Resolving Labor Disputes by Mediation, Arbitration, and Litigation

1. Legal Regulation of Labor Disputes

Labor disputes arising from statutory or contractual bases are resolved by the governmental labor mediation and arbitration process. The mediation process traditionally occurs within the enterprise and is voluntary. Arbitration is available, but claims must be filed within time limits. The Labor Mediation and Arbitration Law (LMA) became effective on May 1, 2008. It provides increased accessibility for employees and greater finality to the arbitration process. It also clarifies the relationship of arbitration awards to judicial appeal. Certain exceptions to the usual exhaustion requirement are now included where direct access to the court is permitted. The new law seems to have spurred an increased use of arbitration: “Guangdong’s courts and arbitrators handled more than twice as many labor disputes this May than a year earlier, after introduction of rules giving workers more rights and making arbitration free.”

The evolving legal regulation of labor arbitration, resulting in the current, primary regulations, began in 1993 with Regulations on Settlement of Labor Disputes in Enterprises, which were followed by the 1994 Labor Law and two Supreme People’s Court Judicial Interpretations in 2001 and 2008.

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2 The number of labor disputes handled by Guangdong’s arbitration agencies tripled and court cases jumped 160 percent in recent months. Ninety percent of the cases were brought in the major Pearl River Delta manufacturing hubs of Guangzhou, Dongguan, Shenzhen, Zhongshan, Foshan, and Huizhou. Fiona Tam, Caseloads Surge as Laborers Air Gripes, South China Morning Post (July 9, 2008).

3 Guan yu shen li lao dong zheng yi an jian shi yong fa lv ruo gan wen ti de jie shi [Interpretation of the Supreme People’s Court Concerning Several Issues Regarding the Application of Law to the Trials of Labor Dispute Cases] (promulgated by the People’s S. Ct., April 16, 2001) [hereinafter S.Ct. Interpretation I].
The LMA and the Labor Contract Law (LCL) were passed in 2007 and became effective in 2008. On January 1, 2009, new Labor and Personnel Dispute Arbitration Procedure Rules were issued by the MOHRSS. Altogether, the laws make available a three-step process of mediation, arbitration, and litigation. The employee may also lodge a complaint with the local Labor Bureau where there is a violation of law over arrears in paying remuneration, medical bills for work-related injuries, severance pay, or damages, and the government will “handle the matter in accordance with the laws.”

The scope of labor arbitration is large and increasing, often varying by region. The number of labor arbitration cases grew from 10,326 in 1989 to about 350,000 in 2007, an increase of more than 3,000 percent and an annual rise of 10.4 percent from 2006 to 2007. In 2007 the 350,000 cases involved 650,000 workers. At the same time the number of arbitration cases has been increasing, the number of collective labor disputes has declined. It decreased from 14,000 cases in 2006 involving 350,000 workers to 13,000 cases in 2007 involving 270,000 workers, or about 41.5 percent of the total workers involved in labor disputes. Collective disputes often lead to collective actions indicative of social unrest, such as demonstrations, strikes, or even violence.

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4 Guan yu shen li lao dong zheng yi an jian shi yong fa lv ruo gan wen ti de jie shi (II) [Interpretation of the Supreme People’s Court Concerning Several Issues Regarding the Application of Law to the Trials of Labor Dispute Cases (2)] (promulgated by the People’s S. Ct., Aug. 14, 2004) [hereinafter S.Ct. Interpretation II].
5 Lao dong ren shi zheng yi zhong cai ban an gui ze [Labor and Personnel Dispute Arbitration Procedure Rules] (promulgated by MOHRSS, Jan. 1, 2009) [hereinafter Arbitration Procedure Rules]. The new Procedure Rules apply to both labor dispute arbitration and personnel dispute arbitration; for example, disputes involving civil servants and People’s Liberation Army (PLA) nonmilitary staff. The new Procedure Rules are drafted based on LMA, Civil Servants Law, and Regulations on PLA Nonmilitary Staff. These supersede the Labor Dispute Arbitration Commission Procedure Rules, issued by the Ministry of Labor on Oct. 18, 1993, and the Personnel Dispute Resolution Procedure, issued by the Ministry of Personnel on September 6, 1999.
6 Labor Law, art. 77; LCL, art. 77; LMA, arts. 4, 5.
7 LMA, art. 9.
11 Id.
12 Brown, supra note 8.
In the first three quarters of 2008, China’s labor dispute arbitration committees accepted 520,000 new cases, a 50 percent increase over the same period in 2007. This figure is expected to increase sharply in the fourth quarter, reflecting the rise in the number of factory closures and mass layoffs in the southeast coastal region.\(^\text{13}\)

