

# **Comparative Industrial Relations:**

China, South-Korea and Germany/Europe

Rudolf Traub-Merz and Junhua Zhang (eds.)



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**Rudolf Traub-Merz and Zhang Junhua(eds. )**

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# Foreword

The College of Administration of Zhejiang University and the Friedrich-Ebert-Stiftung's Office in Shanghai held an international workshop in Hangzhou on 9–10 March 2009 on the theme of 'Comparative Industrial Relations: China – South-Korea – Germany/Europe'. The aim of the event was to expand on experiences from other countries and economies so that they could be used in the Chinese development debate.

When the organisers met to consider the topics four blocs rapidly emerged which henceforth determined the workshop's structure. 'Collective Bargaining' and 'Dispute Resolution' are standard features of every discussion of industrial relations. The two areas are also gaining significance in China in parallel with the retreat of the state from labour planning and wage setting. In the meantime, the government is encouraging the state-organised trade unions to play a bigger role here.

The two other sets of topics suggested themselves equally rapidly. In many industrialised countries a neoliberal rollback has been discernible since the mid-1980s, calling into question trade union achievements of previous decades and attempting to realign labour market policy with classical labour market doctrines. The new, atypical employment relationships which have arisen as a consequence represented a separate thread in the workshop, making it possible to address the development of unprotected employment relationships with the exclusion of trade unions.

The workshop was held at a time when the world economy was in the



throes of the ‘global financial crisis’ and employment was falling dramatically in many countries. Here we wanted to initiate a debate on how trade unions were reacting to the economic crisis and how they adapted their strategies in enterprises faced with the dilemma of safeguarding employment or wages.

The joint event aroused considerable interest. There were lively debates in particular on the tasks of the trade unions in shaping industrial relations and the interaction between trade unions and the state. The organisers came to two conclusions: they declared that they were willing to continue the dialogue under the title ‘Hangzhou Industrial Relations Forum’ and to organise further workshops. And with the present publication they are responding to the participants’ desire that the presentations be made available to a wider audience.

The College of Administration and the Friedrich-Ebert-Stiftung would like to thank all the authors for their willingness to cooperate in this publication. It should also be mentioned that some of the contributions are by authors who did not participate in the workshop (Qiao Jian and Reinhard Bahnmüller), but whose analyses take up key issues of the discussion.

No bilingual volume is possible without translators. Ms. Wu Xiaozhen translated into English the contributions originally written in Chinese and Dr. Chunrong Zhen translated the German and English articles into Chinese. James Patterson rendered the German texts into English and revised all the English articles for publication. We much appreciate their professional efforts.

Hangzhou/Shanghai, February 2010

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# **Industrial Relations in China, South-Korea and Germany**

Rudolf Traub-Merz

The present volume contains the revised versions of the presentations given and debated at an international conference, arranged by the University of Zhejiang and the Friedrich-Ebert-Stiftung in March 2009 in Hangzhou, on the development of industrial relations in China, South Korea and Europe (with a particular emphasis on Germany). The contributions and debates concentrated primarily on three main topics which form the basis of all discussions of industrial relations, namely collective bargaining, conflict resolution and the reactions of key industrial relations actors to economic crises.

The choice of topics and how they were framed was oriented towards making available the experiences of other countries or economies for the Chinese development debate. The selected examples of South Korea, China and Germany, as well as comparisons within Europe, do not, of course, cover the entire spectrum of industrial relations practices of international significance. For example, the USA and Japan, the two largest economies, are not considered.

Furthermore, countries in which the informal sector utterly eclipses the formal sector – for example, India and Indonesia – and where industrial relations may have to be addressed from a quite different standpoint than



the one adopted here, are left out of account.

Nevertheless, the cases presented offer striking examples which serve to illustrate many internationally important industrial relations processes. They are also eminently useful for both the Chinese and the comparative debate in that they reflect different levels of economic development and different social constitutions.

Unfortunately, among industrial relations experts, national or regional approaches tend to dominate and few researchers have devoted themselves to an international comparative perspective. For example, it was not possible to set a comparative view of Asia alongside Thorsten Schulten's comparisons of different European countries in two contributions to this volume. To be sure, this is the result of the much greater heterogeneity of Asian societies and their wide range of socio-economic and political formations, but it is to be hoped that a comparative perspective will gain ground in Asia as well and contribute to a better understanding. This is a matter of some urgency. The expansion of multinational companies has long since breached the national borders of industrial relations. While in many places research is still lacking on how national industrial relations practices develop, transnational enterprises have for some considerable time been exploiting market liberalisation for their own purposes and imposing new rules and practices in accordance with their own interests. By means of their investments they link up previously isolated national labour markets to a global labour market and are able to replace the workers of one country with those of another by relocating. This has set in motion a new kind of standardisation process which undermines national standards and forges a new path. Since industrial relations historically were formed mainly by trade unions operating at national level they will be the major losers from the emergence of transnational industrial relations, unless the collective actors on the workers' side are able to come up with new strategies which will enable them to exert some influence on the new situation.

The present volume is mainly intended for those who take the view



that strong trade unions are needed to improve the living and working conditions of dependent employees. It is published in Chinese and English in the hope that this will ensure a wider readership and in China in particular arouse more interest in the topics addressed. With regard to many socio-economic development processes China has set out along its own path, which has also led to enormous changes in the area of industrial relations in recent decades. However, with a few exceptions – for example, the China Institute for Industrial Relations or the Institute of Industrial Relations of Renmin University of China – there has been little research into industrial relations and in the universities basic subjects, such as labour law, industrial sociology or labour market economics, have been introduced only recently. The present book hopes to stimulate discussion in these areas.

To provide some orientation with regard to the country studies in this volume, we shall first offer some introductory remarks on key industrial relations issues and concepts.

### **What Are Industrial Relations?**

The term ‘industrial relations’ (frequently also ‘labour relations’) describes the relations of exchange between capital and labour. This includes the forms of cooperation and conflict relations which exist between capital and labour or their representatives in the shaping of employment relationships at company, sectoral, national or, more recently, transnational level. These relations are formed on a unilateral, bilateral or trilateral basis, depending on whether one actor (mainly capital) has enough power to engage in one-sided decision-making, two actors (capital and labour) seek agreement through compromise or the state enters the scene as a third party. The legal regulation of bilateral relations between capital and labour by the state or its attempts at political and institutional control are a component part of these relationships of exchange. At the centre of industrial relations, therefore, lies the



concrete organisation of the employment relations of dependent employees via collective regulations.

The emphasis on collective regulation is explained by the structural asymmetry of power between capital and labour. Workers can limit the disadvantage they suffer due to their lack of ownership of the means of production in negotiations on their labour contracts only by getting together in trade unions. Where there are no or only weak trade unions, state regulation – minimum requirements with regard to labour contracts, minimum wages, social protection and so on – must temper the effects of the power asymmetry in favour of the workers.

The ways in which trade unions and the state, in the establishment and safeguarding of collective regulations, relate to each other, work together, merge into one another, substitute one another or come into conflict constitute one of the most significant indications of how industrial relations practices differ between countries.

### **Trade Unions as Labour Market Cartels**

Alongside employers' associations, trade unions are the key collective actors in the industrial relations system. They are organisations of workers formed in an attempt to improve the living and working conditions of their members. Just as there is no unified theory of industrial relations, there is no definition of trade unions which covers all the historical variants and the international variety of forms of trade union organisation. In the early stages of Western industrial capitalism trade unions were primarily benevolent societies providing assistance in the event of social or personal emergencies (for example, unemployment). Only later – in England, for example, in around 1880 and in Germany at the end of the First World War – were they recognised by capital as negotiating partners in the conclusion of collective agreements. Today, trade unions are to be found in many developed industrialised societies as mass organisations with centralised-bureaucratic structures, involved in socio-



political governance and included in government decision-making.

Regardless of the various historical variants, forms and functions, in a market economy a core area of activity can be identified for trade unions which is frequently described as the formation of a labour market cartel. Trade unions can be considered to be successful labour market cartels when they develop the ability to temporarily withdraw a relevant number of essential workers from the labour market, and to restore them again only when enterprises agree to improve general working conditions and wages. The principal task of trade unions is clear-cut in these terms: they attempt to dissolve or limit competition between workers in order to prevent a ‘race to the bottom’ in the individual pursuit of employment. Trade unions can be regarded as successful, therefore, when they achieve a monopoly of supply in the labour market.

In societies characterised by a comprehensive command economy, in which there are no labour markets and the allocation of workers is centrally planned, this function is inherently redundant and trade unions cannot operate as distribution cartels. Insofar as they do exist in planned economies, they have other roles, primarily the mediation of access to social security benefits (allocation of housing, pensions, health care and so on). In a socialist market economy, such as China, in which elements of a planned economy and a market economy intertwine, and a significant and growing private economy exists alongside a strong state sector, trade unions are undergoing something of a transition. Where the labour market has not yet asserted itself, they must continue to play the traditional role of socialist trade unions, while in places where labour and capital are drawn together via labour contracts which have to be negotiated they must assume the role of establishing a sellers’ cartel.

### **Employers’ Associations as a Reactive Development in the Formation of Collective Actors**

Trade unions in Western industrialised societies not only represent a



collective reaction by the workers to the economic preponderance of capital on the labour market, but were historically the midwife of employers' associations. In the normal course of capitalist development the trade unions come into being first and the employers' associations emerge in response. This does not rule out the employers' associations catching up with or even coming to play a more dynamic role in governing the labour market later on, for example, if their membership density is such that it surpasses the level of organisation of the trade unions. The historical sequence, however, sees employers' association as a political answer to trade unions gaining strength, a temporal course of development which appears to be interrupted only when the state interferes.

The genesis of this relationship in German history has been described in plain terms by Gerhard Kessler: 'The trade union is everywhere the primary phenomenon, the employers' association secondary. It is in the nature of the trade union to attack and in that of the employers' association to defend itself. In its infancy, the trade union is principally a strike organisation, the employers' association an anti-strike organisation. The sooner a strong trade union emerges in an industry, the sooner a distinct employers' association develops' (Gerhard Kessler, *Die deutschen Arbeitgeberverbände* [German Employers' Associations], Leipzig 1907, quoted in Gerhard Erdmann, *Die deutschen Arbeitgeberverbände im sozialgeschichtlichen Wandel der Zeit* [German Employers' Associations in the Perspective of Social History, Luchterhand: Neuwied 1966: 53).

This historical sequence is confirmed today in the context of the European Union (EU), in which European trade unions are ready to regulate labour market conditions EU-wide via collective agreements but cannot find a European employers' organisation with a mandate to negotiate from its national member organisations.

This is also confirmed in South-Korea, as shown in this volume by Yoon Youngmo's contribution on collective bargaining. In recent years, industry-wide trade unions have formed there; only at their instigation and, as a result, only partially are enterprises now willing to join together



in employers' organisations in order to negotiate on a branch-wide basis, on equal terms.

### **Forms of Trade Union Organisation**

Trade unions' prospects of success with regard to reducing competition between workers also depend on their form of organisation. In relation to the form in which trade unions try to govern the labour market, we can distinguish four main types, historically and internationally: (i) professional trade unions, which in many countries were often dominant at the outset of trade unions and survive today as individual professional sections – in Germany, for example, for pilots, doctors, police officers and engine drivers; (ii) company trade unions, which try to establish uniform conditions for the same activities in an enterprise and are the general rule in many countries today, such as the USA and Japan; (iii) industry or branch trade unions, which go one step further and try to eliminate competition between the workforces of different companies by attempting to impose uniform minimum standards across the whole branch – this type is found mainly in Europe, but recently also in South Korea; and (iv) general unions, which try to organise all occupational groups in all branches – this all embracing type of association is often found in industrially underdeveloped regions, but also in Anglo-Saxon countries.

But even if trade unions seek to restrict the substitutability of workers, this does not necessarily mean that they themselves are not in competition with other trade unions. In fact, today we find trade union movements in most countries which, to varying degrees and for different reasons, are fragmented into rival blocs, while the so-called *Einheitsgewerkschaftsprinzip* [principle of unitary and non-partisan unionism] (only one trade union at all three levels: company, branch and national) is rather the exception. In Europe, this so-called 'unity unionism' applies in, for example, Germany and Austria, while in Western and Eastern Europe trade union pluralism tends to be the order of



the day. Scandinavian trade unions represent a kind of intermediate type, in that there is no political or confessional separation, but they have separate trade union organisations for blue-collar workers, white-collar workers and professionals.

But even in countries committed to unity unionism there are (growing) demarcation conflicts concerning organisational domains, as well as considerable differentiation with regard to the level of collective agreements (wage arbitration). Companies can exploit these differences by shifting to ‘cheaper’ collective bargaining sectors, which only serves to stoke up the wage competition between trade unions even further.

The reasons for the competition between trade unions lie mainly in the (survival) interests of individual trade unions or trade union leaderships – the latter explains the often mushroom-like proliferation of trade unions in industrially underdeveloped countries – but most are based on political or ideological differences (unions with particular ideological or party political links) or different assessments of the right strategy for organising the workers (a recent example is the split in the US trade union movement).

Unity in trade unionism can rely on a legal or a political monopoly. The All-China Federation of Trade Unions (ACFTU) has a legal organisational monopoly and company trade unions are required by law to become members. The Deutsche Gewerkschaftsbund (DGB) (German Confederation of Trade Unions), by contrast, is a unified trade union on the basis of a political amalgamation. Membership is the voluntary choice of individual trade unions and exit is possible at any time. The third country under consideration here – South-Korea – in contrast is characterised by trade union pluralism. Two umbrella organisations – the Federation of Korean Trade Unions (FKTU) and the Korean Confederation of Trade Unions (KCTU) – compete with one another and differ in terms of strategic direction and also in how radical their approaches to conflict are. The FKTU stands rather for company trade unions, while the KCTU is more in favour of industrial unionism.



It is a matter of dispute whether competition between trade unions boosts or weakens the workers' bargaining power. Unified trade unions have greater organisational power and the ability to bargain strategically, while trade union pluralism may give rise to more radical strategies, due to organisational competition, and the success of one group of trade unions can lead to redoubled efforts on the part of others.

The different forms taken by trade unions can be illustrated particularly clearly through a historical account of their development in Germany. Four main phases can be distinguished with regard to German trade union history: a first period, from 1848, dominated by professional associations, followed by a second period, from 1890, in which industry trade unions became the dominant organisational form. Both periods were based on the principle of unions with particular ideological or party political links. Since 1949 the principle of unity unionism has applied. On this basis, from 1949 the trade unions joined together in industry trade unions. Against the background of serious membership depletion and a dire financial situation in the 1990s there was a trend towards trade union mergers in Germany, as in many other European countries, and the fourth – and current – phase is characterised by multi-branch trade unions.

### **Collective Agreements: Regulation at Enterprise or Sectoral Level?**

If trade unions are associations which seek to eliminate or stem competition between workers in the labour market, a marked hierarchy of degrees of regulatory scope appears to impose itself. National collective agreements are preferred to sectoral agreements, while the latter are preferred to regulations that apply only to a single company. In Europe, especially in the Scandinavian countries, there have been periods in which national collective bargaining, encompassing all branches, was prominent. For several decades, however, a process of decentralisation has been under way, and today regulations applying to the national labour market



as a whole are instigated almost exclusively by the state, by law or decree, and no longer negotiated bilaterally by the social partners. Agreements between employers and trade unions today are concluded almost exclusively at sectoral or enterprise level.

Europe is generally considered as the region in which sectoral bargaining is practiced, while in other regions of the world company bargaining dominates. However, as Thorsten Schulten shows in his contribution, in Europe five models of collective bargaining can be discerned, which are arrayed in a kind of geographical order, of which only the 'Nordic', 'Central' and 'Southern' types are dominated by sectoral agreements. His typological comparisons are interesting: only where sectoral agreements dominate is bargaining coverage high. If collective agreements are largely concluded at enterprise level, however, not only does the regulation of the labour market take place at a lower level, but most companies seek to evade collective arrangements and their workforces are not protected by trade unions.

An interesting project is currently under way in South-Korea. In recent years, company trade unions have combined to form branch trade unions. While trade union reorganisation is proceeding successfully, replacing enterprise agreements with branch agreements is creating considerable difficulties. Individual companies are (at the moment) largely unwilling to give an employers' association a mandate to negotiate branch agreements. With regard to the three examples presented by Yoon in this volume, in which progress seems to have been made (metal, banking and health care), the historical principle seems to apply: first, trade unions have to achieve a 'higher' form of organisation and only when they are strong enough to compel the employers to come together are negotiations at branch level possible.



### **Collective Agreement Coverage, Collective Agreement-free Zones and Legal Regulation**

Just as tendencies towards the decentralisation of collective bargaining from the national to the sectoral level can be identified in individual countries or regions, there are also ongoing decentralisation processes in which enterprise-level arrangements are getting the upper hand or in which companies turn their backs on trade unions. In Germany, the collective bargaining system has been suffering from creeping erosion since the mid-1990s. More and more companies are withdrawing from collective bargaining, exiting from employers' associations and pulling out of collective agreements.

Bahn Müller, in his contribution on developments in Germany, not only points out the falling off in the number of collective agreements, but also describes a new form of collective agreement, where a branch collective agreement is formally adhered to, but the bargaining partners agree to a temporary undercutting of the labour norms in the branch. This hybrid form between branch and enterprise-level regulation has emerged since the mid-1990s and in some sectors is applied by 20–30 per cent of companies. Under pressure from the economic crisis or continuing high unemployment the trade unions consider themselves compelled to consent to these so-called opening clauses in branch agreements. Follow-up negotiations at enterprise level may subsequently lead to enterprise-specific special agreements which can include a temporary reduction in wages.

The declining coverage by collective agreements in Germany is not observed throughout Europe. In most Western European countries, collective bargaining remains stable. One of the reasons for this is the fact that declarations of collective agreements as universally binding are widespread there; in other words, collective agreements which were originally negotiated only for part of a branch are subsequently declared by the state – whether government or parliament – as binding for the branch as



a whole. A specific interaction between the state and the trade unions may be observed here. Where the trade unions are too weak to assert themselves against the employers the state is called in to support them. Bahn Müller takes his conclusion from there. He calls for more substantive involvement on the part of the state in Germany in order to stabilise the collective bargaining system there.

China's collective agreement system is still in its infancy. Collective agreements can have three variants: enterprise-level agreements, local (territorial) agreements, which include all the firms and employees in a particular location, and branch agreements up to the district administration level. Around 40 million workers are now covered by a collective agreement. Given an urban labour force of around 300 million, however, this is still low; as Huan Renmin concludes, in his contribution to this volume, 'generally speaking, collective wage bargaining is still in its early stages in China'.

Wages and working conditions in China have so far not been subject to regulation by collective bargaining to a significant degree and the state has not sought to exercise the possibility of declaring collective agreements generally binding. The wage level is mainly determined by state minimum wage policy and state wage guidelines, and where trade unions do conclude collective agreements they are closely in line with these political provisions. For the vast majority of Chinese workers the minimum wage which varies by district is likely to be the key benchmark, not collective agreements. There are, however, problems with implementation. For a long time, it was difficult to enforce the law due to the partial regulatory autonomy of the local authorities. The new Employment Contract Act of 2008 and stricter controls, however, have noticeably improved the implementation of government regulations.

An interesting parallel seems to have developed of late between Germany and China with regard to the significance of state wage regulation. Until recently, German trade unions rejected minimum wages as undue political interference in free collective bargaining. With the



decline in collective bargaining coverage in the past few years, however, the trade unions have changed their minds. They are now calling for statutory regulation of minimum wages, at least in sectors in which the normative provisions of collective agreements apply only to a minority of workers, and thus a stronger state role in wage setting.

### **Conflictual or Harmonious Industrial Relations, Arbitration and Strikes**

One common classification of the contents of collective agreements distinguishes between substantive and procedural regulations. While substantive regulations concern joint resolutions on wages and working conditions, procedural regulations establish negotiation and arbitration mechanisms for ‘taming’ structural conflicts between labour and capital. Besides procedures negotiated bilaterally between the collective bargaining parties, there are statutory methods and procedures for reaching agreement.

When Chinese and German trade union delegations meet, the German side frequently talks about the right to strike and the Chinese side about the duty to establish harmonious industrial relations and to prevent conflict. What at first glance appears to be so divergent, is a good deal less so on closer examination, however.

The statistics on strike intensity presented in Schulten’s contribution (see Dispute Resolution) appear to indicate the prevalence of conflictual industrial relations in the Western industrialised countries. If one alters the chosen reference variable (strike days for every 10,000 workers) in these statistics, however, and calculates the average loss of working hours per worker due to strikes, the results are astonishing: a German worker is on strike for an average of 19 minutes a year. Even Danish workers, who have the highest strike rate in Europe, take industrial action for only one hour and 15 minutes in a working year. From other sources we know that, in contrast, the average number of employees off sick-in Germany



this amounts to three and a half days a year (2009) – is several times higher. While it is true that the right to strike is a fundamental right in Europe, it is also true that it is exercised infrequently and that trade unions try to resolve labour conflicts primarily by means of peaceful negotiations rather than strike action. Strikes are a recurring topic in collective bargaining, but hardly ever used.

The same applies to South Korea. Yoon shows, in his contribution on dispute resolution that the frequency of strikes has been falling for years, while arbitration by the National Labour Relations Commission (NLRC) has been increasingly successful. He explains the success of the NLRC among other things by its tripartite composition. Representatives of the trade unions, employers' associations and the government are able to work out compromise proposals, as a result of which feasible solutions can emerge for the two collective bargaining parties. Yoon discerns an increasing professionalisation of conflict resolution, which is also manifested in the fact that the negotiating parties take each other more seriously and approach one another with realistic demands.

In comparison, China represents a distinct model. Strikes are not statutorily regulated and trade unions are not actors in collective dispute resolution. Labour law ultimately does not distinguish between individual and collective conflicts and does not provide for specialised labour courts. Labour conflicts are dealt with in terms of the classical sequence mediation, arbitration, litigation and with the new Arbitration Law (2008) workers' access to the People's Court has been made easier. Nevertheless, workers' protests are occurring more frequently and settlements increasingly have to be reached outside the official arbitration machinery. In their contribution, Shen and Pan analyse three instances of strike action, pointing to the weakness of the trade unions and showing that they cannot (always) fulfil their role as arbitrator. Many private companies are not unionised or trade unions exist only on paper, while in public enterprises 'trade unions at the enterprise level depend on the management, which obstructs their protection of workers' rights,



reducing their effectiveness’. Hence their proposal that trade unions be more strongly separated from enterprise managements and that trade union presidents be elected by the workers. This expresses an important principle: trade unions are more likely to prove successful as arbitrators in disputes when they are independent of company management and responsible to the workers.

### **In Economic Crises: Job or Wage Security?**

Economic slumps which result in a fall in demand for labour on labour markets always force trade unions into a fundamental decision: should their priority be to secure wages or jobs? Should jobs be maintained by means of concessions on wage cuts or should the wage level established by collective bargaining remain stable throughout the economic crisis?

The analyses in this book emphasise the sensitivity of this issue. In South Korea (Bae and Traub-Merz), as in Germany (Bahn Müller), concession bargaining is growing in the economic crisis. This manifests itself in various forms, for example, in Germany sometimes in sanctioned deviations from collective agreements by means of so-called opening clauses, sometimes in ‘alliances for jobs’ in enterprises, which are agreed by actors at company level, without the consent of the collective bargaining parties. Whether legitimised by the bargaining parties or not, it is always a matter of bartering. What is usually bartered are employees’ concessions on wages or working time in return for employment guarantees from the company management.

In China, too, during the economic crisis in 2009 the government demanded that state-owned companies refrain from redundancies and, in return, recommended that there be no wage increases this time round. As Ngok shows, there were even demands to suspend labour legislation temporarily, but with the help of the ACGB these were repulsed. Where central government was less able to exercise its authority, however, the law was flouted on a massive scale and local authorities allowed individual



companies to suspend the payment of employer social insurance contributions.

As a crisis strategy, wages and social benefits are usually subordinate to the goal of company competitiveness. But this also points to the problem of enterprise-level wage agreements. As Yoon and Bae show for South Korea, company workforces are struggling to keep their jobs in competition with other workforces and are quick to make concessions which secure employment at their own plant and jeopardise the jobs of others. Bahn Müller shows that even branch trade unions with industry-wide agreements are not averse to this kind of downward competition. During periods of economic crisis even in Germany works councils oppose trade unions from time to time and demand a significant reduction in labour costs.

Germany has probably the most developed ‘toolbox’ in the world for combating crises in the labour market. The principal means of smoothly adapting employment volumes to fluctuations in demand or sales are agreements between trade unions and employers’ associations on employment guarantees, on the one hand, and between works councils and group managements, on the other hand. Working time accounts, in particular, create flexibility (cf. Däubler, *Workers’ Rights*). In boom periods, workers can do overtime for which they do not receive wages but credits in their working time account. In periods of crisis, this is reversed. They continue to receive their regular wage although they work less. Collective agreements on employment at sectoral level create the framework, while company agreements lay down the details.

Short-time working is an intermediate model which has been developed in Germany for reducing both working time and wage costs. The Federal Labour Agency pays subsidies to compensate for some of the workers’ wage losses. This allows cutbacks in production without laying off workers. Working time is reduced equally for all employees in the company or particular part of the company, while wage losses for the employees or social security contributions are largely taken over by the



Federal Labour Agency. ‘The benefits are considerable for both sides. The employee is not dismissed, while the employer retains a well-trained workforce, enabling him to restart under good conditions when the economic situation improves’ (Däubler; Workers’ Rights).

With the help of this instrument Germany has been able to cushion the unemployment resulting from the current world economic crisis to a considerable extent. Over one million workers were on short-time working in 2009, at one time or another, saving around 400,000 full-time jobs.

Adjusting working time to the order situation, accumulating overtime and working shorter hours when orders are lacking: this requires developed methods for managing working time accounts and the agreement of the persons concerned. In South Korea, both are lacking because overtime has, to a considerable extent, long counted as part of the normal working day (cf. Bae and Traub-Merz). Korean companies and trade unions urgently need to think creatively about this. A new instrument has already been tried out by the government: under an Employment Maintenance Programme, enterprises which refrain from laying off workers when there is a downturn in sales receive state compensation.

However much the alternatives of reducing employment or wages might be rational strategies for individual companies facing a fall in sales, this microeconomic rationality can turn into a macroeconomic boomerang if the sales crisis occurs across the board. While wages are only a cost factor for individual companies, for the economy as a whole wage income is a key demand variable. What is disconnected at enterprise level must be brought together at the level of the economy as a whole, and so in an economic crisis wages and employment should increase in order to trigger consumption-induced economic growth. For an individual company acting alone, such a strategy would be suicidal: it can work only if all enterprises act together, which runs counter to the logic of competitive capitalism. In consequence, the task of implementing an expansive wage and



employment policy falls to the trade unions and the government. The government must stimulate consumption and investment with a spending programme somewhat in defiance of market logic, while the trade unions must do all they can to oppose employment reductions and wage cuts. If they join in the race to the bottom for the lowest wages they will only exacerbate the crisis. In his analysis of the contribution of Roosevelt's New Deal to overcoming the Great Depression of the 1930s, Qiao draws the same conclusions for combating the crisis in China: 'A lesson from the New Deal is that it is hard to genuinely increase domestic demand and stimulate economic growth without increasing wage income and social security. Therefore, it is for the purpose of maintaining social equity and economic growth that we stress the protection of workers' rights during economic crises'.

### **Standard Labour Contracts or Atypical Employment?**

'Beyond the standard labour contract' or 'atypical employment' – these are the names given by Däubler's contribution on Germany and Bae's on South Korea to a worrying trend: the proportion of regular jobs is falling and there are more and more short-term contracts, part-time and temporary agency work, as well as (forced) self-employment. In Germany, today one-third of the whole workforce is affected, while in South Korea 36 per cent (2007) of all employees are in atypical employment.

Atypical employment brings down the wage level and thus social insurance contributions. In Germany, the increase in atypical employment has been instrumental in bringing into being a low-wage sector which encompasses around 20–25 per cent of employees. Many in this segment can no longer live on their wages and require state subsidies or income support in order to live a decent life.

Trade unions have been protesting against this trend as it has three



negative repercussions; collective bargaining-free zones are formed; unions lose membership; and a low-wage sector emerges, forcing down wages in standard employment relationships. In fact, many trade unions long ignored this development as a matter of policy and in collective bargaining were more concerned with their members in standard employment relationships than with non-members in atypical employment. In his contribution on ‘Collective Bargaining’, Yoon shows, with the example of a successful case, how trade unions in their collective agreements can also bring about the transformation of short-term into permanent jobs – by refraining from pursuing maximum wage increases.

