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TEACHING ADR IN THE LABOR FIELD IN CHINA

Theodore J. St. Antoine†

The editors have asked us to be quite personal in our ruminations on the future of comparative labor law and policy. For me, over the past several years, the focus has been on China. My first visit to China in 1994, purely as a tourist, was almost by accident. In late September of that year I attended the XIV World Congress of the International Society for Labor Law and Social Security in Seoul, South Korea. In the second week of October, I was scheduled to begin teaching a one-term course in American law as a visiting professor at Cambridge University in England. Despite my hazy notions of geography, I realized it made no sense to return to the United States for the intervening week. The obvious solution was to continue flying westward around the world. Having never been to China before, my wife and I decided to spend the first week of October in Beijing and environs.

Like nearly all other American tourists, I suppose, our first morning in Beijing I asked the hotel doorman to hail a taxicab to take us to Tiananmen Square. "I'm very sorry, sir," the doorman replied gravely, "Tiananmen Square is closed today." I could hardly believe my ears; the world's largest public square was closed? The exact truth was slightly different. It was October 1, the 45th anniversary of the Communist Revolution. Chinese officialdom, along with soldiers, students, and honored citizens, had taken over the major public sites. Also closed were such standard tourist attractions as the Summer Palace and the Temple of Heaven. But what appeared at first as a big disappointment turned out to be a blessing in disguise. Advised by a friendly young Chinese, we headed off to an antique center and some of the famous alleyways ("hutongs") we might never have explored otherwise. The whole city was in a holiday mood. Old men were

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playing mah-jongg outdoors. Little kids were catching goldfish from tanks along the sidewalks; they then placed the goldfish in water-filled plastic pouches to take home.

Despite these quaint scenes, however, the overall impression was how backward the city appeared in a material sense. The taxis were old Volkswagen beetles. Many of the people were still wearing Mao jackets. The cab drivers seemed proud of a new "beltway" but they were about the only people on it. The great mass of the populace rode bicycles even in the heart of the city. Some new high-rise building was under way but it was hardly in a class with Manhattan or the Chicago Loop's.

We were to return just eight years later to an entirely different world. In the meantime, during the 1990s, the privatization of production facilities and the influx of foreign companies had increased dramatically. This was at least part of the explanation for a tenfold rise in labor disputes over the decade. There were 300,000 such disputes in 2000, with about 100,000 going to arbitration. China adopted a new Labor Law in 1994, which included provisions for a governmentally operated arbitration system. But, perhaps with good reason, arbitral decisions were not readily accepted. About 50% of the awards were appealed to the courts, as contrasted with only about 1.0–1.5% in the United States. In response to these developments, a group of six faculty members from the University of Michigan, with me as titular head, obtained a modest grant to go to China during 2002–04 and introduce Chinese lawyers, government officials, union and management representatives, professors, and graduate students to American techniques of alternative dispute resolution (ADR) in the labor field. The core mission, however, was to teach present and future university faculty about ADR, on the theory they in turn could teach others.

The first thing I noticed upon our arrival was that the extraordinary 9% average annual increase in gross domestic product that China had been enjoying for over two decades—unmatched by any other major economy in the world—had begun to pay off in spectacular fashion. The Volkswagen taxis had been replaced by gleaming new models, which, while not American behemoths, were of an entirely respectable size by European standards. Practically everyone on the streets, except for a few elderly folk, was stylishly dressed in Western attire. To keep the economy rolling, the government had been encouraging the purchase of private automobiles, and the traffic jams at rush hour would have done New York City proud. (One could not help wondering how much was

going into mass transit as a feasible alternative.) Handsome new skyscrapers had gone up in much of central Beijing. I read that one-fifth of all the construction cranes in the world—and one-half of all the skyscraper construction cranes—were now located in Shanghai. My wife could not resist telling the dean of one of the colleges we visited that she was worried about the eventual fate of all the picturesque “hutongs” in Beijing. He replied that she was not the only one who was worried about that.