There are significant regional disparities in which labor arbitration cases arise. As might be expected, where industry, investment, and economic development activity are high, there is a correspondingly high incidence of labor disputes. In 2005, Jiangsu, Guangdong, Shandong, Shanghai, Beijing, and Zhejiang each had between 15,000 and 61,200 labor arbitration cases. Regions of heavy industry (involving mostly SOEs, which are making the transition to a market economy and are undergoing restructuring, which affect significant numbers of workers) also have a relatively large number of labor disputes. These include Liaoning, Hubei, Fujian, Chongqing, and Sichuan, which typically have between 8,000 and 10,000 cases per year, compared with fewer than 2,000 cases per year in many of the provinces.\(^\text{14}\)

The characteristics of labor arbitration cases vary widely. Topics of labor disputes include (in order of the number of cases) wages, termination, insurance, and work injury. In 2006, 64 percent of Shanghai’s 24,000 labor arbitration cases involved the failure to pay wages or social insurance. The type of ownership is also an identifiable characteristic, with most labor disputes being with either an SOE or a foreign-invested enterprise (FIE). An interesting side note is that, although more large-scale mass protests occur with SOEs, more work stoppages and strikes occur in the FIEs. Moreover, in Guangdong most of the labor disputes have occurred in Japanese, Taiwanese, Hong Kong, and Korean invested enterprises, where workers’ rights are reported to be more often violated. Lastly, although the worker is the complainant in nearly 95 percent of the cases, the employer may bring a claim as well. Over the years, employers have filed as the moving party in 4 to 13 percent of the arbitration cases, usually on topics dealing with deliberate damage to employer property or other labor contract violations.\(^\text{15}\)

In China, labor disputes involve violations of contractual and statutory labor rights. Generally speaking, resolving a labor dispute between an employee and an employer through labor arbitration is mandatory, if initiated by either party, and in most cases is a prerequisite for a court to have jurisdiction. The


\(^{14}\) Id.

\(^{15}\) Id.
LMA, Article 2, defines a “labor dispute” as one arising from formation of an employment relationship. The LCL provides further definition, stating that “an employment relationship with an employee is established on the day it starts using the employee.” Thus, “applicants,” not yet having formed an employment relationship, would seem to fall outside this definition, whereas “retired employees” may have residual rights to use arbitration over pensions and other benefit entitlements. The LMA, Article 2, continues, stipulating the following as labor disputes: (1) disputes arising from the confirmation of a labor relationship; (2) disputes arising from the conclusion, performance, amendment, termination, or ending of a labor contract; (3) disputes arising from dismissal or from a formal or de facto resignation; (4) disputes arising from working hours, rest and leave, social insurance, benefits, training, or labor protection; (5) disputes arising from labor compensation, medical bills for a work-related injury, severance pay, or damages; and (6) other labor disputes specified in laws or statutes.

2. Mediation

The 1994 Labor Law, Section 80, states that enterprises may establish internal mediation committees to assist in resolving labor disputes. The 2008 LMA broadens this to also include local mediation organizations. Within each enterprise, guidance for the mediation procedures comes from its own rules. If filed, the process must be reconciled within the legal time requirement of filing for arbitration, within one year. The mediation process is voluntary, and usually the employee has no explicit right to an individual representative. If no mediation settlement agreement is reached within fifteen days of submission, then either party may file for arbitration. If a mediation agreement is reached, it is legally binding. If either party fails to fulfill the mediation agreement, the other party may apply for arbitration. However, a mediation agreement on certain subjects, including agreements on payment of overdue labor remuneration, medical bills for a work-related injury, severance pay, or damages, is directly enforceable by the courts.
Under the LMA, there is a tripartite mediation committee, with one representative each appointed from the employer, the workers, and the trade union. However, 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 labor disputes. 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 processed 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.

3. Arbitration

Labor arbitration has proven quite successful in resolving cases; the resolution rate is higher than 92 percent, including conciliation/mediation and arbitration awards, which in 2006 were 34 and 46 percent of the total settlements, respectively. Of a total of 310,780 cases filed and settled in the arbitration process, 104,435 cases were mediated, whereas 141,465 cases were settled by arbitration. The other 20 percent were dispensed with by withdrawals, rejections, and the like. Workers prevailed in 146,028 cases, employers in 39,251, and there were split decisions in 125,501 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 win partial victories in a majority of the split decisions.

