

CHAPTER 14

ELUSIVE WORKPLACE DISPUTE RESOLUTION IN CHINA: LESS THAN MEETS THE EYE

ARNOLD M. ZACK¹

The purpose of this paper is to provide some perspective on the continuing reports of strikes and labor unrest in China. When viewed from the United States and Canada, there are stark differences in the role of trade unions, the concepts of freedom of association and collective bargaining, and particularly the use of labor arbitration to resolve disputes. In North America, what we call labor arbitration is a private system voluntarily negotiated between the employer and the union representing the workers, relying upon a mutually selected neutral to resolve their workplace disputes with a final and binding decision. In China, the procedure is a government-created, party-controlled structure to regulate only individual worker challenges to employer action as a step on the way to court litigation. Without worker-initiated unions and collective bargaining, there is no negotiation, no collective document setting forth terms and conditions beyond statutory minima, no union to represent the worker, no final and binding award. The All-China Federation of Trade Unions (ACFTU) exists to maintain workplace harmony, not to represent workers in either individual or collective bargaining.

In February, while sitting down to write this comparative piece, came the tsunami of student and worker protest across North Africa. The intent to do a simple explanatory piece took on a different light. The pervasive new world of technology, cell phones, Facebook, and Twitter has demonstrated its worldwide impact, bringing together youth, workers, and students under the noses of all repressive governments. The inevitable question now is whether those North African winds will be strong enough to reach all the way to eastern Asia. The recent militancy of workers in

¹Labor and Worklife Program at Harvard Law School.

North Africa had its roots, in part, in economic needs, with overwhelming unemployment and dim prospects of any economic development to provide employment for students and university graduates. Chinese workers likewise had an economic motivation in their growing militancy, so in the light of North African turmoil, what happens on the labor front in China may well take on a political rationale as well. Understanding the labor relations scene may thus be relevant for anticipating the political future of China as well.

First, A Bit of History: “Labor” Dispute Resolution in China Since 1949

To better understand current labor relations in China, one need not look back on its 5,000-year history but only to 1949 when the Communist Party came to power. To end millennia of peasant exploitation, the party took over the factories. Under its new banner there was to be, by definition, no conflict between labor and capital, since all were to work together in state-owned enterprises to serve the interest of the people. The All-China Federation of Trade Unions was established to assume the benign role of monitoring workplace tranquility between the comrade managers and comrade workers. The comrade enterprise manager was to appoint the ACFTU head, and the ACFTU role was to be funded by a stipend of 2 percent of enterprise payroll. The Communist Party made job assignments; factory managers had no right to choose employees or indeed to terminate them, except for gross misconduct, but did arrange for housing and medical and retirement benefits.² As Marge Gootnick reported hearing from an ACFTU apparatchik in 1978, “Our function is to run picnics.” In this nirvana there was obviously no need for any grievance and arbitration system. Any disputes over legal violations were considered individual—not trade union—problems and went through a four-step process: consultation, mediation, arbitration, and, finally, litigation.³

In 1978 Deng Xiaoping undertook to revise the economy’s focus on employment in state-owned enterprises by opening the economy to joint ventures with foreign enterprises, and later

²ANDREAS LAUFFS, *EMPLOYMENT LAW AND PRACTICE IN CHINA* (Sweet & Maxwell Asia 2008), Chapter 1, at 3.

³“Regulations in the Procedure for the Resolution of Employment Disputes,” in LAUFFS, *id.* at 305.

introducing the labor contract system requiring individual contracts setting entitlement on hours of work, overtime, compensation, leave, and other workplace conditions. The leadership of the ACFTU was directed to undertake expansion into the new private sector by “persuading” employers to form unions in foreign-funded and domestically owned private enterprises, and in 1989 it announced that “wherever there are workers it is necessary to establish union organizations.”⁴ Such FOEs (foreign-owned enterprises) now constitute a third of the nation’s total enterprises.