Trade unions alone are scarcely in a position to drive back this segment of the labour market any time soon. Government support and regulation are required. With its new Labour Contract Law (2008), China has created a legal instrument which restricts temporary agency work. In particular, it prohibits companies from setting up their own temporary work agencies from which they then ‘borrow’ their workers. Minimum wages for employees in temporary work agencies and stricter regulation of loan periods would be helpful in Germany. Employment relations without appropriate wage and social insurance are unjustified subsidies to companies which have to be paid by the taxpayer-through wage compensation to those affected or income support if they have reached pensionable age.

### **Concluding Remarks**

Industrial relations are undergoing structural transformation. In many countries, as in Germany, collective regulations are being watered down by decentralisation and flexibilisation. Labour relations regulated by collective agreements and trade union membership are declining (Germany) or stagnating at a low level (South Korea). China is still in the early stages of social partnership involving trade unions. In many areas, the state is on the retreat, but it remains the dominant authority



with regard to setting minimum standards for wages and working conditions.

China, South Korea and Germany (as well as other European countries) have similar problems of labour market management (combating unemployment, safeguarding wage levels, expansion or maintenance of basic social insurance) and different organisational models and solution strategies for coping with these problems. One of the most striking differences concerns the political interaction between the state and the trade unions. If appropriate answers have not been found to the key problems of labour market management and precarious employment is on the rise, the countries and collective actors affected by them should be open and ready for change, as well as to learn from the strengths and weaknesses of the policies applied by others.

In China, the trade unions still have little by way of collective bargaining power and their role in the expansion of the welfare state remains open. The Chinese trade unions need to develop new concepts and strategies in order to establish a strong position in these increasingly important areas.

In Germany, trade union corporatism long stabilised the highly developed welfare state, but was unable to prevent the emergence of a low-wage sector and recently the phenomenon of the ‘working poor’ has become part of the labour and social model of an advanced industrialised country. An expansive wage policy, together with a state minimum wage policy, could contribute significantly to a new social contract for social equality in Germany.

In South Korea, the social insurance system has become weighted towards enterprises and has contributed to the split of the workforce into a privileged minority protected by collective agreements and a majority with little protection. The establishment of collective bargaining partnerships at branch level and a trade union policy on collective bargaining which strives for the transformation of short-term jobs into permanent ones are very promising solutions. What is needed above all, however, is the



expansion of the welfare state. And here the trade unions must examine whether they are strong enough to fight for this alone or should try to achieve a pact with the state in alliance with other social forces.



# **Part I**

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## **Collective Bargaining**



# **Characteristics of Collective Wage Bargaining in China and the Practical Role of Trade Unions**

Huang Renmin

More than a decade has passed since collective wage bargaining began in China in the mid-1990s. The number of enterprises carrying out collective wage bargaining and signing collective agreements and the number of workers covered by those agreements have risen considerably. By the end of 2007, the total number of collective agreements across China had reached 343,000, 12.6 per cent higher than the previous year, and covering 622,000 enterprises, up by 18.3 per cent over the previous year and by 112.3 per cent over 2003. The number of workers covered stood at 39.686 million, up by 6.8 per cent over the previous year. Collective wage bargaining has played an outstanding role in guaranteeing workers' pay and normal wage increases, as well as harmonizing industrial relations. However, generally speaking, collective wage bargaining is still in its early stages in China. There are still problems and shortcomings which must be tackled. In particular, there is a strong need to conduct both theoretical and practical research into the role of trade unions in collective wage bargaining.



## **1. Characteristics of Collective Wage Bargaining in China**

Collective wage bargaining in China differs from bargaining and collective negotiations in the West. It is, in fact, a combination of the two. Collective wage bargaining in China has the following characteristics.

### **1.1 The Premise: Collective Bargaining Oriented towards Mutual Interests and Cooperation**

When it comes to the theory of collective wage bargaining, Western economists inevitably look at the impact of strikes and factory lock outs on the final outcome. Chinese law has not endowed trade unions or enterprises with rights to strike or impose lock outs. The Government, instead, advocates industrial relations on the basis of mutual interest and cooperation. The major measures are:

(1) The Government controls both employer and employee organizations, with a view to resolving disputes through these two parties, preventing tensions and thereby disruptions of the social order.

(2) A tripartite bargaining mechanism consisting of workers, employers and the Government has been established. The Government dominates collective bargaining, especially collective wage bargaining, in order to make cooperation between employers and workers possible. The Government has the final say in bargaining outcomes and monitors implementation. It reins in enterprises' violations of workers' rights and mitigates industrial conflicts to a certain extent. The peacekeeping obligation stipulated in collective bargaining reflects the Government's leading role in industrial relations.

### **1.2 State Intervention: Government-led Collective Bargaining**

In China, the Government plays a leading role in the formation and



evolution of industrial relations. In order to stabilise industrial relations and maintain industrial peace, it actively safeguards the existing trade union system and promotes collective wage bargaining in enterprises.

(1) The Government demands that enterprises participate in collective wage bargaining with workers' representatives, discuss with the latter, on an equal footing, issues such as wage distribution and the wage level, and conclude a collective wage agreement. The Government also gives priority to the collective wage agreement over enterprise regulations and labour contracts, so as to limit the power that may otherwise be enjoyed by enterprises during individual wage bargaining with workers.

(2) The Government reserves the right of final approval of collective wage agreements. That is to say, wage agreements are not valid until the administrative departments of labour and social security have approved the representatives of both sides in collective wage bargaining, as well as the contents of the collective agreement and the relevant procedures.

(3) The Government mandates cooperation in collective wage bargaining; that is, no party is allowed to resort to extreme measures, threats or deception. Collective wage bargaining can be said to constitute Government-led industrial cooperation. The Government strives to maintain industrial peace, reduce conflicts, increase wages and stimulate domestic demand by establishing the collective wage bargaining mechanism and by the system's design.

### **1.3 Representation of Interest Groups: Collective Bargaining among Multiple Stakeholders**

A dual representation system for workers has been adopted in some market economies. For example, there is cross-enterprise collective bargaining, as well as 'codetermination' within enterprises in Germany.



However, German law bestows the right to collective bargaining on trade unions only (Li Qingyi, 2006). According to China's current collective bargaining and contract system, in enterprises without trade unions, representatives chosen by the workers also have the right to participate in collective bargaining and to sign collective contracts.<sup>①</sup> Therefore, trade unions sign collective contracts with employers also in the capacity of worker representatives.

Since the trade union is not the only subject representing the workers in a collective contract, there are dual legal attributes in China's collective contracts:

(1) The trade union is legally a legitimate subject in a collective contract. The collective contract it signs with the enterprise is a group agreement.

(2) A collective contract signed with the enterprise by elected worker representatives is not a group agreement, but a collective agreement

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① According to Article 20 of the Provisions on Collective Contracts, worker representatives in a bargaining unit are to be chosen by the trade union at the enterprise. If there is no trade union, representatives should be elected, through a democratic process, with the assent of at least half of all workers. The chairperson of the trade union should be the chief worker representative. The chairperson may authorize – in writing – other representatives to act on their behalf. If the chairperson's position becomes vacant, the person responsible for the daily operation of the trade union becomes the chief worker representative. If there is no trade union, the chief worker representative should be elected from all representatives through a democratic process.

According to Article 9 of the Proposed Methods of Collective Wage Bargaining, representatives in collective wage bargaining are to be selected by the established procedure. Workers are to be represented by trade unions. In an enterprise without a trade union, representatives should be elected through a democratic process with the assent of at least half of all workers. The legal representative of the enterprise and others they appoint represent the employer.

According to Article 10 of the Proposed Methods of Collective Bargaining, both parties in collective bargaining should name a chief representative. The chairperson of the trade union should be the chief worker representative. They can also authorise – in writing – another person to act on their behalf. If there is no trade union, the chief worker representative should be elected by all worker representatives.

In an enterprise with a trade union, no worker representative has the right to act independently of it in collective bargaining.



signed between all workers and the enterprise.

Current law regards both the group agreement between a trade union and the enterprise, and the collective agreement between workers and the enterprise, as collective contracts. They are equally valid. In case of disputes concerning the conclusion and implementation of a group agreement, the trade union, as a party to the collective contract, naturally becomes a subject which is entitled to file a collective complaint for labour arbitration or litigation. On the other hand, in case of disputes arising from a collective agreement signed by workers' elected representatives, complaints can only be filed in the name of all the workers who are the subject of labour arbitration or litigation.

#### **1. 4 Level of Decentralisation: Predominantly Decentralised Collective Bargaining**

Originally, state laws and regulations went only as far as enterprise-level collective bargaining and collective contracts. They categorise enterprise-level trade unions as legal subjects in concluding collective contracts. Later, Article 53 of the Labour Contract Law promulgated in 2008 somewhat remedied this defect by stipulating that at county level or below, trade unions may conclude industrial or regional collective contracts with the representatives of enterprises in such industries as construction, mining and catering. However, more detailed guidelines still remain inadequate.

There are specific stipulations concerning regional or industrial collective bargaining and collective contracts in local regulations. However, those local regulations vary, resulting in conflicts in application, especially when industrial collective bargaining and collective contracts cross regional boundaries.

Moreover, local regulations are less effective and less specific, which is not conducive to implementation. Consequently, industrial or regional collective bargaining and collective contracts are limited in their growth and function. Many of them stay on paper. Moreover, laws and



regulations fail to establish industrial or regional trade unions as legal actors in collective bargaining and collective contracts, affecting the validity of regional or industrial collective bargaining and contracts. Therefore, it is safe to conclude that regional or industrial collective bargaining and collective contracts are still at an experimental stage and that most collective bargaining in China is decentralized and takes place at enterprise level.

As a result of decentralized collective bargaining and collective contracts at the enterprise level, there is an imbalance of power between the enterprise and its workers. Comparative studies of collective bargaining and contracts in other countries demonstrate that the power of an enterprise-level trade union is much weaker than that of a multi-enterprise trade union in collective bargaining and negotiations.

## **2. Major Problems with Current Collective Wage Bargaining in China**

The characteristics of China's collective wage bargaining, especially the strong role played by the Government and the emphasis on cooperation, have facilitated the wide adoption of the system across China in a relatively short period of time. However, despite the considerable growth in the number of enterprises engaged in collective wage bargaining and concluding collective wage agreements, as well as the number of workers covered, problems still exist in the following areas.

### **2.1 The effect of collective wage bargaining is restrained by workers' inadequate participation in democratic management**

For a long time, China's promotion of worker participation in democratic enterprise management has not been very successful. Participation remains superficial. In other words, it has been quite difficult for workers to participate in the democratic management of the enterprise where they



work. Even if such a system exists in an enterprise, the level of participation is so inadequate that no proper economic or social benefit is experienced. The major reason lies in the fact that many enterprise owners and managers maximise their own benefits by capitalising on their resource and information advantages.

However, if workers can participate substantially in the management of the enterprise, they will have a fuller understanding of its operational and financial status, thereby reducing the scope of enterprise representatives to pursue a strategy of wage minimisation. In other words, workers' participation in management may put owners and managers at a disadvantage. However, this view is short-sighted because, theoretically speaking, in a market economy with perfect competition, enterprise profits will always converge towards zero. In order to achieve above-average profits, enterprises must increase their input, including human capital input. Instead of simply squeezing labour costs, therefore, advanced modern business management tries to improve the added value of human capital, tapping into people's initiative and creativity in order to create above-average profits for the enterprise. High input/high wage/high quality/high profit is the fundamental rationale of modern business management, as well as the foundation on which top enterprises promote democratic participation by workers.

It seems, however, that in China democratic participation by workers in managing company affairs is still at a pre-modern, low wage/low quality/low added value stage, characterised by an obsession with so-called low labour cost advantage, and an unwillingness to improve the structure of input factors. This has become a vicious cycle. 'Low labour costs' has become the trump card for some localities in attracting investment (Zhang Likun, 2007), or a 'low-technology pitfall', according to some scholars. In order to overcome this pitfall, we need to change our mindset, enhance democratic worker participation in enterprise management and reduce information asymmetry, so that workers really care about the enterprise they work for, understand it and relate their own



interests to those of the enterprise. Only in this way can collective wage bargaining transcend the tit-for-tat grab for bigger pieces of the existing pie in the direction of joint efforts to make the pie bigger and therefore to move towards a win-win outcome. It can be concluded that the effectiveness of collective wage bargaining is positively correlated with the level of democratic worker participation in enterprise management. Only by further promoting such participation can we fundamentally change the situation in which collective wage bargaining has significance only on paper.

## **2. 2 Lack of Awareness of Collective Wage Bargaining**

At present, there is a regional imbalance in the development of collective wage bargaining in China. The more advanced regions have formed a favourable social environment, in which employers and workers decide on wages through collective wage bargaining. On the other hand, there are still many regions in which wages are decided unilaterally by the enterprise.

Although it is common practice in market economies for trade unions to represent workers in collective wage bargaining with enterprises, stakeholders in China still have misconceptions or concerns about it. First of all, some local governments take the narrow view that collective wage bargaining drives investors away and stunts local economic growth. They turn a deaf ear to calls for collective wage bargaining for fear of angering investors (Xu Xiaojun, 2006). At the same time, some enterprise owners or managers, especially private business owners, believe it is simply their right to decide wages. This belief leads to the prevalence of unilateral decision-making by enterprises on wage levels, means of payment and raises, making it difficult to promote collective wage bargaining. Consequently, the majority of workers do not enjoy the full benefits of economic growth. Their wage levels are very low, with limited wage rises, resulting in frequent confrontations. In addition, some trade union officials regard it as far too difficult to promote collective wage bargaining or fail to understand the important role of trade unions in collective



bargaining.

### **2. 3 Lack of Binding Force**

Collective wage bargaining is a form of lease transaction between an enterprise and its workers. As internal and external conditions change, the enterprise should renegotiate the labour rental price with workers. Since it is a transaction, the interests of both owners and workers are involved, and there is the problem of whether the different interest groups can reach an agreement by way of compromise. The current bargaining system, laws and regulations in China are apparently inadequate in providing incentives to promote collective wage bargaining or even impose restraints which undermine it. As a result, bargaining is hardly on an equal footing, the weaker party's interest is violated and grievances are accumulated, which is conducive neither to the long-term growth of the enterprise nor to the protection of workers' rights. To be more specific, there are problems in the following areas:

(1) Laws and regulations on wage distribution and wage bargaining in China are inconsistent and incomplete. The *Company Law*, the *Trade Union Law*, the *Provisions on Collective Contracts* and the *Proposed Methods of Collective Wage Bargaining* have different definitions of who should decide on wages, resulting in disagreements about whether wages should be decided unilaterally or bilaterally. The *Company Law* stipulates that the board of directors shall have the function and power to 'formulate the annual financial budget plan and final accounts plan of the company'; that a company shall 'in studying and deciding on issues involving the personal interests of its staff and workers, such as their salaries', solicit in advance the opinions of the trade union and the staff and workers of the company, and that representatives of the trade union shall be invited to attend relevant meetings as non-voting participants. On the other hand, the *Proposed Methods of Collective Wage Bargaining* stipulates that 'worker representatives and enterprise representatives shall carry out



bargaining on an equal footing on wage distribution, ways of wage distribution, and wage levels'. Apparently, the two do not agree on who should decide wages. Moreover, the former is a higher form of law than the latter, which will create obstacles for wage bargaining. Although the current version of the *Proposed Methods of Collective Wage Bargaining* provides for representatives, there are no provisions on how representatives should be selected or what kinds of standards and procedures are applicable in case of disputes. Furthermore, the provisions are legally non-binding with regard to the responsibilities of the enterprise in collective wage bargaining. Article 33 of the *Labour Law* states that 'the employees of an enterprise as one party may conclude a collective contract with the enterprise as another party on labour remuneration, working hours, rest and leave, labour safety and sanitation, insurance, welfare treatment and other things'. The word 'may' indicates that the contract is optional, not compulsory, in legal terms. According to the *Provisions on Collective Contracts*, 'when one party demands collective bargaining, the other party shall give a written reply within 20 days of receiving the request, and shall not reject collective bargaining without justification'. However, it does not define what constitutes 'without justification'. Neither is it clear about the legal consequences if one party rejects or defaults on collective bargaining. In conclusion, incomplete laws and regulations are a major factor restraining collective wage bargaining.

(2) There is a lack of substantial macro guidance with regard to collective wage bargaining by the Government. Collective wage bargaining includes wage distribution, means of wage distribution and wage levels, all of which should reflect the standard state laws on labour remuneration. But the current standard laws on labour remuneration are far from meeting the needs of collective wage bargaining. Moreover, owing to the lack of relevant data, such as average wage in industry, wage bargaining must refer to the local minimum wage or to wage guidelines which are far too general. As a result, collective wage bargaining often lacks objective and valid references.



(3) The current social security system in China fails to give workers enough weight in wage bargaining. A collective wage agreement should result from a consensus between two parties on the basis of equality, reason and consultation. That is to say, it is possible not to reach an agreement. If there is such disagreement, the weaker party has few bargaining counters, such as walking away from the bargaining table, owing to the currently inadequate social security system, which means that workers cannot depend on it if they lose their job. In the end, workers can only accept the conditions set by employers. This kind of superficial consensus can hardly be fair and equitable.

### **3. Maximise the Role of Trade Unions in Collective Wage Bargaining**

Collective wage bargaining came into being in China relatively recently. Neither employers nor employees are well equipped with theories or experience. Trade union representatives seem to be in a weak position in collective wage bargaining. Judging by collective wage bargaining practices in other countries, ‘companies’ ability to pay wages and trade unions’ ability to force companies to pay wages’ are two key factors in collective wage bargaining (Huang Renmin, 2007). However, it takes expertise to leverage these two factors.

#### **3. 1 Judging Companies’ Ability to Pay Wages**

This is a focal issue in collective bargaining. Companies try to downplay their ability to pay wages at the level demanded by trade unions, bringing forward all kinds of financial data to back up their claims, while trade union representatives try to identify areas of misrepresentation in those same data. However, companies usually have access to more information than trade unions. Consequently, trade unions should demand that companies provide all the information needed in bargaining, on the one



hand, while judging the latter's ability to pay wages in terms of the following three factors, on the other:

(1) Whether the company is operating normally. A company unable to maintain basic operations is clearly unable to pay higher wages. Workers usually have a sense of whether there are normal operations, or they could simply check whether capacity is being fully utilized.

(2) The company's profitability, especially its profit tax payments. Both are important indicators of a company's economic performance. A company may make low or even negative profit owing to its lack of competitiveness, the market environment or high costs. As a result, it may be unable to pay higher wages. Corporate profit tax payments are an important piece of evidence in judging a company's profitability and thereby its ability to pay wages.

(3) The company's purchases of production-or non-production-related equipment. A company may cite reasons such as production expansion and equipment upgrading to explain why it cannot pay higher wages. If this is indeed the case, the trade union should be supportive by adjusting its original demands and calling on workers to contribute to the growth of the company, which is again a demonstration that collective wage bargaining in China is oriented towards mutual interests and cooperation. Companies should present physical evidence of new equipment procurement.

### **3.2 Trade Unions' Ability to Force Companies to Pay Higher Wages**

This refers to trade unions' ability to achieve their bargaining targets when companies with the capacity to pay higher wages refuse to come to an agreement. It usually depends on the following three considerations:

(1) How well organised a trade union is. Collective wage bargaining is bargaining on an equal footing between worker representatives and enterprise representatives over wage and other compensation issues. Although it is theoretically and legally possible for workers in a non-unionised enterprise to elect representatives, it is hard to carry out true



bargaining or to defend the interests of those represented without effective organisation. Therefore, the establishment of an effective trade union is an institutional precondition for collective wage bargaining.

(2) The negotiation skills of trade union representatives. Collective wage bargaining is a process of analysis, argumentation, debate and compromise over wage-related issues, which calls for knowledge of law, economics, management and corporate finance. The fulfilment of bargaining objectives depends to a large extent on such know-how. Therefore, trade unions should strive to form a team of market-savvy professionals.

(3) Actions of last resort, which are sometimes unavoidable in collective wage bargaining. Trade unions should be resourceful when negotiations based on restraint and reasonable arguments fail.

### **3.3 Handle Each Stage of Collective Wage Bargaining Carefully to Improve the Outcome**

(1) Choose worker representatives for collective wage bargaining carefully. The *Proposed Methods of Collective Wage Bargaining* stipulate that ‘workers should be represented by the trade union’ in collective bargaining, and that ‘the chairperson of the trade union should be the chief worker representative’. However, in reality, many trade union chairpersons are also administrators or managers, who are either not fully qualified or even ill qualified to represent the interests of workers. There are some rules and regulations on this: Article 24 of the Provisions on Collective Contracts stipulates that a person shall not represent both employer and employee at the same time; Article 24 of the Regulation on Trade Union Work in Enterprises states that ‘enterprise executives, partners and their close relatives shall not become candidates for the enterprise trade union committee’; Article 6 of the Measures for the Election of the Trade Union Chairperson of an Enterprise (Provisional) states that ‘enterprise executives (including deputies), partners and their close relatives, heads of the HR department and



employees with foreign nationality shall not become candidates for trade union chairpersonship'. Nevertheless, these rules and regulations are poorly enforced, leading to unsatisfactory results. Therefore, the *Proposed Methods of Collective Wage Bargaining* should be revised as soon as possible. Before that, trade union chairpersons who are also executives of the enterprise should take the initiative to propose that a more qualified person be found to serve as chief worker representative in collective wage bargaining.

At the same time, trade unions should mobilise workers to take part in collective bargaining. They should solicit workers' opinions extensively, produce a shortlist of candidates and help select worker representatives through such democratic processes as election by secret ballot. Once the representatives are elected, trade unions should offer them training and seminars on how to conduct collective bargaining.

(2) Collect sufficient information, make a correct analysis and put it to the right use. Adequate preparation is indispensable in collective wage bargaining. To ensure that the bargaining is really on just grounds and to workers' advantage, extensive information should be collected beforehand. Correct analysis and usage are also important. Required information includes macroeconomic data and enterprise economic data. To be more specific, macroeconomic data should include the national consumer price index (CPI), guidelines on enterprise wages issued by the local government, annual average wages in the region and average wages in the industry. Under normal circumstances, enterprise wage levels should be adjusted to changes in these indicators. When there is a considerable upward movement in these indicators, trade unions should demand a wage increase.

Enterprise economic data include annual output, annual turnover, annual profits, profit growth, total annual expenditure and total costs (including material costs, overheads, labour costs and so on), total wage payments and average wages. First, when analysing and using the data, they should not be taken at face value. Instead, it should be checked



whether they are consistent. In the bargaining process, trade unions should demand explanations from enterprises or propose that wages be linked to output instead of profits, with a view to protecting workers' rights. Secondly, indicators should be as specific as possible, covering both total amounts and unit amounts. For example, when discussing wage increases, attention should be paid, not only to the percentage of the overall increase, but also the percentage of increase for workers of different levels, so that all workers can benefit from normal raises. Thirdly, when preparing for collective wage bargaining, in addition to specific wage targets, there should also be a comprehensive labour cost analysis and accounting. Labor cost refers to all enterprise costs related to wages, including wage costs and add-ons. Add-ons rise with wage increases. Therefore, before collective wage bargaining, the trade union should give comprehensive consideration to the impact on the enterprise of increases in both wage costs and add-ons, so that its proposal is reasonable.

(3) Work out the issues, including key issues, for the upcoming collective wage bargaining. The identification and regular adjustment of wage levels is a key part of enterprise collective wage bargaining. Besides, there are other substantial issues, mostly related to the wage system and wage differentials. The wage system covers a wide range of items, including the basic wage system, basic wage rates for different posts and types of work, wage payment guarantees and so on. Wage differentials are differences in wages between different types of workers.

Therefore, the topics for annual collective bargaining should be determined in accordance with annual enterprise performance and the long-term wage bargaining plan. They may include: basic forms of wage distribution; whether the wage is linked to departmental performance or enterprise performance, to profit targets or output targets; criteria for raises, such as annual performance evaluation and job titles; overtime wage rates, wage rates when production stops or is running at half capacity, post-waiting allowance and early retirement allowance; wage



increases or decreases for different posts; bonuses and other incentives; wage reduction during industry-wide recessions; lay-off compensation and so on. They may also include: enterprise-specific benefits, the level of the housing common reserve fund, paid wedding and bereavement leave, supplementary insurance and so on (Xu Dongxing, 2003).

Judging by the current state of Chinese trade unions, trade union officials should improve their collective wage bargaining skills, acquire sufficient knowledge to be able to analyse the relevant factors correctly, ensure the effectiveness of collective wage bargaining and protect the rights of workers (Yan Hui, 2007).

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# **Labour Relations and Collective Bargaining in South-Korea**

Moving from Enterprise-level Collective Bargaining to  
Industry/Sectoral-level Collective Bargaining

Youngmo Yoon

## **1. Introduction**

Collective bargaining in Korea was, for a long time, shaped by two strong traditions. One was the strategy of the ‘developmental’ state, the aim of which was to control labour costs and labour activism within the framework of an export-oriented economic growth policy and a statist society. The other evolved from the democracy movement which built up during the years of authoritarian rule and pushed for political democracy and social solidarity. Trade unions in Korea reacted to these two traditions, however, with different strategies, which became a source of fundamental controversy within the labour movement. Prior to 1987, the structure of trade unions and collective bargaining was determined by the government. From the 1970s onwards, unions vacillated between enterprise unionism and industrial unionism, depending on what the government thought was easier to control. When a new trade union activism emerged in 1987, workers’ pressure for autonomy and self-



organisation had to adapt to the existing structure of enterprise unionism, which had been established and maintained by the government since the early 1980s.

From 1987 onwards, during the period of democratisation, when a new wave of trade union organising swept across the country – both in the major industrial regions and service sectors in urban areas – companies, rather than branches and industries, became the main focus of industrial relations. Collective bargaining at enterprise level became the dominant form of wage-fixing, making room for the development of a trade union culture based on ‘enterprise unionism’. However, since the economic crisis in 1997, a large number of trade unions in Korea have decided to eschew narrow ‘enterprise unionism’ and are calling for a change to industry-level collective bargaining. Hand-in-hand with expanding the scope of collective bargaining, unions are seeking transformation from company unions to unions organised at the industry level. This effort has not received any kind of blessing from the government, which has refused to acknowledge the positive value of dynamic industrial relations based on active trade unionism.

The need for a transformation to ‘industrial unionism’ is due to the limitations of ‘enterprise unionism’. Unions found that ‘enterprise unionism’ had a tendency to pursue outcomes which benefited only the employees of the company at which collective bargaining took place. Company bargaining resulted in vast differences, depending on the strength of the individual union and the state of the company. In addition, a large number of workers remained uncovered, especially if they worked in non-unionized companies. At the same time, collective bargaining coverage was limited to workers employed directly by the company as regular employees. ‘Irregular employees’, whether employed indirectly through multi-tiered in-house subcontracting or directly, but on a part-time basis or with fixed-term contracts were excluded from bargaining agreements. This situation was reflected in trade union membership, which was mostly confined to the ‘regular’ employees of a company.



## 2. Crisis of Labour Relations under 'Enterprise Unionism'

During the economic crisis, when many companies folded, enterprise unions began to realise that their future was hostage to the success of individual companies, particularly without an effective state social security system. The loss of one's job carried with it the immediate threat of social marginalisation. Unions began to realise the need to create a level playing field within an industry and to build up resources to provide for the social welfare of workers not linked to the fate of a specific company.

**Table 1**                                      **Features of enterprise unionism**

Some features of enterprise unionism and enterprise collective bargaining in Korea	
Union structure and location of power	Unions at the company level have autonomy in terms of organisation, collective bargaining and collective action, including strikes
Shape of industrial relations	<p>Constant shift in balance of power between workers and employer at each company, without stability, leading to constant stand-offs and tugs of war</p> <ul style="list-style-type: none"> <li>• _ resulting sometimes in worker dominance</li> <li>• _ sometimes in employer dominance</li> <li>• _ each side invests considerable resources in maintaining its position vis-à-vis the other</li> </ul>
Worker participation in work process	No distinction in procedure between conflictual bargaining and cooperative/consultative joint efforts
Industrial action, strikes	Either high frequency of small-sized strikes or no strikes (strikes can prolong bad feeling)
Views of actors	
Trade unions	Preferred by workers who are in an advantageous position (large companies, public establishments); results in a fragmented union movement; little possibility for developing a common agenda for the broader population of workers, especially with regard to common concerns, society-wide institutions and political influence
Employers	<p>Provides the capacity to react flexibly and swiftly to company-specific changes</p> <p>Provides an opportunity to cultivate a company-friendly union; as union organisation is within the company, the employer can intervene in the workings of the union, including the election of its leaders, maintaining close personal relations with them</p> <p>Threatens competitive wage increases in times of economic growth</p>



Some aspects of the crisis of ‘enterprise unionism’ can be found in statistical data. Union density, which peaked at just below 20 per cent in late 1980, started to decline thereafter, dropping below 15 per cent in 1994 and stagnating since 2002, at around 10 per cent. Currently, only 1.6 million workers are organised in trade unions. Of these 1.6 million trade union members, the majority – 62.5 per cent – are employed in large companies (more than 1,000 employees). Thus, most union members belong to better-endowed companies, which can afford to pay higher wages.

