d) It shall be in circumstances where it is impossible to obtain labour by the offer of usual rates of wages. In such circumstances, the people of the area who are participating shall be paid rates of wages not less favourable than those prevailing in the area.
- (e) School teachers and pupils shall be exempted from requisition of work or service.
- (f) In the case of adult able-bodied men who are the main supporters of the necessities of food, clothing and shelter for the family and indispensable for social life, requisition shall not be made except only in unavoidable circumstances.
- (g) The work or service shall be earned during the normal working hours. The hours worked in excess of the normal working hours shall be remunerated at prevailing overtime rates.
- (h) In case of accident, sickness or disability arising at the place of work, benefits shall be granted in accordance with the Workmen's Compensation Act. The work or service shall not be used for work underground in mines.

Cambodia

Relevant Legislation

The Government of Cambodia, *Cambodian Labour Law (1997)*²

Article 15 of the Cambodian *Labour Law* stipulates that forced or compulsory labour is absolutely forbidden [in conformity with ILO International Convention No. 29]. The article ‘applies to everyone, including domestics or household servants and all workers in agricultural enterprises or businesses’.

China

Relevant Legislation

Criminal Law of the People’s Republic of China (Promulgated 14 March, 1997)³

Lao Dong Fa [Labour Law of the People’s Republic of China] (Promulgated by the NPC Standing Committee, effective January 1, 1995), 1994 FAGUI HUIBIAN 91, 94 (Official Source)⁴

Article 32(2) of the Chinese *Labour Law* states that labourers may revoke their labour contract at any time if they have been forced to work by the employer ‘through means of violence, threat or deprivation of personal freedom in violation of law’.

Article 244 of the Chinese *Criminal Law* further provides:

If any employing unit, in violation of laws or regulations on labour administration, forces employees to work by means of deprivation of personal freedom, and if the circumstances are serious, persons directly responsible for the crime shall be sentenced to fixed-term imprisonment of not more than three years of criminal detention, and concurrently or independently be sentenced to a fine.

Lao PDR

Relevant Legislation

Lao PDR *Labour Law* 2006 (Amended)⁵

Article 2(6) of the Laotian *Labour Law* defines forced labour as: ‘the use of labour where the employee does not voluntarily accept the work assigned, which is inconsistent with the employment contract’. Article 3(10) prohibits the use of labour by any form of force.

Thailand

Relevant Legislation

None available.

Vietnam

Relevant Legislation

Labour Code of the Socialist Republic of Vietnam, 23 June 1994 (Amended 2 April 2002, effective 1 January 2003)⁶

Article 5(2) of the Vietnamese *Labour Code* states that: ‘Maltreatment of workers and all forms of forced labour are prohibited’.

International Laws relating to Forced Labour

ILO Convention 29, Forced Labour (1930)⁷

Article 2(1) of the Forced Labour Convention defines forced or compulsory labour as ‘work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.

The exceptions are outlined in Article 2(2):

- [...] the term “forced or compulsory labour” shall not include:
- (a) Any work or service exacted in virtue of compulsory military service laws or work of a purely military character;
 - (b) Any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
 - (c) Any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
 - (d) Any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;
 - (e) Minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

Article 4(1) stipulates that: ‘the competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations’. The Forced Labour convention also obliges States to completely suppress forced labour where it is being used for the benefit of a private company, individual or association [Article 4(2)].

Under Article 10:

Forced or compulsory labour exacted as a tax and forced or compulsory labour to which recourse is for the execution of public works by chiefs who exercise administrative functions shall be progressively abolished.

Article 20 further provides:

Collective punishment laws under which a community may be punished for crimes committed by any of its members shall not contain provisions for forced or compulsory labour by the community as one of the methods of punishment.

Article 25 specifies:

The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.

The Convention on Forced Labour has been ratified by Burma, Cambodia, Lao PDR, Thailand and Vietnam.

International Covenant on Civil and Political Rights (ICCPR) (1966)⁸

Article 8(3) of the ICCPR provides:

- a) No one shall be required to perform forced or compulsory labour;
- b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
- c) For the purpose of this paragraph the term “forced or compulsory labour” shall not include:
 - i. Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
 - ii. Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors;

- iii. Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
- iv. Any work or service which forms part of normal civil obligations.

Cambodia, Lao PDR, Thailand and Vietnam have ratified the ICCPR. China has signed but not ratified the ICCPR. Burma has not ratified the ICCPR.

The Universal Declaration of Human Rights (UDHR) 1949⁹

Article 23(1) of the UDHR states: ‘Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment’.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)¹⁰

Article 11(2) of the Migrant Workers Convention stipulates that: ‘No migrant worker or member of his or her family shall be required to perform forced or compulsory labour’.

Of the GMS states, only Cambodia has signed, but not ratified the Migrant Workers’ Convention. None of the other GMS countries have ratified the Migrant Workers’ Convention.

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers¹¹

Article 5 of the Declaration states that: ‘pursuant to the prevailing laws, regulations and policies of the respective receiving states, the receiving states will intensify efforts to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers’.

Furthermore, Article 17 stipulates that ASEAN member countries shall: ‘take concrete measures to prevent or curb the smuggling and trafficking in persons by, among others, introducing stiffer penalties for those who are involved in these activities’.

Of the GMS countries, all except China form part of ASEAN.

Endnotes

- ¹ SLORC, *Order Supplementing Order No.1/1999*, 2000, available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/59641/65226/E00MMR01.htm> (accessed 28/09/11).
- ² *Cambodian Labour Law*, 1997, available at http://www.gocambodia.com/laws/labor_law.asp (accessed 16/05/11).
- ³ *Criminal Law of the People's Republic of China*, 14/03/1997, available at <http://www.china.org.cn/english/government/207319.htm> (accessed 17/06/11).
- ⁴ *Lao Dong Fa [Labour Law of the People's Republic of China]*, 1/01/1995, available at <http://www.usmra.com/china/Labour%20Law.htm> (accessed 16/05/11).
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