Paper title: conflict resolution in China: the wrongs of mediating rights

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Abstract:
Mediation has traditionally been a method for early disputes resolution within an enterprise and has the advantages of been quick and rather informal, both easing relations between aggrieved parties to facilitate 'normalisation' of relations. In China, in the spirit of reducing conflict which derives from formal judgements or arbitrated awards, mediation has a long history, but two current features of mediation indicate there are fundamental problems in practice. First, generally mediation takes place on termination of an employment arrangement in China. Second, mediation within the formal system is generally restricted to matters of rights. Thus, whereas mediation supposedly acts to repair and build industrial relationships, in China, mediation acts to minimize conflict arising from broken relationships. Moreover, the Chinese system of mediation, although predicated on the principle of volunteerism, is often coercive. Despite recent legal developments, employers have little incentive to mediate in good faith, and ex-employees are often forced to settle for less than their legally defined entitlements, particularly when they are victims of serious industrial health or injury.

Introduction
This paper will examine how mediation is used in China to resolve employment disputes. The argument is that mediation should be used for settling disputes of interest but not rights. The reason is that whilst mediation is quicker and less arduous than going to arbitration and people's courts it lacks the public statement of justice which a violation of a right deserves, but this is exactly one of the reasons why it is preferred by Chinese authorities. China has many substantive legal provisions for workers, as the authorities seek to promote worker interests through legislative rather than procedural means – though detailed legal terms and conditions of employment rather than free collective bargaining. These are not strictly laws but normative rules and guidelines intended to be applied selectively at the local level. In this paper, we will use cases of pursued by victims of extreme health and safety violations which are mediated, to demonstrate the problems of, and caused by, mediating rights as opposed to adjudicating or enforcing them.

Interviews were conducted over a 2 year period with NGOs members, lawyers and victims themselves, as well as extensive research of local media reports and official documentation, including court rulings, laws and regulations, official press releases and news statements. The field research formed part of an investigation into the implementation of recent labour legislation and an on-going interest in labour NGO activity in supporting migrant workers in several parts of China.

The argument is that the laws do not create a legal structure relevant to the recent developments in industrial relations in China but in the absence of procedural laws to form or strengthen the institutions of industrial relations, power relations determine the selective application of the law, which at best is the result of informal ad hoc bargaining but usually based on unilateral enforcement. The paper will outline the theoretical purpose and principles of disputes resolution procedures and the role of mediation. Then we will outline the historical roots and present legal provisions, particularly the Law of the People's Republic of China on Mediation and Arbitration of Labour Disputes (LMAALD) and its aftermath. Using some local examples of regulations and well publicised cases, the progress and problems of the provision will be shown, before detailing the particular problem of industrial health and injury cases. It will be shown that workers are being pressured into

accepting mediated settlements which are contrary to their legal (and moral) rights, and this occurs because of the inadequacies of the mediation system in China itself.

Principles of Mediation

Disputes resolution systems may be divided into ones focusing on rights and ones involving interests (Bendersky 2007: 204, ILO 2007: 3). In complex labour relations, disputes may arise which involve both elements, legally determined or predicated rights, either as a result of laws or legally binding contractual agreements, and interests which are not legally defined or enshrined. ILO Rights disputes when at least one party considers a way or terms of an agreement have been violated by the other party. An interest's dispute normally arises in the process of bargaining to enter into or amend an agreement (usually a collective agreement). A rights dispute therefore involves rectifying the wrong and possibly compensating for the breach. Whilst in practice this can involve a degree of acrimony, it is not so complicated to resolve as the right is usually written clearly in law or legal document (such as an employment contract) and only needs clarifying as to whether the right actually exists. Here a simple adjudication can be made in arbitration or court. An interest's dispute arises as a bargaining tool in which the outcome is possible to have less wiliness to mediate unless the parties have reached a stalemate and in such cases, mediation has developed to reduce conflicts.

To supplement adjudication by courts, different countries have instituted various forms of conciliation, mediation and arbitration into domestic industrial relations systems. Mediation aims to patch up a dispute and reconcile the parties concerned when dispute arises, by involving a third party to appease the disputing parties. It may also involve the third party proposing an operational settlement which can be considered by both parties to facilitate mutual understanding and mutual accommodation and then settle the dispute by negotiation. Fox and Stallworth (2009: 229) argue mediation is effective if the parties are encouraged not to see issues in terms of rights. Quite apart from the morality of deceiving a client (Engram and Markowitz 1985), it is likely the long term climate will not be improved (Waldman 1999) and, as Edelman et al 1993) argue, managers in particular have a habit of redefining rights as managerial problems, thus trivialising the right and reinforcing managerial hegemony in the workplace. Moreover, though not explicitly discussed, even those who support mediation as a part of an integrated disputes resolution system for rights and interests do not see mediation being used as a means for workers to be given less than their legally minimum entitlements.

The history of mediation in China

The traditional Chinese culture embraces the edict that 'Toleration is the most important character for people in social communication' (Xu 2008), and influenced by this, mediation as a way to settle disputes has been widely adopted since ancient periods of China. During the Western Zhou Dynasty (B.C. 11 century to B.C. 771), a 'mediator' (*tiao ren*) position was established to 'coordinate people to keep harmony' (Zheng 2010). In Qin Dynasty (B.C. 221 to B.C.207), there were dedicated positions set up in urban areas to moralize and mediate disputes. Whilst disagreements were seen as natural among people, the emphasis was on behaviour and efforts to settle such disputes. Once mediation failed, the disputing parties could initiate a suit in *yamen* (the official offices of the imperial government whose head was responsible for taxes, civil and criminal law, jailor etc). In Western Han Dynasty (B.C. 202 to A.D. 8), a rigorous judicial mediation system was built up based on the Tiaoren and Yamen system. During the Qing Dynasty, mediations among people were divided into two parts: extrajudicial and judicial. Extrajudicial mediation was also called civil mediation, which mainly included those within clans and between neighbours. Disputing parties should be mediated by clan elders or other neighbours before appealing to *Yamen*. Judicial mediation meant that the county magistrates, who by law could not preside in their home county, would mediate civil disputes and settlements were binding. Moreover, successful mediations were treated as achievements, impacting county magistrates' careers and so an important part of their duties.

During the 19th and early 20th century different forms of guilds were important for economic development. Morse (1966: 27) quotes a guild's rules specifying "it is agreed that members having disputes … shall submit their case to arbitration at a guild meeting, where every effort will be made to arrive at a satisfactory settlement of the dispute." Failing settlement, a member is then free to pursue in court for settlement. However, it appears labour disputes were more often resolved through strikes and quick informal settlements (Morse 1966: 32), with the pressure on employers to settle quickly to avoid the involvement of the local magistrate. Burgess (1976: 190-91) found no evidence of formal guild involvement in industrial relations matters among members, and Morse found rules applying to apprentices which only restricted their number and job opportunities on completion of 'servitude' (1966: 33).