Unrealistically, perhaps, the ACFTU expansion into foreign investment enterprises assumed that the factory managers would continue to operate the enterprise for the benefit of the workers and Chinese society. That assumption left no room for the driving force of the foreign corporate brands to seek the highest return on their investments, or the drive by their local suppliers and managers from Taiwan, Korea, Hong Kong, and Singapore to maximize their own profits by holding down labor costs. One would think that the rapid expansion of these new enterprises would justify even greater government scrutiny to ensure conformity to the Communist ideals of worker protection. However, without worker selection of their own union, and without collective bargaining, and with the prohibition against strikes,⁵ the consequence was even less worker protection. Indeed, the failure of China to ratify the International Labor Organization (ILO) core convention rights of freedom of association and access to collective bargaining may well have been the motivation for such foreign enterprises to move to China. The focus of the ACFTU appears to have shifted from maintaining workplace tranquility in SOEs (state-owned enterprises), to ensuring that the ACFTU was guaranteed its place—as well as its 2 percent take of the payroll—in the factories of the ever-expanding private sector. According to the *China Labor Bulletin*, “[T]he numerous enterprise unions that it has set up have, more often than not, become merely empty shells controlled or dominated by management and unable to represent workers’ interests.”⁶

⁴*Protecting Workers’ Rights or Serving the Party: The Way Forward for China’s Trade Union*, China Labor Bulletin, Research Report, Mar. 2009, at 26.

⁵The right to strike had been in the 1949 constitution but was removed from the PRC’s 1982 constitution, although there is no law specifically banning strike action.

⁶China Labor Bulletin, *id.* at 32.

So What Workplace Protection Does Chinese Labor Law Currently Afford?

There are two main Chinese labor laws, both with 2008 revisions. The first is the Worker Contract Law,⁷ which sets forth the requirement of individual employment contracts, and which contains statutorily and individually provided working conditions and protection against dismissal without cause, but with enforcement through the courts. It establishes individual rights but not collective or union-negotiated rights, and appeal to litigation is undertaken individually.

The second controlling statute, and the prevailing dispute resolution legislation, is the May 1, 2008, Labor Mediation and Arbitration Law,⁸ which sounds like something comparable to our private arbitration system. But there is little similarity to our system, though it uses the same terms. Under the Chinese statute, the cases are brought on claims of violation of statute or of individual employment contracts; the arbitrators are appointed from, and employed and paid by, the government/party. They are not the jointly selected private—let alone jointly selected—neutrals we expect from our North American experience. And of course there is no negotiated collective bargaining agreement with benefits beyond the individual contract to be enforced.

The law requires the arbitrator to mediate the dispute and then, absent agreement, to decide the claim. Their decisions are not final and binding, but are appealable by the worker to the courts.

The Impact of Job Losses in the Recession

Working conditions in these Chinese factories made few headlines until the September 2008 recession, when they awakened the world. In the first 10 months of 2008, 15,661 enterprises in Guangdong Province closed, half of them in October alone.⁹ In March 2009, the *Wall Street Journal* reported some 5 million small enterprises with eight or fewer employees shutting down in the prior six months.¹⁰ Hong Kong and overseas newspapers were rife with reports of enterprise layoffs, plant closings, absconding foreign

⁷www.troutmansanders.com/TS/ChinaNewLaborContractLawOverview.

⁸Law on the Mediation and Arbitration of Union Disputes *available at* www.chinalabour.org.hk/en/node/100244.

⁹Wall Street Journal, Asia, Jan. 19, 2009, at 1.