With a population of 1.3 billion, China is almost five times the size of the United States. But its workforce of over 700 million is still 50% agricultural. The average hourly wage is 32 cents (50 cents in manufacturing), compared to \$16 in the United States. The China wage rate does not include the traditional “iron rice bowl,” consisting of free or subsidized food, housing, and recreational benefits. As the country moves toward a “socialist market economy,” however, and private and foreign investment increases along with global competition, the State may not be able to maintain these lifetime guarantees of the past. Still, the economic juggernaut steams ahead. China’s gross domestic product (measured by purchasing power) is now second only to that of the United States. GDP is in the \$5 trillion range, roughly half of ours or of the Euro countries of the European Union. And China’s economy is growing about three times faster than ours or Europe’s.

Lots of people are making a good deal of money in China. My wife and I wanted to attend a performance of a foreign dance troupe in the Great Hall of the People. The Hall’s main auditorium holds 10,000 and is the site of the Chinese National Congresses. Seats were advertised at the equivalent of \$100 and \$50 apiece in U.S. dollars. I assured my wife that \$50 in good old American money ought to get each of us a very satisfactory seat. In fact, we wound up three rows from the back of that 10,000-capacity auditorium. And there were plenty of Chinese up front in the \$100 section.

China is paying a price for this rapid economic development. At a conference on Chinese labor reform, which was held in Ann Arbor in 2003, one speaker observed that China may now hold the dubious distinction of having replaced the United States as the major country in the world with the widest disparity between the rich and the poor. The economic and societal costs include a loss of social values; rampant corruption at many levels; and increasing inequality, especially among the rural population and certain groups, such as the elderly, new workers, the less educated, and women. Although the official unemployment rate is under 5%, the reality is at least 15%.

The government seems to have adopted the philosophy: Grow the market today and let a future generation deal with social problems and the need for greater economic equality.

My hunch is that much of the most practical, productive comparative labor law and policy activity in the future—research as well as teaching—will resemble the Michigan program in China, but ideally it will be more extended. The emphasis will be on the shared problems of a global economy, and what we can learn from each other. Our six faculty members made a total of four separate visits (singly or in groups) to China over two years, averaging about ten to twelve days each. They gave eight sets of lectures in Beijing and Shanghai. One professor also spent several months studying Chinese ADR procedures. About 300 Chinese attended our lectures. They included lawyers; mediators and arbitrators; officers of labor bureaus; human resources managers; labor union members, professors specializing in law, economics, and industrial relations; and graduate students. The principal local institution involved, the School of Labor Management and Economics, Capital University of Economics and Business, in Beijing, has added a new course to its curriculum, Alternative Labor Dispute Resolution. The School also has plans to publish a textbook on Alternative Labor Dispute Resolution, with the assistance of Michigan faculty members.

Up to the present, the only officially recognized labor organizations are government dominated through Communist Party affiliation. The All-China Federation of Trade Unions (ACFTU) consists of 1.7 million primary trade unions with about 135 million members out of the 700-million-plus workforce. In labor disputes, unions have historically tended to act more like an intermediary between the employer and the employees, rather than like an advocate for the workers. The Trade Union Law, amended in 2001, emphasizes that labor organizations are designed to protect the “legitimate rights and interests” of workers, and requires enterprises to “heed the opinions” of the union when they consider “major” business issues. But some skeptics point out that this actually enhances Party involvement in the management of enterprises, even private enterprises, since all unions must by law belong to the ACFTU and the latter is essentially a Party instrumentality.

The amended Trade Union Law calls for unions, on behalf of workers, to engage in “consultation on the basis of equality” with corporate management and to enter into “collective contracts.” There are around 300,000 such group agreements in China, along with many individual employer-employee contracts. Strikes are not formally

prohibited but the right to strike was removed from the Chinese Constitution in 1982. Since then, the legal status of work stoppages is problematical, apparently dependent on the judgment of government officials, often at the local level. There were 8,000 reported strikes in 2000, and subsequently at least two dozen major work stoppages involving anywhere from several hundred workers to as many as 50,000. Protests have also taken the form of sit-ins and blockages of streets, roads, and rail lines. The causes included unpaid wages and benefits, worker layoffs, and enterprise privatization.