After the formation of the PRC, the first regulations were issued by the Ministry of Labour in 1950, stipulating a process of consultation, mediation, arbitration and judicial review. However, in 1956, these rules were 'superseded' by extensive socialization of assets and the system was replaced by 'people's letters and complaints' (commonly referred to as *xinfang*). The Danwei became the focus of life and most disputes were aired and resolved at that level, and *xinfang* became a kind of appeals process when this failed. In 1987 the State Council issued the Temporary Regulation for Dispute Settlement in State-owned Enterprises (SOEs) which re-established the 1950 regulations. The reason for the change coincided with the first major restructuring of SOEs which resulted in many grievances from workers and retirees. A growing number of workers, in Town and Village Enterprises (TVEs) and the informal sector were excluded, reflecting the government's preoccupation with SOEs as central to China's industrial (and socialist) development. This has now changed, with comprehensive disputes resolution procedures covering almost all workers.

Mediation

From TRLDS (1987) to HLDE (1993), then LMAALD (2007), the first formal stage in labour dispute resolution involves mediation. These three regulations require each enterprise is entitled to establish a mediation committee, drawn up of individuals' representatives from workers, employers and the union. In history, the labour dispute mediation commission (LDMC) in SOEs was the most important agency to deal with labour disputes, most cases had been settled by these agencies before applying arbitration. However, along with the closing and bankrupting of middle and small-sized SOEs during the restructuring started in 1997, the mediation commissions in these enterprises have been disappeared, at the same time, there are almost no mediation commissions in private-owned companies. Accounting to the data from the All-China Federation of Trade Unions (ACFTU), by the end of September 2003, nationwide, there were 153113 mediation commissions at the enterprises level, reduced 11824 or 7.2% from 2002 and 56% from 1997 (Wu 2007). Therefore, once there is a labour dispute, the employee has to directly apply for arbitration.

The employee representative is supposed to be elected by the workers congresses. But again, outside SOEs such congresses have almost never existed, and thus workers willing to put themselves forward for the mediation committee, or popular enough among workers to be informally elected, were especially threatening to the interests of the union, and thus might face retribution. In practice, therefore, the union is the central player, appointing its members and chairing the committee. Where a union does not exist, workers are supposed to elect and decide jointly with management who should join and chair the committee.

On 4 August 2005, the then Ministry of Labour and Social Security (MOLSS) and ACFTU jointly published A Notice on Further Strengthening the Mediation of Labour Dispute, in which, both organizations promoted to set up regional and industrial mediation institutes in township and neighborhood community where more small-sized private-owned enterprises (POEs) and foreign-

owned enterprises (FIEs) located. The MHRSS and ACFTU also encouraged set up regional and mediation institutes at the county or city levels if necessary. LMAALD (Article 10) encourages this extension of mediation committees to beyond the enterprise level committees but also community level, and including establishing committees in towns, villages and districts. In many places in China the number of disputes mediated by community level committees far exceeds those settled at the enterprise level. In 2009, the MOLSS began a pilot programme of setting up mediation centres in several large SOEs, and under the central committee, it is possible to establish mediation groups at workshop and work site levels.

A major problem with this first level mediation is the lack of legal enforcement to back agreements. According to LMAALD (Article 14), either the employer or employee are entitled to refer the case to the next stage (arbitration) if no agreement is reached within 15 days of initial submission to a Mediation Committee. Under current legislation, workers are expected to resolve conflict directly with their employer, and if this fails, contact the local trade union or labour bureau after which a mediation committee will be formed. Table 1 shows that this stage of mediation has patchy results, varying between locations and over time.

Table 1: Cases Labour Dispute Mediation Labour Committees

	Cases Accepted by LDMC	Cases Successfully Mediated by LDMC	Percent Successfully Mediated	Cases Accepted by LDMC	Cases Successfully Mediated by LDMC	Percent Successfully Mediated
	National			**Guangdong**		
2003	192692	51781	27%	37587	8699	23%
2004	192119	54537	28%	21440	4685	22%
2005	193286	42036	22%	39039	5242	13%
2006	340193	63020	19%	63014	18358	29%
2007	318609	59163	19%	61386	15261	25%
2008	322955	66563	21%	45983	13675	30%
2009	275771	67700	25%	49622	13487	27%
	Beijing			**Shanghai**		
2003	2445	941	38%	4454	743	17%
2004	2471	696	28%	3852	892	23%
2005	2844	487	17%	3007	712	24%
2006	5027	609	12%	8688	929	11%
2007	2610	292	11%	7588	717	9%
2008	5179	388	13%	8548	822	10%

2009	3285	429	8%	7029	1053	15%

Source: Source: ACFTU Statistical Yearbook (2004, 2005, 2006, 2007, 2008, 2009, 2010).

The data used in Table 1 is collected by the ACFTU, and given the large fluctuations in the individual figures, should not be seen as reliable; the figures often reflect initial policy making initiatives (in the ways that companies 'massage' their data to meet shareholder expectations). Even though it appears some cases are mediated by the unions at the mediation stage, it is probable that many the cases marked as 'successfully mediated' are subsequently appealed and this is certainly the authors' experience from direct case involvement. Assuming systematic bias, Beijing shows the most dramatic fall in success of this stage in mediation from 38 per cent in 2003 to 8 per cent in 2009. The pattern among other cities and nationally tends to indicate about a quarter of cases are settled at this stage, dipping through the mid-2000s but rebounding since 2008 and the implementation of LMAALD. The legislation itself may not have instigated the recovery in settlement but the context of a resurgent ACFTU and the further legitimation in the law establishing local community mediation has meant these committees are likely to have both increased in number and carried out their duties more diligently. This should not be overstated however, as Beijing did not respond and Guangdong has a decline again in 2009.