¹⁰*Chinese Firms Post Declining Profits*, Wall Street Journal, Mar. 27, 2009, at 1.

managers, unpaid wages, and the like. Claims taken to arbitration on violation of individual employment contracts skyrocketed. The government in some cases stepped in to pay up the contractual obligations of fleeing managers. Two hundred and forty-two million migratory employees went home over the Chinese New Year with uncertainty as to their future employment. Then came the reports of 25 million workers coming back to the industrial zones without assured work, highlighting the stress facing the Chinese economy. On April 22, 2009, *Bloomberg News* estimated 30 million employees in FOEs had lost their jobs in the prior six months.¹¹

Strikes and Suicides

Last year the issue took on a different dimension among those still at work, as leaderless workers—with the ACFTU standing on the sidelines—began to take action to improve their lot. On May 26, 2010, Foxconn, a company assembling Apple products and employing 800,000 workers in two factories (one, a mile square with 420,000 workers) in Shenzhen, reported the first of nine worker suicides resulting from the frustration of long mandatory overtime hours, military-like working conditions, and confined dormitory living.¹² A few days later the *New York Times* on May 29, 2010, reported on a nine-day strike at the Honda transmission plant in Foshan, which resulted in the shutdown of four dependent assembly plants when workers struck for a raise in wages amid rising food and housing costs. The factory offer of a 40 percent wage increase was initially rejected by the strikers, who ultimately settled for a somewhat larger increase, to \$200 per month.¹³ One week later, on June 8, 2010, the *New York Times* reported the Foxconn workers' salaries being increased an additional third to \$300 per month, and Honda raising wages at its striking transmission factory by 24 to 30 percent.¹⁴ Two days later, on June 10, 2010, the *Times* reported that Honda workers at Zhongshan went even further to hold protest marches undertaking to form their own

¹¹ *China's Migrants See Jobless Ranks Soar*, Wall Street Journal, Jan. 27, 2009, at 1.

¹² www.nytimes.com/2010/5/27/technology/27suicide.html?sq=china. Reports that the family of the first suicide received \$14,600 was cited as the possible cause for the rest, one worker allegedly saying that was more money than he could provide his family by staying alive and working, since he rarely saw his family anyway.

¹³ www.nytimes.com/2010/5/30/business/global/30strike.html?sq=china. Blue-collar worker salaries were reported as rising as a consequence of skill shortages from declining birthrate, while one-fifth of high school graduates and one-tenth of college graduates from new and expanding colleges found themselves working free in their first jobs.

¹⁴ www.nytimes.com/2010/6/09/business/global/09labor.html?sq=china.

union, a forbidden goal in China. The workers had conspired through their cell phones to mobilize by department, selecting their most articulate as their shop stewards to represent them, and then meeting with management as a council of 20, demanding to be recognized as a union, which the company said it could not do. They then went on strike, gathering outside the factory gates until their rally was confronted by black-clad police with helmets, face masks, and small round riot shields. The police left at midmorning and the strikers dispersed an hour after that. Management that had previously charged the strikers with days of personal leave, distributed a flier with an offer of \$7.30 for each day the factory had been closed, together with a substantial increase to get them back to work.¹⁵

But the galvanizing triggers of worker protest continued. Recent articles have reported the impact of toxic chemicals used in the making of Apple product screens¹⁶ as well as the use of child labor in assembling Apple products at Foxconn's factories.¹⁷ On May 20, 2011, two were killed and 16 others injured in an explosion of a chemical used to cool while drilling holes in iPad cases at a Foxconn factory. Police kept the hospitalized victims from talking to reporters.¹⁸

The rash of work stoppages and increased worker protest has sorely taxed the government's machinery. In 2008, 700,000 disputes went to arbitration—nearly double the year before—and that number has increased further since 2008.¹⁹ There has been a 95 percent reported increase in disputes before the Supreme People's Court in the first eight months of 2010.²⁰ The Ministry of Labor on Tuesday reported that it had helped recover \$1.5 billion in 384,000 cases in 2010 involving delayed or denied wage payments for migratory workers.²¹ One wonders at the sudden rash of spontaneous strikes and work stoppages in a country where worker-created unions are prohibited and where the only authorized union has remained uninvolved.

¹⁵ www.nytimes.com/2011/06/17/business/global/17strike/html?sq=china.