The crisis of representation becomes even more evident when union density among workers in various categories of ‘non-regular’ employment is examined. Unionisation of these workers was 2.4 per cent (190,000 workers) in 2003, 3.2 per cent (270,000) in 2005 and 2.8 per cent (240,000) in 2006. When union density is unpacked, the density among workers in ‘regular employment’ rises to 21.7 per cent. The low membership of non-regular workers demonstrates the representational profile of trade unions. In 2003, only 11.5 per cent of union members were workers in ‘irregular employment’. The situation has not changed greatly – despite the much publicised efforts of the trade unions – in subsequent years: 13.9 per cent in 2004, 15.4 per cent in 2005 and 13.7 per cent in 2006.

**Table 2**                      **Union membership, by firm size (2003)**

Firm size	Unions	Union members	All employees
Less than 50 workers	2976 (49.9%)	50446 (3.3%)	79.3%
50—99 workers	1041 (17.5%)	74206 (4.9%)	8.9%
100—299 workers	1350 (22.6%)	223547 (14.9%)	9.6%
300—499 workers	235 (3.9%)	91187 (6.1%)	3.5%
500—999 workers	183 (3.1%)	124925 (8.3%)	3.4%
1000 workers and more	186 (3.1%)	941861 (62.5%)	5.3%
Total	5971 (100%)	1506172 (100.0%)	100.0%

Note: Ministry of Labour data do not include ‘unregistered unions’.

Sources: Ministry of Labour, Press Release, 9 November 2006; KLI, KLI Labour Statistics, 2005.



**Table 3**      **Union density, by employment type (August 2004)**

Employment type	Wage earners	Union members	Union density
Permanent	7,700,000	1,735,000	22.5%
Temporary	4,813,000	72,000	1.5%
Daily	2,071,000	8,000	0.4%

Source: Korea Labour Institute, *KLI Labour Statistics*, 2005.

The trade union movement in Korea, especially the Korean Confederation of Trade Unions (KCTU), has proclaimed its intention to transform enterprise unionism into industrial unionism. It has pointed out the many limitations of enterprise unionism, as listed below, in reaffirming its commitment to industrial unionism:

- it is difficult to organise workers in micro, small and medium-sized enterprises and especially workers in irregular employment, when unions function only as enterprise-bound organisations;
- enterprise unions promote a company-oriented consciousness and selfishness and thus obstruct broader workers' solidarity and unity;
- enterprise unions contribute to the fragmentation of the workers and the labour market by widening wage differentials between companies (especially in terms of firm size);
- a trade union movement based on enterprise unionism is limited in its ability to initiate and lead broader campaigns for social security and social, political and economic reform at the national level; and
- enterprise unionism makes it difficult for the trade union movement as a whole to exert its influence on society and politics in general as a powerful political force.

The twin crisis of enterprise unionism in Korea – its inability to provide social security outside the walls of specific companies and the crisis of trade union representation and workers' solidarity – has propelled trade unions to develop a new strategy and to move forward towards the



development of ‘industrial unionism’. Two processes are under way. While the efforts of unions to reorganise themselves have gathered considerable momentum, the changes in the legislative framework for collective bargaining beyond the company level are still in their early stages.

In reorganising themselves, trade unions are faced with two challenges. On the one hand, they have to transform themselves organisationally from enterprise unions into industrial unions, dissolving smaller organisational units and coming together in larger structures, while on the other hand, they have to build a new platform for joint bargaining with employers at the industry level. Success on these two fronts has been mixed.

### **3. Transforming Enterprise Unions into Industrial Unions**

Despite the principled stance on the need to move towards industrial unionism, until 1997 there was little progress. A new factor that propelled the movement towards national industrial unions arose from the drastic changes in the labour market situation in the aftermath of the Asian economic crisis which hit South Korea in late 1997. The unending series of mass retrenchments, workforce downsizing and outsourcing, undertaken in the name of labour market flexibility, and the defensive position the unions were forced into in their wage and collective agreement negotiations, led to losses in terms of the employment (job) security, wages and improvements in working conditions they had won at company level as enterprise unions over the years. Trade union members were driven out of jobs in droves and converted into ‘irregular’ workers, without being able to put up any kind of resistance. The unions found themselves totally powerless. Overall trade union density fell back to the level before the 1987 upsurge in the trade union movement. The economic crisis had the potential to shake the trade union movement to its core, as



its representativeness came under serious challenge.

Widespread and sudden exposure of the limitations of enterprise-based trade unionism engraved in the minds of union leaders and members alike the legitimacy of the need to transform the trade unions into national industrial unions. The organisational transformation into larger unions began in earnest in 1997, resulting in successful restructuring in the health and medical sector. This led to the formation of the first nationwide industrial union, the *Korean Health and Medical Workers Union* in 1998.

The organisational transformation from enterprise unions to multi-enterprise unions and to national unions has been fairly successful. In 1996, only 90,000 workers (5.5 per cent of total union members) were members of multi-enterprise trade unions. Ten years later, in 2006, some 900,000 workers had become members of just over 50 nationwide industrial unions. There has also been a significant development in the establishment of regional general unions and ‘occupational’ unions. The remaining organised workers, out of a total of 1.6 million, belong to some 6,000 enterprise unions.

The organisational transformation of trade unions has been undertaken in the following sectors:

- banking
- metal
- hospitals
- media (newspapers and TV-radio)
- branches of the financial sector (insurance, securities and so on)
- research services
- branches of the construction sector (ready-mixed concrete delivery vehicles, plant maintenance, tower crane operators, carpenters and so on)
- branches of the transport sector (cargo truck drivers, taxis, buses and so on)
- municipal services
- teachers, civil servants
- public sector (government agencies and transportation [railways-subways, buses, taxis])



#### **4. The Struggle for Collective Bargaining at Industry Level**

The most pronounced progress in transforming company-based trade unions into industry-wide structures has been recorded in the banking sector, the metal sector and the hospital sector. These changes have been accompanied by varying degrees of successful industry-wide collective bargaining.

##### **4. 1 Banking Sector**

In the banking sector, collective bargaining takes place at the industry level, between the *Korean Financial Industry Union* and an ad hoc group of banks represented by the *Korea Federation of Banks*. The negotiating partners usually agree on a ‘bandwidth’ for wage increases, which allows union structures at each national bank group to negotiate a specific wage increase within the pre-determined limits. During the 2008 collective bargaining round, both sides also agreed that the employers would enter the bargaining round in 2009 represented by a banking sector employers’ organisation, which should be established by then.

The *Korean Financial Industry Union* – the main industrial union in the banking sector – has a long history, starting from the *National Association of Bank Workers Unions* in 1960. It has also had some experience of operating as an industrial union, prior to 1980. Furthermore, it also managed to set up a binding ‘sectoral level’ central labour-management council in the banking industry. In the 1980s, following the forced transition to enterprise unionism by a change in the law in 1980, the union tried to stick to the previous arrangements and there were numerous cases of joint collective bargaining, where the *Federation of Bank Workers Unions* and an affiliated enterprise-level union joined up to bargain with a single bank employer.



The employers in the banking sector were also not so vehemently opposed to the idea of centralised collective bargaining, as wage levels and working conditions are similar across the banking industry, and there was de facto ‘pattern bargaining’, where the results of an agreement in one of the major banks always affected negotiations in other banks.

Collective bargaining at the industry level focused mainly on general issues facing all the banks and banking workers, such as the introduction of a five-day working week and reductions in business hours, without going into more detail about specific working conditions. Industry-level collective bargaining established a tradition of setting broad parameters for wage increases, which gives localised collective bargaining in individual banks room to develop specific, single-enterprise arrangements.

#### **4. 2 Metal Sector**

Industry-level collective bargaining in the metal sector – led by the KCTU-affiliated *Korean Metal Workers Union* (KMWU) – has developed in two stages. The *Korean Metal Workers Union* was formed in 2001, when some 40,000 workers in about 200 enterprise unions affiliated to the *Korean Metal Workers Federation* (KMWF) decided to join together into a single industrial union. The actual transformation required each of the enterprise unions to go through a process of ‘dissolution’ and adopt a resolution to be part of an industrial union. According to the statutes, this required a two-thirds majority of all members of each union. In 2001, unions in large companies were mostly unable to join. The *Hyundai Motor Workers Union*, for example, which alone had a membership of more than 40,000, failed on two occasions to secure the required majority of its members. As a result, until 2006, the metal sector industrial union represented only 40,000 members – mostly from small and medium-sized firms – while a further 100,000 workers, mostly from larger firms, remained members of enterprise unions.



While trade union organisational transformation was one factor in pushing for collective bargaining at industry level, the employers resisted the idea of transferring bargaining authority to any employers' association at industrial level. In order to overcome employer resistance, the unions adopted different methods to bring employers together at one negotiation table. This took the form of 'joint collective bargaining', 'group collective bargaining' or 'diagonal collective bargaining' (see box for a brief description of each of these forms of collective bargaining). These different methods also reflected the preparedness of union members at different enterprises to accept the concept and discipline of collective bargaining at a higher organisational level.

Collective bargaining undertaken by the KMWU developed through different phases. Immediately after its establishment in 2001, it took the form of 'joint collective bargaining' and 'diagonal collective bargaining'. In 2002, it progressed to 'group collective bargaining' by regional locals, whose main objective was to secure from employers a 'basic agreement' which committed them to more centralised collective bargaining the following year. In 2003, employers of 97 enterprises authorised and mandated collective bargaining to a select group of employer representatives. This led to the first ever 'semi-centralised' collective agreement concluded by the *Korean Metal Workers Union* and a (still small) employers' negotiating group. The collective bargaining agreement contained provisions on a 40-hour, five-day working week, protection of workers in irregular employment, measures on muscular-skeletal disorders and trade union rights in the workplace. It was the strategy pursued by the *Korean Metal Workers Union* which finally led to the formation of an industry-wide employers' organisation in early 2006. Despite the continued progress in industry-level bargaining, however, substantial issues, including agreement on wages, were still settled mainly at the enterprise level.



**Brief chronology of the development of industry-level  
collective bargaining in the metal sector**

2001	Formation of the Korean Metal Workers Union (membership: 30,795)
2002	'Group collective bargaining'; conclusion of 'basic agreement' at 108 enterprises
2003	Centralised industry-level collective bargaining; unified agreement, including five-day working week
2006	Formation of metal sector employers' collective bargaining organisation
2006	Successful vote for transformation to industrial union at larger enterprises

The second stage of developing collective bargaining at industry level in the metal sector began with the successful dissolution of enterprise unions at large companies, such as the *Hyundai Motor Workers Union* on 30 June 2006. Trade union members in some 14 enterprise unions, with a total membership of over 90,000, went to the ballot box, including the *Hyundai Motor Workers Union*, and decided to become part of the *Korean Metal Workers Union*. KMWU emerged as an industrial union representing some 150,000 workers.

During the first year, the endeavours of the enlarged industrial union to engage in collective bargaining in the metal sector in 2007 were plagued by a lack of preparedness and, in particular, by the remaining enterprise-union structures at the newly converted unions. Complications arose, also, due to the resistance of employers from larger companies to join the employers' organisation that had been established earlier. There were signs that some groups – both employers and unions – would refuse to subject themselves to the discipline established previously by smaller organisations. As a result, industry-level centralised collective bargaining was limited again to those workplaces at which industry-level collective bargaining had taken root since 2001, while larger companies still settled for enterprise bargaining. As yet, the second stage of industry-wide collective bargaining in the metal sector has not made significant progress. It is still marred by unexpected developments on both sides: by the resistance of employers from large companies, as well as the unions' own



failure to master organisational discipline in collective bargaining.

**Box: Different forms of collective bargaining in Korea**

a. *Enterprise-level collective bargaining*: This is the dominant form. Collective bargaining takes place between the employer of an enterprise and the union established at the workplace. The collective bargaining agreement applies only to the members of the union (or employees) at the particular company/establishment/workplace. However, the agreement may also determine coverage and specify which employees it will apply to.

b. *Unified collective bargaining*: This takes place between a national-level trade union organisation and a national-level employers' organisation. Both sides have, by virtue of the rules and constitutions of their organisations, the authority and mandate to conduct and conclude collective bargaining affecting all their members.

From a trade union point of view, industry-level bargaining can be conducted either by an industry-wide trade union or an industry-wide federation of trade unions, if its members, the enterprise unions, have delegated bargaining authority to the federation.

An industry-level collective bargaining agreement may set the standard working conditions in the particular industry, while leaving further conclusions to collective bargaining at enterprise level.

An industry-wide union – an industrial union – usually allocates the authority and mandate to conduct collective negotiations to the president of the organisation.

Unified collective bargaining centralises the collective bargaining process, as well as the right and resources to take industrial action.

Unified collective bargaining requires the bestowal of authority for bargaining at higher levels on the employers' side, as well. (In the case of the industry-wide collective bargaining conducted by the KMWU in 2003, there was no employer organisation yet. Rather, the employers of individual establishments transferred their bargaining authority and mandate to a temporary body, which became known as the 'KMWU-associated employers'.)

(Box cont'd)



c. *Diagonal collective bargaining* : This reflects an organisational asymmetry between trade unions and employers. Diagonal collective bargaining is adopted by a national trade union organisation (either a federation of individual enterprise unions or an industrial union) when there is no representative employers' organisation which functions as a counterpart in collective bargaining with the national union organisation. Bargaining is conducted by a national trade union structure with the employer of a single establishment at enterprise level.

Diagonal collective bargaining may be adopted as a general collective bargaining strategy by a national (industrial) organisation or as a way of dealing with collective bargaining problems at a single enterprise.

In the former case, the collective bargaining representatives selected by a national organisation of trade unions engage in a series of collective bargaining rounds with individual employers of numerous establishments under its 'jurisdiction', on a one (national organisation of unions) to one (a single employer) basis.

It can also be adopted when wage levels and working conditions differ greatly between the various workplaces represented by the national union organisation. It is also often used as a means of effecting pattern bargaining. It is aimed at obtaining an industry-wide outcome on the basis of a general collective bargaining agenda and strategy.

d. *Joint collective bargaining* : This is a form of collective bargaining in which the national trade union organisation and enterprise-level trade union form a single bargaining team to bargain with the employer of a single enterprise.

This method of collective bargaining can overcome the weakness of enterprise-level collective bargaining. It is also a way for the national union organisation to exercise some influence on the collective bargaining process of a strong enterprise trade union. It may require the enterprise-level union to transfer some authority to the federation for collective bargaining purposes. This form of collective bargaining differs from diagonal collective bargaining in the fact that, in the latter, the national organisation is the central actor in the bargaining process.

e. *Group collective bargaining* : This is a form of collective bargaining in which a trade union organisation engages in collective

(Box cont'd)



bargaining with a group of employers. On the union side, the bargaining body may be a single national union organisation (industrial union or a federation of enterprise unions) or a group of unions forming a council that corresponds to the participating employers. This form of collective bargaining can achieve a common set of outcomes for the establishments represented in substantial areas of collective bargaining.

#### **4.3 Achievements of Industry-level Collective Bargaining in the Hospital Sector**

The *Korean Health and Medical Workers Union* (KHMWU) was formed in 1998, following concerted efforts by the *Korean Federation of Health and Medical Workers Unions* (KFHMWU). The transformation of organisational structure brought some 100 unions from different hospitals into one national union, with a total membership of over 40,000. (Union density in the sector, however, remains low, at around 10 per cent.)

The *Korean Health and Medical Workers Union* has considerable experience in its efforts to overcome the limitations of enterprise bargaining. It used ‘diagonal collective bargaining’ even before the transition to industrial unionism. KHMWU applied a gradual strategy to unify collective bargaining. The first stage was aimed at securing ‘joint collective bargaining’ on the basis of ‘diagonal collective bargaining’ arrangements. The second stage called for the establishment of ‘unified collective bargaining’. The union managed to conclude an industry-level central collective bargaining agreement for the first time in 2004, applying to more than 100 hospitals.

Industry-level collective bargaining in the hospital sector has achieved far-reaching significance, especially with regard to wages and irregular employment. And the hospital sector has become the first sector to introduce effective industry-wide wage negotiations. Initially, wage bargaining was limited to setting the basic minimum (not standard) wage



increase, while leaving the negotiations on specific wage increases to hospital-level collective bargaining.

In 2004, KHMWU agreed with the employers that, henceforth, industry-level agreements should have priority over supplementary bargaining at individual hospitals. After this, the union was able to reach a standard arrangement for working hour reductions (introduction of a 40-hour, five-day working week), as well as uniform wage increases. The new approach involved coordination of the interests of trade union members in different hospitals, whose capacity to pay differed widely, based on their size. However, some of the union chapters in the larger hospitals objected to the concept of wage increases based on average capacities. As a result, union chapters in around 10 large hospitals split from KHMWU and established a separate federation, reverting back to enterprise unionism and single-hospital bargaining.

Nevertheless, industry-level bargaining in 2004 continued to produce substantial agreements on wages and other important issues.

Irregular employment has evolved gradually as an issue tackled by means of annual agreements. In 2004, the KHMWU organized a campaign to extend the application of the Labour Standards Act, occupational health and safety regulations and social insurance requirements to irregular workers in direct employment. In 2005, the union called for the conversion of directly employed irregular workers (part-time, fixed-term employees) into full-time, regular employees. It also demanded job security for temporary contract workers and indirectly employed irregular workers (who work in hospitals as employees of a firm contracted by the hospital). It also called on hospital managements to introduce a criterion on the capacity of contractors to ensure appropriate wages for their employees. In 2006, the union went a step further and campaigned for improvements in the wages and working conditions of directly employed irregular employees, while also demanding job continuity for indirectly employed workers when their contractors changed.



***Landmark achievement in industry-level collective bargaining in 2007***

Collective bargaining for 2007 began on 23 April and lasted for two months and 14 days. It started with a union demand for a 10 per cent wage increase, the same increase for irregular workers and the conversion of irregular workers into regular employees. Employers initially responded with a call for a wage freeze or, alternatively, a 1.6 per cent increase and categorical rejection on all other union demands. In the course of the negotiations, the unions reformulated their demands, producing a new formula to rebalance the interests of irregular and regular employees:

- flexibility in wage increases for regular workers on condition that irregular workers are converted into regular workers;
- wage increase of 3–6 per cent, plus additional funds to finance the cost of converting irregular employees into regular employees.

An agreement was concluded without a strike. Regular workers had to forgo about a third of their possible wage increase and the resulting savings in wage costs were set aside to finance employment conversion and improvement of working conditions for irregular workers. As a result, a total of 30 billion won was provided to improve the situation of irregular employees.

**Collective bargaining agreement 2007: wage increase and employment conversion**

	Total wage increase	Actual wage increase for regular employees	Portion of wage increase set aside for employment conversion
Private university hospitals	5.3%	3.5%	1.8% *
Public university hospitals	4%	2.5%	1.5%
Private medium-sized hospitals	4.3%	3%	1.3%

Note: \* A 1% wage increase is equivalent to 1–2 billion won for the whole of the bargaining unit.

The industry-level collective agreement brought significant improvements for irregular workers, who made up 20 per cent of the workforce (11,800)



in unionised hospitals. Over 6,000 workers with non-permanent contracts (direct employment) benefited when their employment status changed to that of permanent employee. Over 5,000 indirectly employed irregular workers (employees of subcontractors to the hospitals) saw improvements in their wage and welfare provisions. At the same time, the union managed to introduce an industry-wide minimum wage for indirectly employed irregular workers (mostly security and cleaning services), raising the wage floor.

There were two related changes in industrial relations. As in the case of the metal sector, the efforts of the union to develop industry-level bargaining gave rise to the establishment of an employers' organisation which received a mandate to bargain on behalf of its members. Employers originally resisted the idea of transferring bargaining authority to an employers' association, as illustrated by the deadlock in collective bargaining in 2005. In 2006, they agreed to move forward and to establish their own organisation by the end of the year. Despite a further delay, in 2007 the employers' organisation was formed to be the counterpart of the union in nationwide, industry-level collective bargaining.

The development of collective bargaining at industry level has also resulted in significant changes in the shape and intensity of industrial disputes. The early days of industry-level collective bargaining were marked by long and agonising disputes. For example, collective bargaining in 2004 gave rise to 13 days of strikes involving the entire union and 67 cases of strikes at individual hospitals, in the course of just over three months of negotiations. Having gone through a difficult period in the previous year, both parties approached the negotiations in 2005 with greater caution. This resulted in a dramatic reduction in strike days. There were only three days of strikes involving the whole union, while disputes in individual hospitals were limited to 12 cases. The maturing of industry-level bargaining could be seen over the next two years, when there was only one strike day (11 cases of individual hospital-level disputes) in 2006 and one industry-wide strike in 2007.



The decline in strike incidence and, in particular, the decline in disputes in individual hospitals (subsequent to industry-level bargaining) is indicative of the growing stability of industry-level collective bargaining. This reflects an increased capacity of the union to coordinate the workers' demands. The same can also be said of employers, as indicated by the establishment of their own collective bargaining organisation. Another dimension is the widening agenda for collective bargaining. New issues are increasingly being included to address industry-wide concerns. This has the effect of moderating hospital-specific demands, as the interests of workers as a whole are addressed at the industry level.

## **5. Conclusion**

Trade unions in Korea have been fairly successful in transforming their organisational structure from one characterised by enterprise unions into one characterised by industry unions. This process has received much of its momentum from experiences during periods of economic crisis, when unemployment leapt and the very existence of trade unions was threatened by the collapse of their company or the loss of employment for a large part of their membership. But while unions moved upwards in terms of organisational scale and started to push for industrial bargaining, employers mostly rejected such a move and preferred to meet trade unions at company level and to stick with single-enterprise agreements on wages and working conditions. Nevertheless, trade union pressure in a few sectors, such as banking, metal and hospitals, finally paid off and opened the door for the conclusion of industry-wide bargaining agreements. In this process, employers were confronted with the need to follow trade union restructuring by establishing industry-wide employers' associations, which received a mandate from their members to bargain and conclude agreements on their members' behalf.

Overall, industry-level collective bargaining in Korea remains in its infancy and is still limited. The paramount challenge in improving



collective bargaining is to increase union density and widen the scope of collective bargaining. Of special importance is the success of a strategy to embrace irregular employees. Trade unions have to put the policy of transforming irregular and flexible employment patterns into regular labour contracts high on their agenda. The challenges of employment flexibility remain of central concern for both the trade unions and the employers, although their views on the matter are rather different.



# Collective Bargaining in Europe – An Overview

Thorsten Schulten

## 1. What is Collective Bargaining About?

The term ‘collective bargaining’ was first used by the British academic and socialist reformer Beatrice Webb in the late nineteenth century. Basically, collective bargaining comprises a process of collective negotiations on wages and working conditions. It represents an alternative to both individual bargaining between employers and individual workers and unilateral decision-making on the part of the employer. Historically, collective bargaining has developed as a result of various struggles of the labour movement, which originally had to force employers to recognise trade unions as collective organisations defending workers’ interests.

From a workers’ perspective, collective bargaining is a crucial instrument for overcoming the structural imbalance of power between employers and individual employees. It is intended to help workers to achieve equitable wages and working conditions. Moreover, collective bargaining can be interpreted as a form of industrial democracy which enables workers to participate in the regulation of work and to have a say in the distribution of income.

Although, historically, employers have opposed collective bargaining, in the course of time many have come to recognise that it has



some advantages even for them. Since, over the years, in most industrialised countries, collective bargaining has become highly institutionalised and takes place in a well-defined legal framework, from an employer's point of view it represents a relatively 'calculable' way of dealing with possible conflicts. Moreover, if collective bargaining takes place – or is at least coordinated – at sectoral level, it creates a certain competitive order in which all employees become subject to equal working conditions, so that labour costs are taken out of competition. This has the advantage that, in order to increase competitiveness, companies now have to raise productivity, provide better quality and create more innovative products, rather than simply cutting labour costs. Collective bargaining can, therefore, be seen as an important institution, enabling a more 'high road' economic development model.

Today, in most countries, collective bargaining takes place between autonomous trade unions, on the one hand, and individual employers or employers' associations on the other. Both parties have to be independent from one another. There are many international conventions which identify collective bargaining as a fundamental social right. For example, in 1949, the International Labour Organisation (ILO) adopted a convention on the 'right to organise and collective bargaining' (ILO Convention No. 98), according to which 'measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements' (Article 4). A 'right to bargain collectively' is also recognised in the European Social Charter of 1961 (Article 6), the EU Charter of Fundamental Rights of 2000 (Article 28) and the national constitutions of various European countries.



## **2. Varieties of European Capitalism – Varieties of Collective Bargaining Regimes**

The concrete forms and institutions of collective bargaining in Europe vary considerably, depending on the national economic, social and political context, including the national industrial relations system. There are various collective bargaining *regimes*, which show significant differences in terms of the strength of trade unions and employers' associations, the levels of collective bargaining and collective bargaining coverage. The national collective bargaining regimes are embedded in the wider social and economic systems and can be seen as a core institution of national models of capitalism.

In Europe, there are at least five different models of capitalism, with corresponding collective bargaining regimes (Table 1). First, there is the *Nordic model*, covering the Scandinavian countries, states such as Denmark, Sweden or Finland which can be characterised as a politically coordinated market economy. The collective bargaining regime of the Nordic model is characterised by a high union density, a medium employers' density, a primarily sectoral bargaining model and high collective bargaining coverage. The second variant of European capitalism is the *Central model*, covering countries such as Belgium, Germany, the Netherlands and Austria. The Central model also represents a coordinated market economy, with a collective bargaining system characterised by medium trade union density, high employers' density, sectoral bargaining and relatively high bargaining coverage. Thirdly, there is the *Southern model*, including countries such as France, Greece, Italy and Spain, which have a rather state-oriented market economy. The corresponding collective bargaining regime is based on a relatively low trade union density, a high employers' density, sectoral bargaining as the dominant bargaining level and high collective bargaining coverage. The latter is strongly supported by the state, which usually extends collective agreements to employees and companies which are not directly represented in the bargaining.



**Table 1 Varieties of European capitalism and collective bargaining regimes**

	Nordic	Central	Southern	Western	Eastern
Countries	Denmark, Finland, Sweden	Belgium, Germany, Netherlands, Austria, etc.	France, Greece, Italy, Spain, etc.	UK, etc.	Czech Republic, Hungary, Poland, Slovakia, etc.
Type of market economy	coordinated	coordinated	state-oriented	liberal	state-oriented or liberal?
Trade union density	high	medium	low	medium	low
Employers' density	medium	high	high/medium	medium	low
Level of bargaining	sectoral	sectoral	sectoral	company	company
Bargaining coverage	high	high	high	low	low

Source: Based on European Commission, 2009, p. 49.

A fourth model of European capitalism is the *Western model*, the prototype of which is the United Kingdom. The Western model can be categorised as a liberal market economy, with medium trade union and employers' densities and a collective bargaining regime characterised by a decentralised system of company bargaining and rather low bargaining coverage. Finally, the fifth type is the *Eastern model*, covering most of the new EU member states such as Poland, Czech Republic, Slovakia, Hungary etc. The Eastern model is the outcome of the transformation of the former socialist economies since the early 1990s. As a result, a new model of capitalism emerged, which is a mixture of a – partly – still state-oriented and an increasingly liberal market economy. The corresponding collective bargaining regime of the Eastern model is characterised by a rather low density of trade unions and employers' associations, as well as rather fragmented and decentralised bargaining systems, with very low bargaining coverage.

To summarise, there is no single European collective bargaining regime, but a wide range of regimes which correspond to the varieties of

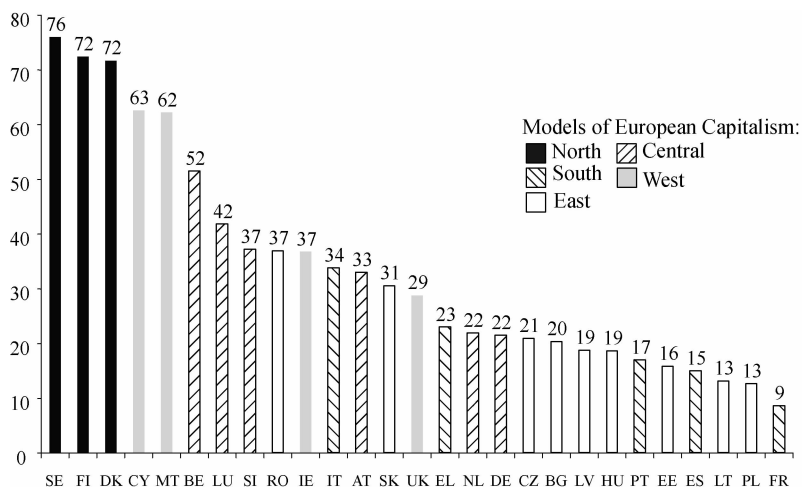


European capitalism. However, all European countries have accepted workers' rights to organise in autonomous trade unions and to call on employers to engage in collective bargaining. The same holds true for employers, who have the right to organise in independent employers' associations. Concerning the density and political meaning of these collective interest organisations, there are great differences from country to country.

