

Rule of Law in China: Chinese Law and Business

China Labour Dispute Resolution

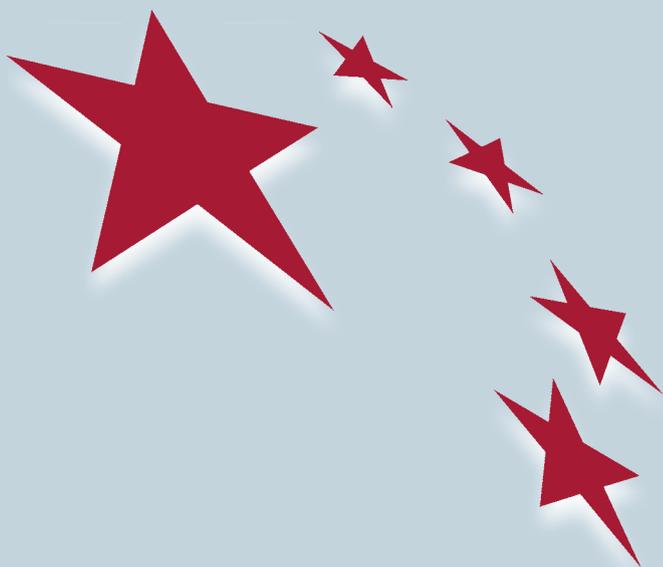
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Executive Summary

- Economic growth and the transition to a market economy have strained the employment relationship, leading to rising disputes. Labour disputes grew between 1994 and 2006 from 19,098 to about 317,000, including 14,000 *collective* labour disputes involving 350,000 workers, or 51 per cent of the total workers involved in labour disputes.
- *Enterprise mediation* is voluntary, and involves the employer, employee, and union. Dominated by the union, which is strongly influenced by the employer, the percentage of settlements remains high. However, mediation has declined in popularity as claimants increasingly bypass the process for arbitration.
- *Arbitration* is generally a prerequisite for litigation. Arbitration cases have increased, although arbitration fees may deter some use of the process and awards are not easily accessible.
- *Litigation* cases increased to 122,405 in 2005, with over 20 per cent mediated and nearly 55 per cent litigated. The employee prevails in the overwhelming majority of arbitration cases and the majority of litigated cases.
- *Timeliness*: the sixty-day limit from the labour dispute to filing can sometimes be too short or too long and must be adjusted accordingly.
- *Enterprise mediation* is being under-utilized and bypassed in favour of arbitration, undermining settlements and increasing cases proceeding to arbitration and litigation. Reversal of the perception and reality of the union's current advocacy role is needed. Clarifying the legal enforceability of mediation settlement agreements could bring quicker resolution.
- *Arbitration* could increase its mediated settlements by increased *training* in mediation skills and legal education. More transparency should be accorded arbitration decisions. Courts could *defer* to arbitration decisions, absent an irregularity, rather than having a *de novo* review. This will be consistent with policy used in commercial arbitration. There should be a separate simplified procedure for enforcement of uncontested awards. More fundamentally, labour arbitration of contractual labour disputes could be privatized.
- *Litigation* reforms include clarifying the type of 'labour disputes' which can be directly litigated. Mediated settlements in the courts have been substantial and should be encouraged.
- *Access and advocacy limits*: Adequate worker representation can be achieved by reforming the role of the unions, creating incentives for lawyers, and expanding the numbers of legal aid centres.
- A 2007 Mediation and Arbitration Law addresses some, but not all of these issues.

China Labour Dispute Resolution

Overview

The phenomenal economic growth in China in recent decades brought with it a transformation in the area of labour relations, as workers under a planned economy became employees under the labour laws of a transitioning market economy. Employers, previously state-owned enterprises (SOEs), now also include a growing number of privately owned enterprises, both foreign and domestic, which operate with increased managerial discretion, no longer hampered by the historic 'iron rice bowl' employment relationship. The process of labour dispute resolution is, to some extent, still catching up with these changes; and periodic large-scale worker protests over nonpayment of wages or substandard working conditions are reminders that reforms are needed in the labour dispute resolution system to deal with the inevitable conflicts arising in the workplace and the burdens that attach to an unreformed labour mediation-arbitration process.