The vast majority of labor disputes, over 90%, involve individual and not collective claims. An important 2001 amendment of the Trade Union Law requires management to consult with the representative labor union before terminating a worker. As yet there is little reliable information about how this process is working. Since 1993, regulations issued by the central government have governed the mediation and arbitration of grievances of any sort by a worker against an employer. The first formal step is mediation before a local committee composed of representatives of the enterprise, the workers, and the trade union. The union representative chairs the committee. Except for the union representative, however, these bodies are appointed by management or the government. And of course the Communist Party controls the union.

If the parties are dissatisfied with the efforts at mediation, they may proceed to one of the 3,200 local labor dispute arbitration committees in the country. These committees are also tripartite, consisting of government, union, and employer representatives, with the government representative chairing. Some 20,000 government labor arbitrators are available in the local labor bureaus to deal with the 200,000 or so cases that now go to arbitration annually. In the relatively rare instances of tripartite arbitration in the United States, the neutral nonparty chair ordinarily decides the case in effect, simply adding the concurring vote of either the union or the employer delegate to produce a majority. In China, however, all three arbitrators generally make an effort to negotiate a solution among themselves before resorting to any formal decision-making. Something like this negotiation process is not unheard of in tripartite arbitrations in the United States, especially in new-contract or "interest" disputes. It might be one of the areas in which we have some lessons to learn from the Chinese.

Appeals from arbitral decisions may be made to the courts in China, and half of all labor arbitrations wind up there. Here, too, the Communist Party is in charge, with only Party members becoming

judges. While this whole process, both the arbitration and judicial portions, may seem to stack the deck against individual workers, the decisions that are released indicate employees do prevail in a substantial number of cases. From an outsider's perspective, the major procedural flaw in the Chinese system is the lack of finality in arbitration and the willingness of the courts to entertain review. At times, in some locales, the appeal rate is as high as 90%.

Significant changes in Chinese labor relations occurred during the two-year period of our lecture series on ADR. A pilot program of labor dispute resolution by independent arbitrators started in Beijing and Shanghai in 2003. The arbitrators are generally lawyers in private practice. Before that, all nonparty, neutral labor arbitrators were government employees from district and city labor bureaus. Even in the new experiments, however, it appears that the labor bureaus will make the appointments. A question asked me during my lectures was how could the neutrality and impartiality of nongovernmental arbitrators be ensured. I refrained from saying I would like to know how the neutrality and impartiality of governmental arbitrators could be ensured in the Chinese system. Instead, I pointed out that, in the United States, the repeated use over time of labor arbitrators was dependent on their continuing acceptability to both unions and employers. Insofar as the new trial efforts with independent arbitrators in China might eventually entail the voice of labor and management in their selection, the problem of neutrality and credibility could largely be solved. But it may not be easy for government to yield that much control over arbitrator appointments.

China's ACFTU now plans to set up different forms of organization in factories and shops with different forms of ownership, such as state-owned, foreign-owned, privately owned, and joint ventures. Outside the state-owned enterprises, the union would act much more like an autonomous advocate for the workers rather than an arm of government. The ACFTU stoutly denies, however, that this represents any sort of movement toward independent unionism. The slogan is, "One union—two functions." That refers to the markedly different roles of ACFTU affiliates in state-owned firms and in others. But despite strong official opposition, including the threat and the actuality of imprisonment, dissenters continue to agitate for the creation of some truly independent, nongovernmental unions. The likelihood of genuine collective bargaining, in one form or another, in the relatively near future is quite high. The growing unrest among Chinese labor, as evidenced by the dramatic surge in strike activity, as well as the keener sensitivity of the government to the demands of the

World Trade Organization and the conventions of the International Labor Organization, may all contribute toward that end.

A live possibility exists that a neutral labor arbitration association will be established in China. It would be akin to the American Arbitration Association and would provide arbitration services to workers, unions, and employers. Its services might include the compilation of profiles of, and recommendations on, arbitrators, as well as their training, examination, and certification. Americans, of course, have always shied away from any formal testing or certification procedure for arbitrators. But the systematic Chinese seem leery of unleashing a group of unproven wannabe arbitrators into the field.