¹⁶ *Workers Sickened at Apple Supplier in China*, New York Times, Feb. 22, 2011, at 1.

¹⁷ *Apple's Child Labor Issues Worsen*, London Telegraph, Mar. 30, 2011, at 12.

¹⁸ *SACOM's Video Proves Foxconn Has Been Ignoring Work Safety*, CSR Asia Weekly, May 25, 2011.

¹⁹ *As China Aids Labor, Unrest Is Still Rising*, New York Times, June 20, 2010, [www.nytimes.com/2011/06/21/world/asia/21chinalabor.html/sq=china labor7st=cs](http://www.nytimes.com/2011/06/21/world/asia/21chinalabor.html/sq=china%20labor7st=cs).

²⁰ *Global Crisis Adds to Surge of Labor Disputes in Chinese Courts*, New York Times, Sept. 16, 2010, www.nytimes.com/2010/09/16/world/asia/16china.html?sq=china.

²¹ *Unpaid Chinese Workers Recover Wages Worth 10 Bln Yuan With Government Assistance*, CSR Asia Weekly, May 25, 2011.

Interestingly, the initial activists in these wildcat strikes had been the migratory laborers who were the beneficiaries of the Chinese government's deliberate effort to lower the cost of mobile phone and Internet service throughout the country, creating an Internet population of 400 million. Their use of cell phones and text messaging has become a tool to report on management abuses and to secretly organize and coordinate prohibited activities.²² Videos of harsh working conditions and workers being beaten and roughed up sent to workers in their own factories, and to restive and striking workers elsewhere in China, created new concerns for the government.²³ They outwitted the censors and made covert activity open and persuasive, and they used it to mobilize and organize strikes without the need for mass meetings, thus avoiding police scrutiny, monitoring, and arrest. Those department meetings and leader elections at Honda were arranged by cell phone right under the noses of the factory managers and the ACFTU.

Where To Now?

The Chinese government has long faced a problem of balancing its self-interest in building a foreign-tied economy through its east coast factories with its need to generate enough revenue to support the social services so essential to the survival of those remaining in the vast unindustrialized rural areas. China accomplished this by providing jobs and benefits to legal migratory workers who work long hours, live in crowded dorms, and traditionally return home over Chinese Lunar New Year with their saved earnings to support their rural families. The family's agricultural plot may be as small as one-tenth of an acre, making the return of more mouths to feed a threatening burden on the stability of rural and small-town societies. Those societies, made up of grandparents tending grandchildren, survive on the remittances from the 40 percent of their residents—the mothers and fathers working as many hours as are available—living in cramped dormitories in the industrialized deltas awaiting the annual trip home to see their children. The recession closed off the job opportunities for millions over the past three years, with reduced job prospects fueling the desire to remain with their families in the rural non-factory areas. Few

²²*In China, Labor Movement Enabled by Technology*, New York Times, June 16, 2010, www.nytimes.com/2010/6/17/business/global/17strike.html?sq=china; abpr&st=cs.

²³*China Fears Rural Tremors as Migrants Flock from Coast*, New York Times, Feb. 23, 2009, at A8.

jobs have been available in those rural provinces, although the government has announced plans to distribute factory work more equitably around the country, facilitated by a burgeoning network of high-speed railroads and highways. The explosion last weekend at the Foxconn factory was in a new one being built in Chengdu, staffed with migratory laborers who reported to work in Shenzhen and were then shipped to the new Sichuan site, where they were paid lower wages working 10- and 12-hour shifts, with more women and local students being brought in to bolster the new staffing requirements.²⁴

The lack of employment in the rural areas to which migrants have returned, and the distress to rural families caused by the cessation of their remittances, coupled with the layoffs and reduced hours of those remaining in the industrialized areas, has placed great stress on a factory system suffering from reduced overseas orders, from which it is only now emerging.²⁵ Ironically, the workforce cutback and resistance of migrants to return to uncertain jobs in the enterprise zones has triggered a labor shortage, in part a consequence of the government's one-child policy, but it is also a product of raises granted to striking workers to help cope with the rising cost of living. The problem occurs at a time when the government is pressured to raise wages in SOEs to ease the widening income gap between those workers and those in the better-paid FOEs²⁶ for fear it might otherwise trigger social unrest.²⁷ Raising wages for those in SOEs is viewed as a way to stimulate domestic production and consumption and make the country less dependent on low-priced exports.