The process of resolving labour disputes, including *contract* (individual and collective) and *statutory* rights is through *voluntary* enterprise mediation, *mandatory* labour arbitration (through a government labour arbitration commission), and possible review by *litigation* in the courts on appealed arbitration decisions.

Legal regulation

The evolving legal regulation of labour arbitration, resulting in the current, primary regulations, began in 1993 with *Regulations on Settlement of Labour Disputes in Enterprises*; this was followed by the 1994 Labour Law, and two Supreme People's Court Judicial Interpretations in 2001 and 2006, along with several other lesser regulations in between. Other laws, such as the recent Labour Contract Law, may also affect arbitration cases. A new Law on the Mediation and Arbitration of Labour Disputes is effective on 1 May 2008. It further clarifies the labour dispute mediation-arbitration process.

Scope of labour arbitration

The scope of labour arbitration is large and increasing, the number of cases growing from 19,098 in 1994 to about 317,000 in 2006. In 2006 the number of *collective* labour disputes reached about 14,000 cases. Collective disputes such as these are often the ones that lead to collective actions indicative of social unrest, such as demonstrations, strikes, or even violence.

There are significant regional disparities where labour arbitration cases arise. As might be expected, where industry, investment, and economic development activity is high, there is a correspondingly high incidence of labour disputes. In 2005, each region of Jiangsu, Guangdong, Shandong, Shanghai, Beijing, and Zhejiang had between 15,000 and 61,200 labour arbitration cases. Regions of heavy industry (involving mostly SOEs, which are transitioning to a market economy and undergoing restructuring which affects significant numbers of workers) also display a relatively large number of labour disputes. These include Liaoning, Hubei, Fujian, Chongqing, and Sichuan, which typically have between 8000 and 10,000 cases per year, compared with fewer than 2000 cases per year in many of the provinces.

The characteristics of labour arbitration cases show great variety. Topics of labour disputes include (in order of number of cases) wages, termination, insurance, and work injury. In 2006, it was reported in Shanghai that 64 per cent of its 24,000 cases involved the failure to pay wages or social insurance. While more large-scale mass protests occur with SOEs, more work stoppages and strikes occur in the foreign-invested enterprises. Moreover, it is reported that in Guangdong most of the labour disputes have occurred in Japanese, Taiwanese, Hong Kong, and Korean-invested enterprises where workers' rights are more frequently violated. Lastly, data on the complainant in the labour dispute, while typically the worker (in nearly 95 per cent of the cases), also includes the employer.

Processes of labour dispute resolution

Enterprise mediation

The 1994 Labour Law, Section 80 says enterprises may establish internal labour dispute mediation committees. Guidance for the mediation procedures within the enterprise comes from particular rules on the mediation process and claims. If filed, the process must be reconciled within the time requirement of sixty days from the date of filing for arbitration. The mediation process is voluntary and usually there is no right to a union or other representative. In fact, this process can be, and often is, bypassed and the claiming party may directly proceed to arbitration.

As early as 1997, the number of cases being taken directly to arbitration was the same as the number being appealed from enterprise mediation. The number of enterprise-mediated settlements continues to decline even as the number of arbitration cases rises. However, even with dramatically declining numbers of cases using enterprise mediation, the percentage of cases settled remains high, though cynics may claim they are usually settled for the wrong reasons. This raises the question of whether this mediation process should be eliminated or improved.

According to the law, the mediation committee is to be tripartite, with representatives appointed from the employer, the workers, and the trade union. Many enterprises do not have a union, and those who do typically provide no meaningful training in mediation and are said to lack the ability or credibility to mediate labour disputes.

Interestingly, in those enterprises with established mediation committees, it has been reported that in at least one large enterprise the number of labour disputes may be only a fraction of the dispute cases heard by the committee. It is reported that in a Jiangxi enterprise, of 2115 disputes submitted to the committee, only 177 were labour-related cases. These committees differ from the People's Mediation Committees, which are independent of the enterprises and mediate minor civil cases and petty criminal offenses in the community.