Arbitration

The next stage is arbitration, although either party may take a dispute directly to arbitration, bypassing either or both consultation and mediation. In reality, the arbitration stage is where the majority of disputes start their resolution process. The labour dispute arbitration Commission (LDAC) can in certain circumstances reject to hear a case, but only when the Commission does not have jurisdiction, such as domestic labour disputes (e.g. employer employee relations in a domestic household). Although there was a decline in the gap between cases accepted at mediation and arbitration from 17 per cent more cases being arbitrated than mediated in 2003 to 10 per cent in 2006, the gap exploded in 2008 (147 per cent) 2009 (148 per cent), amounting to almost two and a half times as many cases being accepted in arbitration as compared with mediation (Tables 1 and 2). This increase is largely attributable to the 2008 environment, as a small annual increase in cases entering LDMCs to an almost doubling of those accepted by LDACs nationally between 2007 and 2008. It is likely LMAALD in particular had an important impact, as workers saw advantages of arbitration over informal means of dispute settlement because of the increased likelihood of being paid quickly and the increasing availability of arbitration committees in their locality. Moreover, although supposedly mediated, arbitration commission has been willing to accept cases without mediation. Finally, the publicity surrounding the promulgation of LCL meant workers were more confident in their 'legal rights' even if they were to be alter disappointed by their actual experience of the arbitration process.

Before LMAALD, the claimant needed to submit a dispute for arbitration within 60 days of the occurrence of the issue in dispute, but now this has been extended to 1 year, and starts from when the aggrieved party becomes aware of the issue in dispute. The 60 day rule made workplace health claims (e.g. silicosis) almost impossible to remedy. In other cases, the union or managers (if they were different people) could string a worker along through meetings, promises and the like until

they ran out of time to file a valid complaint. Now, a LDAC should be convened by the local government to review the case. According to Yang Zhiming, deputy-minister of MOHRSS, by the end of 2008, 758 entity arbitration organizations have been set up in China (MOHRSS 2009).

Like the courts, there is a degree of formality in the proceedings, which are daunting to less educated workers and in which they are required to collect evidence to prove their case. However, the MOHRSS has been trying progressively to make proceedings less rigid. As can be seen in Table 2, workers win their cases much more often than employers, in part indicating accessibility. Table 2 also shows that there is a continuing emphasis on mediation prior to the Commissions formally sitting to arbitrate, although failing successful mediation, the Commissions must arbitrate within 45 days of accepting the case. Prior to LMAALD, there was some ambiguity about the legal enforceability of the arbitration, but now a clear set of rules apply, which, subject to appeal to court within 15 days of the announcement of the award, and if the court finds no legal error either in the decision or the evidence on which it was based, the award is legally enforceable.

Table 2: Cases Accepted by Arbitration Committees

Year	Number of Cases Accepted	Number of Collective Labor Disputes	Percent of collective cases	Number of cases appealed by Workers	Percent of cases appealed by Workers	Number of Laborers Involved	Number of workers involved in Collective Labor Disputes	Percent of workers involved in collective disputes	Average size of collective disputes (no. of workers)
National									
2003	226391	10823	4.78	215512	95.19	801042	514573	64.24	48
2004	260471	19241	7.39	249335	95.72	764981	477992	62.48	25
2005	313773	16217	5.17	293710	93.61	744195	409819	55.07	25
2006	317162	13977	4.41	301233	94.98	679312	348714	51.33	25
2007	350182	12784	3.65	325590	92.98	653472	271777	41.59	21
2008	693465	21880	3.16	650077	93.74	1214328	502713	41.40	23
2009	684379	13779	2.01	627530	91.69	1016922	299601	29.46	22
Guangdong									
2006	54855	1330	2.42	151217	275.67	54176	83220	153.61	63
2007	55473	830	1.50	10620	19.14	132265	62092	46.95	75

2008	150023	1897	1.26	144051	96.02	351275	197756	56.30	104
2009	118155	1776	1.50	107266	90.78	198881	72877	36.64	41
Beijing									
2006	22647	913	4.03	23647	104.42	22077	10808	48.96	12
2007	22163	966	4.36	21594	97.43	22163	9193	41.48	10
2008	49784	2656	5.34	49068	98.56	49784	18934	38.03	7
2009	73463	665	0.91	72556	98.77	73463	15309	20.84	23
Shanghai									
2006	24172	789	3.26	34770	143.84	23698	11389	48.06	14
2007	29475	891	3.02	28725	97.46	39734	11150	28.06	13
2008	64580	601	0.93	63268	97.97	83207	19215	23.09	32
2009	57392	257	0.45	56037	97.64	63659	6490	10.19	25

Source: China Labour Statistical Yearbook (2008, 2009, 2010）

As Table 2 shows, in the four year period from 2003 to 2007, as with the union mediation services, there was a roughly 50% increase in the number of cases accepted by the LDACs but this pails into insignificance by the near doubling of cases between 2007 and 2008. Moreover, whilst the number of workers involved in disputed declined between 2003 and 2007, they also doubled in 2008. Table 2 shows that whilst the number of disputes rose dramatically, the number of those disputes which were categorised as collective, were both small (less than 5 per cent) and declining (1 per cent by 2009).

Examining various cities for a shorter period than the national data shows again Beijing being different, with massive escalation of disputes and number of workers involved, even from 2008 to 2009. Guangdong appears to have a higher number of workers involved in collective disputes than nationally or other cities. This may imply that in Guangdong, the Pearl River Delta area where the industrial manufacturing concentrated, there were many factories that were more vulnerable during economic crisis and led to collective labour disputes because of arrears of wage and compensation.

Table 3: Disputes Reasons

Year	Labor Remuneratio	Social Insurance	Change the Labor Contract	Renewal of Labor Contract	End the Labor	

	n	and Welfare			Contract	
National						
2003	76774	76181	5494	40017	12043	
2004	85132	88119	4465	42881	14140	
2005	103183	97519	7567	54858	14015	
2006	103887	100342	3456	55502	12366	
2007	108953	97731	4659	67565	12696	
2008	225061	153598	No data	139702	No data	
2009	247330	153546	No data	43896	No data	
Guangdong						
2006	24628	8637	779	15349	2607	
2007	22185	8089	579	18060	1357	
2008	65027	13591	No data	51450	No data	
2009	47687	10994	No data	13207	No data	
Beijing						
2006	13459	1341	25	197	12	
2007	13131	97731	4695	67565	12696	
2008	30782	2049	No data	206	No data	
2009	44203	3731	No data	43876	No data	
Shanghai						
2006	8842	7675	68	1586	121	
2007	11344	6979	39	6657	150	
2008	32079	9902	No data	15340	No data	
2009	29576	8097	No data	1906	No data	

Source: China Labour Statistical Yearbook (2008, 2009, 2010).

Note: some disputes have more than one reason listed here.