### 3. Trade Unions and Employers' Associations

The development of trade unions and employers' associations is the result of a long historical process reflecting specific national political developments and power relations between labour and capital. Today, there are major differences in the organisational strength of both sides of industry. On the employees' side, trade union density varies between 76 per cent in Sweden and 9 per cent in France (see Figure 1). The highest density is in the Scandinavian countries, where about three-quarters of all employees are still members of a trade union. The high union density is supported by

Figure 1 Trade union density, 2004–2005 (%)

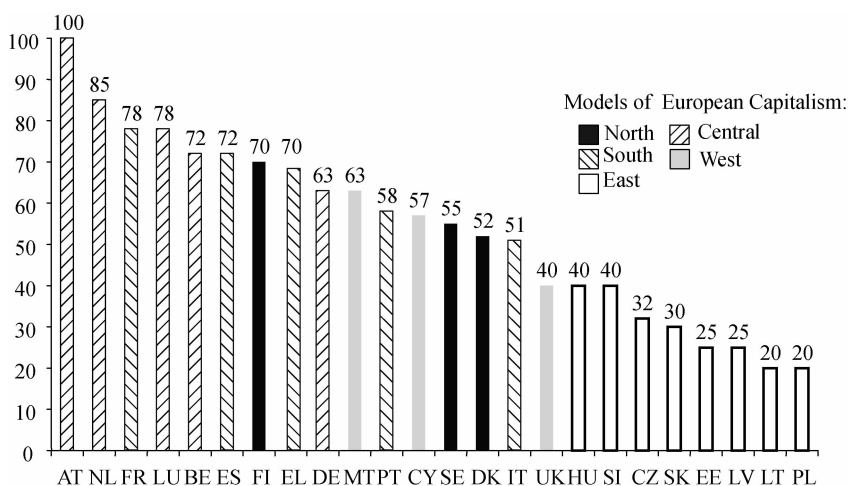


Source: European Commission, 2009.



specific institutional arrangements (in particular, the management of unemployment insurance by the trade unions) and is a major characteristic of the Nordic model. A majority of employees are also trade union members in Cyprus, Malta and Belgium. However, in most European countries, union density is below 50 per cent, while in 13 states it is below 25 per cent. The lowest trade union density can be found in countries which belong to either the Southern or the Eastern models of capitalism.

**Figure 2 Density of employers' associations, 2006 (%)**



Note: AT=Austria, BE=Belgium, BG=Bulgaria, CY=Cyprus, CZ=Czech Republic, DE=Germany, DK=Denmark, EE=Estonia, EL=Greece, ES=Spain, FI=Finland, FR=France, HU=Hungary, IR=Ireland, IT=Italy, LT=Lithuania, LU=Luxembourg, LV=Latvia, MT=Malta, NL=Netherlands, PL=Poland, PT=Portugal, RO=Romania, SE=Sweden, SI=Slovenia, SK=Slovakia, UK=United Kingdom.

Source: European Commission, 2009.

On the employers' side, the densities of employers' associations vary between nearly 100 per cent in Austria (where there is de facto compulsory membership) and 20 per cent in Poland and Lithuania (see Figure 2). With the exception of the Scandinavian states, the rate of organisation for the employers is always higher than the trade union density. The highest percentage of organised employers is found in



countries belonging to the Central and Southern models, while the lowest employers' association density exists in the East European countries.

#### **4. Legal Framework of Collective Bargaining**

Collective bargaining is regarded as a fundamental social right which in most European countries is guaranteed – explicitly or implicitly – by the constitution. In addition, there are various procedural rules for collective bargaining which are laid down either in the Labour Code (for example, in France), or in special collective bargaining acts (for example, in Germany), or have been laid down by the peak trade union and employers' organisations in so-called Basic Agreements (for example, in Sweden). The procedural rules can contain a definition of the parties which may conclude collective agreements, extension mechanisms, bargaining rules, rules for conflict resolution, and so on.

There are some significant differences between the various European countries regarding the legal coverage of collective agreements. Basically, only those employees and employers are covered by collective agreements which are members of one of the bargaining parties, that is, a trade union or employers' association (see Table 2). However, most countries have so-called extension procedures which may extend coverage to other workers or employers. As far as workers are concerned, 19 out of 25 EU member states have a so-called 'erga omnes' rule, according to which not only trade union members but all workers at a certain company are covered by collective agreements. Moreover, also in those countries in which, in a strictly legal sense, collective agreements cover only trade union members, in practice the employers often extend the collectively agreed conditions to all workers in order to avoid unequal treatment in the company. In some countries (for example, Germany), the employers are also not allowed to pay non-union members a higher wage for the purpose of giving union members an incentive to leave the union.



**Table 2**      **Parties covered by collective agreements in Europe**

	Workers		Employers
	Trade union members only	All workers	Extension procedure
Austria		X	Yes
Belgium		X	Yes
Bulgaria	X		Yes
Cyprus		X	No
Czech Rep.		X	Yes
Denmark		X	No
Estonia	X		Yes
Finland	X	(X)	Yes
France		X	Yes
Germany	X		Yes
Greece		X	Yes
Hungary		X	Yes
Italy		X	Yes
Latvia	X		Yes
Lithuania	X	(X)	No
Malta		X	No
Netherlands		X	Yes
Poland		X	Yes
Portugal		X	Yes
Romania		X	No
Slovakia		X	Yes
Slovenia		X	Yes
Spain		X	Yes
Sweden	X		No
UK	X		No

Source: Schulten, 2005.

As far as employers are concerned, in 18 out of 25 EU member states the government has, under certain conditions, the legal power to extend collective agreements to all employers in a particular sector, while in seven



countries (among them Denmark, Sweden and the UK) there is no legal possibility for extension. The use of such extension mechanisms can also vary a great deal from country to country. While in France, for example, more than 90 per cent of all collective agreements are extended to other employers, in Germany less than 2 per cent are extended.

### **5. Levels of Collective Bargaining**

In principle, collective bargaining in Europe can take place at various levels, including national, sectoral and company. Where there is national-level bargaining, it often contains a more general framework for working conditions rather than wages. However, there are two countries (Belgium and Ireland) in which general wage increases are determined at national level, with complementary bargaining at sectoral and company level. In five countries (Estonia, Greece, Hungary, Lithuania and Romania) there are national collective agreements on minimum wages.

In 13 European countries, the sector is the dominant level of collective bargaining on wages. The fundamental idea of sectoral bargaining is to have equal pay levels within a whole branch, sector or industry in order to limit competition on labour costs. Sectoral bargaining is dominant in the countries belonging to the Nordic, Central and Southern models of European capitalism, as well as in a few states of the Eastern model. Usually, sectoral bargaining is complemented by bargaining at company level, which often provides additional pay increases. Some countries also have so-called ‘opening’ or hardship clauses within sectoral agreements which allow companies experiencing economic difficulties to diverge from the sectoral agreement for a certain period.



**Table 3**                      **Levels of collective bargaining in Europe**

	National	Sectoral	Company		National	Sectoral	Company
Belgium	XXX	X	X	Austria		XXX	X
Ireland	XXX	X	X	Bulgaria	X	XXX	X
				Denmark	X	XXX	X
Cyprus		X	XXX	Finland	X	XXX	X
Czech Rep.		X	XXX	Germany		XXX	X
Estonia	(XXX)	X	XXX	Greece	(XXX)	XXX	X
Hungary	(XXX)	X	XXX	Italy		XXX	X
Latvia		X	XXX	Netherlands	X	XXX	X
Lithuania	(XXX)	X	XXX	Portugal		XXX	X
Luxembourg		X	XXX	Slovakia		XXX	X
Malta		X	XXX	Slovenia	X	XXX	X
Poland		X	XXX	Spain	X	XXX	X
Romania	(XXX)	X	XXX	Sweden		XXX	X
UK		X	XXX	France	X	XX	XX

Notes: XXX=dominant bargaining level for wages;

(XXX) =dominant bargaining level for minimum wages only;

X=existing, but not dominant bargaining level;

XX=no dominant bargaining level.

Source: Update of Schulten (2005).

There are 11 countries in the EU which have only a few sectoral agreements, while the company is the dominant bargaining level. This group covers many countries belonging to either the Western or the Eastern model of European capitalism, so that company-level bargaining can be regarded as typical of a more liberal, free market-oriented economy.

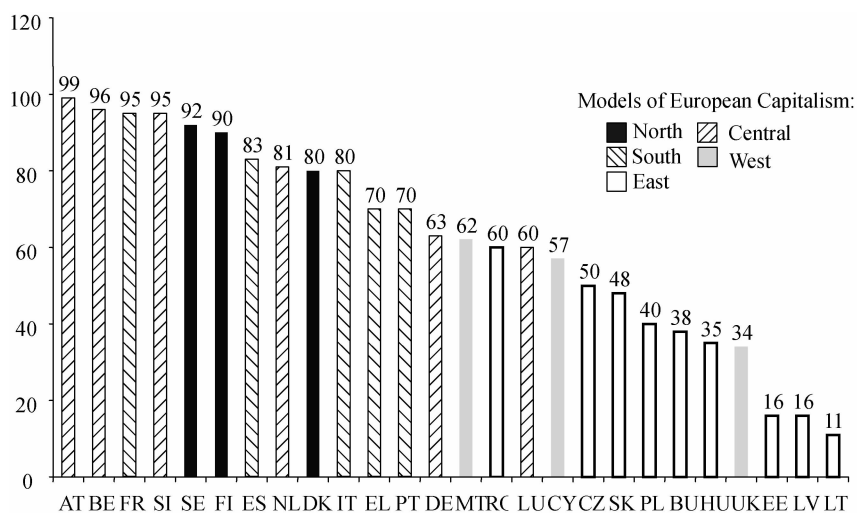
## 6. Collective Bargaining Coverage

Collective bargaining coverage is the proportion of workers covered by a collective agreement and can be regarded as a major indicator for



measuring the scope and effectiveness of the collective bargaining system. Within Europe, collective bargaining coverage shows huge differences, ranging from 99 per cent in Austria to only 11 per cent in Lithuania (see Figure 3). In the countries belonging to the Nordic, Central and Southern models of European capitalism, bargaining coverage is fairly high, varying in most countries between 70 per cent and 95 per cent. In contrast, the lowest coverage is in the Eastern European countries – together with the UK – with less than 50 per cent of employees covered by a collective agreement.

**Figure 3 Collective bargaining coverage in Europe, 2006 \***



Note: \* % of all employees.

Source: European Commission, 2009.

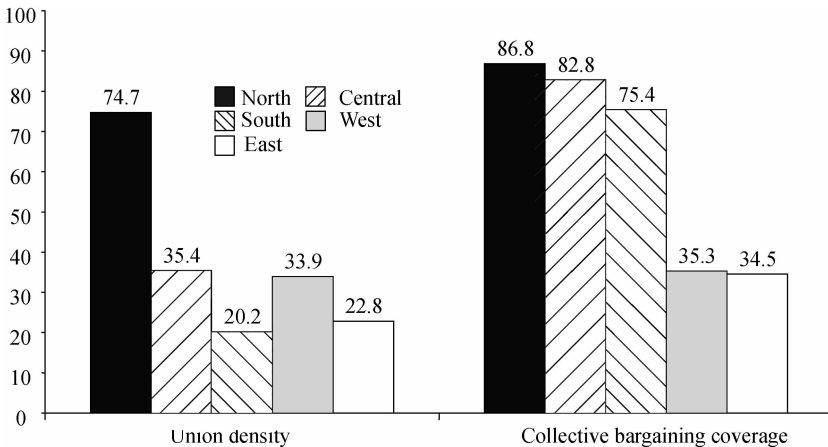
There are at least three major reasons for higher or lower bargaining coverage. First, there is clear evidence that more centralised bargaining systems, with collective bargaining at national or sectoral level, have higher bargaining coverage. In contrast, countries with more decentralised bargaining systems and dominant company bargaining (such as most East European countries and the UK) have comparatively low coverage. In these countries, the existence of a collective agreement depends largely on the strength of the trade union representation at the level of the individual



firm. The second reason for high collective bargaining coverage might be a high trade union density, which is the case mainly in the Scandinavian countries. Thirdly, in countries coming under the Central and Southern European models of capitalism, high bargaining coverage depends largely on the use of extension procedures by the state, which is an important player in supporting the collective bargaining system.

To sum up, all the different models of European capitalism have a distinctive pattern regarding the relationship between trade union density and collective bargaining coverage (see Figure 4). The highest coverage exists in the Nordic model, which also has the highest union density. The Central model also has very high collective bargaining coverage, but only a modest trade union density, so that bargaining coverage depends mainly on the use of extension mechanisms. The same holds true for the Southern model, which also has relatively high collective bargaining coverage but the lowest trade union density. Both the Western and the Eastern models combine low collective bargaining coverage with a relatively low union density.

**Figure 4 Union density and collective bargaining coverage in different models of European capitalism, 2005–2006 (%)**



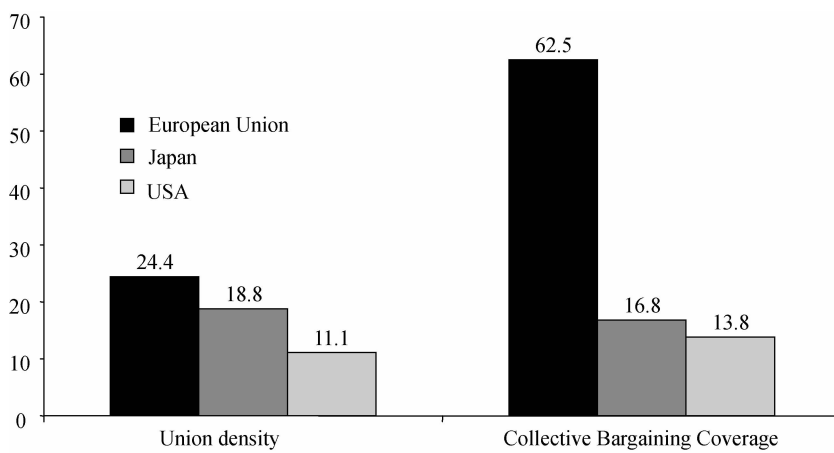
Source: European Commission, 2009.



## 7. European Collective Bargaining in an International Perspective

Looking at collective bargaining in Europe as a whole, it has a number of distinctive features in comparison with the USA or Japan (see Figure 5). While collective agreements in the European Union cover, on average, about two-thirds of all employees, bargaining coverage is only about 17 per cent in the USA and 14 per cent in Japan. Comparing trade union densities, the differences between Europe, on the one hand, and the USA and Japan, on the other, are less pronounced. About 25 per cent of all European workers are members of a trade union, compared to 19 per cent in the USA and 11 per cent in Japan. Therefore, the major reason for the much higher collective bargaining coverage in Europe is not its higher trade union density but the fact that many countries have national or sectoral collective bargaining, while in the USA and Japan the company is the dominant bargaining level. Moreover, in many European states, the collective bargaining system is actively supported by the state.

**Figure 5 Union density and collective bargaining coverage in the EU, Japan and USA, 2004–2006 (%)**



Source: European Commission, 2009.



## **8. Collective Bargaining Under the Conditions of an Economic Crisis**

Against the background of the current economic crisis, everywhere in Europe collective bargaining is under enormous pressure from the employers' side, which aims to tackle economic difficulties by reducing labour costs. However, what might be rational from an individual employer's point of view has negative consequences for the economy as a whole. As pointed out by John Maynard Keynes in his General Theory, the economic crisis could even deteriorate as a result of a general cut in wages, since it would further contract consumer demand and promote deflation. Therefore, it is of great importance that, under conditions of economic crisis, collective bargaining is able to stabilise or even increase wages. In Europe, collective agreements at national or sectoral level have proved to be a more efficient institution against wage cuts than company agreements, which are more closely related to the economic performance of the individual firm.

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# **The Dual System of Representation in Germany: Structure and Current Developments**

Reinhard Bahn Müller

The German system of workers' interest representation, with enterprise-level representation by works councils, on the one hand, and sectoral interest representation by trade unions, on the other, has been reorganising for some time. Signs of development include external erosion due to decreasing collective bargaining coverage of enterprises and workers and changes within the collective bargaining system which generally come under the heading of deregulation and differentiation. In what follows, first, the core elements of the dual system of interest representation in Germany will be presented. Second, current developments will be examined and the consequences for the collective bargaining system and the role of the trade unions stated. We will conclude with a brief summary.

## **1. The Dual System of Interest Representation in Germany: Structure and Current Developments**

### **1. 1 The Dual System of Interest Representation**

Characteristic of the German system of workers' interest representation is the duality of enterprise representation by works councils, on the one hand, and industry-wide representation by trade unions, on the other



hand. As a result of this duality, there is a two-tier representation system at enterprise and sectoral/industry level. There are also two separate arenas for dispute resolution. The legal/institutional structure of the two arenas differs, as do the actors, the objects of contention and conflict resolution procedures. Nevertheless, the two levels or arenas are related to one another in terms of functional differentiation (Müller-Jentsch 2007: 47).

## **1. 2 Free Collective Bargaining and the Social Partners**

The legal basis at the industry-wide, sectoral level is free collective bargaining. It has a prominent place in the Constitution, ranking immediately beneath the universal franchise. The Basic Law guarantees freedom of association ‘for everyone and all occupations’, that is, freedom to ‘form associations to safeguard and promote working and economic conditions’ and thereby the right to establish independent trade unions and employers’ organisations. In free collective bargaining, the collective actors—trade unions and employers’ organisations—meet and negotiate, if not exclusively, at least predominantly the ‘conditions of sale’ of labour, that is, wage rates, working hours and other generalisable working conditions. Conflicts can be resolved in this arena by strike action. The legal foundations of the collective bargaining system are laid down in the Collective Agreements Act. It states that only the trade unions can conclude collective agreements with individual employers (that is, enterprises) or associations of employers (that is, employers’ organisations). The legal norms of the collective agreement related to the contents, conclusion and termination of the employment relationship apply directly to the parties to the collective agreement and are mandatory. There are minimum standards which enterprises may not fall short of. Labour norms agreed in collective agreements have priority over other, for example, enterprise or individual regulations. Works councils, therefore, cannot conclude agreements in the enterprise with the employer concerning remuneration and other working conditions, which have



already been regulated in a collective agreement or otherwise, and by means of which the minimum norms fixed in the collective agreement would be undercut. However, enterprise agreements which are more favourable for the employees are legally permissible—in other words, the so-called ‘favourability principle’ applies. The priority of collectively agreed provisions also applies to so-called collective agreements at company level. They apply only to the individual company, but are concluded by trade unions with the management and works councils cannot conclude agreements which undercut normative provisions of collective agreements.

Free collective bargaining and the right to collective association that goes with it perform different functions for actors or groups of actors. For employees, the *protection function* is the most important. Through coalition formation, the market power of capital can be diminished and decent working conditions can be ensured or, as Götz Briefs, one of the forefathers of German labour law, formulated it, as early as 1927: ‘a safe house [set up] against the commercialisation of human labour’. Alongside the protective function for the purpose of ensuring the reproduction of labour power, free collective bargaining also performs a *distribution and participation function*. By its means employees can be ensured a share in the growing economic prosperity due to increasing labour productivity.

For the employer, free collective bargaining essentially performs three functions. First, its *cartel function* should be mentioned. Collective agreements provide conditions of equal competition for enterprises through the standardisation of wage rates, working hours and other generalisable working conditions. Second, collective agreements fulfil a *governance function* by ensuring manageable and stable wage structures and working conditions. Third, collective agreements perform a *peace and pacification function* for enterprises. While collective agreements are in force, the workers may not go on strike, so that peaceful labour relations and thereby the preconditions for cooperation in the enterprise are ensured.



For the state, free collective bargaining has a ‘relief’ function. It is released from the responsibility for regulating working conditions – to the extent that certain minimum standards are not undercut. Through autonomous self-regulation, the state does not suffer a loss of legitimacy due to conflict and does not itself become the target of labour disputes. In conflicts, it plays the role of neutral third party, from which it acquires legitimacy.

### **1. 3 Enterprise-level Interest Representation**

Let us turn to the enterprise level of the dual system of interest representation. The actors in this arena are not the trade unions and employers’ organisations, but company managements and the works councils. Works councils can be set up in all companies with five employees or more, although in fact they exist in only 11 per cent of companies, for which 48 per cent of all employees work. Many small companies have no works council; in companies with more than 100 employees, however, the rate is over 80 per cent. While trade unions are associations of members, works councils are the product of elections. Works councils are therefore not trade union committees, but elected representatives of all the employees of a company. Most works council members are also members of a trade union (around 75 per cent), however, and carry out their activities against the background of trade union objectives. But works councils have a considerable degree of independence which is by no means merely formal.

The legal foundation for actors in the company arena is the Works Constitution Act. It regulates the information, consultation and codetermination rights of the works council and the responsibility to engage in ‘cooperation based on trust’ with the employer. Works councils have to take into account, not only the interests of the employees, but also the well-being of the company and they may not call for strike action in support of their demands. Industrial action between employers and



works councils is legally inadmissible.

The objects of negotiations or disputes at company level are, generally speaking, not the ‘conditions of sale’ of labour power (which are basically determined at sectoral level), but rather the ‘conditions of use’, for example, the distribution of working time, concrete work organisation, workplace design or social regulations. In addition, works councils are responsible for supervising the implementation of collective agreements and their normative provisions.

The interaction of free collective bargaining and works constitutions have, for many years, ensured the flexibility and stability of the collective bargaining system in Germany.

**Figure 1**      **The dual system of workers’ interest representation**

Tier	Level/ arena	Legal framework	Actors	Topic	Form of conflict resolution
1st tier	Sectoral level	Free collective bargaining (Basic Law, Collective Agreements Act)	Trade unions versus employers’ organisations	Conditions of sale of labour (wage increases, duration of working time and so on)	Bilateral with strike action
2nd tier	Enterprise level	Works constitution (Works Constitution Act)	Works council versus management	Conditions of use of labour (situation and distribution of working time, breaks, workplace design and so on)	Bilateral without strike action

## 2. Current Developments

From the number of collective agreements currently in force, one might get the impression that the German collective bargaining system is very stable and full of vigour. At the end of 2008, there were no fewer than 70,632 collective agreements, around 5,000 of them newly concluded in 2009. A little more than half of valid collective agreements are agreements concluded by trade unions with individual enterprises and described as



company or ‘house’ collective agreements. And the number of collective agreements is not falling; rather it has been rising for years.

However, the collective bargaining system is anything but stable, and has been under massive pressure for change for around 20 years. Three developments in particular have brought about far-reaching changes: (1) a decrease in the number of enterprises bound by collective agreements and so the diminishing coverage of collective agreements; (2) the trend towards the decentralisation of collective bargaining, that is, a shift from the sectoral to the enterprise level; and (3) the differentiation, linked to decentralisation, of normative provisions, which now follow productivity at the individual enterprise and no longer, as is customary with sectoral agreements, the average in the branch.

## **2. 1 Decline in the Number of Enterprises Bound by Collective Agreements**

The decline in the number of enterprises bound by collective agreements and, alongside it, the number of workers whose working conditions are determined by collective agreements, is considerable. While in 1995, around 83 per cent of companies in western Germany were bound by collective agreements, today the figure is below 40 per cent. In eastern Germany, the level of organisation of enterprises from the beginning of German reunification in 1989 onwards was significantly lower than in western Germany and now only 24 per cent of enterprises are bound by collective agreements. The decline in the number of employees covered by collective agreements has not been so dramatic since larger companies are still fairly committed to collective agreements. However, the trend among employees, too, is downwards. The downward trend has slackened somewhat in the past five years, but it has by no means come to a halt. Collective agreements, consequently, directly affect only just over half of employees and the areas without collective bargaining are getting bigger and bigger. This development highlights the external erosion of the collective bargaining system.



**Table 1**      **Development of the number of employees and enterprises  
bound by branch collective agreements, 1995–2007 (%)**

	Employees		Enterprises	
	West	East	West	East
1995	72		53	
1996	69	56		28
1998	68	51	48	26
1999	65	46	44	21
2000	63	44	45	23
2001	63	44	45	22
2002	63	43	44	20
2003	62	43	43	21
2004	61	41	41	19
2005	59	42	38	19
2006	57	41	37	20
2007	56	41	36	20

Source: IAB-Betriebspanel.

## **2.2 Decentralisation of the Negotiation System and Differentiation of Normative Provisions**

Enterprises which remain bound by collective agreements have experienced two new and related developments. In more and more cases, the enterprise is becoming the scene of collective bargaining, as a result of which the benchmark for the contents of negotiations is changing. The negotiating parties take their bearings less from the average situation of companies in the branch, than from the specific situation at an individual company, above all company productivity. As a result,



companies are subject to a kind of double collective bargaining reality. They remain bound to the branch agreement, but so-called ‘opening clauses’ are introduced, which make possible a temporary or permanent undercutting of branch norms.

The shift of (part of) negotiations to enterprise level and the orientation towards the productivity of individual companies are consequences of the dwindling number of those bound by collective agreements and underline the need for the stabilisation of the collective bargaining system. The fact that enterprises have more room to manoeuvre and the possibility to undercut minimum norms under certain circumstances make it less attractive to employers to withdraw from collective agreements completely. Whether this really contributes to the stabilisation of the collective bargaining system is debatable. As differently as the contributions of decentralisation and differentiation to stabilisation are evaluated, it is indisputable that opening clauses – which allow companies not only to shape the provisions of collective agreements but also to undercut them – have become widespread. Research data on the extent of opening clauses differ with regard to survey year, branch and the form of the questions. Generalising, we can say that opening clauses may be found, depending on the branch, in 10 – 15 per cent of companies, in which between 30 and 50 per cent of workers are employed. And where they exist they are usually applied (Schnabel and Kohaut 2006; Bahnmüller 2009).

### **2.3 New Architecture of the Interest Representation System**

The partial relocation of negotiations on working conditions has consequences for the dual system of interest representation, as has already been described. Duality as it has existed so far is increasingly being superseded by a multi-arena system in which the collective bargaining parties do not conclude agreements only at sectoral level, but also parallel enterprise agreements. At enterprise level they negotiate on subjects that have already been the objects of conflict and negotiation at branch level.



The change in the level of negotiations no longer automatically entails a change in the actors and conflict issues. The parties also take up new topics in enterprise-level negotiations, such as decisions on relocation, promises of investment or social plans related to plant closures, which previously were the legal preserve of the two enterprise-level partners, management and works councils, or were decided by the management alone. Conversely, works councils take up subjects which ‘really’ belong to the collective bargaining parties, and negotiate partly with, partly without their approval on working time, wage components or special payments. In this way, the parties attempt to gain ground. The boundaries between works constitution and free collective bargaining are being re-examined and contested. To summarise, the previous dual system of interest representation is mutating in the direction of a three-tier system, with a sectoral collective bargaining arena, whose legal framework is provided by free collective bargaining; an enterprise-level collective bargaining arena, also legally regulated by free collective bargaining; and an enterprise arena, which is subject to the provisions of the Works Constitution Act.

Further trade union options are not available, however, since, according to the prevailing interpretation of the law, the trade unions remain bound to the so-called *Friedenspflicht* (duty to avoid industrial action during wage negotiations), in collective bargaining in the enterprise arena, in which deviations from norms established at sectoral level (the rule) are at issue, and so strike action may not be taken.

What is changing in the transition to the multiple-arena system is the character of normative provisions in collective bargaining. The norms of regional collective agreements no longer guarantee equal minimum standards for all employees in a branch or the same minimum labour costs for all enterprises. They no longer ensure what the textbook says they should, namely the maximum reduction of competition among employees. This new kind of collective agreement is more like a framework for orientation from which it is possible to deviate to a greater or lesser extent



(Fitzenberger and Franz 2000).