Arbitration

In China, 'labour disputes' include violations of contractual and statutory labour rights. Generally speaking, resolving a 'labour dispute' through labour arbitration is *mandatory* and a *prerequisite* for a court to have jurisdiction. The labour arbitration system, having been restored in 1987, has had to cope with a growth in the number of cases from 10,326 in 1989 to 317,000 in 2006: a phenomenal explosion of over 3000 per cent.

The arbitration process itself has proven quite successful in resolving cases, with a settlement rate over 90 per cent, including conciliation/mediation and arbitration awards, which in 2005 were 34 and 43 per cent of the total settlements, respectively. Out of a total of 306,027 cases filed and settled in the arbitration process, 104,308 cases were mediated, whilst 131,745 cases were settled by arbitration. The other 23 per cent were dispensed with by withdrawals, rejections, and the like. Workers prevailed in 145,352 cases, employers in 39,401, and there were split decisions in 121,274 cases. Since 1999, the annual number of arbitration awards has exceeded the number settled by conciliation/mediation. Statistics show workers win nearly four cases for every one by the employer, and partially win a majority of the other cases.

The process is administered under a government organization, the labour bureau, which establishes a tripartite labour arbitration commission (representatives of the governmental labour administration, employer associations, and the trade unions) which thereafter will convene labour arbitration tribunals as needed, comprising one to three arbitrators, or, if the case is a collective arbitration, (involving more than thirty claimants) an odd number of more than three arbitrators are selected. Arbitrators may be full- or part-time, with the former usually drawn from the administrative staff of the labour bureau. Training of arbitrators is often provided, but few have legal education. Relatively few decisions can be found in the public domain that could be used as guidance in future cases. Arbitration cases appealed to the courts are

redetermined *de novo*. Those not appealed require court enforcement absent voluntary compliance by the employer.

Litigation

The number of *labour dispute* cases appealed to the courts from labour arbitration decisions has grown dramatically from 28,285 in 1995 to 114,997 in 2004 and to 122,480 in 2005 (involving about 2.37 billion yuan). The government reports that in 2005, appeals from labour arbitration decisions, needing review or enforcement, resulted in workers prevailing in litigation judgments in over half the cases; and in some courts, such as Ningbo in Zhejiang and Zhongshan in Guangdong, in earlier years as many as 90 per cent were settled in favour of the worker.

In 2005, 121,516 court cases were settled (resolved); 62,608 by court judgment, 27,944 by mediation, and 20,998 were withdrawn, with 7,115 rejected. Interestingly, the court successfully mediated nearly one-third of the settled cases.

Appeals to court within fifteen days from labour arbitration decisions are provided by Article 79 of the 1994 Labour Law and further defined by Judicial Interpretations of the Supreme People's Court. Chinese law ordinarily (with some exceptions) distinguishes between 'labour contracts' and 'contracts for work', with the latter treated as a 'civil' contract case able to be taken directly to court, and with the former, treated as a labour case, first requiring resolution of the 'labour dispute' through labour arbitration before court access is granted. In those cases determined to involve a 'labour dispute', the court will review it *de novo*, rather than deferring to the arbitration award, as is the case in commercial arbitration.

Defining problem areas

Reform design?

An overarching issue to be resolved by the Chinese government is how best to design the reforms so as to provide reasonable, efficient, and just resolutions that can facilitate a general defusing of the ever-increasing, potentially volatile number of labour disputes. Whilst, on one hand, collective disputes

involve the highest number of workers in labour disputes (though only a fraction of the number of cases filed), labour disputes are concentrated in a relatively small number of provinces, and labour arbitration has resolved nearly 90 per cent of the cases taken to arbitration. Perhaps this suggests that a tailored reform approach or interim-trial projects, rather than a complete overhaul, would yield greatest success. On the other hand, progressive labour reform would typically seek to provide comprehensive solutions available to all current and potential future users of the labour dispute processes.