In my own initial set of lectures in 2002, running over five days, I concentrated almost entirely on labor mediation and arbitration techniques in the United States, with just a little discussion of the legal background. But I found my audiences, especially the professors and the graduate students, wanted to learn more about American labor law in general and even something about the history and structure of American labor unions. For the second year's series, therefore, I started off with an overview of the United States system of labor and employment law. By this time, my task was eased considerably because the participants had full Chinese translations of my course outline. At the recommendation of my Chinese hosts, I did not attempt to deal with the existing governmentally operated mediation and arbitration system in China, or how it might be adapted to take advantage of the best features of the American process. Nonetheless, since I have now become more familiar with the Chinese approach, I believe that in any future presentations I would make more of an effort to compare the two systems and show how each might draw some lessons from the other. I think such an approach gives a Chinese audience a firmer starting point and enables them more easily to understand the differences and relative merits of the American system. I would also say more about the qualifications of arbitrators, the various ways of selecting them, and the pros and cons of single arbitrators versus tripartite panels.

With the modifications just mentioned, the major topics I covered both years in China were: (a) the differences between mediation and arbitration; (b) the diverse forms of mediation; (c) the distinction between grievance ("rights") arbitration and new-contract ("interest") arbitration; (d) the conduct of the arbitration hearing; (e)

the rules of evidence; (f) the arbitrator's decision and judicial review; and, (g) case studies of several types of hypothetical arbitrations.¹ Once we got into the hypotheticals, however, the participants became intensely interested in how the cases should be resolved and it was harder to get them to focus on the procedural aspects. A Chinese faculty member then gave me some advice that improved matters considerably.

The advice came at one of the top law schools, where I was told the students would respond warmly to role-playing exercises. I had no doubt that was true; I have found role-playing highly effective in teaching both advocacy and decision-making techniques in America. But even if the Chinese students (and I) could have overcome the language obstacles, the limitations of time made it unfeasible to have the students engage in such exercises. Nonetheless, I found I invariably got an enthusiastic reaction when I departed from a straight lecture mode and played the part, in turn, of employee representative, employer representative, and arbitrator. I suppose it should be no surprise that in dealing with rather complex concepts, concreteness and specific, vivid illustrations are even more important pedagogically in a foreign setting than at home.

Now in the planning stage, on the assumption further funding will be available, is a four-month stay at the University of Michigan by the Chinese faculty member who currently teaches the course in Alternative Labor Dispute Resolution at Capital University in Beijing. This visit would make it easier for me and others at Michigan to collaborate with her and the faculty at Capital in preparing a textbook on ADR in the labor field. The Chinese have high hopes for this project. They believe the sort of scholarly yet practical volume that is proposed could be a milestone on the road to a more effective use of ADR techniques in resolving labor disputes. The Chinese Ministry of Labor has also made overtures about obtaining assistance in a possible revision of the 1994 Labor Law, and specifically the provisions covering arbitration.

One of the real revelations for me in our Chinese program was the fluency in English of nearly all the graduate students we encountered. For general or mixed audiences, naturally, we used interpreters, translating after every few sentences. This actually led to one minor contretemps. At several sessions, my interpreter was a

1. The outline of my course in China covered twelve single-spaced pages. For anyone interested, I would be happy to supply a copy as an e-mail attachment. My e-mail address is tstanton@umich.edu.

high-ranking figure from the Ministry of Labor. Some graduate students challenged her translation at certain points—and apparently they were right. When I spoke at a couple of leading law schools, with only graduate students in attendance, our hosts informed us we could dispense with the interpreter altogether. It was not braggadocio. The students all laughed in the right places, and came back with some hard-hitting technical questions—in nearly flawless English. It may not be only Indian lawyers who will provide competition for American law firms through outsourcing to Asia in the future.

The Chinese academic community, both faculty and students, seemed entirely receptive to new ideas from America about ADR procedures in dealing with labor disputes. They were full of questions and desirous of getting their hands on additional written materials providing more detail about the subject. Labor bureau mediators and arbitrators appeared less enthusiastic, but that was probably to be expected. How many government bureaucrats relish the notion of having to change their accustomed ways, especially at the behest of a bunch of outsiders? On the other hand, I was pleasantly surprised at the willingness of higher-level officials from the Ministry of Labor to hear us out in what appeared a most attentive and open-minded fashion. And indeed, as previously indicated, changes in the direction of the American ADR model do seem to be occurring, with more in the offing.