

## **International Trends In ADR – An Asian View**

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In globalization would like to refer to trends in international law, or international trends in national law. But the reality is that in the international arena there is no legal recourse or workplace protection as there is in the national arena leaving ADR as the only forum for moving forward. Much as we would like to report on the sweeping and expanding success of labor and employment ADR in Asia, with two exceptions, the pickings are slim.

Let me be more precise.

#### **National law**

We are all used to reliance on and protection by national laws. In some countries the national law is stronger than in others. In the European and Code countries there is extensive workplace protection through laws and national labor courts to assure compliance therewith. In the US and Canada there is less statutory protection (no paid holidays, no statutory severance pay, no paid vacation etc. And in the US, we don't even have state provided health insurance. Here we traditionally relied on the canard that collective bargaining would enable employees to secure such protections through negotiations. With 8% of the private sector workforce that is obviously not a promising route.

Globalization has made statutory protection of workers even more illusory. As enterprises move their production to developing countries where statutory protection, assuming most have the laws, is even less effective. The pressures of rural migration from failed agricultural societies into urban areas, the fear that failure to conform to the demands of new investors i.e. accept graft for lax enforcement may lure them to the more compliant neighboring country, and the lack of financial resources to effectively enforce what laws they have, all contribute to increasing worker exploitation and disregard of legal if not moral community obligations.

Applying that standard of national law to China, let us see look at what workplace protections are provided by national statute. The Peoples Republic of China in 1949 established state owned enterprises and those who worked in such enterprises were afforded statutory protection and presumably the services of the All Chinese Federation of Trade Unions as their workplace union. However, the ACFTU does not represent workers; it is the Party's vehicle for assuring workplace stability, funded by the enterprise, and usually led by a designee of factory management, resolving disputes between workers and the employer. In the 1970s when Deng Xiaoping Opened China to foreign investment and export manufacturing, he failed to recognize the toll that the profit motive of FOE's would exact on Chinese factory workers, or their need for representation. The governmental ban against independent trade unions continued, despite its violation of the ILO Convention allowing freedom of association and the right to Collective Bargaining, and the ACFTU remained the only recognized trade union despite the fact that it did not represent workers. Indeed all FOEs were mandated to

recognize the ACFTU by Nov 30, 2008. Thus today, when one third of Chinese factories are foreign owned, and when the economic downturn of the past few months has resulted in the closing of some 7,000 factories with 4.85 million migratory laborers returning home from work in the east coast factories, an estimated 6.5 million jobless next year<sup>1</sup> makes an economic crisis a potential political crisis. Thus in China national law protects individual rights, but denies collective bargaining and the right to employee chosen unions and therefore denies crucial tools for assertion and protection of workplace rights not only for those in FOEs but those in SOEs as well.

### **International Law**

Although there are treaties and international conventions guaranteeing intellectual property rights there is no counterpart international protection of workplace rights, and to the extent that free trade agreements offer to protect workplace rights (to date, only the Free Trade Agreement with Jordan) access to enforcement is uncertain. There are hortatory commitments to a Social Clause or to endorsement of the ILO's nearly 200 International Conventions, but employees can hardly rely on international law for workplace protection.

### **ADR**

Alternative Dispute Resolution, long relied on as an ancillary tool along national law for resolving workplace disputes. That is particularly evident in the US and Canada with interest mediation provided by the state and federal government, and with rights and interest mediation and arbitration provided by mutually selected private neutrals. We naively assume our system of labor dispute resolution is the standard world wide. Unfortunately that is not the case. Our systems are unique. And given my charge of looking at ADR in Asia it is difficult to find much evidence of new uses or trends in the use of ADR.

### **Mediation**

Mediation/conciliation is routinely used by Labor Officers in most countries which were former colonies of the British or French, or in the case of the Philippines, the US. Conciliation is the norm as a precondition for enforcement of labor law in most Asian countries, but it is usually a necessary annoyance in the pursuit of exercise of government authority in most countries.

### **Arbitration**

Arbitration of rights disputes a normal component of collective bargaining agreements is rare in Asia. In Australia under its federal and dwindling state Arbitration system the government provides and has provided for more than 100 years a system of government based arbitration for setting wage rates and resolving disputes, although on a federal or state wide basis and only recently has turned to encouraging enterprise based dispute resolution. As a component of their system the government arbitration commissioners often sought to conciliate disputes before arbitrating them, using a system of opting out, enabling the parties to chose a different neutral for the arbitration component.