Timeliness

One of the problem areas which emerges from the current system of mediation and arbitration requirements relates to timeliness: is the filing deadline too short, is the process too slow at the outset, or is the entire arbitration process too long? The sixty-day statute of limitations for filing labour arbitration claims does not work in all cases, and some argue is too inflexible. (The new law sets a one-year limit [Art. 27].)

In cases involving worker accidents, the statutory labour claim must first flow through the administrative claim process before reaching the stage of employer dispute with the worker over compensation (i.e., the labour dispute), which is the time when the period begins. In the Pearl River Delta Region, this time from accident to enforcement was recently reported to be in excess of 1000 days.

Accessibility and advocacy

Obstacles to accessing the labour arbitration process are several, and include a lack of knowledge of labour rights under the law, the inherent problems involved with complaining against an employer, and the lack of finality of mediation or arbitration. However, the most common obstacles encountered are the lack of readily available advocacy at different stages of the process and the costs of the dispute resolution processes.

The credibility of enterprise mediation is an institutional issue raised by many commentators. The union representatives in mediation have a

reputation for taking the lead and for being overly responsive to the employers' interests, thus perhaps explaining the decline in the number of cases using mediation. It is said that, often, the workers treat the mediation committee as 'the parasite of the administration' who 'breathe through the same nostrils as the general manager'.

In 2006, the ACFTU reported that it had 669 lawyers across the country to work with the unions and over 12,000 'legal specialists' employed by the unions, who are ineligible to practice law, but nonetheless can assist workers, within this limitation. The Union said it has nearly 4000 legal aid offices that in 2005 helped settle 16,657 labour disputes.

There are other, non-union legal aid offices offering assistance to workers in labour dispute cases, many of which specialize in assisting migrant workers. The Ministry of Justice reports that more than 40,000 cases were handled generally via legal aid, with a 90 per cent success rate. There also is some experimentation into the use of regional mediation organizations, staffed with well-trained mediators who can bring skills to resolving the labour disputes at the enterprise level. The increasing availability of legal aid assistance indicates at least the beginnings of a more accessible process.

Perhaps the most prohibitive aspect of dispute resolution is the legal cost incurred. The arbitration process requires the payment of application and handling fees, set by regulations (which include travel costs, wages of witnesses, and printing costs), and paid by the losing party, or shared when neither clearly wins. This amount can act as a deterrent to many would-be complainants. One study found that the 'real' cost to the worker of undergoing the arbitration process to retrieve 1,000 yuan (\$121) in owed wages was 920 yuan (\$111), plus 11–21 days of lost work at 550–1100 yuan (\$66–\$127), not to mention the cost of wages for the government workers. (The new law provides for the government to pay the costs [Art. 53].)

Labour arbitration

The labour arbitration commission falls under the guidance, if not the leadership, of the

government, and receives most of its funding from the government. Allowing a continued legally circumscribed government presence, rather than full privatization, seems necessary because statutory (as well as contractual) disputes are being resolved. For many commentators, the issue of reform comes down to a judgment on whether government or private labour arbitration best serves the needs of the constituents.

The lack of finality of the arbitration process continues to cause difficulties: in the resolution of labour disputes, burdening complainants (costs and representation), and increasing the judicial caseload. The courts could lessen these impacts by deferring to the arbitration awards, absent a showing of illegality or other procedural irregularity, rather than continuing its current practice of *de novo* review that is inconsistent with its practice for commercial arbitration. According to current statistics, this would further increase the percentage of worker victories. (The new law establishes deferral for certain disputes such as wage disputes [Art. 47] and allows an employer to vacate an award for certain procedural deficiencies [Art. 49].)

Litigation

Remedial regulations must be put in place to address the continuing suffering caused by the long delays during the administrative claims procedures. The current definition of 'labour dispute' within the labour arbitration procedures should be better reconciled with the administrative accident claims procedures, or *visa versa*.