The LMA has 34 articles in Chapter 3 that outline the arbitration requirements and process. They increase accessibility to employees by extending the

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24 LMA, art. 10.
26 Brown, supra note 8, at 3; for an argument that mediation is underutilized, see Aaron Halegua, Getting Paid: Processing the Labor Disputes of China’s Migrant Workers, 26 BERKELEY J. INT’L L. 254 (2008).
28 Id.
Table 14.1. Disposition of labor disputes in 2006 and 2007

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of cases left over from last period</td>
<td>22,165</td>
<td>25,424</td>
</tr>
<tr>
<td>Cases accepted</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of cases</td>
<td>317,162</td>
<td>350,182</td>
</tr>
<tr>
<td>Number of collective labor disputes</td>
<td>13,977</td>
<td>12,784</td>
</tr>
<tr>
<td>Number of cases appealed by laborers</td>
<td>301,233</td>
<td>325,590</td>
</tr>
<tr>
<td>Number of persons involved overall</td>
<td>679,312</td>
<td>653,472</td>
</tr>
<tr>
<td>Number of persons involved in collective disputes</td>
<td>348,714</td>
<td>271,777</td>
</tr>
<tr>
<td>Cause of the disputes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Change the labor contract</td>
<td>3,456</td>
<td>4,695</td>
</tr>
<tr>
<td>Relieve the labor contract</td>
<td>55,502</td>
<td>67,565</td>
</tr>
<tr>
<td>End the labor contract</td>
<td>12,366</td>
<td>12,696</td>
</tr>
<tr>
<td>Cases settled</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of cases settled</td>
<td>310,780</td>
<td>340,030</td>
</tr>
<tr>
<td>Manner of settlement</td>
<td></td>
<td></td>
</tr>
<tr>
<td>by mediation</td>
<td>104,435</td>
<td>110,436</td>
</tr>
<tr>
<td>by arbitration lawsuit</td>
<td>141,465</td>
<td>149,013</td>
</tr>
<tr>
<td>Others</td>
<td>64,880</td>
<td>71,581</td>
</tr>
<tr>
<td>Result of settlement</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Won by units</td>
<td>39,251</td>
<td>49,211</td>
</tr>
<tr>
<td>Lawsuit won by laborers</td>
<td>146,028</td>
<td>156,955</td>
</tr>
<tr>
<td>Lawsuit won partly by both parties</td>
<td>125,501</td>
<td>133,864</td>
</tr>
</tbody>
</table>


The law affirms the use of the previously established, government-based Labor Arbitration Commission (LAC).29 Pursuant to the Organization Rules of the Labor Dispute Arbitration Commission,30 the LAC is staffed by representatives from the labor administrative authorities (labor bureau), the labor union, and a government-appointed representative with management authority.31 It is in charge of the following functions: (1) retaining and dismissing full- and part-time labor dispute arbitrators, (2) accepting and hearing labor arbitration

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29 LMA, arts. 27, 53.
30 LMA, arts. 17.
32 Organization Rules, art. 7; LMA, art. 19.
cases, (3) discussing major or difficult labor arbitration cases, and (4) overseeing labor arbitration activities.\(^{33}\) The total number of commission members must be an odd number.\(^{34}\)

Arbitrators who serve on the LAC’s Labor Arbitration Tribunals must meet certain qualifications under the LMA. In addition to being “just and upright,” they must have: (1) once served as a judge; (2) been engaged in legal research or education with a mid-level or higher title; or (3) possess legal knowledge and been professionally engaged in human resource management, labor union work, or other such work for at least five years; or (4) practiced as a lawyer for at least three years.\(^{35}\)

Earlier qualification standards for arbitrators do not appear to have been explicitly displaced by the LMA. A 2008 Notice by the Beijing Labor Dispute Arbitration Commission on referring part-time labor arbitrators provides a good example on how the two sets of standards may be currently applied. The qualifications for the nominees are (1) labor arbitrators who have been licensed since 2004; (2) labor union public lawyers; (3) previous experience as a judge; (4) been engaged in law research or a professor with a mid-level or higher professional title; (5) a bar license and more than two years of experience in labor union work; (6) legal knowledge and more than five years of experience with labor union legal aid or legal counseling; or (7) a law degree and labor union work experience for more than five years.\(^{36}\)

\(^{33}\) Organization Rules, art. 10; LMA, art. 19.