Issues over which conflicts occur are always more complex than simply 'wages' or 'overtime provisions' etc. imply but it nevertheless interesting to look at such areas in China. Table 3 shows that the vast majority of cases are either dispute over wages or social insurance and welfare. The number split evenly between the two, but if we examine by city, the booming cites, with large migrant worker populations tend to have more conflicts over wages, whereas the former state industrial towns, particularly inland, have conflicts mainly over social security provisions. This reflects the profile of opportunities for workers, where younger workers in industrially vibrant locations focus on gaining money, whilst older workers in declining areas are aware of their precarious employment opportunities and seek security. It does not mean that employers are any better at maintaining their social security commitments in the boom towns. One remarkable figure is the spike in disputes related to renewal of contracts nationally and in the cities apart from Beijing, in 2008. The LCL added a limitation to the number of contracts workers could be made to work before they are given open ended employment terms and this law led to a lot of workers disputing employers who tried to make them sign term agreements or create an agreement with a break in service (in a technique to delay the impact of the law). The recession and employers moving to inland locations or overseas to reduce exceptions of payroll costs associated with the Employment Law led to an escalation in disputes associated with end of contract payments etc. (last column of table 3)

Table 4: Result of Settlement

Year	Won by Units (employers)	Won by Laborers	Partly Won by Both Parties	Total	Percent of Units Won	Percent of Labor Won	Percent of Both Won
National							
2003	34272	109556	79475	223303	15.35	49.06	35.59
2004	35679	123268	94041	252988	14.10	48.72	37.17
2005	39401	145352	121274	306027	12.88	47.50	39.63
2006	39251	146028	125501	310780	12.63	46.99	40.38
2007	49211	156955	133846	340012	14.47	46.16	39.37
2008	80462	276793	265464	622719	12.92	44.45	42.63
2009	95470	255119	339125	689714	13.84	36.99	49.17
Guangdong							
2006	6013	21072	28020	55105	10.91	38.24	50.85
2007	9328	23085	22113	54526	17.11	42.34	40.55
2008	17161	45005	69748	131914	13.01	34.12	52.87

2009	17923	31668	71034	120625	14.86	26.25	58.89
Beijing							
2006	3798	6409	12345	22552	16.84	28.42	54.74
2007	3710	6034	12295	22039	16.83	27.38	55.79
2008	6817	6917	30997	44731	15.24	15.46	69.30
2009	10374	8342	45499	64215	16.16	12.99	70.85
Shanghai							
2006	3182	8582	11687	23451	13.57	36.60	49.84
2007	4116	8787	14621	27524	14.95	31.92	53.12
2008	8129	10524	28515	47168	17.23	22.31	60.45
2009	13860	8944	49945	72749	19.05	12.29	68.65

Source: China Labor Statistical Yearbook (2008, 2009, 2010)

Table 4 shows that workers win cases much more often than their employers ('Units' or employing units) but there is an increasing tendency towards decisions giving partial awards to each side. Over the 7 year period (2003 to 2009) the percentage of wholly won by workers versus partially one has reversed, so that workers appear increasingly unlikely to gain an award which wholly favours their petition. This partly reflects the increasing complexity of law and the greater range and detail of workers submissions, and, thus, is not a surprising trend. However, when examining the three cities again, the pattern is more pronounced in Beijing and Shanghai than Guangdong, such that by 2009 employers were more likely to win than their employees in the two former cities. Thus, there is a swing towards employers in an increasing number of cases, due partly to workers recognising that they have but misunderstanding their legal rights and partly as a result of political pressure placed on LDACs to narrow their scope of accepting worker claims against their employers in the face of the global economic recession. The main problem in many LDACs is that since the LMAALD was enacted, the legal obligation to arbitrate has caused a reinforcement of formality in proceedings. Some arbitration committees conduct their proceedings in rooms that resemble courts and the process has become dominated by lawyers on all sides (employers, workers and the state). However, the main problem remains enforceability, which despite LMAALD remains with the courts, to which we turn next. Moreover, the Interpretations of the Supreme People's Court on Some Issues concerning the Application of Laws for the Trial of Labor Dispute Cases (II), issued by the Supreme People's Court on August 14, 2006, allowed limited opportunities for workers with clear evidence of wage arrears to submit their cases directly to courts, as a measure to quell a huge escalation in migrant worker unrest over non-payment of wages.[i]

Litigation

The next stage in formal disputes resolution is filing a case in a People's Court of First Instance (usually but not always, at district level). If a court accepts a case, it should take the labour dispute as a civil case and rule within 6 months and there may be a number of courts sessions. There is usually a panel of judges, though in what are perceived to be simple cases, a single judge may sit. The court is fairly formal, but concessions are made for workers, such as in lowering bond requirements when attempting to sequestrate employer's assets and so on. The court judges also attempt to mediate the dispute rather than make a formal judgment. However, within China generally, there is no case law precedent, and so the plaintiff and defendant are dependent on the ability of the judges to understand the law accurately and their attached implementing regulations, and the evidence provided. There are many cases where judges seek guidance on relevant law from the plaintiff or defendant's lawyer. All our legal informants confirmed that they have been asked by judges to instruct them in relevant law on occasion.

Table 5: Court of First Instance Labour Cases

			Cases settled			Percentage of cases		
Year	Cases Accepted	Cases Settled	Judged	Withdrawn	Mediated	Judged	Withdrawn	Mediated
Shanghai								
2004	6903	6973	3463	1725	1645	49.66	2.47	23.59
2005	6985	6837	3522	1608	1641	51.51	2.35	24.00
2006	10681	10166	4777	2885	2414	46.99	2.84	23.75
2007	10901	10898	5367	2803	2728	49.25	2.57	25.03
2008	16510	15596	7098	3771	4727	45.51	2.42	30.31
2009	21932	21315	8640	3847	8679	40.53	1.80	40.72
Beijing								
2004	5496	5196	3340		454	64.28		8.74
2005	6652	6917	3886		598	56.18		8.65
2006	6828	6805	4128		775	60.66		11.39
2007	7997	7985	4958		819	62.09		10.26
2008	15033	13992	8004		2085	57.20		14.90
2009	21935	20899	12355		2997	59.12		14.34
2010	22458	24192	13570		4263	56.09		17.62

				Guangdong				
2004	22776	22858	14983	3543	2697	65.55	1.55	11.80
2005	25971	25578	14744	3168	5311	57.64	1.24	20.76
2006	29225	29280	20090	4500	3219	68.61	1.54	10.99
2007	30002	29807	18071	4625	6237	60.63	1.55	20.92
2008	78304	76733	39507	8810	26061	51.49	1.15	33.96
2009	67738	67413	32328	10024	22340	47.96	1.49	33.14

Source: Beijing Statistical Yearbook (2005, 2006, 2007, 2008); Shanghai Statistical Yearbook (2005, 2006, 2007, 2008, 2009), Guangdong Court Yearbook (2005, 2006, 2007, 2008, 2009, 2010)

Table 5 shows court cases accepted by the same three jurisdictions we examined previously, and no national data is available. The table reveals two remarkable results. First, following LMAALD there has been a rapid rise in cases taken to court. Between 2007 and 2008, the number of cases accepted by courts increased to 52 per cent in Shanghai, 88 per cent in Beijing and 161 per cent in Guangdong. Although, in the following year this declined 13 per cent in Guangdong, cases continued to rise in Shanghai (33 per cent) and Beijing (46 per cent, dropping back to a mere 2 per cent rise by 2010). The employment law and the degree to which it was publicised have encouraged workers to file their disputes. In the first half of 2009, the labour disputes accepted by the courts at different levels showed a huge escalation. On 13 July, a senior official from the Supreme Court stated that, during this period, the cases accepted by the court nationwide reached nearly 17 million, increased 30%, compared with the same period of last year. In some regions such as Guangdong, Jiangsu and Zhejiang provinces, in the first quarter of 2009, the number of cases increased by up 41.63%, 50.32% and 159.61% respectively (Ye 2009).