The court should reconsider the effects on workers of its current policy of *de novo* judicial review of labour arbitration awards and instead implement a deferral policy, reserving review for cases raising a legal irregularity. Since a high percentage of the appeals are brought by workers and workers win over half the arbitration cases, it can be argued that there is a need for reforms to address issues associated with the enforcement and the finality of arbitration awards, as further discussed below.

Possible reform agenda

Enterprise mediation

While mediation in China appears to be more dominated by the union (though perhaps more influenced by the employer), its utility in resolving labour disputes is being diminished by its perceived lack of fairness. Bypassing mediation in favour of directly using arbitration would seem counter-intuitive, given the high success rate of mediated settlements, unless that perception also perhaps includes the notion that the settlements reached are *imposed* and not fair.

If enterprise mediation is to be retained, its reform could include realigning the union as a real advocate for the worker (perhaps borrowing from America the legal duty of 'fair representation') and providing workers with more access to the union's increasing legal aid talent. Making training available to those involved as representatives in the mediation process could bolster the efficiency and fairness of the process. Attention should also be given to those regions experimenting with regional mediation organizations that bring well-trained mediators to the enterprise mediation process, to see if increased skills are matched by increased mediation settlements.

Arbitration

While the number of mediated settlements conducted under the arbitration procedures of the arbitration tribunal has declined in recent years (as has the enterprise mediation), it is still a substantial number. This number could possibly be increased by more skillful use of mediation by arbitrators. Better training in these skills during the professional preparation and licensing of arbitrators could enhance the efficiency of the process and perhaps provide more 'win-win' settlements. On this point, while the level of professionalism for arbitrators has increased, most have not received legal education. Whether they should or not may be open to debate, but in China, where arbitrators resolve both contract and statutory claims, some understanding of the law is important, as there are those cases in which there is a clear violation of the law where no compromised settlement should be permitted. (The new law requires substantial legal knowledge of mediators [Art. 11] and arbitrators [Art. 20].)

On the timeliness issue of the sixty-day statute of limitations, it is unclear how many workers are dissuaded from filing because of the expected time delays, in that many of the 'typical' arbitrations take one year from filing to court enforcement. In this case, with vulnerable workers, 'justice delayed' may indeed be 'justice denied'. Perhaps the enterprise mediation process should be reformed, as discussed below, to attract wider use within its shorter sixty-day limit. (The new law extends the limitation to one year [Art. 27].)

A more reasonable approach to reform designed to address the problem of timeliness when a labour dispute begins in the case of a worker accident may lie in reforming the administrative claims process rather than the arbitration procedures. On that point, it could also be useful to revisit the current law of having the same labour arbitration process for statutory labour rights as for labour contract rights. (The new law allows for tolling the limitation [Art. 27].)

One of the characteristics of Chinese labour arbitration is the lack of access to the award for anyone but the parties involved (for purpose of court appeal), except for the occasional published model award. This lack of transparency lessens the opportunities of other labour relations personnel or the public (including potential job applicants) to learn from the outcomes of contractual and statutory violations by particular employers. While there may be disagreement over the advisability of publicizing private contract labour disputes, the statutory labour disputes would seem of value to the public. (The new law provides for arbitration in public unless the parties agree otherwise [Art. 26].)

Lastly, there needs to be consideration of whether reforms should change the courts' review policy from *de novo* to deferral, absent a showing of illegality or other procedural irregularity, which could be reviewed by the court, as discussed below. Enabling the labour arbitration award to be final and binding, regardless of the parties' agreement with the award, should alleviate many of the burdens now faced by workers who must resort to the courts for enforcement.

Litigation

There is a growing need for clarification on the jurisdictional issue of definitions and applications of the term 'labour dispute' in order to determine what is for direct court review and what must first proceed to labour arbitration. (The new law provides further clarifications [Art. 2].) There is also a need to consider the appropriate relationship between the labour arbitration process and the court process on cases determined to be 'labour disputes'. That is: what should be the appropriate standard of judicial review of labour arbitration decisions? The current relationship between labour arbitration and the courts is that 'labour disputes' in most cases, 'in accordance with the law', must first go to labour arbitration before the court will assert jurisdiction. Thereafter, the court will reassess the labour dispute, mostly in a *de novo* review, unlike its deferral policy to commercial arbitration cases.