\(^{34}\) Organization Rules, art. 7. Usually the head of the local labor administrative bureau is the president of the commission. Art. 8. One or two vice presidents will be voted in by members of the commission. More than two-thirds of members must attend any commission meeting. Id. The appointment and dismissal of labor arbitration commission members have to be approved by the local government. Art. 9.

\(^{35}\) LMA, art. 20.

\(^{36}\) Guan yu zuo hao xiang Beijing shi lao dong zheng yi zhong cai wei yuan hui tui jian jian zhi lao dong zhong cai yuan gong zuo de tong zhi [Notice on Referring Part-time Labor Arbitrators] (promulgated by the Beijing Labor Dispute Arbitration Commission, Sept. 1, 2008), http://www.bjzgh.gov.cn/template/10002/file.jsp?cid=436&aid=13821. An example of a recommendation form (2008) can be found on the Beijing Municipal Trade Union’s Web page, http://www.bjzgh.gov.cn/template/10002/file.jsp?cid=436&aid=13821. Earlier mandates, such as the Measures on Labor Arbitrators Hiring and Management, issued by the Ministry of Labor in 1995, appear to still be effective; Lao dong zhong cai yuan pin ren guan li ban fa [Measures on Labor Arbitrators Hiring and Management] (promulgated by the Ministry of Labor, Mar. 23, 1995) [hereinafter Measure]. Because the LMA is not retroactive and there is no clear annulment of the 1995 measures, Labor Bureaus will need to clarify the continuing qualifications of arbitrators selected under them and determine whether they must meet the new qualifications. Professional labor arbitrators under the 1995 measure are hired from government staff working on labor dispute resolution in local labor administrative bureaus. Id., art. 2. Part-time labor arbitrators can be hired from other government staff working in local labor administrative bureaus or other government entities, labor union staff, scholars, or lawyers. Id.
Labor arbitrators must undergo training and take a qualification exam; there is a permit system for labor arbitrators as well. Anyone with the background and experience described in the previous paragraph has the right to apply to be a labor arbitrator. For example, the Beijing Labor Dispute Arbitration Commission issued a notice on referring part-time labor arbitrators on September 1, 2008. The notice asked all local levels of the labor union, the city’s various industry departments, workers’ committee, employee University, and legal service centers to nominate part-time labor arbitrators to the city-level labor union for approval. Each permit is effective for three years. However, LAC members, once nominated by the government, automatically receive this permit.

The LAC will convene Labor Arbitration Tribunals as needed, composed of one, two, or three arbitrators, or if the case is a collective arbitration (involving more than thirty claimants), an odd number of more than three arbitrators is selected. Most arbitration cases are handled by one arbitrator under simplified procedures. Arbitrators may be full- or part-time, with the former usually drawn from the administrative staff of the Labor Bureau. Training of arbitrators is often provided, but few had legal education before the LMA. At the end of 2007, it was reported that there were 7,424 full-time and 12,906 part-time arbitrators nationally. In addition to conducting the arbitration,

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37 Measure, art. 4.
38 Measure, art. 3.
40 Measure, art. 6.
41 Id.
45 Lin Ling, Ying dui lao dong zheng yi an jian jing ben yao you shi ce [Measures to be Taken to Deal with Massive Labor Dispute Cases], CHINA LABOR & SOCIAL SECURITY DAILY, April 24, 2008, http://www.cnss.cn/xwzx/zlzl/ldzyf/qjzw/200804/t20080424_187145.html.
Arbitrators are also called on to attempt mediation before rendering the arbitration award.\(^{46}\) In 2006, more than one-third of the decided cases filed in arbitration were mediated.\(^{47}\)

Arbitrator fees vary according to local standards. Under the old system, the party who lost the labor arbitration paid for the arbitration fees. Now, under the LMA, labor arbitration is free for the parties, and local governments pay the fees. Several provinces have issued special local regulations on labor arbitration fees (e.g., Hunan,\(^ {48}\) Fujian,\(^ {49}\) and Guangdong\(^ {50}\)). Under those local rules, the local ministry of finance at the same level as the labor arbitration authority reimbursed the labor arbitration fees from May 1, 2008, to December 31, 2008; the labor arbitration fees became part of the government-spending budget in 2009. In most cases, this amount is relatively modest. For example, the standard in Taizhou, a small city in Jiangsu Province, which is relatively wealthy, depends on the labor arbitrator's qualification: at the senior level, 120 yuan per case; at the junior level, 100 yuan per case; at the associate level, 80 yuan per case; and at the assistant level, 50 yuan per case.\(^ {51}\) In Guangxi province, which is relatively poor, labor arbitrators receive a flat subsidy of 30 yuan per case, and there is a ceiling of 60 yuan per month for each arbitrator.\(^ {52}\)