This motivation may also be behind the more recent efforts of the government in some regions to loosen the prohibition against local election of union leaders. Shanghai is coping with new regulations effective May 1, 2011, which allow elected Employee Representative Councils for enterprises with more than 1,000 employees to coexist with the official government union, while the regional ACFTU announced a plan in January 2011 which would make collective consultation available to 80 percent of regional enterprises by 2013.²⁸ Guangdong Province proposed legislation providing

²⁴*Foxconn and Apple Fail to Fulfill Promises*, SACOM report, 9 May 2011.

²⁵*China Fears Rural Tremors as Migrants Flock from Coast*, New York Times, Feb. 23, 2009, at A8.

²⁶*China Will Boost Spending, Trying To Close Income Gap*, Boston Herald, Mar. 6, 2011, at A3.

²⁷*China's Focus Turns To Its Poor*, Wall Street Journal, Mar. 7, 2011, at A11.

²⁸Baker & McKenzie Labor Group, China Employment Law Update, Feb. 28, 2011, at 2.

for worker election of leaders to an enterprise-based “democratic administration committee,” which would then engage with the employer in collective consultations, but the third revision of the proposal has been held in abeyance because of the opposition of Hong Kong-based employers.²⁹

How Far the Wind?

Whether the recent sandstorms of North Africa and the Middle East will reach as far as China is obviously unknown. What *is* known is that the Chinese government has demonstrated until now an abiding effort to resist free and independent unionization as we in the western world have come to know it. The cracks in the wall to date show that, for a variety of self-interested reasons, the government has continued to encourage foreign enterprise development, which has expanded from garment assembly and shoe manufacture into more complex industrial commodities including solar power, automobiles, and high-speed trains. The peaceful protests in North Africa based on worker protests over industrial unemployment and student fears of their own joblessness might ultimately constitute a potential threat to Chinese stability as well. The question is whether the Chinese youth will unite with worker protests to heed the spreading call from North Africa and the Middle East for political change. The alliance between students and intellectuals and the Chinese laboring class may not fit the Chinese way of life, where the long-standing separation between the laboring and intellectual classes has survived, even in that classless society. The Chinese leadership may rationally view future political stability as dependent on future economic stability. If it recognizes the potential threat of an intellectual uprising and chooses to co-opt the workforce, it might thereby defuse a dreaded “Jasmine Revolution.”³⁰ It might do that by consenting to worker efforts toward a better economic life through allowing worker-based trade unions and by authorizing collective bargaining. The resulting workplace protections and self-regulation of the workplace could well convince the workforce that the government is indeed the beneficent patron of a new and more tolerant labor relations structure. If that turns out to be the consequence of the North African/Middle East chaos, it may bring the Chinese closer

²⁹Trans-Asia Lawyers, PRC Employment News Flash, 17 Dec. 2010, Vol. 11, No. 12.

³⁰*Is China Next?*, Wall Street Journal, Mar. 12–13, 2011, at C1.

to our American collective bargaining paradigm. But it also raises the ghost of Deng's initial edict requiring FOEs to conform to the same rules as SOEs, that is, resurrecting the lingering fear of allowing inroads of democracy triggered by independent unions and collective bargaining in Gdansk and raising the specter of a *Solidarnosc* political opposition, creating perhaps an even greater risk. Either alternative may pose an existential challenge to the Chinese government, hardly foreseeable in their 1949 creation of that Chinese workers' paradise.