**Figure 2**                      **Metamorphosis of the dual system of interest representation: on the way to a three-tier system**

<b>Tier 1:</b>	<b>Sectoral level</b>
Legal framework	Free collective bargaining
Actors:	Trade unions versus employers' organisations
Subject of regulation	'Conditions of sale' of labour (wages, working time and so on)
Form of dispute resolution	Bilateral with the right to strike
<b>Tier 2</b>	<b>Enterprise level</b>
Legal framework	Free collective bargaining
Actors:	Trade unions versus employers'/employers' organisations
Subject of regulation	Conditional undercutting of sectoral norms in exchange for employment or location guarantees or promises of investment
Form of dispute resolution	Bi/trilateral without the right to strike
<b>Tier 3:</b>	<b>Enterprise level</b>
Legal framework	Works constitution
Actors:	Works council versus management
Subject of regulation	'Conditions of use' of labour
Form of dispute resolution	Bilateral without the right to strike

## **2.4 Changed Roles and Self-Conception on the Part of Trade Unions and Employers' Organisations**

These changes in the architecture of the interest representation system have repercussions with regard to the roles and self-conception of the collective bargaining parties. The trade unions, which have mainly been strongly opposed – although without success – to decentralisation and differentiation, find themselves confronted by previously unknown coordination and control problems, which they are barely able to manage with the resources they have to hand. Their efforts are directed towards keeping decentralisation as much as possible within manageable boundaries and to have a decisive say at enterprise level (Haipeter 2009a). This has given rise to new problems, however, concerning self-definition and legitimisation. The balancing act between (diverging) individual enterprise interests and industry-wide or collective interests, previously managed by the works councils, is now the task of the trade unions, who must also get



their members on board (Rehder 2006).

The employers' organisations have fewer problems with decentralisation and differentiation, which they have pursued vigorously. They do not envisage control and coordination problems comparable with those of the trade unions. Instead, the extended range of options at enterprise level, in particular, deviation from the norms of regional collective agreements, have relieved them of much of the burden of finding a common denominator among the interests of their member firms. Any firm wishing to deviate from an agreement can more or less do so. Nevertheless, they also have legitimisation problems, since the conclusion of regional collective agreements is no longer as significant as it once was. While the signing of regional collective agreements was once the very *raison d'être* of employers' organisations that is no longer the case. The identity of employers' organisations is changing and for a number of years they have also offered their members membership without being bound to collective agreements (so-called 'OT' [*ohne Tarifbindung*] organisations'). For these enterprises they now function as service providers, offering consultation and support for individual companies. And the strategy, pursued in particular in the metal and electrical industry, is paying off. The loss of members, from which employers' organisations were also suffering, has been halted. The losses registered since 2000 by the employers' organisation for the metal industry have in the meantime more or less been made good (Bahnmüller 2009).

### **3. Summary**

The decentralisation to the enterprise level of collective bargaining and the differentiation of the normative provisions of collective agreements are the two dominant developments in the German collective bargaining system since the 1990s. Decentralisation is not a marginal or transient phenomenon, however. Company agreements which deviate from branch collective agreements have become a permanent feature of collective



bargaining and have changed the architecture of the German system of interest representation. The social partners now operate also at the enterprise level, not only at the sectoral level. Sectoral norms remain the point of reference for the determination of enterprise working conditions, but they are renegotiable in the enterprise. The trade unions have tried to avert decentralisation and differentiation, but they have failed. Ultimately, the trade unions were forced to go along with decentralisation.

There are different views on the contribution of opening clauses and the reorganisation of the negotiating system to the stabilisation of the collective bargaining system. While, on the one hand, decentralisation and differentiation are regarded as a modernisation of the collective bargaining system or as its adaptation to changes in external conditions (globalisation) or production regimes, which has modified the institutional structure, but has not changed its fundamental principles (Thelen 2009; Streeck and Thelen 2005; Haipeter 2009a, 2009b; Jacobi 2003), others regard developments as illustrating a continuing internal erosion which is fundamentally changing the character of the collective bargaining system and collective agreements (and so its basic principles) (Bispinck and Schulten 1998; Wiedemuth 2007; Bahn Müller 2009). It can certainly be stated that the erosion of the collective bargaining system has not yet been halted; the number of enterprises bound by collective agreements continues to decline. The rate of decline may have moderated, but it continues. Almost 70 per cent of enterprises, employing around half of all workers, are now outside the regional collective bargaining system. Free collective bargaining and, with it, the pillars of the German system of interest representation has been so weakened that stabilisation is not within the power of the bargaining partners alone. Regional collective agreements are effective only where both trade unions and employers' organisations are still in a position to conclude collective agreements which have a real influence on the working conditions of the majority of employees in a particular branch. This is often no longer the case.



Stabilisation of regional collective agreements will be impossible without government intervention. It must help the social partners to implement the labour standards which they have negotiated comprehensively; that is, it must ensure that they are generally binding. Only in this way, in my opinion, can the functionality of collective bargaining be restored and the decline in the significance of the social partners halted. The situation is paradoxical: the state is being called upon to support free collective bargaining—which was always characterised by its freedom from state interference and the autonomy of the social partners—by generalising collective agreements. This is by no means a desirable development, but, it seems to me, a necessary one.

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# **Part II**

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## **Dispute Resolution**



# **The Role and Function of Trade Unions in Resolving Collective Labour Disputes in China**

Shen Qinqing and Pan Taiping

Collective labour disputes have increased rapidly in China in recent years. Collective labour disputes involving a large number of workers are likely to cause group conflicts, thereby affecting social stability and economic development. In this chapter, we try to identify the root causes of collective labour disputes in China by looking at some typical cases. This chapter will also make a number of proposals on how trade unions can play a role in such disputes.

## **1. Current Collective Labour Disputes in China**

Labour disputes are caused by disagreements between employers and employees over workers' rights and obligations. Labour disputes include individual labour disputes and collective labour disputes. The main actors in individual labour disputes are usually individual workers and their employers. The disputes are concerned only with individual rights and obligations and claims are made by individual workers.

There are, in general, two types of collective labour dispute: (1) disputes involving several workers with the same complaint, such as disputes between a number of workers and their employer over wage



issues; (2) disputes arising from the conclusion or fulfilment of collective contracts, for example, an enterprise refuses to sign a collective contract as demanded by the trade union, or there is a failure to reach agreement, or an enterprise refuses to fulfil a collective contract.

Article 5 of the *Regulation on Settling Labour Disputes in Enterprises*, which came into force on 1 August 1993, states that ‘[w]hen a group of employees, involved as one party and holding the same claim in a labour dispute, comprise more than three persons, they should elect a representative to attend the mediation or arbitration meetings.’ Article 7 of the *Labour Dispute Mediation and Arbitration Law*, which came into force on 1 May 2008, stipulates that ‘[w]here the party in a labour dispute consists of more than 10 labourers, and they have a joint request, they may recommend a representative to participate in mediation, arbitration or litigation activities.’

As China’s societal transformation speeds up, collective labour disputes are peaking. According to statistics, between 2000 and 2008, cases of collective labour disputes accepted by labour dispute arbitration tribunals at all levels, grew from 11,000 to 22,000, while the number of workers involved grew from 259,000 to 503,000. In 2008, 41.4 per cent<sup>①</sup> of workers involved in labour disputes were involved in collective labour disputes. Evidence shows that collective labour disputes have become a major form of labour dispute in present-day China. They include sensitive issues, such as slow wage increases, wage arrears and social security contribution evasion, threatening the livelihood of workers. Since collective labour disputes involve a large number of people, they are difficult to handle and any indiscretion may give rise to group conflicts.

Worker group conflicts refer to workers’ conduct in collective labour disputes, such as strikes, petitions, demonstrations, sit-ins and protests, without going through the current labour dispute resolution procedure of

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① Ministry of Labour and Social Security (2001); Ministry of Human Resources and Social Security (2009).



‘mediation-arbitration-litigation’, for the purpose of self-protection. Since the late twentieth century, worker group conflicts have been on the rise in China. Take Shenzhen as an example: between November 2007 and January 2008, there were three to five times more worker group conflicts than in the same period the previous year. Hit by the current global financial crisis, some enterprises went bankrupt or closed; some enterprise owners and managers vanished without paying wages. These new problems gave rise to more worker group conflicts.

## 2. Analysis of Some Typical Collective Labour Disputes

Since collective labour disputes dominate labour disputes in China, it is crucial to understand their underlying reasons, as well as to analyse the role of trade unions at different levels before and after disputes. What follows are descriptions and detailed analysis of three typical cases of collective labour disputes. Hopefully they can help to illustrate the root causes of collective labour disputes in China and explore the roles expected of trade unions.

### *Case 1: Strike at Yantian International Container Terminals Limited*<sup>①</sup>

Located in Shenzhen, Yantian Container Terminal is one of the largest container terminals in the world. It was officially launched in 1994 as a mainland-Hong Kong joint venture. At dawn on 7 April 2007, 280 tower crane and gantry crane operators went on strike, paralysing the entire terminal – its impact was felt internationally.

Wage issues were the underlying reason for the YICT strike. Since its launch in 1994, the company had seen dramatic profit growth of close to 500 times without giving its workers a raise. For example, an inland haulage operator was paid RMB 10 Yuan per hour in 1994, and they are

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① Xu Xiaojun and Ren Xiaoping (2008), p. 35.



still paid the same wage more than ten years later, although their workload has grown from a dozen TEUs to over 20 or 30. That is to say, there is no normal wage increase mechanism at YICT.

The direct trigger of the YICT strike was the success of similar strikes in the industry. On 23 March 2007, over 300 workers working for two of YICT's handling subcontractors went on strike. On 30 March, 180 crane operators went on strike. Both strikes ended up with concessions from the enterprise, which sent a signal to workers at YICT: crying babies get milk from adults, strikers get wage increases. Therefore, the YICT strike is a typical case of a chain reaction to regional and industrial strikes.

The trade union played its expected role in this case. In fact, before the strike there was no grassroots trade union at YICT. The first demand made by striking workers was to 'establish a trade union'. The upper-level trade union played a positive and important role in the strike. The Shenzhen Federation of Trade Unions arrived at the strike scene immediately, helping to prevent the situation from deteriorating. Afterwards, it sent a taskforce of a dozen members, headed by the Deputy Director of its Department of Organisation, to help workers at YICT to establish their union. As a result, a trade union truly representing the interests of workers was created via direct election. In the next phase, the Federation sent its Legal Affairs people to help the newly-established trade union negotiate with the enterprise over wage issues. Thanks to its guidance, some progress was made in the areas of working hour allowances, wage rises and welfare in the two-to-three-month long negotiations.

Thanks to the efforts of the upper-level trade union, workers' demands were basically met. Operators' hourly wages rose from RMB 10 Yuan to RMB 12 Yuan. In addition, the enterprise spent over RMB 100 million Yuan on retrospective wage increases, overtime and other types of allowance. Consequently, morale and productivity were improved considerably, a win-win situation for employer and employees.



**Case 2 : Strike at Smart Union Toy Factory**<sup>①</sup>

Smart Union Group (Holdings) Limited was founded in 1996. In its heyday, it had four factories in Dongguan and Qingyuan, employing approximately 10,000 people. It specialised in the production of premium electronic toys and stuffed animals. On 13 October 2008, workers at the Dongguan factory went on strike in protest against wage arrears. The local government intervened on the same day, asking the management to pay a month's worth of arrears immediately. However, both the owner and senior management vanished overnight. Thousands of workers waved banners demanding payment of their wages at the Zhangmutou Industrial Park.

The direct triggers of this strike were wage arrears and the vanishing of the owner. The root cause was a decrease in demand for toys owing to the international financial crisis. As we are still in the crisis, collective labour disputes from wage arrears and runaway owners have become the major form of collective labour dispute.

In this case, the grassroots trade union did not play its expected role, for the trade union at this factory existed only formally. When asked, a manager at its engineering department said, 'Trade union? We don't have a trade union. No, we've got a trade union, but it's just a sign at the factory entrance. In fact, the plant manager is the chairperson of the trade union. But there is no other staff or office.' Mr Huang, the plant manager, was supposed to be in charge of the trade union, but such a lip-service entity could hardly protect workers' rights.

In the end, the Zhangmutou Township Government advanced over 24 million Yuan in wages to more than 6,500 workers.

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<sup>①</sup> 'Two Smart Union Toy Factories Announced Bankruptcy in Dongguan'. Available at: <http://www.sina.com.cn/14:51,10-17-2008,ycwb.com>.



**Case 3 : Strike by Chongqing Taxi Drivers<sup>①</sup>**

On 3 November 2008, taxi drivers in downtown Chongqing went on strike. Both Xinhua Net and People Net reported this incident, actually using the term ‘strike’, the same morning. Afterwards, the local government communicated with cabbie representatives to hear their complaints, hold discussions with them and reach an agreement. Within two days, taxi services in Chongqing returned to normal.

One root cause of this strike was the lack of a mechanism for appeals and feedback. According to a report by the Xinhua News Agency, ‘Cabbies in Chongqing have repeatedly appealed to the competent authorities to help resolve such issues as the difficulty of obtaining LNG refills, low fares and unreasonable fines. However, their appeals were ignored and conflicts escalated.’

After the local government’s pledge to have taxi services reduce the contract fee, increase the number of LNG refill stations and crack down on unlicensed taxis, some taxis went back into service on 4 November. On 5 November, taxi services in Chongqing were fully restored. At the same time, the Chongqing Federation of Trade Unions issued a joint circular, together with other authorities, to 155 taxi services in Chongqing, requesting that they establish trade unions by the end of November.

### **3. Analysis of the Root Causes of Collective Labour Disputes**

These three typical cases share the following characteristics: first, they took place after workers’ rights had been violated; second, the grassroots trade union did not perform its duties well enough when it came to the

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<sup>①</sup> ‘Demands of 8,000 Cabbies in Chongqing Not Met for a Long Time’. Available at: <http://www.sina.com.cn>, 02: 46, 11—4—2008, *The Beijing News*.



protection of workers' rights; and third, workers did not resort to legal proceedings to resolve the dispute. An in-depth analysis of these commonalities will reveal the root causes of collective labour disputes in China.

### 3. 1 Problems in the Labour Market

There has been an imbalance in labour supply and demand in China. According to the estimates of Chen Wei (2006) of the Population and Development Research Centre, Renmin University of China, China's total population will reach 1.35 billion in 2010, and 1.425 billion in 2020. It is expected to peak at roughly 1.442 billion in 2029.<sup>①</sup> Then, a slow decline will set in. In the next 20 years, the population in China will continue to grow rapidly. On the supply side, rapid population growth will result in a plentiful labour supply in the coming years. Between 2007 and 2016, the proportion of the labour force aged between 15 and 64 will grow steadily, from 956.78 million to 997.47 million. Labour supply will peak at 997 million in 2016.

Therefore, we will have nine more years of abundant labour supply, followed by a gradual shrinkage. The demand for labour, on the other hand, depends on GDP growth and employment elasticity. In order to make a forecast of future demand for labour, we make the following assumptions: a GDP growth rate of 8 per cent (floor), employment elasticity at 0.08 (floor). Calculations tell us that demand for labour will rise from 768.89 million in 2007 to 814.33 in 2016.<sup>②</sup> From the above forecast, we can see that supply will exceed demand by 183.14 to 187.89 million in the next ten years in China, as illustrated in Table 1.

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① The assumption here is that the overall birth rate will rise from 1.7 in 2000 to 1.8 in 2010. Afterwards, the rate will be maintained. Life expectancy for males will reach 76.63 in 2050, while that of females will stand at 80.82.

② Chen Wei (2006), pp. 24–28.



**Table 1 Supply and demand trends in China's labour market (in millions)**

Year	Total population	Labor demand	Labor supply	Gap
2007	1323.41	768.89	956.78	187.89
2008	1331.79	773.81	965.51	191.70
2009	1340.59	778.76	972.46	193.70
2010	1349.85	783.75	979.80	196.05
2011	1359.26	788.76	985.26	196.50
2012	1368.63	793.81	989.31	195.50
2013	1377.76	798.89	992.92	194.03
2014	1386.46	804.00	994.97	190.97
2015	1394.56	809.15	996.24	187.09
2016	1401.99	814.33	997.47	183.14

The unbalanced labour market in China gives more bargaining power to employers than to employees. Consequently, most labour disputes are caused by worker rights violations. According to statistics, between 1995 and 2006 the number of labour disputes rose from 33,030 to 317,162, close to a tenfold increase in ten years, 80 per cent of which involved employers' violations of workers' rights.<sup>①</sup>

### **3. 2 Problems with Grassroots Trade Unions**

Realities in the labour market urge the protection of workers' rights by trade unions. However, all the above cases indicate that, despite the positive involvement of upper-level trade unions, grassroots unions still play a very limited role in collective labour disputes. Their organisation needs to be strengthened and their power must be felt.

First of all, there are problems in the formation of grassroots trade unions, especially in private companies. As private companies employ the

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① Yan Hui (2007 p. 148.



majority of workers in China, it has become increasingly important for trade unions to reach out to them.

Second, there are problems in the effectiveness of rights protection by grassroots trade unions. A fundamental principle in China has been that all the cadres report to the Communist Party. Trade union cadres report to the Party committee at the same organisational level, with supervision by upper-level trade unions on the side. However, this principle has been hard to implement since the economic transformation.

In public enterprises, the Party head is often also the top executive. As a result, trade union cadres report to the management rather than the party committee. Most private companies do not have a Party chapter. Even if there is one, it plays a limited role in human resource management and supervision. The promotion, reward and contract renewal of trade union cadres are often decided by the management. As a result, trade unions at the enterprise level depend on the management, which obstructs their protection of workers' rights, reducing their effectiveness.

### **3. 3 Problems with Labour-related Legislation**

At present, there are still some limitations in China's labour-related legislation, which impose constraints on the resolution of collective labour disputes.

#### *3. 3. 1 Rules and provisions on the handling of collective labour disputes in existing legislation*

*First, relevant provisions in the Labour Dispute Mediation and Arbitration Law:*

Article 5 of the *Labour Dispute Mediation and Arbitration Law* stipulates that 'Where a labour dispute arises, the parties are not willing to have a consultation, the consultation fails or the settlement agreement is reached but not performed, an application for mediation may be made to a mediation institute. Where the parties are not willing to mediate, the



mediation fails or the mediation agreement is reached but not performed, an application for arbitration may be made to the labour dispute arbitration commission. Where there is an objection to the arbitration award, litigation may be initiated to a people's court unless otherwise specified herein. ' Article 7 of the same law states that 'Where the party in a labour dispute consists of more than 10 labourers, and they have a joint request, they may recommend a representative to participate in mediation, arbitration or litigation activities. ' These two articles indicate that when there are joint labour disputes, they are handled as normal labour disputes.

*Second, relevant rules from Arbitration Rules for Handling Personnel and Labour Dispute Cases promulgated by the former Ministry of Labour*

According to the *Arbitration Rules for Handling Personnel and Labour Dispute Cases*, ad hoc proceedings apply to the arbitration of collective labour disputes involving 30 or more workers, which means the establishment of an ad hoc arbitration tribunal, case acceptance within three days, ruling within 15 days and timely communication with the local government. This rule indicates that ad hoc proceedings apply to joint labour disputes under arbitration.

*Third, relevant provisions in the Labour Law :*

Article 84 of the *Labour Law* states that 'cases of disputes resulting from the conclusion of collective contracts shall be handled through consultation by all the parties concerned brought together by the labour administrative department of a local people's government if these cases cannot be handled through consultation between the parties involved. ' Article 84 (1) of the Labour Law states that 'cases of disputes resulting from the implementation of a collective contract shall be handled as a normal labour dispute.'



*Fourth, relevant provisions in the Labour Contract Law:*

Article 56 of the *Labour Contract Law* states: ‘If an employer breaches the collective contract and infringes the labour rights and interests of the workers, the labour union may demand that the employer incur liability according to the law. Where any dispute arises from the performance of the collective contract and no agreement is reached after consultation, the labour union may apply for arbitration or bring a lawsuit according to the law.’

### *3.3.2. Analysis of the Rules and Provisions on Handling Collective Labour Disputes*

The following conclusions can be drawn from the rules and provisions on handling collective labour disputes listed above: the procedures for handling collective labour disputes are basically the same as those for handling ordinary labour disputes, that is, mediation, arbitration and litigation. But there are three differences: first, ad hoc procedures apply to the arbitration of collective labour disputes; second, in cases resulting from the conclusion of a collective contract, when no agreement is reached after consultation, the labour administrative department of a local people’s government shall bring all parties together for further consultation; third, where any dispute arises from the implementation of the collective contract and no agreement is reached after consultation, the labour union may apply for arbitration or bring a lawsuit according to the law.

It can be seen from the above analysis that labour legislation in China treats collective labour disputes basically in the same way as other labour disputes. Not enough attention is paid to the handling of collective labour disputes nor to special legislation on collective labour disputes, posing difficulties for the resolution of collective labour disputes.

## **3.4. Impact of the Financial Crisis**

Owing to the current financial crisis, many enterprises have closed or gone



bankrupt. Some owners and managers have vanished without paying workers their wages. According to statistics, there were 48 such cases in the fourth quarter of 2008 in Shenzhen, with runaway owners owing RMB 30 million yuan to workers, a figure much higher than in the same period the previous year. A survey by the Shenzhen Public Security Bureau at the end of 2008 also showed that there were 370 enterprises with wage arrears, involving 39,200 workers and a sum of RMB 102 million. More runaway cases have been reported in the Pearl River Delta since then. Under the impact of the financial crisis, collective labour disputes triggered by runaway owners have been on the rise.<sup>①</sup>

#### **4. How to Leverage Trade Unions in Collective Labor Disputes**

As the number of collective labour disputes climbs, trade unions should take an active part in their prevention and resolution.

##### **4.1 Form Grassroots Trade Unions and Strengthen Their Effectiveness**

###### *4.1.1. Formation of Grassroots Trade Unions*

The formation of grassroots trade unions, especially in private enterprises, should be strengthened. A change of mentality is needed. In fact, there should be four transitions; first, a transition from traditional homogenous trade unions to diversified and innovative forms; second, a transition from focusing on enterprise-level trade unions to focusing on cluster trade unions; third, a transition from stressing the number of trade unions established to stressing the number of workers covered; and fourth, a transition from trade unions acting alone to joint efforts by party committees, the government and trade unions.

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① ‘More Business Owners Run Away from the Pearl River Delta, with Three Outstanding Characteristics’. Available at: [http://www.ce.cn/xwzx/gnsz/gdxw/200902/25/t20090225\\_18318467.shtml](http://www.ce.cn/xwzx/gnsz/gdxw/200902/25/t20090225_18318467.shtml), 11: 53, 02—25—2009, *Economic Information Daily*.



#### *4.1.2. Improve the Effectiveness of Trade Unions' Protection of Worker Rights*

In this new and historic era, we must emphasise the effectiveness as well as the formation of grassroots trade unions. To improve effectiveness, the following measures can be taken.

First, innovation in the protection of workers' rights. Regional or industry-wide mechanisms for rights protection could be established, such as industry-wide wage bargaining and collective contracts, so that upper-level trade unions could assume more responsibility. Besides, a bargaining mechanism with trade unions and enterprises on an equal footing could be created and regional or industrial collective contracts could be promoted, so that collective contracts could have more weight and wider coverage.

Second, trade union chairpersons should be selected via direct election. With such a system, the chairperson becomes the trustee of trade union members and is held accountable to the latter. If the chairperson fails to meet the members' expectations, he or she will be removed by a general meeting or a meeting of workers' representatives.

Third, the functioning of trade unions should be improved. Working rules for trade union committees should be formulated, disclosure of major information or decisions should be required, and the work of trade union staff should be democratically supervised.

Fourth, the protection of trade union staff. Upper-level trade unions should protect enterprise-level trade union staff in carrying out their tasks, offering legal assistance and compensation to those staff members who suffer retribution for campaigning for the protection of workers' rights.

Fifth, the chairpersonship of a trade union should become a full-time job. In order to make trade unions more effective in the protection of workers' rights, the chairperson should be at a distance from the enterprise instead of being an employee. In this way, chairpersons at private companies would have less inhibitions and more initiative, a



necessary condition if trade unions are to play their proper role.

## **4. 2. Make Full Use of Trade Unions in Collective Labour Disputes**

### *4. 2. 1. Grassroots Trade Unions Should Set Up an Early Warning System for Strains in Industrial Relations*

As the number of worker group conflicts rises, grassroots trade unions should be on the lookout. Their key priorities are: full and punctual payment of wages, as well as reasonable wage increases; the handling of employment relations when enterprises close, stop production, merge, change ownership or reorganise; working hours, breaks and vacations; social security and welfare; the establishment and termination of employment; meetings of workers' representatives and transparency of company decisions; occupational health and safety; and the infiltration of illegal rights protection organizations among workers. They should spot likely triggers of group conflicts so that, instead of escalating, conflicts can be resolved when they first emerge. Enterprise-level trade unions should be the first to know about and report potential group conflicts.

### *4. 2. 2. Upper-level Trade Unions Should Play an Active Role in Handling Collective Labour Disputes*

When collective labour disputes arise, especially when there are group conflicts, upper-level trade unions should get involved, in three stages. The first is to arrive on the scene to contain the situation. Upper-level trade unions should step in at once to bring matters under control, persuade workers to resume production and set out to resolve the conflict. The second stage involves guidance and help. If there is no trade union at the enterprise, the local federation of trade unions should dispatch a taskforce to help establish one. Third, consultation and dialogue with a view to reaching agreement. Upper-level trade unions should communicate with both the management and employees in order to facilitate collective wage bargaining between the enterprise-level trade union and the



company, and to promote the establishment of a normal wage increase mechanism.

Upper-level trade unions should play an active role in handling collective labour disputes, helping workers to realise all or part of their demands. They must adhere to three principles: first, rightful claims must be met; second, reasonable claims must be insisted upon; third, reasonable but unlawful claims must be given up. In a word, there should be give-and-take.

### **4. 3. Further Improve Relevant Laws and Institutions**

#### *4. 3. 1. Further Improve the Handling of Collective Labour Disputes*

A special mechanism for handling collective labour disputes should be established as soon as possible. The government could set up a special department for this matter, with priority being given to mediation.

#### *4. 3. 2. Punish Those Responsible for Malicious Wage Arrears and Runaways*

With the financial crisis in full swing, enterprises are facing more difficulties and so wage arrears and runaways may increase. Protective measures must be taken as soon as possible. A number of experts propose that the cure lies in the addition of a crime under the heading of ‘Wage Arrears and Runaways’ to the Criminal Law. Before that amendment is made, however, the Supreme Procurator and Supreme Court should come up with a joint judicial interpretation of this matter to impose penalties on malefactors. A Wage Arrears and Runaway Early Warning System should be established to nip danger in the bud. Despite legal barriers against the punishment of foreign owners or managers who vanish without paying wages, every alternative should be explored to track them down. Law enforcement authorities should direct their attention to overseas parent companies if there is sufficient evidence. If there is inadequate evidence, in order not to disrupt social stability, workers should be allowed and



encouraged to protect their rights and trade unions should represent them in negotiations with overseas parent companies.

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# **Industrial Disputes and Dispute Resolution Mechanisms in South-Korea**

Youngmo Yoon

## **1. Collective Bargaining and Industrial Disputes**

The modern Korean industrial relations system has gone through three phases over the past few decades. The first phase, which came to an end in 1987, was characterised by official trade unionism under government control and sporadic bouts of independent worker activism. The second phase, which ended with the economic crisis in 1997, saw the establishment of a second national trade union organisation, the Korean Confederation of Trade Unions (KCTU), to rival the existing organisation, the Federation of Korean Trade Unions (FKTU). The third phase has been characterised by efforts to build up industry – level collective bargaining, but also by a crisis of representation due to the rapid expansion of irregular, non-unionised employment. During the second and third phases, most collective bargaining-and thus industrial disputes –has been located at the enterprise level.

Since the late 1990s, a process of organisational transformation has been going on, amalgamating enterprise-based unions into industrial or sectoral unions. Today, more than 70 per cent of workers in the Korean Confederation of Trade Unions (KCTU) are organised into occupational,



sub-sectoral or industrial unions, while the Federation of Korean Trade Unions (FKTU) remains an organisation of mostly enterprise unions. Despite these changes in organisational structure, collective bargaining is still mostly conducted at enterprise level – including by most of the newly established industrial unions – to determine wages, working conditions, various workplace issues, employment security and union facilities. Many employers are still hostile to trade unions and very reluctant to engage with them, however. As a result, the relationship between employers and trade unions – especially for those unions affiliated with the KCTU – is still one of distrust. Where ‘enterprise unionism’ remains dominant – which is also preferred by employers – labour conflicts take place in the workplace, in contrast to many Western countries, where disputes are often transferred to the sectoral level and so take place outside the workplace.