Because the majority of the full-time labor arbitrators are actually public servants working for the Labor Bureau, they typically do not receive additional compensation for arbitration, but this can vary by locale. Part-time arbitrators usually receive only a nominal reimbursement or subsidy. This is quite different from commercial arbitration in China, in which the Chinese arbitrator can get paid a very high hourly rate and/or a percentage of the total amount under dispute.

### 4. Arbitration Process

Arbitration is mandatory if requested by either party and has three phases: filing, the hearing, and the award. The applicant for arbitration must file

\(^{46}\) LMA, art. 42.


\(^{50}\) http://www.gd.gov.cn/govpub/zwdt/bmdt/200811/t20081125_74103.htm.


\(^{52}\) http://www.51labour.com/lawcenter/lawshow-2697.html.
with the LAC within one year of the alleged violation, and there is no prior requirement to use mediation.53 As described earlier, since the LMA became effective on May 1, 2008, labor arbitration is free of charge.54

MOLSS published its latest working rules on labor and personnel disputes arbitration on January 1, 2009.55 These rules supersede all previous procedural rules, and although there are few major changes, they provide more details and instructions.56 Article 4 provides that the Labor Dispute Arbitration Commission will give priority to disputes involving more than ten workers or to collective contracts. Article 8 allows shareholders, mother companies, or supervisory departments to be joined as co-defendants when the employer in dispute has its business license revoked, is shut down or dismissed, and is unable to be responsible for the liability. Article 20 provides that when parties cannot collect evidence by themselves because of objective reasons, the Labor Dispute Arbitration Commission can collect evidence based on the PRC Civil Procedure Law. Article 26 provides that the case records of the LAC are open to the parties or their representatives for review and copying, except for those cases involving national or military secrets.57

The filing deadline of one year may be tolled in certain circumstances, such as when an applicant is currently seeking a remedy from a relevant government authority, or there has been an intervention of force majeure, or if the labor dispute involves overdue remuneration during the ongoing employment relationship.58 The applicant must provide pertinent information in the arbitration application, including the nature of the claim, supporting evidence, and witnesses.59 The LAC must accept or reject the application (with a stated reason) within five days from its receipt, or else the applicant may proceed directly to court, as is also the case if the application is

53 LMA, art. 27; also see Supreme People’s Court’s guidance, if the matter should be in court. S.Ct. Interpretation II, supra note 4.
56 Id.
57 Id.
58 LMA, art. 53.
59 LMA, art. 28. The application has to provide (1) the name, occupation, address, and employer of the employee, as well as the name, address, and title of the legal representative or principal of the employee; (2) arbitral claims, supporting facts and reasons, evidence, sources of evidence, witnesses’ names and addresses; and (3) the attorney’s engagement letter and signature. The new LMA allows oral application, and commission staff will help record the application and serve the party when it has difficulty in writing an application. Id.
The respondent is notified within five days after acceptance of the application and has ten days to respond.\textsuperscript{60} The LAC first designates a Labor Arbitration Tribunal (LAT) and notifies the applicant of its composition within the five-day period from receipt of the application.\textsuperscript{62} The one to three arbitrators are bound by ethical standards and must recuse themselves or be challenged by the parties for violating any listed areas of impropriety, such as being related to a party, having a material interest in the case, etc.\textsuperscript{63} The LAT will attempt mediation before issuing its award, and if a resulting written mediation agreement is signed by the arbitrator(s) and the parties, it is enforceable in the courts.\textsuperscript{64}

The arbitration hearing process allows for the parties to cross-examine, argue, and make final comments, and a record is maintained.\textsuperscript{65} Evidence accepted as genuine by the LAT is used as “the basis for determining the facts,” and the burden of production, if not proof, is on each party, except where the evidence is in the possession or under the control of the employer and the employee is unable to submit it, in which case the employer must produce it by a deadline, and failure to do so will be held against the employer’s burden of proof.\textsuperscript{66} Although there is some guidance available on determining

\textsuperscript{60} LMA, art. 29. All following “days” in the procedure means “workdays.” The commission decides whether to accept the labor arbitration application. The review determines (1) whether the applicant has standing, (2) whether it is a labor dispute, (3) whether the commission has jurisdiction, (4) whether the one-year statute of limitation has run, and (5) whether the application and other relevant materials meet the requirements. If the application is incomplete, the commission will send a request to complete the application. If all the conditions are met, staff will prepare a case file opening approval form and let the person in charge sign the form. Then the commission will send notice to the applicant about its decision within five days.