Second, the courts are mediating many disputes rather than giving judgments although there are wide differences in tendencies between locations. On 6 July 2009, the Supreme Court published the Guidance on Justice for Labour Disputes, in which the importance of mediation is stressed. The Supreme Court asked the courts at different levels to mediate the labour disputes as much as they can, and invite the people from trade union and resident committees to join the mediation. In Beijing, only 14 per cent were mediated in 2009, as can be seen in Table 5 but 33 per cent and 41 per cent in Guangdong and Shanghai respectively. Mediating at the court stage does tend to indicate that the earlier arbitration and mediation stages are not effective, although we cannot account for variations between locations on based wholly on different levels of performance in the LDMCs and LDACs, as judges are closely controlled by their local party committees. More significantly, in all three locations, mediated settlements are a growing proportion of cases, doubling or tripling over a 6 year period, depending on the location. This trend appears unaffected by LMAALD and illustrates the way the court system in China differs from 'western' systems, having a long tradition of mediation and avoidance of 3rd party judgments.

Although HLDE (1993) specified that arbitration was compulsory, many courts accepted cases directly or with cursory evidence of pre-court attempts at resolution. However, as courts became inundated with various forms of civil cases, they began systematically refusing labour cases which had not been previously arbitrated through the early 2000s. There is an obvious preference among workers to go to court, despite the cost and intimidating atmosphere of the process because

decisions of the courts are always enforceable quickly. The courts can make the employers pay, whereas the earlier stages could not. However, LMAALD has supposedly reaffirmed the requirement of arbitration (and mediation) preceding court and our informants appear to confirm that judges are increasingly requiring evidence of arbitration, even if arbitrators are not requiring evidence of mediation, as already discussed.

If a party is unhappy with the ruling, they can appeal to the higher court within 15 days, although historically only a very small number do so (according to Zhang 2008, around 2-4 per cent nationally). Between May 2008 and April 2009, Ding (2009) claims Beijing No.1 Intermediate court accepted only 20 per cent of appeal claims treated to labour issues, although these still accounted for over half all the cases dealt with by the court, reflecting the preponderance of labour disputes in general.

Table 6: Mediation on Appeal (2009) in Guangdong

			Cases settled			Percentage of cases		
	Cases accepted	Cases settled	Judged	Withdrawn	Mediated	Judged	Withdrawn	Mediated
Court of 2nd instance	32943	30439	21198	2030	6536	69.64	6.67	21.47
Appeals court	154	172	127	9	20	73.84	5.23	11.63

Source: Guangdong Court Yearbook (2010)

Table 6, shows that in Guangdong, almost half the cases accepted in 2008 or 2009 by the court of 1st instance were subsequently appealed to the court of 2nd Instance in 2009. This illustrates the way disputes are not being settled between the disputing parties in the overall disputes resolution process. Table 6 also shows that a few cases go on to the appeals court, but this small number only reflects the difficulty to gain acceptance by an appeal court. Echoing the court of 1st instance, 21 per cent and 12 per cent of cases are mediated even at these late stages.

Until 2008, the individual labour contract, especially if written, was often the primary document against which a court and legal council would decide disputes (Michelson 2007:169). This usually extended to cases where the workers agreed to terms and conditions which were illegal (for example lower than the minimum pay) or to agree to settlements which were illegal (such as compensation for injury which is lower than the statutory minimum or less than the full payment of wages in arrear). Workers very often agreed to such illegal contracts through ignorance of their legal entitlements or the need to make a quick settlement. The pressure to accept lower legal entitlements sometimes led to appeals when the worker or family member was less urgent for the money, and commonly arose because migrants needed some money to go home at Chinese New Year and feared their employer would not exist on their return, or to pay hospital fees in cases of industrial or work related sickness. However, commissions and courts would generally apply the principle that the contract was indomitable. The result was, many workers who did have clear documentary evidence for their case were discouraged to file a formal case with either the courts or, as they are meant to, with the arbitration commissions. However, a review of court cases in Qingdao and Shenzhen shows evidence of judge's using substantive laws in place of the terms agreed in contracts. In some cases this meant ruling in favour of workers where contracts contain illegal or

lower than legally guaranteed minimum entitlements. In other cases, courts sometimes replace terms in a contract which favour a worker with those of the local or national legal minimum (such as wage entitlements). In both these situations, courts replace the terms of contracts agreed between workers and employers with substantive legal minimum laws. Terms in collective contracts are most often ignored in preference for the individual contracts or substantive legal minimum provisions.

On 24 July 2009, the Supreme Court published the Several Opinions on Establishing an Institution to Deal with Dispute by Alternative Dispute Resolution, in which, the Supreme Court states that, under the direction of mediation commission of labour dispute, once two parties reach the mediation agreement, they have to fulfill the terms of their obligations, and any party can directly apply to court for affirming the validity of this agreement, without going through prior arbitration procedures. This means, once one party rejects to fulfill its obligations arising from mediation, another party can directly apply to the court for enforcement. The Opinions also states that, where a mediation agreement is reached on a matter of delayed wages, medical expenses for a work-related injury, economic indemnity, or compensation, and the employer fails to execute it within the period of time prescribed in the agreement, the employee may apply to the People's Court for a payment order based on the mediation agreement (Article 13). However, we found no evidence of this being successfully achieved in practice.

Thus the system places considerable emphasis on mediation throughout the different levels of dispute resolution in contrast to systems existing in most industrialised countries, where disputes settlement tends to move from volunterist and informal to increasing levels of third party involvement, culminating in imposed decisions by a third party. The Chinese system appears to emphasis voluntarism throughout, with various state functionaries (community groups, the state union cadres and judges) repeatedly encouraging the parties to settle. Although this emphasis on voluntarism appears to be resource intensive and inefficient, it shows prima facia a reluctance for state autarchy which is absent from many other areas of civilian life in China. In reality, this emphasis on mediation favours employers and local state officials who seek to further their private interests over those of workers and their families. We will illustrate this problem though examining the resolution of one particular type of dispute, industrial injury.