If we take the incidence of strikes as one indicator of peaceful and stable industrial relations, we can easily observe the cycles of conflict in Korea. In terms of the number of strikes and working days lost, Korean industrial relations were fairly peaceful in the first half of the 1980s, before an upsurge in the number of strikes in the second half of the decade strained relations between workers and employers. Much stability had returned by the mid-1990s, but when the Asian financial crisis (1997) hit wages and employment, trade unions tried to defend what they had previously gained and resorted more often to strike action. Since then, the situation has remained fairly peaceable.

There are two main reasons why trade unions resort to strikes. One is the struggle for recognition of the right to collective bargaining. The other is related to improvements in wages and working conditions. Previously, industrial disputes, to a large extent, concentrated on trade union recognition by employers, as well as wages and working conditions. Since the Asian financial crisis, however, disputes have focused more on issues of employment security. This includes disputes on the right of ‘irregular’ workers to union recognition and representation of their employment concerns.



**Table 1 Incidence of strikes in Korea, 1980—2006**

Year	Number of strikes	Working days lost (in 1000)	Working days lost per 1000 employees
1980	206	61	9.5
1985	265	64	7.9
1987	3749	6947	755.8
1989	1616	6351	611.4
1991	322	4487	409.8
1993	144	1308	109.5
1995	88	393	30.8
1997	78	445	33.6
1999	198	1366	109.1
2001	235	1083	79.3
2003	320	1299	90.2
2004	462	1199	80.5
2005	287	848	55.8
2006	224		

Source: Ministry of Labour.

## 2. Legal Framework for Dispute Resolutions

The legal regime for conflict resolution in Korea distinguishes between ‘individual disputes’ and ‘collective disputes’, depending on whether the party involved is a union or an individual employee. It further differentiates between ‘rights disputes’ and ‘interest disputes’, depending on whether an existing right or concluded agreement is not being properly observed or implemented or whether a party to the dispute



is calling for a change to an existing agreement.

**Table 2** **Types of dispute and resolution**

	Interest disputes	Rights disputes
Individual disputes	<ul style="list-style-type: none"> <li>• None</li> </ul>	<ul style="list-style-type: none"> <li>• Civil trial; remedy sought through the judicial process</li> <li>• Adjudication by the National Labour Relations Commission (for unfair labour practices)</li> <li>• Violation of mandatory provisions should be addressed by a labour inspector</li> </ul>
Collective disputes	<ul style="list-style-type: none"> <li>• Public mediation at the request of either labour or management</li> <li>• Private mediation at the request of both labour and management or collective agreement</li> </ul>	<ul style="list-style-type: none"> <li>• Civil trial; remedy sought through the judicial process</li> <li>• Decision by the National Labour Relations Commission takes precedence (for unfair labour practices)</li> <li>• Disagreement over interpretation or implementation of collective agreement or mediation agreement – the National Labour Relations Commission is asked to give its opinion, which has the same validity as an arbitration award</li> </ul>

## **2. 1 Industrial Action**

The right to industrial action in Korea is restricted to a certain group of industrial disputes. In general, industrial action is possible only in the course of collective bargaining, which concerns issues such as working conditions and wages. Furthermore, disputes must deal with issues which the employer is in a position to address. There are four areas of workers' concerns with regard to which the use of strike action is prohibited:

- (1) The legal regime for dispute resolution does not grant trade unions the right to engage in political strikes. This includes industrial action in response to government social and economic policy.
- (2) Secondary strikes – that is, action in solidarity with other workers – are banned.
- (3) Trade unions cannot take industrial action to demand wages as long as a valid collective bargaining agreement is still in place.



- (4) Non-compliance with a collective agreement is not a ‘dispute of interest’ but a ‘dispute of law’ and must be settled through the courts, not industrial action.

The legal framework for industrial action has been criticised as too limited. In a number of other Asian countries, the law is more liberal. In the Philippines, strikes are possible on issues of unfair labour practices, while in Vietnam and Cambodia, unions can strike on ‘rights’ issues, including an employer’s non-compliance with the collective agreement. The legislative provisions on industrial action in Cambodia allow workers to take industrial action to defend economic and social interests, while in the Philippines unions can strike in response to an employer’s actions which threaten the existence of the union.

Labour law provides a set of procedural rules which must be followed before a union can take industrial action, two of which are of particular importance:

- (1) After a dispute has been declared, it must first be referred to mediation. Mediation is compulsory. According to the Trade Unions and Labour Relations Adjustment Act, either of the parties to an industrial dispute is legally required to apply for mediation. Industrial action is prohibited during the mediation period (10 days in the private sector and 15 days in public services). However, the parties are free to reject any proposal presented to them for resolution of the dispute and can declare a deadlock.
- (2) After mediation has ended in a deadlock and a union wants to engage in industrial action, it must give prior notice to the employer. The notification period is 10 days.

Other Asian countries again differ in this respect. The notice period prior to a strike is 30 days in the Philippines, but only five days in Vietnam, and seven days in Cambodia and Indonesia. In some countries, disputes can be referred to arbitration, which produces a result which is binding on both parties. In the Philippines, the legislative provisions



allow for the employer to present a ‘final offer’, which the union is obliged to put to a vote of the members before calling a strike.

***Box 1 : Role of the Labour Relations Commission (LRC)  
in Conflict Resolution***

In Korea, both individual disputes and collective disputes come under the mandate of the Labour Relations Commission (LRC). The LRC is a tripartite public agency and differs from a labour court. The LRC is composed of representatives of trade unions, employers and government. There is a National Labour Relations Commission and a number of regional Labour Relations Commissions. The National Labour Relations Commission serves as an appeal body for individual disputes dealt with first by regional Labour Relations Commissions. It has jurisdiction in collective disputes which go beyond the territory covered by a regional Labour Relations Commission.

Labour Relations Commissions have jurisdiction over labour disputes which are collective in nature and some individual disputes. In dealing with individual disputes, it can make adjudications and resolutions, issue approvals, grant recognition and ask employers to take anti-discriminatory measures in cases related to the Labour Standards Act, the Trade Unions and Labour Relations Adjustment Act, the Promotion of Workers' Participation and Cooperation Act, Teachers' and Public Servants' Labour Acts, and the Temporary Workers Act. However, individual disputes can be simultaneously pursued through the ordinary court system and the Labour Relations Commission does not have a monopoly of jurisdiction over individual labour disputes. At the same time, a decision of the Labour Relations Commission can be challenged in the courts. Any challenge to the final decision of the National Labour Relations Commission can be brought before the appellate court (appeals court) and, subsequently, to the Supreme Court.

The LRC is also responsible for conducting mediation in collective labour disputes, which arise from collective bargaining.



## 2. 2 Mediation Procedures

Mediation is carried out by the Labour Relations Commission (see Box 1 on LRC for details on duties). The Chairperson of the Commission nominates a Mediation Committee from among the pool of mediators in each of the regional Labour Relations Commissions. The Mediation Committee is composed of three persons (one representative from the workers, one from the employers and one from the government). The Mediation Committee, after listening to the arguments of the parties to the dispute, draws up the mediation proposal and recommends that the parties accept it. If it is accepted by both parties, the mediation proposal becomes an agreement and is signed by the committee members and both representatives of the parties. The dispute then ends. If the mediation proposal is rejected by any of the parties involved, a declaration is made that mediation has failed.

### ***Box 2 : The Work of a Mediation Committee***

After an application for mediation has been lodged, the chairperson of the Labour Relations Commission appoints the Mediation Committee, nominates an investigator from the secretariat to deal with the case and fixes the day of the mediation meeting. The investigator confirms the points at stake and draws up the report for discussion by the Mediation Committee by collecting materials and conducting analysis.

The Mediation Committee may conduct meetings with both parties, separately or together, to ascertain the differences and the possibility of resolving the dispute. If the dispute remains unresolved, the Mediation Committee draws up the mediation proposal and advises the parties concerned to accept it.

*(Box cont'd)*



The Mediation Committee may publicise the mediation proposal and its reasons in order to promote acceptance through the press or broadcast media.

If the mediation proposal is accepted, the Mediation Committee draws up the mediation decision for the parties to the dispute. The accepted mediation decision has the same effect as a collective agreement.

If any of the parties to the dispute rejects the mediation proposal, mediation is declared to have failed. Parties to the dispute are then free to engage in industrial action.

Korean law offers a second path for mediation, so-called ‘private mediation’, which takes place outside the LRC. If parties to a dispute agree, or if an agreement has been concluded previously and is now being challenged, unions and employers can call on a third party, other than the Labour Relations Commission, to preside over the mediation process. This is deemed to have the same effect as the mediation procedure involving the Labour Relations Commission.

Table 3 gives an overview of the outcome of mediation between 1999 and 2006. The Table shows a number of trends:

- The number of cases referred to Mediation Committees fell between 2001 (1,086) and 2006 (739). This decline may be taken as an indicator that employers and unions have become less keen on referring disputes to the LRC and have become more ‘mature’ in finding ‘internal’ compromises through negotiations.
- The number of cases successfully ‘mediated’ doubled within a short span. While in 1999, only 25 per cent of proposals from Mediation Committees were accepted by the parties, by 2006 the acceptance rate had jumped to 53 per cent. This may be seen as an indication that mediation as a whole became more acceptable to the parties and that the



Labour Relations Commissions are seen as more balanced in their consideration of the interests of both parties.

If we compare the figures in Table 3 with those in Table 1, we also discover that not all cases with failed mediation automatically proceeded to strike action. Total strike incidence is much lower than the number of failed mediations. Overall, only some 25–35 per cent (1999 to 2006) of cases of failed mediation actually resulted in strikes by trade unions.

### 2.3 Informal Mediations/Conciliation by Labour Inspectors

Labour inspectors play a crucial role in conciliation/mediation to narrow the differences between the parties by using their first-hand knowledge of the dispute at hand and the context of industrial relations at the workplace concerned. Labour inspectors use their authority to investigate labour law violations – especially those linked to the dispute in question – to promote

**Table 3** Dispute settlement through mediation, 1999–2006

Year	No. of Cases	Successful			Unsuccessful			Success rate (%)
		Sub total	Acceptance of mediation	Agreement (withdrawal of case from mediation)	Sub total	Refusal to accept mediation proposal	No mediation proposal forthcoming	
2006	739	340	106	234	303	97	206	52.9
2005	875	433	114	319	317	117	200	57.7
2004	852	379	89	290	407	144	263	48.2
2003	886	396	94	302	389	123	266	50.4
2002	1030	382	123	259	485	192	293	44.1
2001	1086	385	100	285	507	220	287	43.2
2000	1024	235	82	153	513	362	151	31.4
1999	849	129	62	67	384	288	96	25.1

Source: National Labour Relations Commission.



compromise between the parties. Intervention and informal conciliation/mediation by labour inspectors accounts for a significant part of the efforts of the government and the Labour Relations Commissions. However, mediation through the LRC plays an increasingly central role in resolving industrial disputes, especially as industry-wide disputes have become more important with the emergence of industry-level bargaining.

#### **2. 4 Arbitration and ‘Essential Services’**

The legislative provisions on industrial disputes provide room for arbitration in collective labour disputes, too. However, this is possible only if both parties apply for it, or if an existing collective agreement calls for it explicitly.

As in many other countries, Korean labour law also has special provisions for so-called ‘essential services.’ An ‘essential service’ is a service whose interruption through a strike may cause substantial harm to the public in an important area. Such services are regulated by special arrangements for dispute resolution. In Korea, this is the case for public services, teachers and public officials. For sectors in which strikes are outlawed, arbitration is possible through the Labour Relations Commission.

#### **2. 5 Unfair Labour Practices**

Among the individual disputes presided over by the Labour Relations Commission, there is a special category concerning ‘unfair labour practices’. They usually arise out of trade union activities and affect the organisational rights of unions. Unfair labour practices, as defined in the Trade Unions and Labour Relations Adjustment Act (Article 81), refer to employer’s attempts to hinder trade union activities, including formation and campaigning for new members. In dealing with unfair labour



practices, the Labour Relations Commission has identified five types of violation.

#### Five types of unfair labour practices

Type 1	Dismissal of or discrimination against a worker on the grounds that the worker has joined, or intended to join, a trade union or to establish a trade union, or has performed a justifiable act related to the operation of a trade union.
Type 2	Employment of a worker on the condition that the worker should not join or should withdraw from a trade union, or should join a particular trade union.
Type 3	Refusal or delay of collective bargaining, without good reason, with representatives of a trade union or a person who has been authorised by a trade union.
Type 4	Employer's domination of or interference with the formation or operation of a trade union.
Type 5	Dismissal of or discrimination against a worker on the grounds that the worker has taken part in collective action or has reported a violation of the provisions of this Article by the employer to the Labour Relations Commission, or has testified about such violations or has presented evidence to the administrative authorities.

**Table 4** Cases of unfair labour practices referred to the LRC, by type

Year	Total Cases	Type 1	Type 2	Type 3	Type 4	Type 5
1998	787	679	7	62	36	3
1999	950	821	4	61	47	17
2000	1040	831	2	79	124	4
2001	1502	1366	3	55	75	3
2002	1355	1195	6	53	92	9
2003	947	811	3	67	54	12
2004	908	761	0	90	53	4
2005	968	831	5	65	60	7
2006	1134	987	35	76	33	3

Source: National Labour Relations Commission, *2006 National Labor Relations Commission Yearbook*.

The overwhelming number of unfair labour practices cases belong to Type 1 (see Table 4). The next most frequent complaints involve the employer's refusal to enter into collective bargaining or their delay of the bargaining process. The number of applications for a remedy to unfair



labour practices has increased in recent years, reaching a peak in 2001 – 2002. This increase is related to a more difficult industrial relations environment at the workplace level due to economic problems and a wave of restructuring. The increase indicates that employers have become more aggressive towards trade unions than previously.



# Conflict Resolution in Europe

Thorsten Schulten

## **1. Labour Relations, Industrial Conflicts and the Right to Strike**

Industrial conflicts are a normal and even inevitable feature of labour relations. Employers and employees tend to have different views on a range of matters, including the organisation of work, working conditions, the workload or the quality and productivity of workers' performance. Moreover, in capitalist economies, there are fundamental differences of interest regarding the distribution of income. As already analysed by Karl Marx in *Value, Price and Profit*, there is a 'continuous struggle between capital and labour', whereby 'the capitalist constantly tends to reduce wages to their physical minimum, and to extend the working day to its physical maximum, while the working man constantly presses in the opposite direction.'

The historically developed institutions of labour relations – such as trade unions, labour law, collective agreements, workplace rules and so on – create a certain regulatory framework in which workers and employers can work out their conflicts. Considering the structural imbalance of power between employers and individual employees, these institutions should also enable workers to bargain with the employers on an equal footing.

Apart from labour courts – which deal mainly with conflicts between individual employees and their employers – there are two core instruments



which regulate collective industrial disputes. The first is the *right to strike which, under certain circumstances, allows workers to stop work in order to enforce their claims and to put pressure on the employers*. Although strikes are often seen as a last resort, without a right to strike – as pointed out in a famous ruling of the German Federal Labour Court in 1980 – ‘collective bargaining is nothing less than *collective begging*’. For employees and their trade unions, the right to strike is a fundamental precondition if employers are to view them as an equal party at the negotiating table.

Second, there are various established practices of conciliation, mediation and arbitration, which shape the course of industrial conflicts. The aim of these instruments is to help employers and employees to find acceptable compromises before the latter call for a strike. Their principal aim is to avoid work stoppages and to contribute to the building of cooperative and ‘peaceful’ labour relations.

## **2. Legal Foundations of the Right to Strike**

The right to strike is widely accepted as a fundamental social right of workers and their organisations to promote their economic and social interests. In international law, the right to strike is covered in two legal instruments. Although there is no explicit Convention of the International Labour Organisation (ILO) dealing with the right to strike, it has been affirmed in the case law developed by the ILO’s Freedom of Association Committee that such a right can be deduced from ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise. Furthermore, a right to strike is mentioned explicitly in Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is a multilateral treaty adopted by the United Nations General Assembly in December 1966.

In Europe, the right to strike is guaranteed by the 1961 European Social Charter of the Council of Europe. In Article 6, para 4 of the Charter, it is stated that ‘with a view to ensuring the effective exercise of



the right to bargain collectively, the Parties undertake: ... [to] recognise... the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike'. Later on, the 1989 EU Charter of the Fundamental Social Rights of Workers proclaims that the 'right to resort to collective action... shall include the right to strike' (Point 13). Finally, the 2000 Charter of Fundamental Rights of the European Union points out that 'workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interests, to take collective action to defend their interests, including strike action' [author's emphasis] (Article 28).

Furthermore, the right to strike is accepted by national legislation in all 27 member states of the European Union (Table 1). In 16 member states, the right to strike is explicitly guaranteed by the national constitution. In a further three member states, the right to strike is not explicitly mentioned in the constitution but is deduced by case law from the constitutional right of freedom of association. Finally, in eight EU countries, the right to strike is not a constitutional right, but is accepted de facto through a broad legal immunity for cases of industrial action. To sum up, the right to strike is a core element of European industrial relations.

**Table 1**                      **The right to strike in EU member states**

Explicitly guaranteed by the national constitution	Implicitly guaranteed by the national constitution	No constitutional right, but accepted de facto through legal immunity for industrial action
Bulgaria, Cyprus, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden	Denmark, Finland, Germany	Austria, Belgium, Czech, Republic, Ireland, Luxembourg, Malta, Netherlands, UK
16 countries	3 countries	8 countries

Source: Based on Jeschke, 2005, and Warneck, 2007.



### **3. Legal Regulations and Restrictions on the Right to Strike**

Beyond the acceptance, in principle, of the right to strike, all European states have more or less comprehensive legislation which determines the possibilities and restrictions with regard to taking industrial action. In most countries, the concrete rules and procedures for strikes have been developed by case law, and only a few countries have detailed legal provisions. In some countries, such as Denmark or Sweden, the procedural rules for industrial action are determined by so-called basic collective agreements between the peak trade union and employers' organisations.

With regard to concrete definitions of whether a strike is lawful or not, there are significant differences between the European countries. In Germany, for example, strikes are allowed only in the context of collective bargaining. Other countries also allow *solidarity strikes*, where a certain group of workers, not directly involved in the conflict, takes industrial action in order to support colleagues who are on strike. Finally, a few countries –for example, Italy –have a long tradition of *political strikes*, where unions are allowed to take industrial action against the economic and social policy of the government. However, in other countries, such as Germany or the UK, such political strikes are banned.

The most important restriction on strikes is the so-called *peace obligation*, which exists in almost all European countries and forbids workers to go on strike for the duration of a valid collective agreement.

There are also various national regulations on the question of who is allowed to call a strike. In most European countries, only the trade unions have the right to go on strike. If workers at plant level organise industrial action without the backup of the trade unions, these strikes are seen as *wildcat strikes* and are illegal. In contrast, in a few countries, such as France, the right to strike is an individual right of each employee,



although one which has to be realised collectively. Finally, in some countries, certain groups of employees – such as civil servants or those in the military – are excluded from the right to strike and have no possibilities to take industrial action.

If a trade union wants to call a strike, it usually has to meet a number of procedural requirements. First, it must give advance notice to the employer. Second, before a strike may start, in many European countries trade unions have to organise a strike ballot in order to ask their members for support. Finally, in some cases trade unions first have to accept a joint dispute resolution procedure and are allowed to call a strike only when the latter has failed.

#### **4. Joint Dispute Resolution**

Strike regulations have two basic functions: on the one hand, they enable workers to take industrial action and thereby give them an autonomous power base to promote their interests; on the other hand, strike regulations restrict the possibilities for legal work stoppages in certain circumstances and so help to create ‘peaceful’ labour relations, to a considerable extent. Moreover, in order to avoid strikes, almost all European countries have established far-reaching procedures of conciliation, mediation and arbitration. *Conciliation* describes a process in which the bargaining parties draw on the expertise of a ‘neutral’ third party to assist negotiations and foster collective agreements. *Mediation*, which is often used synonymously with conciliation, takes an additional step by permitting the third party to make recommendations in order to resolve the conflict. Finally, arbitration is a more institutionalised process of mediation in which the third party makes a proposal to solve the conflict which involves a substantial moral and political commitment and is sometimes legally binding.

The concrete regulation of joint dispute resolution exhibits great variety among European countries. In most countries, the procedures for



conciliation, mediation and arbitration are regulated by law, while in some countries they are determined autonomously by trade unions and employers' associations through collective agreements.

**Table 2 Institutions responsible for joint dispute resolution in the European Union**

Country	Ministry of Labour etc.	National arbitration offices	National tripartite bodies	Autonomous bodies created by unions and employers
Austria		X	X	
Belgium	X			
Bulgaria		X		
Cyprus	X			
Czech Republic	X			
Denmark		X		X
Estonia		X		X
Finland	X	X		
France	X	X		
Germany				X
Greece	X	X		
Hungary		X		
Ireland		X		
Italy				X
Lithuania		X		
Latvia		X	X	
Malta	X	X	X	
Netherlands		X		X
Poland		X	X	
Romania	X			
Slovenia			X	X
Slovakia	X			
Spain	X	X		
Sweden		X		X
UK		X		

Source: Based on Eisner and Welz 2006, p. 14.



All European countries have created institutions which are responsible for joint dispute resolution (Table 2). In some countries, it is the state which, through the Ministry of Labour or other ministries, takes on the role of main mediator or arbitrator. In 17 out of 27 EU member states, there are independent national mediation or arbitration institutions. Furthermore, in some countries, dispute resolution is organised by existing national tripartite bodies, such as social and economic councils. Finally, there are countries in which trade unions and employers' associations establish their own autonomous arbitration bodies, which are often set up only on an ad hoc basis.

In most European countries, there are legal provisions which stipulate some form of mediation or arbitration before the bargaining parties are allowed to take industrial action. The results of the arbitration process usually entail a high degree of moral and political commitment; arbitration is compulsory in only a few cases. Usually, both trade unions and employers' associations have to decide autonomously whether or not they accept the results of arbitration.

### **Box 1: Arbitration—The examples of Germany and Sweden**

#### *Germany:*

In Germany, joint dispute resolution is regulated autonomously through collective agreements between trade unions and employers' associations. There are three different forms of arbitration during collective bargaining:

- (1) Both parties have to agree on arbitration (for example, in metalworking)
- (2) If one party ask for arbitration, the other has to accept it (for example, in public services)

*(Box cont'd)*



- (3) There is automatic conciliation before strikes (for example, in construction)

Joint dispute resolution procedures usually prolong the peace obligation period. In the end, both parties have to decide whether or not they accept the results of arbitration.

*Sweden:*

Sweden has two systems of arbitration, which are regulated either by law or by collective agreement. As far as the arbitration system regulated by law is concerned, a bargaining party which plans industrial action must give notice of such action at least seven working days in advance to the National Mediation Office (NMO). The NMO may appoint mediators even without the consent of the parties and can ask them to postpone industrial action for up to 14 days.

In many sectors, there are special collective agreements on joint dispute resolution which leave out the system of state mediation. According to the collective agreement in the manufacturing sector for 1997, all negotiations on a new collective agreement must start at the latest three months before the current agreement runs out. If the bargaining parties have not achieved any results after two months, an impartial chair shall intervene in the negotiations. The latter can ask the bargaining parties to postpone industrial action for up to 14 days.

## **5. Significance of Strikes in Practice**

In practice, the use of strikes in different European states exhibits considerable differences. International statistics provided by EUROSTAT and the International Labour Organisation (ILO) measure the frequency of strikes in terms of the annual number of days not worked due to industrial action per 1,000 employees. In the period 1998–2007, the average number of days lost per year ranges from 157.3 in Denmark to 0.8 days in

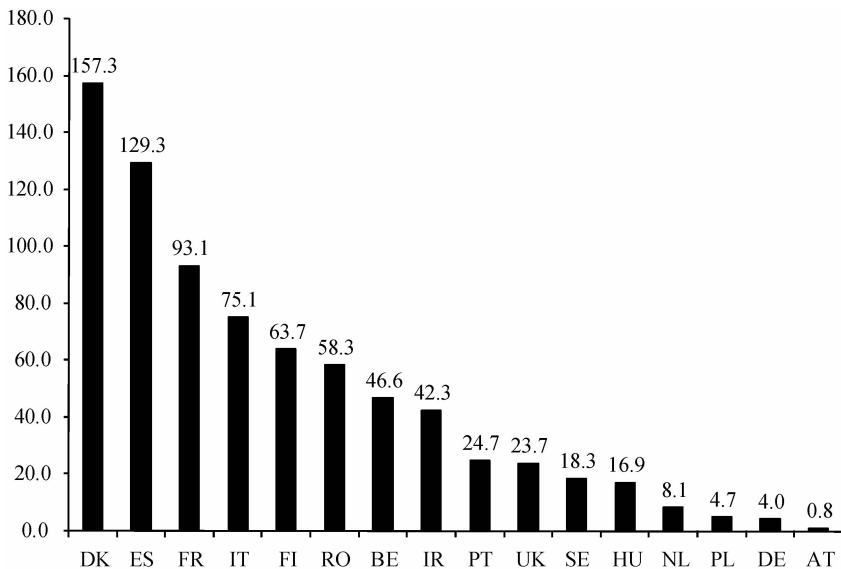


Austria (Figure 1). The countries with the highest strike frequencies can be found in both northern and southern Europe, while in Central and Eastern Europe the number of strikes is comparatively low.

Industrial action involves halting the work process, thereby losing time for making products or providing services. However, even in countries with high strike frequencies the actual working time lost through strikes is relatively low. Even in Denmark, the country with the highest strike frequency, an average worker goes on strike only for 0.16 days per year. Assuming 230 working days in a year and an eight-hour working day, a Danish employee works 1,840 hours a year, losing only 1 hour 15 minutes for strike action. In Germany, annual average working time lost due to industrial action is even less, at only 19 minutes.

**Figure 1 Industrial action in Europe, 1998–2007**

(days not worked due to industrial action per 1,000 employees, annual averages)



Note: AT = Austria, BE = Belgium, DE = Germany, DK = Denmark, ES = Spain, FI = Finland, FR = France, HU = Hungary, IR = Ireland, IT = Italy, NL = Netherlands, PL = Poland, PT = Portugal, RO = Romania, SE = Sweden, UK = United Kingdom.

Source: Eurostat, ILO, national statistics.



An international comparison of strike frequency in Europe with that in countries in other regions of the world shows that the frequency of strikes in Europe is comparatively high (Figure 2). In the period 1998–2007, the average annual number of working days lost due to industrial action per 1,000 employees was 45.8 in the European Union in comparison to 30.3 in the USA and only 0.6 in Japan. However, in South Korea, 89.9 working days were lost in the same period, nearly twice as many as in the European Union.

**Figure 2 Industrial action in South Korea, Japan, USA and the European Union, 1998–2007**



Source: Eurostat and ILO.

## **6. What Explains the Different Strike Frequencies between Countries?**

There are at least four factors which contribute to the remarkable differences in strike frequency between countries. First, there is the degree of legal restrictions on strikes; the relatively low strike frequency in Germany, for example, can partly be explained by the very restrictive regulations on industrial action, which allow strikes only during a specific period, when new collective agreements are being negotiated. A second



factor is the nature of the collective bargaining system. Usually, more centralised bargaining systems, with collective agreements at national or sectoral level, tend to minimise the potential for conflicts in comparison to systems based on company-level agreements.<sup>①</sup> An exception to this rule is Japan, which combines collective bargaining at company level with a very low strike frequency. A third factor has to do with trade union structure. Many countries have competing trade union organisations, which emerged historically, along political, religious or professional lines. Generally speaking, a system of strong, competing unions tends to produce more strikes than a system in which there is only one major union organisation. There is, however, no clear relation between the level of strike activity and the strength or weakness of trade unions. A high strike frequency can be an expression of the strength of trade unions' organisational power; it can also be an expression of its weakness, if the unions have no other options for promoting their interests than strike action. The Scandinavian countries exemplify the former and the South European countries the latter.

Finally, the number of strikes is also influenced by the general economic situation. Structural changes in the economy associated with globalisation and high unemployment have systematically weakened the bargaining position of employees. This might explain the fact that, over the last decade, in most countries, the number of strikes was significantly lower than in previous decades.

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① For a description of European collective bargaining systems, see my chapter on 'Collective bargaining in Europe –An overview' in this volume.



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# **Part III**

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## **Industrial Relations during Economic Crisis**



# Chinese Labour Law in the Global Financial Crisis

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## **Introduction**

Since late 2008, Chinese labour has been suffering from the effects of the global financial crisis, which has its roots in the subprime crisis in the USA. In the wave of factory closures and relocations caused by the financial crisis, many workers have been laid off, especially migrant workers from inland villages who have been working in the labour-intensive, export-oriented industries in the coastal regions. In order to keep existing jobs and maintain social stability, the Chinese government has launched support programmes to help enterprises weather the economic downturn. One of the concerns is whether the implementation of labour laws – especially the newly enacted Law on Labour Contracts – will be relaxed and workers' rights and interests be compromised. Although no direct action has yet been taken to change labour law provisions, there are nevertheless many signs that the authorities are now willing to turn a blind eye to routine violations of labour laws and other regulations designed to protect workers' interests.