\textsuperscript{65} LMA, art. 30. Even if the commission does not receive the complaint, the labor arbitration proceeding will continue. \textit{Id.}

\textsuperscript{66} LMA, arts. 42, 51; private settlement by the parties is also authorized. LMA, arts. 4, 41. A mediation agreement reached under labor dispute mediation commission with contents of labor rights and obligations has the binding force of an employment contract and can be the basis for the judgment of the people’s court. Where the parties involved only reach a mediation agreement under the labor dispute mediation commission, if the employer fails to perform the payment obligation determined in the mediation agreement and the laborer lodges a lawsuit directly with the people’s court, the people’s court can accept it as a common civil dispute. Guan yu shen li lao dong zheng yi an jian shi yong fa lv ruo gan wen ti de jie shi (II) [Interpretation of the Supreme People’s Court Concerning Several Issues Regarding the Application of Law to the Trials of Labor Dispute Cases (II)] (promulgated by the People’s S.Ct., Aug. 14, 2004). If during the proceeding the parties settle their case, the arbitration application will be deemed withdrawn. LMA, art. 41.
the “burden of proof” in court cases, it is not expressly binding on arbitrators in the arbitration process.\footnote{\ref{67}}

The arbitration award must be rendered within forty-five to sixty days from the date of acceptance by the LAC of the application for arbitration.\footnote{\ref{68}} When the LAT is composed of more than one arbitrator, the written award is based on majority opinion, or if none can be reached, it will be in accord with the opinion of the chief arbitrator, along with dissent(s) also placed in the record.\footnote{\ref{69}} The award is final and legally effective on the date it is rendered in two areas of labor disputes: (1) labor remuneration, medical bills for work-related injuries, severance pay, or damages, in any amount not exceeding the equivalent of twelve months of the local minimum wage\footnote{\ref{70}} and (2) working hours, rest, leave, social insurance, etc., arising from the implementation of state standards.\footnote{\ref{71}}

An employee dissatisfied with an award in those two areas may appeal to the court within fifteen days, whereas an employer within thirty days may seek to vacate the order in intermediate court only on errors in law, jurisdiction, or statutory procedure; fabricated or concealed evidence; or if the arbitrator demanded a bribe or committed graft.\footnote{\ref{72}} All other non–Article 47 appeals may be brought to court by either party within fifteen days from the date of the receipt of the written ruling.\footnote{\ref{73}} In 2008, in the first reported case under the LCL, a district court in the Chaoyang District of Beijing upheld an arbitration ruling that awarded an employee an open-ended labor contract based on her circumstances, including her prior employment with the employer, and notwithstanding her leave of absence.\footnote{\ref{74}}

Arbitration awards tend to be brief, without elaborate analysis, as contrasted with, for example, longer American arbitration decisions. Access to Chinese awards is limited, with only the appealing parties granted access to the award.\footnote{\ref{75}} In 2009, new Procedure Rules provided that the case records of Labor

\footnote{\ref{67} S.Ct. Interpretation I, supra note 3, art. 13.}
\footnote{\ref{68} LMA, art. 43.}
\footnote{\ref{69} LMA, arts. 45, 46.}
\footnote{\ref{70} LMA, art. 47(1); see LMA, art. 44 (advance execution and transfer to court).}
\footnote{\ref{71} LMA, art. 47(2).}
\footnote{\ref{72} LMA, art. 49(1–6).}
\footnote{\ref{73} Id.}
\footnote{\ref{75} Gu Weixia, Recourse against Arbitral Awards: How Far Can A Court Go? Supportive and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration, 4(2) CHINESE J. INT. L. 481 (2005).}
Arbitration Commission are open to the parties or their representatives for review and copying.\textsuperscript{76}

There are mixed views about whether the new law will resolve the growing number of labor disputes. Most see it as a further improvement\textsuperscript{77}; whereas advocacy groups argue the LACs are ill-equipped to deal with the surging workload.\textsuperscript{78}

5. Litigation

The number of labor dispute cases appealed to the courts from labor 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).\textsuperscript{79} In 2005, about 94 percent of appeals were initiated by workers, and they prevailed in more than half of them; in some courts, such as in Ningbo in Zhejiang and Zhongshan in Guangdong, as many as 90 percent of the appeals were settled in favor of the worker. The LMA seeks to add more finality to arbitration decisions in stipulated areas, as discussed in this section.