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<sup>1</sup> NYTimes Dec 19, 2008, p.1

### Recent Trends in ADR

Probably the most interesting changes in the use of ADR in Asia are occurring in Cambodia and China. The first quite effective and the second quite illusory

Cambodian Arbitration Council In 2002 the ILO launched its Labor Dispute Resolution Project in Cambodia establishing a national tripartite Arbitration Council to resolve collective labor disputes as part of the 1999 USA-Cambodia Trade Agreement on Textile and Apparel. Collective disputes which are unresolved at the Ministry level are referred by the Minister within 5 days to the Arbitration Council. The Council consists of three 10 person arbitration panels' worker, management and neutral. Each party to a dispute chooses one arbitrator from the partisan lists who in turn select a third from the neutral panel. The Arbitrators convene a session at which the parties present their case. After some additional efforts at conciliation the tripartite panel will hear the dispute and issue a written decision which by agreement of the parties will be either binding or not binding. Among the topics arbitrated are illegal recruitment of workers during a strike, failure to disperse gratuities billed to hotel guests, discrimination based on union membership, etc. Decisions are rendered within 7 days, and are published on the Council's web page. In its first three years of operation, the Council had received 182 cases involving enterprises employing over 150,000 workers. 36% of the cases were resolved through conciliation by the arbitrators, 31% were resolved by decision, 9% were settled after the award, and in 23% of the cases the award was not implemented.<sup>2</sup> Most importantly the Council has been held responsible for a 96% decrease in strikes and a 97% decrease in lost time due to strikes since its creation.<sup>3</sup> To date, the council has received 531 cases, 190 of which were settled prior to award, with 331 going to decision. Ten are currently in process. In assessing the project Booz Allen Hamilton attributed its success to the following

- Politically neutral selection of the pool of arbitrators with assistance from international donors, with arbitrators of high experience, education and integrity
- The tripartite selection process from the three panels increases the parties confidence and eliminates bias toward either party
- Reasoned decisions are promptly published and disseminated and serve as precedent for the parties and for the Council's future decisions
- The process is perceived as open and transparent
- The fact that most decisions are non binding eliminates the incentive for corruption since if one party is believed to have bribed a panel the other party can simply reject the decision
- Both sides have a strong incentive to resolve a dispute quickly – a lengthy court battle in the midst of a strike could cost the workers salary and the employer productivity<sup>4</sup>

China's Labor Dispute Mediation and Arbitration Law On May 1, 2008 a new law for mediation and arbitration of labor disputes went into effect. Looking at its title,

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<sup>2</sup> Lejo Sibbel, "Arbitration Council Review" Labor Dispute Resolution Project, Kingdom of Cambodia, ILO, June 2005 p 8

<sup>3</sup> ILO and World Bank, *Cambodian Women and Work in the Garment Industry*, 2007, p.21

<sup>4</sup> Boos Allen Hamilton USAID Southeast Asia Commercial Law and Institutional Reform and Trade Diagnostics – Cambodia April 2007, p. 62

particularly from a US/Canadian perspective it sounds like ADR has triumphed as the means of resolving workplace disputes in China. But when you look at the legislation in the light of the legal structure noted earlier, the ACFTU does NOT represent workers who are on their own primarily as individuals in appealing to this new facility. Government staff is the mediators and arbitrators. There is no independent body of neutrals from which disputants make their joint selection, there is no collective representation by a union and there is certainly none of the joint funding which, I believe, helps to keep the arbitrators honest, responsible and diligent under our system. Indeed the evidence shows that the procedure is an expedited vehicle for removing from the courts the prevailing workplace disputes over non or delayed payment of wages which are often withheld by employers conning their employees, usually living in company dormitories, that their delayed payments are imminent. Certainly this new law is more expeditious, allows longer filing times, and is free to the workers. On December 11, 2008 the Director of the Arbitration Office of the Guangzhou labor and social security bureau, which handles about 25% of the labor disputes in China reported that more than 60,000 applications had been made for arbitration, twice the number for the 2007, 60% for back pay<sup>5</sup>. The current backlog of 9,600 cases, not expected to be settled until next September, is bound to swell with increasing plant closures and layoffs. Even in the best of time it is hardly a realistic use of ADR for resolving workplace disputes

## **Conclusion**

The Cambodian and Chinese initiatives in labor arbitration are perhaps diametrically opposed outcomes, both different from what we in the US and Canada have come to expect as new developments in “our” kind of bottom up party created, ADR. In both cases they reflect government utilization of the ADR approach as being more appealing to the users, and as being more effective than traditional courts and litigation in helping the government control workplace disputes. It would be nice to report that they represent a recognition that workers and managements have developed sufficient sophistication to resolve their own workplace disputes, but alas in the world of globalization, particularly in Asia where governments play an increasing role in managing or controlling private enterprise workplaces, ADR has become its tool in co-opting the players in an environment of increasing government control.

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<sup>5</sup> Chinese Digital Times, Labor Arbitration cases Soaring in Guangzhou, Dec 11, 2008