This chapter examines the impact of the current global financial crisis on Chinese labour and the implementation of labour laws. It consists of



four sections. In Section 1, the main effects of the global financial crisis on Chinese workers will be identified. In Section 2, a brief introduction to the essentials of Chinese labour law is provided. Section 3 highlights the fate of the newly implemented Law on Labour Contracts in the face of the global financial crisis. Section 4 constitutes the core of the chapter and examines the government's attitude to labour law implementation. The chapter closes with a brief conclusion. The main argument is that, in response to the global financial crisis, the tendency of the Chinese government is to take a flexible attitude to labour laws. The worry is that, although retaining jobs is a valid concern during an economic downturn, putting economic growth ahead of the rule of law may not only erode labour rights and interests, but also risk creating even greater social unrest.

### **1. Impact of the Global Financial Crisis on Chinese Labour**

The effects of the global financial crisis have been spreading all over the world. Compared with the USA and other developed capitalist economies, however, China seems not to have been hit so heavily by the financial tsunami due to its piles of cash, huge domestic market and relatively closed financial system.

Nevertheless, because of its high dependence on export markets and foreign trade, China is not immune to the global economic virus let loose by the global financial crisis. Economic slowdown is evident in China, especially in the coastal regions, such as the Pearl River Delta in Guangdong, China's manufacturing and export centre. According to a report issued by the General Administration of Customs in October 2008, 3,631 toy exporters – about half of the industry's businesses – shut down in 2008<sup>①</sup>. Official statistics released by Guangdong province showed that 15,

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① [http://www.chinadaily.com.cn/bizchina/2008-10/22/content\\_7130799.htm](http://www.chinadaily.com.cn/bizchina/2008-10/22/content_7130799.htm).



661 enterprises were closed in the first 10 months of 2008, and in October alone, 8,500 firms shut up shop. Provincial officials in Guangdong admitted that the global financial crisis has brought Guangdong its most difficult year (2008) since the 1998 Asian financial crisis. Major economic indicators in Guangdong – including GDP, imports and exports – fell back in 2008. Local fiscal revenue declined by 9 percentage points from 2007. Due to the slump in export markets and factory closures, migrant workers – employed mainly in manufacturing – are among the first to bear the brunt of the financial crisis. More than 143,000 migrant workers left Guangdong in the first half of 2008 – by the end of October 2008, the number had reached 500,000. The provincial statistics bureau has estimated that a total of 600,000 migrant workers may have left Guangdong in 2008<sup>①</sup>.

In some cities, such as Dongguan in the Pearl River Delta, many employers whose businesses have failed have fled to avoid paying compensation to their employees. Workers affected by wage arrears went onto the streets and even blockaded government offices. It is not uncommon for labour disputes to develop into mass incidents. In October 2008, thousands of workers at a toy factory in Dongguan occupied the factory and surrounding streets in protest against non-payment of wages, which forced the government to agree to make good the arrears. Later, 500 workers at another toy factory rioted against dismal severance payments made to workers being made redundant.

As a result of the factory closures, more and more workers – especially migrant workers – have become jobless. The official urban registered unemployment rate may reach 4.6 per cent by the end of 2009, the highest since the early 1980s (Yep, 2009). According to an estimate in a research report issued by the Chinese Academy of Social Sciences – a top think tank in China – in December 2008, the urban unemployment rate was already 9.4 per cent (double the official figure) in late 2008 and could rise to 11 per

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① [http://www.chinadaily.com.cn/china/2009-01/08/content\\_7379836.htm](http://www.chinadaily.com.cn/china/2009-01/08/content_7379836.htm).



cent in 2009<sup>①</sup>. Moreover, the unemployment figures do not take into account those migrants who have returned to their home towns and villages and are not registered as unemployed. According to a figure based on a large-scale survey by the Ministry of Agriculture in early 2009 among the 130 million migrant workers, about 15.3 per cent had lost their jobs in cities and returned to their hometown – that is to say, about 20 million migrant workers were laid off in China<sup>②</sup>. Such a large number of jobless migrants clearly represent a threat to social stability. As ‘Document No. 1’, on ‘Boosting the Stable Development of Agriculture and Making Sure Peasants’ Incomes Increase’, issued by the CPC Central Committee and the State Council in 2009, indicates, it will be a very tough year for migrant workers to maintain their income<sup>③</sup>.

As the global financial crisis continues, 2009 will witness more conflicts and clashes, which will further test the capacities of governments at all levels. The Chinese government faces a trade-off between economic growth and protection of labour rights. It is evident that the government regards economic stabilisation as a more reliable option for social stability. Achieving 8 per cent GDP growth has been announced as the top priority on the government agenda for 2009. A 4-trillion-yuan (\$586 billion) plan has been launched to boost the national economy. More public expenditure has been invested in sectors directly related to people’s livelihoods. For example, spending on social security will be increased by 18 per cent in 2009 and another 850 billion yuan will be allocated for medical and health care reforms over the next three years (2009–2011) (Wen, 2009).

## **2. Essentials of Chinese Labour Law**

Since the launch of market-oriented economic reforms and the transition

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① [newsxinhuanet.com/politics/2008-12/16/content\\_10509969.htm](http://newsxinhuanet.com/politics/2008-12/16/content_10509969.htm).

② <http://cn.reuters.com/article/idCNChina-3879520090306>.

③ [http://www.china.com.cn/economic/node\\_7060672.htm](http://www.china.com.cn/economic/node_7060672.htm).



from the planned economy in the late 1970s, China's labour regime has been undergoing dramatic changes. The replacement of lifelong employment by contract-based employment, in particular, marks a paradigm shift in China's labour policy (Ngok, 2007). Correspondingly, China's labour relations and the labour law regime have been reconfigured. Although the state still dominates the making of labour policy, it has reduced its administrative intervention in labour relations and has come to rely on the law to regulate labour relations. As a result, more and more labour policies have been codified into law. With the enactment of the Labour Code of the People's Republic of China (PRC) in 1994, China's legal labour framework has begun to develop. The year 2007 was of particular importance, when the Law on Labour Contracts (2007), the Law on Employment Promotion (2007) and the Law on the Mediation and Arbitration of Labour Disputes (2007) were promulgated. A relatively robust labour law regime has now been established in China.

The basic framework of Chinese labour law (in descending order of authority) consists of: (1) the Constitution of the PRC (labour-related articles); (2) national labour laws enacted by the National People's Congress (NPC) and/or its Standing Committee; (3) administrative labour regulations enacted by the State Council; (4) local labour decrees promulgated by Local People's Congresses; and (5) administrative and local labour rules issued by an administrative agency under the State Council or by local government.

China's Labour Code covers such matters as workers' rights, labour contracts, collective contracts, hiring and firing, wages and salaries, working hours and overtime, rest and vacations, the settlement of labour disputes, the role of trade unions, labour administration, and social insurance programmes for employees. The Code also lays down labour standards in China, including the eight-hour working day and 44 hour working week (shortened to 40 hours in March 1995 by the State Council), limits on overtime, occupational safety and workplace hygiene.

Although the Labour Code of 1994 established the basic legal



framework for China's labour regime in the era of market transition, the three key pillars of the post-Mao labour regime – that is, the labour contract system, the collective agreement system and the labour dispute resolution system – are neither readily enforceable nor fully implemented. More importantly, migrant workers – the new working class emerging from China's transition from a planned economy to market economy – have not received enough protection under the current labour regime. In view of these problems, further efforts have been made since 2003 to stabilise labour relations and improve working conditions. In line with this, the Law on Labour Contracts was drafted in 2007 (Ngok, 2008).

The Law on Labour Contracts is expected to protect workers' interests and rights more effectively and to regulate labour relations. Compared with the Labour Code, the Law on Labour Contracts is more specific and operational in terms of its provisions. Employers who violate the Law are subject to stringent penalties. Officials in charge of labour policies and laws and their enforcement are under greater pressure to perform their duties under the Law. Meanwhile, trade unions are allowed to play a larger role in protecting workers. Specifically, the Law on Labour Contracts is intended to establish sound standards for labour contracts, the use of temporary workers and severance pay. It makes mandatory the use of written contracts and strongly discourages short fixed-term contracts by requiring employers to issue non-fixed contracts to workers who have already completed two fixed-term contracts for them. Severance pay should be given to a worker when a fixed-term contract expires and the worker is willing to renew the contract.

In order to assess whether changes have been made to labour laws in China in response to the current economic and financial crisis, the legal provisions on labour contracts and dismissal will be examined in some detail here. According to the Law on Labour Contracts, a worker must sign an individual written labour contract with his or her employer, and such contracts must contain the following clauses: (i) the employer's name, residence, legal representative or major principal; (ii) the worker's



name, residence, identity card number or number of any other valid identity certificate; (iii) the duration of the labour contract; (iv) place and nature of work; (v) working time, rest and vacation; (vi) remuneration; (vii) social security; (viii) labour protection, working conditions and protection against and prevention of occupational injury; and (ix) other matters that shall be incorporated in the labour contract according to relevant laws or regulations.

According to Article 39 of the Law on Labour Contracts, a worker may be dismissed if he or she (i) does not satisfy the recruitment requirements during the probation period; (ii) is in serious violation of the employer's rules; (iii) causes severe damage to the employer due to serious dereliction of duty or in pursuit of private gain; (iv) establishes a labour relationship with other employers at the same time which may significantly influence his or her work at this establishment or refuses to terminate his or her labour relation with other employers even though the employer has pointed it out; or (v) is subject to criminal prosecution. Regarding collective redundancies, Article 41 of the Law on Labour Contracts stipulates that, in case of difficulties in production and business operations, if the employer needs to lay off more than 20 workers or, if the required employment reduction involves fewer than 20 workers, it accounts for 10 per cent or more of the total workforce, the employer shall inform the trade union or the workforce as a whole 30 days beforehand. After it has solicited the opinions of the labour union or the workers, it may institute the redundancies after informing the labour administration.

To summarise, current Chinese labour legislation comprises: (i) the labour contract system (employment relations must be based on a written labour contract); (ii) the collective negotiation and collective agreement system (highlighting the role of the trade unions); (iii) the minimum wage system (determined by provincial governments); (iv) the labour dispute resolution system (including mediation, arbitration and litigation); (v) the employment-based social insurance system (including pension, unemployment, health care, maternity and accident insurance);



(vi) limits on working hours (8 hours per day, 40 hours per week); and  
(vii) a tripartite structure of labour relations (including employers' associations, trade unions and government).

### **3. Law on Labour Contracts under Heavy Siege**

The Law on Labour Contracts, the controversial labour law in China's market transition, was enacted in 2007 and entered into force on 1 January 2008. There were heated debates during the drafting process. Since many workers lack written contracts, do not receive their wages on time and are unfairly trapped in short-term contracts, the Chinese government wanted the Law on Labour Contracts to provide more protection, thereby bringing more peace and order to the workplace. However, business interests were worried that the Law would 'over-protect' workers and make lay-offs more complex and expensive. Since the implementation of the Law from the beginning of 2008, business groups have tried to water down this much-needed employment protection, declaring that the implementation of the Law on Labour Contracts has harmed workers' interests. Their voices have been echoed by some economists and jurists.

Under the impact of the global financial crisis, some leading Chinese economists have proposed suspending implementation of the Law on Labour Contracts on the grounds that it will exacerbate unemployment and damage the interests of the workers. One die-hard opponent of the Law on Labour Contracts is Professor Stephen Cheung, a Hong Kong-based economist. He has written many articles against the Law and has asserted that its promulgation was the biggest mistake made by post-Mao Chinese leaders to date<sup>①</sup>. Another outspoken opponent is Professor Zhang Weiying of Peking University. In a speech at the Forum of Chinese Entrepreneurs on 8 February 2009, Zhang proclaimed that the Law on Labour Contracts was detrimental to workers' interests because it

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① <http://blog.sina.com.cn/zhangwuchang>.



increased enterprise costs, leading to unemployment. He advocated the immediate and decisive suspension of the Law on Labour Contracts<sup>①</sup>. The well-known labour economist Wang Yijiang of Changjiang Business School also called for enterprises – especially small and medium-sized enterprises (SMEs) – to be released from the Law on Labour Contracts, since it is likely to impose excessive restrictions on their operations (Wang, 2008). In Shanghai, Liu Ji, honorary president of Shanghai Zhong – ou International Business School, went one step further and argued that the main reason for the current economic downturn in China was not the financial crisis, but the Law on Labour Contracts. He called for the rapid revision of the Law – otherwise, China's economic growth would be hindered<sup>②</sup>.

Criticisms of the Law on Labour Contracts have also been made by local governments. In Guangdong, a deputy mayor in Dongguan city, the manufacturing hub in the Pearl River Delta, publicly called for the suspension of the Law on Labour Contracts. In February 2009, at the annual session of the Provincial People's Congress, a number of deputies also called for suspension. Even some officials in Hong Kong have joined the chorus of voices. The Chief Executive of Hong Kong, Donald Tsang, said publicly that 'Hong Kong enterprises worry that, in complying with the Law on Labour Contracts, labour costs will surge, flexibility in managing human resources will be undermined and labour disputes will arise'. He hoped that the mainland authorities could introduce relief measures to address the issue<sup>③</sup>.

Compared with the strong opposition from the business sector and academic economists, the proponents of the Law on Labour Contracts seem weaker. Although the controversy between opponents and proponents has raged since promulgation of the Law, its opponents are

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① <http://business.sohu.com/20090208/n262114995.shtml>.

② <http://finance.sina.com.cn/hy/20090111/15275745561.shtml>.

③ see <http://www.ihlo.org/HKM/271108.html>.



more prominent in the mass media. It seems that few public figures, legal experts, legislators and government officials are willing to stand up and speak in favour of the Law. The Chinese legislature is under considerable pressure to amend the Law on Labour Contracts.

Fortunately, the National People's Congress, China's legislature, has expressed its attitude firmly and publicly. At the annual session of the NPC in March 2009, Xin Chunying, deputy director of the Legislative Affairs Commission of the NPC Standing Committee, stated that the Law on Labour Contracts will not be amended because of the current global economic downturn. She even claimed that China will 'strengthen enforcement of labour laws' to protect workers' rights. Speaking at a press conference at the NPC session, Xin concluded that 'the crisis has nothing to do with the Law', declaring that the reason for rising unemployment in China was the global financial crisis, not the Law on Labour Contracts. To refute economists who argued against the Law on Labour Contracts, Xin maintained that the Law has 'played a positive role in maintaining stable labour relations' amid the economic downturn and has helped to improve workers' social welfare (*China Daily*, 10 March 2009).

#### **4. Between Economic Growth and Labour Rights: The Government's Attitude to Labour Laws**

As already mentioned, confronted by the global financial crisis, the Chinese government has given top priority to keeping existing jobs and maintaining social stability, and many favourable policies have been introduced to aid enterprises in trouble. For example, the government has allowed enterprises to reduce or postpone social insurance contributions so as to reduce their social insurance burden. Currently, five types of social insurance scheme are statutory in China: old age insurance, unemployment insurance, health care insurance, work-related injury insurance and maternity insurance. Measures are being taken to prevent



large numbers of people from becoming unemployed and averting labour unrest. For example, mass layoffs in both state and private companies are not permitted, for the sake of maintaining social stability, and local governments are being urged to establish wage compensation funds to provide back pay for workers whose employers have fled or declared themselves bankrupt. To help unemployed migrant workers, vocational training programmes have been launched nationwide.

Although the Chinese national authorities have no intention of amending or suspending the Law on Labour Contracts, which was enacted only recently after several years of debate and welcomed by workers, there are many signs indicating that local authorities are exhibiting ‘flexibility’ and inconsistency with regard to enforcement. It is an open secret that some localities have not completely implemented the Law on Labour Contracts. On 10 March 2009, at a press conference held at the 2nd session of the 11<sup>th</sup> National People’s Congress, Yin Weimin, Minister of Human Resources and Social Security, was asked to explain the situation by a reporter from Newsweek. In his reply, Yin admitted that

[i]n general, implementation is good, but in the process of implementing a new law, some contradictions and problems are always encountered. The international financial crisis and the particular circumstances of the Chinese real economy and Chinese enterprises are posing new problems for the implementation of the Law on Labour Contracts.<sup>①</sup>

For Chinese workers, it is good news that the NPC is not ready to amend the Law on Labour Contracts and to compromise workers’ interests and rights. However, this does not mean the Law will be implemented completely. Due to weak law enforcement and the weak tradition of the rule of law in China, it is very easy for local governments and enterprises

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① [http://fdi.gov.cn:8080/pub/FDI\\_EN/News/Investmentupdates/t20090311\\_103084.htm](http://fdi.gov.cn:8080/pub/FDI_EN/News/Investmentupdates/t20090311_103084.htm) 2009-03-11.



to circumvent labour law regulations by administrative means. Local governments may implement a law selectively or even enact local administrative regulations which are not consistent with national laws. Some provincial authorities have even introduced measures that undermine the prosecution of wrongdoing by influential businessmen. In the following subsections, the government's attitude to the implementation of various aspects of labour law in the face of the global financial crisis is laid out.

#### **4. 1 Reiterating the Protection of Workers' Rights**

Since the onset of the global financial crisis, the Chinese national authorities have promulgated several documents to reiterate the protection of workers' rights, especially the right to receive wages. On 20 December 2008, the General Office of the State Council issued a Notice outlining practical measures to be taken to aid migrant workers during the economic crisis (the 'December Notice'). The Notice focuses on the need for local governments in migrants' home provinces to provide assistance, stressing the retraining and vocational education of migrant workers, helping them to set up their own businesses and encouraging investment in new rural construction projects. It emphasises that returning migrants should be entitled to social security, that their children should have free and unfettered access to local education and that their existing rural land rights should be protected.

On 10 February 2009, the State Council issued a notice on 'Improving employment situation in the current economic context' (the 'February Notice'), which stated that (a) priority should be given to ensuring employees' legal rights, (b) employers should not refuse to pay social insurance contributions as long as an employment relationship still exists and (c) local labour officials should monitor such companies to ensure that employers do not flee or delay paying wages and social insurance contributions.



## **4. 2 Guaranteeing Wage Payments to Workers**

To ensure that laid-off workers receive compensation, thereby preventing labour unrest, is becoming a major concern of the government. The December Notice urged local governments to establish mechanisms – such as wage arrears contingency funds – to guarantee the prompt payment of wages. Many cities, such as Dongguan and Shenzhen in Guangdong province, have already established such funds. From June to October 2008, the Shenzhen government paid 10 million yuan in wage arrears to jobless workers<sup>①</sup>.

However, due to the large number of factory closures, it is not easy for local governments to pay back wages to workers on behalf of their employers. In fact, they have only been able, at best, to provide temporary relief to laid-off workers.

## **4. 3 Curbing Collective Dismissals**

As China lacks a robust social safety net to deal with the large number of jobless workers, the Chinese government has taken measures to prevent collective dismissals. Several local and provincial governments have already instructed enterprises that the authorities must be informed before any mass layoffs, so that appropriate measures can be taken to ease potential unrest. According to the February Notice, if a company plans to lay off more than 20 employees, or over 10 per cent of the workforce, in one go, it must submit a written report to the local labour and social security department 30 days in advance. This requirement implies that the government has rewritten the provision on mass layoffs laid down by the Law on Labour Contracts (Article 41), as employers looking to dismiss 20 people or 10 per cent of their workforce must get approval from the local

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① [http://www.chinadaily.com.cn/bizchina/2008-10/22/content\\_7130799.htm](http://www.chinadaily.com.cn/bizchina/2008-10/22/content_7130799.htm).



authorities. Employers are encouraged to do whatever they can to avoid collective dismissals, such as reducing payroll, changing working hours and giving workers unpaid leave.

#### **4. 4 Freezing the Minimum Wage**

China first introduced the minimum wage system in the mid-1990s and the minimum wage level is regarded as a major indicator for safeguarding workers' rights. Since economic reforms began, Chinese workers have suffered from low wages as cheap labour has been used as the country's key competitive advantage. The minimum wage level has been increasing rapidly since 2003, when the 'people-centeredness' policy and 'harmonious society' concept were initiated. In Guangdong, the minimum wage level has even been used as an important policy instrument in upgrading its economic structure. With the rising minimum wage and increasingly strict environmental protection measures, many small firms operating at the lower end of the market, with small profit margins and operating at low cost, based on a labour-intensive and low-profit business model, were forced to close or relocate even before the advent of the global financial crisis.

With the financial crisis, there is now increasing pressure from the business sector to abolish the minimum wage system. Although abolition is not on the agenda, the Chinese authorities have frozen the minimum wage level. On 17 November 2008, the Ministry of Human Resources and Social Security issued a notice declaring a temporary moratorium on a long overdue minimum wage rise.

#### **4. 5 Reducing Social Insurance Contribution Rates**

Since the mid-1990s, China has been developing an employment-based social insurance system. Both employers and employees are required to contribute to a social insurance scheme. As such social insurance



contributions account for a major proportion of their labour costs, many enterprises are reluctant to join the schemes or try to minimise their social insurance contributions. Faced by the global financial crisis, reducing social insurance contributions has become one of the main concerns of the business sector. In order to help local firms and individuals cope with the global financial crisis, in December 2008, the authorities in Beijing city announced a plan to slash social insurance contribution rates from January 2009. According to the plan, the unemployment insurance contribution rate for employers will be reduced from 1.5 to 0.5 per cent and from 1 to 0.2 per cent for employees. The work injury insurance contribution rate will be cut from 0.59 to 0.48 per cent<sup>①</sup>.

In February 2009, in order to help enterprises ease their financial burdens, Guangdong provincial government decided to lower the insurance contribution rate of four social insurance items (not including old age insurance), allow companies in difficulties to postpone the payment of social insurance contributions and provide social insurance subsidies for companies in difficulties, as well as subsidies for employee training. In February 2009, Shenzhen municipal government decided to substantially reduce the work-related injury insurance, comprehensive medical insurance and in-patient medical insurance contributions paid by enterprises. This will last for one year. Subsequently, work-related injury insurance contributions will be reduced by 50 per cent, comprehensive medical insurance contributions will be reduced by 2 per cent, in-patient medical insurance contributions will be reduced by 0.3 per cent and the medical insurance contributions paid by enterprises for rural workers will be decreased by 2 per cent<sup>②</sup>.

When announcing the policy of lowering social insurance contribution rates, provincial and local governments claimed that both enterprises and their employees would benefit as they would have to pay less for social

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① [http://www.chinadaily.com.cn/bizchina/2008-12/25/content\\_7339042.htm](http://www.chinadaily.com.cn/bizchina/2008-12/25/content_7339042.htm).

② <http://ctichina.org/v2/en/node/726>.



insurance programmes, thereby cutting production costs and keeping workers in employment. However, after the cut of the social insurance contribution by the employers, the governments failed to make sure that workers will receive fiscal subsidies to make up for the reduced contribution.

#### **4. 6 Relaxing the Implementation of the Law on Labour Contracts**

On 7 January 2009, the Guangdong Provincial People's Procurator issued an Opinion stressing that, during the current economic difficulties, its officials should exercise caution in prosecuting white-collar criminals and endeavour to ensure that companies stay in business and that normal enterprise production and development is guaranteed (*Guangzhou Daily*, 7 January 2009). The Opinion states that prosecutors may choose not to arrest factory owners, managers and key technical staff accused of crimes such as embezzlement and corruption. Moreover, they should clearly establish the facts before taking action to freeze or close bank accounts, disrupt enterprise logistics or issue statements that might damage the reputation of the enterprise. Neither should prosecutors take action that might jeopardise an enterprise's negotiations on major projects or contracts. Meanwhile, the Opinion stresses that prosecutors should crack down on any crimes that harm the legitimate interests of enterprises or jeopardise production. They should 'handle appropriately and according to the law (initially civil, now criminal) cases in which economic disputes trigger violent incidents, such as forced debt recovery, kidnapping, looting and so on, and effectively safeguard social order and safety'. The Guangdong guidelines were imitated by other local governments in areas hit by the economic downturn. In Shandong, government officials have reportedly told factory owners that, as long as they do not lay off large numbers of employees, the government would ignore other labour rights



violations<sup>①</sup>. On 4 November 2008, Shenzhen municipal government published an urgent notice on ‘stabilising jobs for migrant workers’, requesting that related authorities provide support and ‘early intervention’ for enterprises which encounter trouble.

## 5. Conclusions

In response to the global financial crisis, the Chinese government has given top priority to economic growth and to keeping and creating jobs. Although the national authorities have reiterated the importance of protecting workers’ rights and interests, a flexible attitude has developed to the implementation of labour laws. Although there has been no open declaration suspending the Law on Labour Contracts, its implementation has been relaxed on the basis of administrative intervention by the government. There are signs that, in order to maintain economic growth and social stability, the authorities are now willing to turn a blind eye to routine violations of labour laws and other regulations designed to protect workers’ interests. While keeping jobs and, therefore, maintaining social stability is a valid concern during an economic downturn, is equality before the law a fair price to pay? Putting economic growth ahead of the rule of law, the authorities may not only erode workers’ rights, but also risk creating even greater social unrest. At a time when governments at all levels are concentrating their efforts on economic growth and helping enterprises, trade unions should step up their activities in defending workers’ rights and interests. Chinese trade unions, represented by the All-China Federation of Trade Unions, played a leading role in the preparation of the Labour Code and the Law on Labour Contracts; they should play the same kind of role in monitoring the implementation of labour laws. Otherwise, the already unbalanced relationship between labour and capital will deteriorate further, thereby posing a threat to

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① [http://www.chinalawblog.com/2009/01/chinas\\_labor\\_laws\\_worry\\_me\\_or.html](http://www.chinalawblog.com/2009/01/chinas_labor_laws_worry_me_or.html).



social stability in China if the global financial crisis continues.

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# Lessons for China from Labor Policies during the Great Depression in the USA

Qiao Jian

As the current economic crisis looms large over China, as the Party and the Government spare no efforts in securing employment, people are shocked by reports that trade unions should ‘be on vigilance against hostile forces infiltrating migrant workers’ Li (2009). One can’t help but consider the role of trade unions in economic crises. Maybe US labor policies and measures taken by US trade unions during the Great Depression of the 1930s could offer us some insight.<sup>①</sup>

The worst economic crisis in the US took place in 1929, when the stock index dropped 35% on Black Monday and the following day, triggering the ten-year-long Great Depression. During this period, 50 million people lost their jobs globally, countless people became homeless, over 10,000 businesses went bankrupt, the global industrial output dropped by 37% to the level ten years before. When Franklin Roosevelt was sworn in as US President in March 1933, the epic New Deal began.

Apart from massive intervention in public life, the most controversial aspect of the New Deal is its labor policy in favor of trade unions. However, such a policy won sufficient support from the working class. It

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<sup>①</sup> All information on historical events during the Great Depression in the US, if not otherwise noted, is quoted from Dixon Wector (2008).



could be said the legal and policy foundations for establishing US industrial relationship and labor standards were laid in this period (Budd, 2007: p.145). Thanks to the crisis and the Roosevelt Administration, trade unions developed on an unprecedented scale, discovered where they could exert political influence, awakened long dormant class consciousness and class struggle. Eventually, the protection of grass-root workers' rights and income growth stimulated the economy. The political and ideological legacy of the New Deal is well worthy of our further discussion.

### **1. The Expansion of Trade Unions**

In the post-WWI decade the US economy grew at an unprecedented pace. During this period the management had tight control of business, trade union membership shrank, while collective bargaining was further weakened. There was no trade union in such important industries as steel and automotive industries. Even so, the working class won two key legislative battles under the Hoover Administration. The 1930 unanimous ruling by the US Supreme Court over *Texas vs. New Orleans Railway Company* found that the employer's attempt at imposing a company union on workers constituted interference with workers' rights. The Norris-LaGuardia Act signed by President Hoover in March 1932 declared any 'yellow dog' contract, under which an employee promised not to become a member of any labor organization, to be unenforceable, and deprived federal courts of jurisdiction to issue weapons injunctions against organized labor. The act was based on the following theoretic assumption: any individual laborer is helpless unless he is entitled to organize a trade union and appoint representatives to bargain on his behalf over employment and labor conditions. These ideas and practices led to the New Deal.

The first law enacted during Roosevelt's rule was the National Industrial Recovery Act, which reiterated some labor protection measures included in the Norris-LaGuardia Act, promising that 'employees shall



have the right to organize and bargain collectively through representatives of their own choosing’ and shall be free from any restraint. Both labor and capital responded immediately, to different ends, though, employers trying to establish ‘company unions’, while trade unions trying to eliminate ‘company unions’ so as to dominate negotiations. United Mine Workers of America (UMWA), under the leadership of its president John L. Lewis, was the most active. Its membership surged from 150,000 in 1932 to 400,000 in 1935. Although the American Federation of Labor (AFL) didn’t grow as rapidly, its membership also increased by close to 75% between 1933 and 1936.