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.\textsuperscript{80} Interestingly, the court successfully mediated nearly one-third of the settled cases.


\textsuperscript{77} Li Jiangang, PRC Law on Mediation and Arbitration of Labor Disputes: Further Improvement in Handling Labor Issues in China, CHINA LAW & PRACTICE 31 (May 2008). In the first three months of 2009, the following increases in labor disputes handled by courts occurred; Guangdong, 42 percent; Jiangsu, 50 percent; Zhejiang, 64 percent; Shandong, 19 percent. China cares soar as workers seek redress, http://english.people.com.en/90001/90776/90882/66452282.html.

\textsuperscript{78} They argue that the situation in the Haizhu District in the Pearl River Delta is typical. Their LAC has only three staff members, working six days and three evenings a week to keep pace with the dramatic number of new cases. Help or Hindrance to Workers: China’s Institutions of Public Redress, China Labor Bulletin Research Report, http://www.clb.org.hk/en/files/share/File/research_reports/Help_or_Hindrance.pdf. In Shanghai there are 20 labor dispute arbitration offices with 162 full-time arbitrators; in the first nine months of 2008 workers filed 52,930 cases, more than double the previous year’s number. It was reported by the union that each arbitrator handled more than 226 cases last year, whereas a “reasonable work load would be 50 cases.” Arbitrators are said to be working excessive overtime and delays in the arbitration process have occurred due to too few arbitrators. Dong Zhen and Wang Xiang, Workers’ disputes cause headaches for arbitrators, supra note 51.

\textsuperscript{79} Brown, supra note 8, at 4.

\textsuperscript{80} Id.
Chinese law ordinarily distinguishes between “labor contracts” and “contracts for work,” with the latter treated as a civil contract case able to be taken directly to court. In contrast, the former is treated as a labor case in which resolution of the labor dispute through labor arbitration is required before court access is granted. The LCL and a 2006 SPC Interpretation (preceding the LMA) authorize direct lawsuits in court on certain limited topics, such as back wages owed for which the amount is not in dispute. A recent court case in Shanghai, basing its holding on the Civil Procedure Law (CPL) Article 191, ordered a wage payment of RMB 200,000 to an employee whose employer had agreed the money was due, and the date for payment was past.

There may be some question as to how best to reconcile this narrow exception with Article 44 of the LMA, which requires first going to arbitration and requesting authorization for “advance execution,” as discussed in this section. However, a limited number of nonperformed mediation agreements (settlements) may be taken directly to court for enforcement, and the LMA


82 LCL Article 30 provides a fast and simple procedure – “order to pay” for wage default cases; see also S.Ct. Interpretation II, supra note 4, art. 3.


84 Article 44 allows “advance execution” in labor arbitration cases seeking wage defaults, payment for work injury medical bills, or severance payment and when execution after the arbitration decision would be detrimental to the applicant's living situation where the obligations are obvious. See Lao dong zheng zhi tiao jie zhong cai fa jie xi: di 44 tiao (xian yu zhi xing) [Interpretation of LMA: Art. 44 (Advance Execution)], Mar. 16, 2008, http://www.163.com/law/laodonghetong.org/10044a.html (in Chinese). In contrast, the order to pay is available for all wage default cases under the LCL when the debtor-creditor relationship is clear, no matter whether the employee has difficulty maintaining a life without the procedure. Min shi su song fa [Civil Procedure Law] (promulgated by the Nat'l People's Cong., April 9, 1991, amended by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective April 1, 2008), arts. 191–4 (P.R.C.) [hereinafter Civil Procedure Law], and see Xiao Chengchi, Ru he zheng que shi yong zhi fu ling [How to Use the Order to Pay Correctly], Nov. 14, 2005, http://www.chinacourt.org/html/article/200511/14/i85400.shtml (in Chinese).