Mediating rights – examples from occupational injury in China

According to the circular issued by Ministry of Health P.R.C on June 2009, occupational diseases rose in 13,744 cases load in 2008 and among that new pneumoconiosis cases accounted for 78.79%. Furthermore, based on '2007 national report on occupational diseases situation' by Chinese Centre for Disease Control and Prevention, up to 2007 year-end, grand total number of pneumoconiosis arrived to 627,405. In an episode of Half-Hour Economy of 2006 which was about coal miners' situation of pneumoconiosis, the experts pointed out the statistical numbers of dust phthisis only calculated cases from big-size coal mines of state-owners, not including local and township coal mines which the diseases cases are far more than statistics. It's estimated that more than one million miners suffer the dust phthisis. Even the estimated data does not include those sufferers who have took up other heavy dust careers in the industries such as gold mining, stone mining and constructions. By 2010, China's centre for disease control and prevention recorded 27,240 new cases of occupational disease, 23,812 of which involved pneumoconiosis, about 87 per cent of the total. These figures brought the total number of registered pneumoconiosis cases in China at the end of 2010 to 676,541 (Ministry of Health 2011). As early as in 2006, Zheng (2006) estimated the total number of coal miners alone in China with pneumoconiosis at more than one million.

Following numerous well documented cases where many workers are injured in killed, such as in mining (Li and Taylor 2008), the system for settling industrial injuries is well established on paper and has some evidence of working in practice. Workers have a reasonably comprehensive cover,

detailing the diagnosis and assessment of occupational disease and injury, the calculation and award of benefits to "protect the health and other relevant rights" of workers to ensure they are both compensated for losses and protected throughout their injury or industrial disease.[ii] This means a worker with an injury that prevents them undertaking their old job must be given work suitable to their new conditions without loss of pay, and in the case of on-going treatment, the employer must pay all the relevant costs. Should an employer fail to obey the law, the worker only need inform the relevant authorities (union, labour bureau, industrial injury board or court) and the employer will be forced to comply. However, these laws assume victims are always diagnosed with a problem when they are working for the employer responsible for the injury or disease. Once the employment relationship ends, so does much of the legal protection. An ex-employee must pursue the employer they hold responsible for an injury though the procedures outlined in the previous section, as a labour dispute. Not only is the employer encouraged to dismiss workers as soon as they become ill but also they have no incentive to settle until forced to by third party interventions. Pneumoconiosis caused by dust inhalation for example, starts with flue like symptoms and take years to develop to incapacity and death. Employers in industries where dust is prevalent are required to let their workers have regular health checks to detect such illnesses and the law requires employers to redeploy susceptible workers to less dangerous occupations. Employers often simply and quietly dismiss migrant workers as soon as the employer sees an indicative medical result or when a worker starts a persistent cough. The worker will probably only realise they were infected after months or years, and he or she may have voluntarily left because they felt sick and wanted to return home for what they think is a brief recuperation. A procedure of regular check-ups regulated by the Code of Occupational Disease Prevention of PRC (2001) has the laudable intention of detecting illnesses early, but in practice provides employers with advance notification to get rid of potential claimants.

Once the employment relationship has ended, a victim must pass a three stage process in the hope of gaining redress. If the employment relationship is still there, no problem; if the ER has ended, there will be another story) First, they have to show evidence of an employment relationship, such as labour contract, pay slips or work identity card, with the enterprise responsible for said injury or illness. It is indeed a perfectly reasonable requirement, but it is one that can often be impossible to fulfil for vast majority of China's pneumoconiosis suffers who were employed in small- and medium-sized private enterprises such as mines, construction sites and workshops. These enterprises usually do not provide their workers with a written employment contract, and low paid workers seeking to maximize their opportunities to work illegally high levels of overtime are sometimes complicit. Other forms of written evidence of employment, such as pay slips or work identity cards are usually left behind by workers when they quit their jobs because the workers do not think they will ever need them again and often employers demand ID cards are returned to them. Even if the employment relationship can be proved, many employers will change company registration documents to make the offending company disappear, to prevent a workers claim.

Second, the victims have to show they have an industrial disease or injury. In the case of a severed limb, the proof is not so difficult but in health cases expert opinion is crucial. To claim as a victim, a worker must gain a certificate from a hospital or clinic approved by the local industrial injury board in the vicinity of the employer from which the claim is made. The clinic or hospital will ask the employer to confirm the employment relationship (present or previous) before admitting a claimant for diagnoses. Although the clinic is empowered to proceed with a diagnosis in the absence of an employer's confirmation of employment relationship, they seldom do. Certification from any other hospital or doctor is not acceptable. The assessor must diagnose an illness is work related unless there is clear evidence for an alternative explanation (Article 42, Prevention and Control of Occupational Diseases Law, 2001). However, political pressure on doctors to refuse diagnoses, bribery and illegally vague reports (failing to specify whether or not the illness was an occupational injury) all prevent workers from gain a just certification. In one particular case (CLB, 2008) , a court

rejected a claim by a worker who was unable to gain certification for occupational leukaemia because the province had no guideless on the disease, although technically the doctor only needed to certify the cause of the disease, which appeared benzene related (and thus occupationally induced) rather than the disease itself.

Third, the certifying doctor must also issue a second certificate specifying the degree of disability. This then forms the basis for compensation and any on-going medical bills. The diagnoses of severity has important implications for both parties as the compensation associated with the decision on severity can vary from a few thousand to several million *renmenbi*. The compensation is made up of three elements: the one off award of compensation for the injury itself as determined by the certification, payment for lost earnings arising from the impediment to work, and on-going medical bills for treatment.

Whilst each stage is formally required by any worker claiming to be a victim of industrial injury or illness, the ex-employee has to struggle to convince the authorities of the validity, access and significance of each of these three stages. An employed worker need only submit these documents to the relevant industrial injuries board for the claim to be settled, and ask for a second opinion when particular findings do not seem to be just (such as a miss diagnoses of severity). For the ex-employee, the whole process of claiming takes two to five years, and in some cases much longer, depending on whether the ex-employee could show evidence of an employment relationship with their former employer. Often the victims' family are the ultimate 'beneficiaries' of a claim, as the victim themselves die from the illness itself or when the money runs out for treatment to keep them alive. In this context, the examination of access to compensation for industrial illness has s strong moral rights claim as well as the narrower legal rights of victims seeking to claim what legally belongs to them.