A reform to bifurcate the judicial review process could be as follows: for '*uncontested*' cases the party seeking enforcement can go to the court for compulsory enforcement of the arbitration award, wherein the court uses an expedited enforcement procedure; and, for '*contested*' cases appealed to the court based on the merits or procedural irregularity, the courts should not second-guess the merits, but defer to the arbitration award, absent a showing of procedural irregularity. The new law has some limited areas, final at arbitration (e.g., wage disputes), with the right to expedited court enforcement [Art. 44 and 47]. The employers may vacate the arbitration award for limited reasons [Art. 49].

Such legal reforms can further empower the arbitration process by replacement of the courts' *de novo* review with a deferral policy similar to the policy on commercial arbitration. Focus can then be better concentrated on improving the administration and the enforcement of the mediation and arbitration processes. This can include finding ways to 'relocate' the great number of court-mediated settlements to the labour arbitration tribunals' mediated settlements, which have been on the decline. This may also create some pressures for improving the 'credibility' of enterprise mediation.

Adequate worker representation

A recurring problem in China is the lack of adequate representation of workers in these labour dispute resolution processes. The *role* of China's trade union, the ACFTU, has been disappointing to many workers' advocacy groups. While the union has organized the giant Wal-Mart and is working to increase its union membership, to many, its record on advocacy has been less than satisfactory. Its traditional multi-function responsibilities include representing worker interests, maintaining worker compliance with management directives, and mediating between workers and employers. However, since union officials often serve in management positions, the union is generally regarded as being complicit with the employer, and it is difficult to see the union in the role of advocate. Clearly, faster and broader reforms by the union in the area of worker advocacy would bring more balance and better access to the protection of labour rights.

In America, labour rights disputes arising from collective contract grievances are resolved internally, as part of the 'living contract'. Only 'labour interests', not 'labour rights', are susceptible to outside government-sponsored mediation by well-trained mediators. On the other hand, '*statutory* labour rights' in America mostly utilize a governmental administrative process, often using conciliation/mediation and ending in a final decision (after a government hearing), usually reviewed by a court. Since China's labour disputes arise from both statutory and contract labour rights, one common feature for resolving labour contract issues is the first-step-use of internal grievance procedures administered by the parties (though China is tripartite). The difference here comes down to the role of the union: in the US, as is required by law, it must be the zealous advocate of the worker; in China, the mandate of the union is more truncated.

While increased and improved legal aid and trade union assistance is useful, in the long run it may be a great boost to law enforcement if more lawyers would get involved in representing workers. The current difficulty is that, commonly, clients are

unable to afford legal services, so relatively few lawyers represent the interests of workers. A possible solution might be to allow recovery of attorney fees by successful plaintiffs, to be paid by the losing party, usually the employer (except in frivolous cases brought by an employee). This has worked well in the American experience (under Title 7 of the 1964 Civil Rights Law) and has the advantages of encouraging and rewarding lawyers, deterring employer violations, and adding another level of enforcement power for compliance with labour laws.

Conclusion

The new Law on Mediation and Arbitration seeks to strengthen these two institutional alternatives to dispute resolution. It offers clearer definitions on labour disputes, extends the time limit for filing for arbitration, adds a legal component to the qualifications of mediators and arbitrators, allows legal enforceability of mediation agreements, and provides some increased finality to arbitration awards in certain specified areas. The law also specifically provides for expedited enforcement of uncontested awards by workers, while at the same time allowing the employer to vacate the award on certain procedural deficiencies. Lastly, it removes the cost barrier by having the government assume the expenses of arbitration.

Yet to be fully realized under the new law, which becomes effective on 1 May 2008, is the promise of addressing the professional staff shortages, building the county-and-above employment relationship harmonization mechanism (Art. 8), increasing the credibility of the union, increasing successful mediation, and involving more advocates to make the new changes work. The State Council is charged with drafting implementing rules (Art. 52).

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