85 LMA, art. 16.
authorizes other nonconflicting related laws to continue in force. Some of these related laws, such as the Women’s Rights and Interests Law (Women’s Law) and the Employment Promotion Law, specifically grant the right to “institute a legal action in a People’s Court.” Whether that precludes first exhausting this “labor dispute” in labor arbitration is doubtful, though debatable, in view of current court cases.

Uncontested arbitration awards, except those falling under Article 47, or those qualifying for advance execution under Article 44, will be final after the fifteen-day appeal period. Under new provisions of the LMA, the usual right of appeal and full review, largely de novo, of the arbitration award by the court can be avoided either by a successful application for advance execution or an arbitration award in two stipulated areas under Article 47.

An advance execution can be made in qualifying cases involving recovery of “labor remuneration, medical bills for a work-related injury, severance pay or damages.” The employee applies to the LAT for an award for advance execution and transfer of the case to the court for execution. Two conditions are required: (1) the rights and obligations are clear and (2) the failure to grant will “materially affect the livelihood of the applicant.” Article 47 provides for “final and legally effective” arbitration awards on the date they were rendered in two areas: (1) labor remuneration, medical bills for a work-related injury, severance pay, or damages “not exceeding the equivalent of twelve months of the local minimum wage rate” and (2) disputes over working hours, rest, leave, social insurance, etc. arising from the implementation of government labor standards.

If an employee is dissatisfied with the arbitration award under Article 47, he or she may make an appeal to the Intermediate People’s Court within fifteen days. An appeal by an employer to vacate the award is limited to six circumstances: (1) error in the application of laws; (2) the LAC lacked

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86 LMA, art. 52.
89 LMA, art. 50.
90 LMA, art. 44. There is no need to provide a security in such cases.
91 LMA, art. 47(1–2).
92 LMA, art. 44.
93 Id.
94 LMA, art. 47.
95 LMA, art. 48.
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jurisdiction; (3) a statutory procedure was violated; (4) evidence on which award was based was fabricated; (5) the other party concealed evidence sufficient to affect the fairness of the award; and (6) the arbitrator demanded or accepted a bribe, committed graft, or rendered an award that perverted the law. If the award is vacated, it will be final unless either party, within fifteen days, takes the labor dispute to the People’s Court.

There are certain requirements for and barriers to court review of labor disputes. As discussed earlier, an appellant first must have a “labor dispute” arising from an employment relationship and, second, must have first exhausted the labor arbitration procedures, except where this requirement has been excluded. A mediation agreement reached in court, like a mediation agreement reached in arbitration, is binding, except on the legality of the agreement.

Arbitrated labor dispute cases, taken by the courts, unless otherwise directed by laws or Supreme People’s Court (SPC) guidance, will be enforced in accordance with the law. The Civil Procedure Law includes rules on evidence, review standards, appeals, etc., and, according to the SPC’s 2001 Labor Dispute Interpretation, the employer has a burden to produce evidence within its control, and in cases of termination, reduction of compensation, or recalculation of an employee’s length of service, it has the burden of proof.

96 LMA, art. 49.
97 Id.
98 Where mediation is possible prior to the rendering of a judgment, a session of mediation may be conducted. Civil Procedure Law, art. 128.
99 Civil Procedure Law, arts. 147, 158, 213.
100 S.Ct. Interpretation I, supra note 3, art. 13; this burden of production is similar to that in the arbitration process. LMA, arts. 6, 39. Alternatives to arbitration are available to aggrieved employees. For example, they may petition (xin fang) the Letters and Visits Offices to resolve labor conflicts. They also “can withdraw by shifting to another enterprise or locality, or endure the treatment faced, or attempt to negotiate directly with the employer, or file a lawsuit [if permitted]. A survey carried out by the Shenzhen Labor Bureau in 1996 revealed that 1,537 of 2,789 migrant workers had encountered some labor-related problem during the previous year. The survey found that 4 percent of the migrant workers had turned to either arbitration committees, courts, or Letters and Visits Offices, although the survey did not distinguish among these three routes. Another 39 percent of the migrant workers had tried to take up their problem directly with their employer, 26 percent had given up trying to improve their situation, 23 percent had initiated some form of mediation process within the enterprise, 5 percent had quit the enterprise over the problem, and 15 percent had launched an appeal to the local news media.” Isabelle Thireau & Linshan Hua, The Moral Universe of Aggrieved Chinese Workers: Workers’ Appeals to Arbitration Committees and Letters and Visits Offices, 50 The China J. 83, 84 (2003). Although current labor laws better support the employees’ choice to arbitrate, these other alternatives are still available.