Comparing five cases of compensation.

In the five cases of claims the illnesses are similar, with similar requirements for medical treatment, but some variation in incapacity, which is signified by the category of disability, a higher number signifying a greater degree of severity.

Zhong Guangwei, a 37-year-old villager from Shanxi, had worked from 2006 at a private-owned coalmine and in March 2007, he exhibited early-stage symptoms of pneumoconiosis. By the end of 2008, he obtained a certificate of occupational disease diagnosis, stage-three pneumoconiosis as grade-three disability. In September 2009, Zhong filed a civil lawsuit against his former employer, asking for 530,000 *yuan* in compensation and in January 2010, the court in the trial of the first instance awarded 490,000 in compensation. However, because the coalmine had been closed in 2008, the former employer rejected payment. Zhong decided with no alternative that so long as the employer could pay immediately, he would make a concession on the payment. In October 2010, under the auspices of the court, Zhong was forced to reach an agreement of mediation, accepting 270,000 *yuan* compensation (Liu 2010).

He, a Beijing coal miner, was diagnosed with stage-two pneumoconiosis, a grade-four disability in March 2010. He filed a lawsuit against his former employer, and the court awarded him 447,615 *yuan* compensation, including downtime payment, living allowance, a disability allowance, a work-related injury medical allowance and transportation (Yang 2011).

Yan Qinghai, a Henan migrant worker for Yuehua Company in Foshan, Guangdong since 2004, was diagnosed with stage-three silicosis by the Guangdong Provincial Occupational Disease Centre in September 2009. In Nov. 2009, he was assessed by the Foshan Municipal Labour Capacity Assessment Committee, who diagnosed grade two-disabilities. On suing Yuehua, in June 2010, the

Foshan Municipal Intermediate Court decided that Yuehua should pay 391,774 *yuan* compensation, including medical bills, a hospital food subsidy, a disability allowance, a work-related injury medical allowance, downtime payment and spiritual damage compensation (Huang 2011).

Han was employed by a coalmine at Wangcang county, Sichuan province from 2004 to 2009. In August 2010, he was diagnosed with a stage-three silicosis by the local occupational disease centre and assessed at a grade three disability. On 4 July 2010, under mediation of local court, both Han and coalmine reached an agreement whereby Mr Han would be paid 150,000 yuan compensation in three instalments (Liu and Yang 2011).

Li Tinggui and other six migrant workers were employed at a coalmine at Sinan County, Guizhou. In March 2010, they were diagnosed with varying degrees of illness, ranging from stage-one to stage-three silicosis. From April to July 2010, under the mediation of local trade union, these migrant workers had several meetings with their former employer. The workers asked for three levels of compensation, 10,000 Yuan for stage-one, 200,000 *Yuan* for stage-two and 300,000 *Yuan* for stage-three sufferers. These were rejected by employer, and on 17 July, both parties reached an agreement whereby the employer would pay 30,000 for stage-one, 50,000 for stage-two and 70,000 for stage-three sufferers. Before reaching this agreement, Li Tinggui died (Yang 2010).

These are not statistically significant cases to represent the general problem, but two features of the variation between outcomes are significant. First, although the cases involve workers with similar levels of incapacity, disease and costs for medication, the amount of compensation they receive varies enormously from 50,000 *Yuan* to 391,774 *Yuan* for a grade-two disability. Second, mediation as opposed to court rulings severely disadvantage claimants even in court. The question then arises, why would a worker agree to a mediated settlement, to giving up a part of their legally entitled compensation?

Mediating away your rights

Luo, a lawyer specialising in hundreds of industrial injuries, claims workers accept mediated settlements for two reasons. First, as mediators the world over claim, mediation is quick and simple. The workers who has medical bills to pay and the costs of staying near the employer throughout much of the period of the dispute settlement is desperate for money and a mediation agreement is sealed with the payment of money. The process to apply for occupational compensation is not complicated in terms of law itself for those in employment, and includes four procedures: diagnosis of occupational disease, work injury claim, appraisal of labour ability and accounting of treatment and compensation. However, for ex-employees, the processes for compensation claims are much more complicated, and the original four procedures are broken down into twenty-two procedures, including administrative reconsideration, labour dispute arbitration, labour dispute lawsuit and administrative lawsuits etc. It will take at least 54 months or four and half years to complete all twenty-two steps according to law, excluding the spent in collecting evidence and preparing documents as well as lawfully permitted extensions for special causes which employers often use ad nausea. The victim who always carries the burden of ill health, financial debt and family consideration is paid quickly if he or she agrees to mediation. For example, Zhong's wife told a reporter that they badly needed the money for her husband's medical treatment: "our immediate concern is his survival" (Liu 2010). Finally, there is a good chance in the intervening years, the employer will close their business and the legal claim will then founder. Most ill workers simply cannot afford this risk or the legal bills of fighting their claim in court.

Second, although workers have a range of beneficial legal rights, there are vague areas which even judges find confusing. Luo is often asked by judges in the cases he pursues to explain points of law to them. In consequence, in other cases the judges appear simply to ignore the laws that confuse them.

A case in point is the Regulation on Work Injury Insurance, in which a terminated employee receives a lump sum made up of disability allowance, medical allowance and an allowance to compensate a worker for lost earnings due to their disability. The amount of compensation depend on seniority, severity of the case and local government regulations. There is a legal amount the worker should be paid but it is beyond the average worker (and seemingly some judges) to ascertain what the amount is. The Supreme People's Court also allows for workers to claim for personal damages, spiritual or psychological stress, follow up treatment costs, maintenance payments and even alimony for divorces in cases where this is seen as related to the industrial injury. However, because there are no standards for this, no tables or guileless for judges to follow, they are nearly always ignored. The result is that beyond the disability compensation the worker does not know what they are entitled to and unless a legal NGO takes on their case for free they are unlikely to ever know what they are entitled to, let alone adequately argue their case in court with blissfully or wilfully ignorant judges of their rights. In contrast, according to our interviews with victims/ claimants, mediation has a degree of certainty and although the workers give up most of their legal rights to compensation, they are paid.

The result of taking the mediation route is low compensation. Beijing Legal Aid Association for Migrant Workers published a report, Research on Migrant Workers' Industrial Injury Insurance in August 2009 which examined 329 work injury cases of migrant workers. The report found that in almost a quarter of 132 cases that were mediated, injured workers settled for less 50% compensation they had applied for, and it is unlikely they had claimed for anything they would not normally be legally entitled to as the mediators would have rejected such claims outright.

The key to gaining legal rights in China

The two cases below illustrate methods used by claims to gain something approximating their legal rights.

Shenzhen construction workers case

Over 170 migrant workers from Hunan province suffered silicosis because of pneumatic drilling and blasting jobs in Shenzhen's construction sites in the 1990s, and were employed by labour contractors on the building sites as is common in the industry, when their symptoms first began to show, the workers went back to their hometowns to recuperate. They gradually returned Shenzhen and asked for compensation when they found the symptoms were worsening. However, the medical certificates produced by Shenzhen's hospital showed they were not ill in May 2009, and, angered, in mid-June, the workers assembled in front of Shenzhen municipal government and requested government's intervention. From July, different departments of Shenzhen government, including the labour bureau and health bureau started to mediate the dispute. The result, according to interviews with local legal counsel, was that for workers whose employment relationships could be verified payments from work injury insurance of Shenzhen were made to their full legal rights, and for workers whose employment relationships could not be verified, the Shenzhen government itself would pay between 70,000 and 130,000 *yuan*, based on different stages of disease.

Using the media was crucial in this case, as well as a well organised campaign of support from local and Hong Kong based NGOs. The major advance in this case is the willingness of the government to take over from the employer as the paymaster of compensation, showing the degree to which 170 ill workers with just grievance can unsettle a government into taking on responsibility for their claims to head of the threat of social instability. Whilst the workers received justice, the employers have evaded their responsibilities and so justice has not been served overall.

Zhang Haichao case

Zhang Haichao, a 29-year-old villager from Henan, had worked for several years at an abrasive

materials factory in Xinmi, near the provincial capital Zhengzhou. His job involved operating a grinder. In the latter half of 2007, he began to suffer from a cough and tightness in his chest so he sought diagnoses for a number of different local and national hospitals, all of which confirmed he was suffering from pneumoconiosis. However, Zhang needed a formal diagnosis from the Xinmi Centre for Disease Control and Treatment, in the vicinity of the employer. The centre initially refused to examine him because his former employer did not provide the necessary documentation to prove his employment status. When the centre finally agreed to see him on 25 May 2009, it diagnosed Zhang had tuberculosis and not pneumoconiosis. Angered, Zhang underwent a thoracotomy at another hospital in Zhengzhou and the operation on 22 June 2009 revealed that his lungs were indeed clogged full of dust, pneumoconiosis. Zhang's case was reported by a local newspaper on 10 July 2009 and came to the attention of Xu Guangchun, the Secretary of the Henan Province Committee of the CCP. Within one week, Xu made two instructions which required the senior leaders of Zhengzhou city and Xinmi city to investigate the case and compensate Zhang Haichao. On 25 July, a group consisting of the leaders from several departments of local government and on 26 July, Zhao had received a certificate of occupational disease diagnosis, specifying he had stage-three pneumoconiosis at a grade three disability. On 15 September he was awarded 615,000 Yuan in compensation in a mediated settlement with his former employer (Zhang 2009; Qu 2009).

In cautioning us against seeing his case as a victory for justice Zhang explained "My case is special and does not follow the legal procedure. 'Handling special cases with special methods' was the requirement from senior local leaders. They told me that you can ask anything if you think they are fair, reasonable and legal." Thus he identified his luck of receiving the attention of the Party Secretary, the supreme officer of Henan province, as the only explanation for his success and to this we should add his luck in gaining journalist interest in his case in the first place. As Zhang explained in an interview in 2011:

> Yes, I got 615,000 Yuan as compensation. But my colleagues were not as fortunate as me. They got 140,000 to 200,000 Yuan. Why? There are more factors. For example, if the case have got more public attention, if the senior leaders have made special instructions, if the guy would like to bring his case to Beijing and so on. Therefore, my case is the No.1 case and has caused wide public concern at that time.

The contrast with his fellow workers shows the problem that justice depends on media attention and senior party interest. As with the Zhang case the ability to gain media attention which highlights the injustices of rapid economic development and unscrupulous capitalists is crucial to success in these cases, and such support is easier for workers dying of a preventable illness than the thousands of cases of non-payment of wages, etc. that barely gain mention in domestic media now. Pressured, or shamed by media outlets with considerable public trust, success ultimately depends on the political authorities becoming involved. The role of the NGOs is less clear. On the one hand they seem to provide organisational ability to help claims to pursue their claim especially once the authorities have accepted the claims legitimacy. On the other, we have come across dozens and dozens of cases where NGOs have supported clients who have simply caved under pressure from local level authorities and settled for a fraction of their legal entitlements. Until and unless NGOs are permitted to represent their clients, this bulling behaviour is unlikely to change.

Conclusion

Robertson (2006: 239) states that "It is trite and therefore true, to say that there are no 'rights' without remedies", meaning a statement of rights (perhaps enshrined in laws) is meaningless without a level of application which allows remedies to occur when rights are infringed or denied. Informal mediation in China has become a method to enforce labour rights but this confuses two fundamental tenants in industrial relations – rights and interests. Whilst the industrial relations

actors may have a legal right to mediate disputes of interest, and it is generally seen as good practice to mediate, rather than litigate disputes, it is not generally acceptable to mediate a right. This is a fundamental issue as the counterfactual, the ability to mediate a right damages any moral basis to a right. It is true that courts will attempt to make decisions between competing rights, but it does not 'mediate' between them but must rule which right takes precedence or attempt to propose a new right which evolves from the two existing rights. As such a right cannot be mediated, to do so would be to deny the existence of the right. In China, the problem of attempting to mediate rights occurs because (1) there is essentially no fundamental view of a right. CCP interests always trump other clams (including legal rights), and (2) the development of laws and regulations in China is extremely chaotic, creating numerous contradictions and anomalies which obfuscate legal clarity, a prerequisite to enforceability of a right.

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Endnotes

[i] The original text is "If a laborer, by using a wage IOU issued by the employer as the evidence, directly file a suit at the people's court, and the claims are not concerned with any other dispute over labor relationship, it shall be regarded as a dispute over the default on labor remunerations and shall be accepted as a common civil dispute." (Article 3)

[ii] The current laws and administrative regulations relevant to occupational disease diagnosis and assessment, classification of work-related injuries, and work-related injury benefits include the *Law of the People's Republic of China on Prevention and Treatment of Occupational Diseases* (passed on October 27, 2001 by the National People's Congress and implemented on May 1, 2002); *Management Regulations for Diagnosis and Assessment of Occupational Diseases* (Issued by the Ministry of Health on March 28, 2002 and implemented on May 1, 2002); the *Work-Related Injury Insurance Regulations* (issued on April 27, 2003 by the State Council and implemented on January 1, 2004); and the *Regulations on the Classification of Work-Related Injuries*, (issued on September 23, 2003 by the Ministry of Labour and Social Security and implemented on January 1, 2004).