## **2. Basic Legal Framework Coordinating Industrial Relations**

In August 1933, President Roosevelt established the first national tripartite mechanism in history, the National Labor Committee, consisting of employer and trade union representatives, chaired by Senator Robert F. Wagner, to mediate collective bargaining. However, the Committee lacked administrative power. In June 1934, the Congress took back the power from the executive branch, replaced the Committee with the quasi-judicial National Industrial Relations Board (NLRB). The Board, composed of three industrial relations expert, was supposed to be neutral, but in fact sided with the labor in most cases.

Throughout the 1930s, trade unions won respect from workers and people in general by promoting collective bargaining, thereby exerting important psychological and legal influence on workers. Despite the later-on collapse of National Recovery Administration, trade unions, with support from the NLRB, were strong enough to urge the Congress to make more laws protecting labor rights. On July 5, 1935, the National Industrial Relations Act (Wagner Act) was passed by the Congress. Its author, Senator Wagner, became known as the Father of US Labor Laws. The Act constitutes the basic legal framework coordinating US industrial relations and has been in use ever since. Its core argument is that labor



disputes arise from power imbalance between the employer and individual workers in negotiation, and that the way out is to organize unions and cultivate collective bargaining (Budd, 2007: p. 145). It bars interference with the formation of labor organizations or with collective bargaining, makes it illegal for employers to refuse negotiation with employee representatives, to support “company unions”, or to discriminate against union members in employment, and demands that the Federal government protect workers’ right to strike.

A new three-person National Industrial Relations Board was established to administrate the Act. Moreover, a series of Federal Court rulings provided great support to the NLRB. By the end of January 1941, the NLRB had handled 33,000 labor disputes involving nearly 7,000,000 workers and 3,166 strikes involving 400,000 workers, in addition to the prevention of approximately 1,000 strikes involving 200,000 workers.

### **3. Strike Movement and the Development of Radical Trade Unions**

The massive strike movement in the US in mid-1930s actually resulted from workers’ grievance during the Great Depression as well as the encouragement of the Roosevelt Administration. In late May 1934, the Dunn brothers, believers in communism, organized a teamster strike in Minneapolis, which led to bloodshed. In San Francisco, a maritime strike that started in May evolved eventually into a general strike, the largest of its kind since 1919. In September 1934, 350,000 cotton mill workers took the street to protest against wage reduction caused by fall in production. Subsequently a mediation board chaired by former New Hampshire Governor John G. Winant was established, which published a report in favor of strikers and recommended the formation of a textile industry industrial relations committee.

Faced with the increasing power of the workers and terrified by signs of radical infiltration, capitalists began to spend heavily on private



detectives and strike breakers, or, in the euphemism of Henry Ford, the Service Department. Between January 1934 and July 1936, General Motors spent close to one million US dollars on private detectives to cope with unionization in the automotive industry.

Automotive capitalists were challenged by the Committee for Industrial Organization (CIO), a new belligerent force in US trade unions. Radicals headed by John L. Lewis, President of United Mine Workers of America (UMWA), insisted that the traditional ‘horizontal’ structure (or guild structure) of the American Federation of Labor (AFL) block union movement, cause ‘labor aristocracy’ to look down upon lowly-paid workers engaged in mass production, and that industrial unions should replace the former. During this period, industrial workers formed their own unions, including those in the automotive, rubber, mining and steel industries. By 1938 those industrial unions boasted a membership of four million, roughly half million more than that of AFL. Later they merged into Committee for Industrial Organization (CIO) (Lansbury et al, 2007: p.66), turning a new leaf in US labor movement. Industrial unions were bolder, more belligerent and radical. For example, the ‘sit-down strike’ they invented was rapidly adopted by other groups. They won frequent victories in labor-capital disputes, took active part in elections and labor-related legislation, and were keen on leveraging government support in realizing their own objectives.

The ten years of Great Depression brought about changes in US labor mindset. Labor policies included in the New Deal that were in favor of trade unions, as well as the radical school in union movement, gave birth to unprecedented class consciousness among workers (especially in major industrial centers) and consequently a new sense of identity. Labor leaders strengthened efforts in turning union offices into clean charming community centers and leisure activity centers, complete with lounges, game rooms, ballrooms, restaurants and libraries, where cohesion among workers could be nurtured through such social activities as dancing, card games, dinners and beer parties.



#### **4. Establishing Fair Labor Standards**

As the New Deal drew to a close, President Roosevelt introduced the draft Fair Labor Standard Act to the Congress in May 1937. Six months later, as the 1937 Depression worsened, he again urged the Congress to adopt it. In June 1938, after a tortuous depressive winter, plus modification and simplification of the draft, the Act was adopted. President Roosevelt told his people, ‘Apart from the Social Security Act, this might be the most far-reaching, far-sighted program for the benefit of workers ever adopted in this or any other country.’

The Act’s predecessor was the Walsh–Healey Public Contracts Act adopted in the latter half of 1935, which protected employees of government contractors whose contracts exceeded USD 10,000. For these employees, it established overtime as hours worked in excess of 40 hours per week, set the minimum wage equal to the ‘prevailing wage’ in an area. The Fair Labor Standards Act expanded the protection to all employees engaged in interstate commerce, with the exemption of agriculture, fishery and some service sectors. No worker was obliged to work, more than 44 hours a week during the first year (42 the second year, and 40 thereafter). Except for some seasonal jobs, there was to be a minimum wage of 25 cents per hour for the first year, to be increased to 40 cents within seven years. Such a gradual process allowed employers time for mild adjustment. The Act also prohibited employment of child labor in the manufacturing part of interstate commerce.

This federal law establishing the minimum wage and maximum working hours had profound impact on US wage-earners. Its major beneficiaries were those un-unionized, unprotected workers, including women, minors and unskilled labor. It is estimated that, thanks to the Act, about 300,000 workers had their wage increased to 25 cents, 1,300,000 workers had their working hours shortened; 690,000 workers had their second-year wage increased to 30 cents, and 2,382,000 workers had



their second-year working hours shortened to 42 hours; the 1940 40-hour-per week reform benefited about 2,000,000 people. Apart from urgent war-generated orders, this could be counted as the most effective measure in stimulating the economy and increasing demand. On February 3, 1941, the Supreme Court ruled that the Act be a permanent part of US industrial relationship.

## **5. Lessons Learned**

There are quite some apparent differences between labor policies during the Roosevelt New Deal and those in China in the face of the current financial crisis, the major one being guiding principles. New Deal policies were completely in favor of workers; whereas in China the focus is on relieving SMEs (small and medium-sized enterprises) of their burdens. Throughout the year of 2008, the Chinese government wavered between worker rights protection and economic stimulation including salvaging SMEs. Eventually it decided to postpone the introduction of Enterprise Wage Regulation and the Wage Increase Mechanism, also known as the ‘Nine Rules on Wage Increase’. The Regulations for the Implementation of the Labor Contract Law doesn’t mention agency workers at all, leaving such flexible form of employment to itself. Government policies promulgated so far this year give top priority to employment, leaving people with the impression that as long as an enterprise pledges to ‘try its best not to lay off workers’, it has full discretion to weaken workers’ rights, such as delaying payment into social security accounts, giving unpaid vacations, deducting effective working hours, or even defaulting on wage payment under certain circumstances. Some people raise a riotous clamor about suspending the implementation of the Labor Contract Law and even removing minimum wage requirements.<sup>①</sup> It is no exaggeration

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<sup>①</sup> “Scholars Call for a Halt to Labor Contract Law Implementation Upon Its Anniversary”, [www.stnn.cc](http://www.stnn.cc), 2/10/2009.



that the implementation of the Labor Contract Law and the efforts on protecting workers' rights may come to a premature end. This author believes that we should avoid an economic policy that is concerned only with businesses or employment in general, but not the number of jobs created or the protection of workers' rights. A lesson from the New Deal is that it's hard to genuinely increase domestic demand and stimulate economic growth without increasing wage income and social security. Therefore, it is for the purpose of maintaining social equity and economic growth that we stress protection of workers' rights during economic crises.

A second lesson from the New Deal is that practical and effective collective bargaining is even more necessary in economic crises. The All China Federation of Trade Unions' initiated in December last year the 'Mutually Agreed-upon Actions', i. e., collective negotiation and agreement over key challenges to enterprise operation and workers' rights. Employees should help their employers tide over difficult times, while employers should protect employees' rights. As a result, hopefully an amicable collaborative employer-employee relationship could be established. Moreover, the All China Federation of Trade Unions stresses that the collective bargaining mechanism should be integrated into the 'Mutually Agreed-upon Actions', so that collective contracts or supplementary agreements tailored to the specific conditions of the enterprise could be signed, thereby expanding coverage and enhancing effectiveness. The logic of All China Federation of Trade Unions well illustrates the need for harmonious industrial relations as well as the priority given to 'No Laid-off Workers, No Wage Reduction' in collective bargaining. A guideline issued by competent authorities in February this year also demanded that the government, employers and employees should accelerate the development of the collective bargaining mechanism, making it an institutional guarantee for employee-employer cohesion, risk sharing and common efforts in overcoming difficulties. It is expected that by the wide adoption of the collective bargaining mechanism, autonomous



readjustments of industrial relations can be strengthened. The point here is not to come up with some temporary measures to cope with the current crisis, but to improve industrial relations. What must also be pointed out is that there have been some chronic problems with traditional collective bargaining in China, such as trade unions' lack of independence and representation, and perfunctory collective negotiation. The improvement over collective bargaining in face of the financial crisis would mainly be driven by the Party and the government. In effect the collective bargaining mechanism should be guided by the Party and the government while encouraging member participation, thereby 'endowing trade unions with more resources and means' in two ways.

A third lesson is to take advantage of the current economic crisis to promote the development and restructuring of trade unions, raise employee awareness, and enhance the economic, socio-political status of trade unions. Experiences from the New Deal show that when economy grows at a normal or fast pace, employees are more likely to identify with the enterprise than with the trade union, which applies especially to white-collar workers in high-end service sectors. An economic crisis orients the lower classes who feel the common pain towards common objectives. Once they are involved in a progressive labor movement, they are more likely to form a common class consciousness and therefore solidarity. It happened during the New Deal, and will happen this time. Trade unions should strengthen their efforts in expansion. In particular they should target migrant workers, offer them assistance and enhance their identity with the working class and trade unions, laying a solid foundation for the future growth of trade unions.

As to organizational structure, this author believes that trade unions should lead the efforts in workers' rights protection, not that they must follow the radical approach of CIO in the US, but that China will have basically established a complete labor law framework oriented towards market economy by the 12<sup>th</sup> Five-Year Plan. By that time, the priority in industrial relations will shift from law making to strict enforcement and



labor-capital autonomy. A major form of labor-capital autonomy is to establish a trade and industry level coordination and dialogue mechanism in different geographical regions. Therefore, efforts should be made from now on to develop and staff trade or industry unions, industry employers' associations and government-backed guilds, accumulate experience and create conditions for building an industrial relations coordination mechanism in the future. Besides, enterprise-dominated bargaining has been proven to be more perfunctory, therefore it should only be auxiliary. All in all, trade unions must demonstrate their competence in representing workers and protecting their rights. Only in this way can they win respect from the society in general. The current economic crisis is a window of opportunity for trade unions.

A final lesson is to take advantage of the current economic crisis to readjust and improve national industrial relations coordination mechanism oriented towards market economy. The institutional framework of the contemporary US industrial relations coordination mechanism was established during the New Deal. Despite subsequent adjustments and challenges posed by economic globalization, flexible employment and de-unionization, its main function is intact, offering us a lot of references. For example, in industrialized countries, there is usually a tripartite industrial relations board separate from government's labor authorities, which makes investigation, planning and decisions over major labor-capital issues, and which handles labor-capital disputes of significant social impact. This was a legacy from the New Deal. This author believes that we should learn from the practice by institutionalizing the tripartite board in order to cope with major labor-capital issues caused by the crisis. It is worth mentioning that there are some self-evident weaknesses in the Law on Mediation and Arbitration of Labor Disputes that came into force last year, for example, the failure to mention how to handle group events such as strikes. Moreover, existing laws and regulations on collective disputes are too simple, too ambiguous, requiring a long time to process, and too subordinated to other laws and regulations. Unfit for the current



situation, they call for legislative and administrative adjustments.

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# How Can the Interests of Workers Be Safeguarded during the Economic Crisis in Korea?

Kiu Sik Bae and Rudolf Traub-Merz

## 1. Introduction

The global financial crisis, which commenced with the collapse of the subprime mortgage market in the USA at the end of 2007 and then spread throughout the world with the collapse of Lehman Brothers in September 2008, has wrought havoc in many economies, in particular those which are bound to the US economy through their banking and financial systems or export sectors. It has demonstrated with exceptional clarity that integration in world markets not only provides opportunities for economic growth but forces the participating economies to share the burden of emerging crises, no matter where they may have arisen or for what reason. In the course of a few months, the world experienced a domino effect, with one sector after another being caught in a downward spiral, stemming from non-functioning banks or shrinking consumer demand. It became clear to all that markets had no in-built mechanism to halt this development and that market economies might even be facing total collapse. In a feat of unprecedented proportions, governments of the leading economies were forced to design rescue packages to bail out insolvent banks and have tried to stimulate domestic investment and



demand with public expenditure programmes, mainly financed by credit.

Korea must bear a substantial share of the costs. It has a fairly small domestic market compared to its well-developed industrial capacity and in recent decades has pursued an economic growth strategy relying on exports, especially to China, Hong Kong and the USA. When global demand for Korean exports started to shrink, the effects were felt in many segments of the national economy. GDP in the fourth quarter of 2008 fell by 5.6 per cent, while industrial production dropped by 12 per cent over the same period.

The decline in economic activity generated shockwaves on the labour market, leaving the government, employers, trade unions and workers in search of answers to the problem of rising unemployment, including ways of maintaining at least some employment security. In this chapter, we shall attempt to describe how in Korea the government and the social partners are coping with the employment crisis and to assess the effectiveness and limitations of their common efforts. Section 2 looks at rising unemployment. Section 3 considers employment contracts and assesses the importance of employment regulations. Section 4 examines the legal limitations on employment flexibility as an answer to the output crisis, while Section 5 reviews current policies on employment adjustment.

## **2. Current Unemployment Situation in Korea**

Table 1 shows general employment trends in Korea over the past six years. The unemployment rate has remained fairly low. It is noteworthy, however, that informal employment is fairly high and that, at almost 5.8 million, the self-employed constitute a large proportion of the labour force.



**Table 1**                      **Employment indices, Korea, 2003–2008 ('000)**

	2003. 8	2004. 8	2005. 8	2006. 8	2007. 8	2008. 12
15 years of age and above	37390	37771	38428	38835	39232	39864
Economically inactive	14454	14542	14739	14864	15018	16156
Economically active	22936	23229	23689	23972	24214	23709
Employed	22126	22382	22847	23164	23458	22861
Unemployed	810	848	843	807	756	848
Participation rate (%)	61. 3	61. 5	61. 6	61. 7	61. 7	59. 5
Unemployment rate (%)	3. 5	3. 6	3. 6	3. 4	3. 1	3. 6
Employment rate (%)	59. 2	59. 3	59. 5	59. 6	59. 8	57. 3

Source: National Statistical Office, annual surveys of the economically active population.

Official unemployment rates do not record the full extent of joblessness. Table 1 reveals a sudden decrease in the number of employed persons – by 597,000 – from August 2007 to December 2008, while the number of unemployed increased by only 92,000 over the same period. The missing half a million are to be found in the category of economically inactive persons, which increased by over one million, around 800,000 above what might have been expected merely from the extrapolation of previous trends. A large number of unemployed persons are not recorded in the official unemployment rate.

### **3. Employment Contracts and Employment Regulations**

#### **3. 1 Informal Contracts**

Informal employment contracts are concluded orally. They usually arise in circumstances in which the employer has the upper hand and workers have



no recourse, for example, to trade unions in non-unionised companies. Informal contracts often give rise to disputes, for example, when employers are faced with adverse business conditions and feel unable to honour what they had agreed.

However, whether formal or informal, both types of employment contract are subject to minimum conditions stipulated in the Labour Standards Act. The government has encouraged employers and employees alike to use written contracts since the mid-1990s and provides a standard form of employment contract for the purpose. There has been some progress in this respect, but more than half of all employment contracts in Korea are still concluded orally (see Table 2). This applies to employees on open-ended contracts and to temporary workers.

**Table 2**                      **Proportion of written employment contracts**

	All employees	Open-ended contracts	Temporary workers
2008 (Aug. )	46.5 %	46.8 %	46.1 %
2007 (Aug. )	42.8 %	41.5 %	45.1 %

Source: Ministry of Labour, February 2009; Press release on employment, January 2009.

### **3. 2 Standard Employment Contracts**

According to the Labour Standards Act, employment contracts must include a minimum set of provisions, for example, on wages (composition of wages, how to calculate wages, payment methods), working time, holidays, annual leave and other working conditions (see Table 3). Employment contracts are legal documents on which employers and employees must rely. However, if a dispute arises on the contents or application of contracts, they are often regarded as merely formal and conflict resolutions usually tend to rely more on the interpretation of employment regulations than on what is written down in the employment contracts themselves.



**Table 3** **Outline of employment contracts**

Category	Type of information to be supplied
1. Term of labour contract	from (dd/mm/yy) to (dd/mm/yy)
2. Place of employment	
3. Jobs/duties	Industry, business, occupation
4. Working hours	Average working hours : ____ hours, shift system
5. Rest hours	____ minutes per day
6. Holidays	Legal holiday (May Day, Christmas, Buddhist birthday, other), Saturday/Sunday, other
7. Payment	1) monthly (hourly, daily, weekly) wages 2) allowances, bonuses 3) overtime, night shift or holiday rates
8. Payment date	Normally monthly
9. Payment methods	Direct payment (at least one monthly payment)
10. Other benefits	Food and other company benefits
11. Other matters not regulated in this contract will follow the provisions of the Labour Standards Act.	
(Date) Employer (signature) Employee (signature)	

### 3. 3 Employment Regulations

Employment relations are governed to a large extent by employment regulations. The Labour Standards Act stipulates a set of minimum conditions which employers must adhere to (see Box for the various categories). Any provision of an employment contract or company employment regulations is nullified if it violates the Labour Standards Act.



**Box: Terms and Conditions based on Employment Regulations**

- Start and end time of work, breaks, holidays, leave, shift work
- Wage determination, methods of wage calculation, payment methods, period over which wages are paid, payment time, wage increases
- Family allowances and retirement, food benefits
- Retirement payments, bonuses, minimum wages
- Education facilities, parental leave, motherhood protection
- Safety and health
- Recognition of good performance and disciplinary sanctions
- Other things that allied the whole workforce at firms

Source: Article 93 of the Labor Standard Act.

This applies to all employment, but is of particular significance for non-unionised firms, where workers do not enjoy additional protection from trade unions. Employment regulations provide a special protective shield for manual workers and low grade clerical workers, since they contain minimum standards, beyond the contents of employment contracts. At unionised firms, collective agreements have priority over employment regulations. However, even here, employment regulations are significant because they ensure that collective agreements do not fall below a certain standard.

In order to make sure that the Labour Standards Act is implemented in the workplace, the Ministry of Labour deploys a large number of labour inspectors throughout Korea. In non-unionised companies, they have additional tasks; for example, they are supposed to resolve disputes filed by workers, particularly concerning wage arrears. In unionised enterprises, trade unions also participate in monitoring the implementation of employment regulations or collective agreements. Both the Labour Standards Act and employment regulations tend to be respected at large



firms, but the situation is a good deal more patchy at small firms.

Once company employment regulations are in place, changes may be made only by following a strict procedure. According to the Labour Standards Act, any changes in or rewriting of employment regulations by an employer must be done in consultation with trade unions representing more than half of the employees or, when it comes to non-unionised firms, in consultation with more than half of the company's employees. If the employer's envisaged changes would be detrimental to the employees, the employer must reach agreement with the trade union or more than half the employees concerned. The law imposes fairly strict constraints on unfavourable changes to employment regulations to prevent employers from taking advantage of an unfavourable employment situation.

#### **4. Flexibility of Employment Contracts or Regulations in the Face of the Economic Crisis**

Once employment contracts are concluded or company employment regulations laid down, they cannot easily be modified in accordance with the business cycle without the consent of the employees. In a recession, any adjustment in terms and conditions at unionised firms is often accompanied by protracted negotiations with the unions. Where there is no union, employers facing tough economic conditions often try unilaterally to decide on wage freezes or cuts in bonuses or benefits without the agreement of their employees.

Two situations apply here. For highly qualified workers, such as graduates or managers, it has become common practice for employers to change employment contracts or regulations unilaterally or to force them into voluntary or early retirement. However, this is not the case for manual workers or non-managerial clerical workers, who enjoy special protection under the Labour Standards Act.

The Labour Standards Act contains a clause on compulsory redundancies as a means of cutting output and employment. The



application of the clause is fairly strict and guarantees employees with open-ended contracts quite strong employment security. Employers can terminate open-ended contracts – that is, make permanent workers redundant – only under special circumstances, in which there are ‘urgent business reasons’ (for example, bankruptcies, severe economic downturn and heavy losses). Furthermore, employers must have already exhausted other ways of avoiding redundancies.

Resort to compulsory redundancies has been made more difficult for companies by trade unions, particularly in large firms, which in many cases have successfully negotiated the inclusion of employment security clauses in collective agreements since 1998. Employers now must negotiate with trade unions on the reasons and terms of redundancies and conclude new agreements before redundancies or forced retirements can be imposed.

Korea has bitter experience of compulsory redundancies and related confrontations, direct and indirect, during the financial crisis of 1998 – 2002. Today, employers are reluctant to use compulsory redundancies to reduce the number of manual or low grade clerical workers, even if company output falls or there are ‘urgent business reasons’ for such redundancies. The preference now is for voluntary retirement.

## **5. Special Adjustment Practices during the Economic Crisis**

### **5.1 Flexible Use of Overtime**

Korea built its industrialisation model on low wages and long working hours to compensate for low productivity. There is a culture of long working hours at workplaces and overtime or weekend work are accepted and even welcomed by both employers and employees. While long working hours enable employers to utilise their production or service facilities to the maximum and to minimise the number of employees, they provide workers on low basic salaries with an opportunity to obtain



additional income through overtime or holiday rates.

Regulations on maximum overtime hours per week are less strict in Korea than in other OECD countries and are not monitored by labour inspectors or even trade unions. Trade unions have been reluctant to strive for reductions in working hours due to the resistance of the members.

**Table 4 Korea and other OECD countries: annual working hours, 2000–2007**

Time Country	2000	2001	2002	2003	2004	2005	2006	2007
Canada	1755.7	1750.6	1738.3	1727.4	1744.4	1734.7	1734.3	1732.5
France	1490.7	1481	1443.3	1439.1	1465.7	1458.9	1465	1457
Germany	1387.1	1375.2	1365.4	1360	1363.7	1354.1	1351.2	1352.5
Hungary	1795.3	1766.4	1766.4	1777.2	1806.6	1802.8	1798.8	1779.9
Japan	1853	1836	1825	1828	1816	1802	1811	1808
Korea	2474.4	2446.8	2409.6	2390.4	2379.6	2350.8	2301.6	2265.6
Mexico	1935.5	1915.7	1945	1908.3	1919.4	1970.2	1943.6	1933.2
Netherlands	1768.6	1760.6	1758.3	1757.7	1786.6	1776.5	1759.5	1750.7
Spain	1686.6	1683.5	1682	1667.1	1653.8	1639.7	1624.1	1620.5
UK	1686.9	1689.4	1674.3	1654.7	1648.9		1648.2	1655
USA	1835	1814	1810	1800	1803	1800	1801	1798
OECD average	1733.6	1722.6	1722.7	1714.2	1722.4	1721.8	1712.7	1627.5

Source: OECD, 2008. Statistics on working hours, OECD Employment Outlook 2008.

As indicated in Table 4, despite the 40-hour working week effective since 2004, Korean employees work far longer hours than those in other OECD countries. Annual working hours in Korea exceed the OECD average by 638 hours. Korean employees work, on average, 345 hours' overtime a year. For many Korean employees, their relatively high incomes come from such overtime payments (150 per cent of normal working hours).



Working time in Korea can be flexibly adjusted to changes in demand or to minimise the number of employees. Cutting into overtime and reducing working time is the easiest way for employers to reduce output. Overall, there is much potential for the creation or maintenance of jobs by reducing working time.

## **5. 2 Shortening of Regular Working Time**

In the face of the recent economic downturn, employers have been forced not merely to limit overtime or weekend work, but also to shorten the regular eight-hour working day. Because of the short-sightedness and poorly developed working time management of both employers and trade unions, Korea does not yet have anything similar to individual ‘working time accounts’. There is no experience with accumulating (partly unpaid) overtime during boom times and using these ‘savings accounts’ to compensate for times when less work is needed. In Korea, cuts in working time lead to falls in income and threaten workers’ basic living standards.

During the current crisis, some firms have been forced to cut working time drastically or to ask their employees to take unpaid leave for a few weeks or even a month. In some cases, temporary closure and long-term reduction of working time have been combined. For example, Ssangyong Automobiles first closed the plant for several days before the management and trade union commenced negotiations on changing from the normal two eight-hour shifts, day and night, to either an eight-hour working day without shifts or two shifts of five hours each.

If businesses close temporarily for business reasons, the Labour Standards Act stipulates that employees must receive 70 per cent of their regular wages. However, if approval is obtained from the Labour Relations Commission, they can pay less than 70 per cent. Employers do not have to pay for the temporary closure of the business if there is no work to do.



### **5.3 ‘Voluntary’ and Negotiated Retirement**

Employers use the voluntary retirement of middle aged employees as a means of reducing the workforce. The practice of voluntary retirement, which comes with some financial compensation but in many cases amounts to de facto forced early retirement, is widely used by large and medium – sized firms to make redundant engineers, middle managers and professionals in their late forties or early fifties. Members of this group find it difficult to withstand pressure from employers for early retirement as they are usually not represented by trade unions. Depending on the financial situation of the firm, the compensation packages for retirement can be quite high or fairly poor.

For manual workers or low grade clerical workers at large or medium –sized firms, retirement practice differs significantly, as they are often organised in unions. Trade unions in Korea have fought bitter labour disputes against compulsory redundancies, such as the struggles at Hyundai in 1998 and at Daewoo in 2002. If trade unions recognise that redundancies are inevitable, however, they usually negotiate hefty compensation packages.

Despite strict legislation on compulsory redundancies, however, in many non-unionised small and medium-sized companies ‘voluntary’ cutbacks are common, not only of clerical workers, engineers, middle managers and professionals, but also of manual workers, usually with little or no compensation.

Korea recently amended the Labour Standards Act with a recall clause which can be applied to workers who lose their jobs through compulsory redundancies for ‘urgent business reasons’. However, this clause has been implemented only rarely so far.



#### 5. 4 Unions Concede Bargaining Rights to Employers

Enterprise-based trade unions frequently renounce negotiations on collective agreements and temporarily allow employers considerable discretion when companies are faced by economic difficulties, in return for employment security. Concessions of this kind are usually granted only when trade unions trust the management and industrial relations are generally cooperative. When employers are entrusted with the right to flexibly adjust the provisions of collective agreements to the current economic environment, they often take care not to disappoint their employees and the trade unions, which would put future relations in jeopardy. Nevertheless, concession bargaining by trade unions may provide employers with significant room for manoeuvre to adjust to economic crises. Employers may freeze wages, cut bonuses or other benefits or shorten working time, but it is also common practice for senior management to tighten their belts, too, for example, by reducing their own salaries.

**Table 5**                      **Concession bargaining, 2008–2009**

Year	Concession bargaining (cases)
2009	927
2008	46

Source: Korea International Labour Foundation, *Labour Today*, 7 May 2009, Issue No. 68.

Table 5 shows how concession bargaining has skyrocketed since 2008. During the first four month of 2009, there were 927 cases, a twentyfold increase compared to the previous year, which saw only 46 cases.

The outcomes of concession bargaining are presented in Table 6. In more than 50 per cent of the reported cases (587 out of 927), management managed to secure a wage freeze, while in 22 per cent of the cases, labour was forced to agree to wage cuts.



The figures do not differentiate between concession bargaining in unionised and non-unionised enterprises. While we may assume that the majority of cases reflect concessions in non-unionised plants, there are still many cases of trade unions temporarily renouncing bargaining rights. A number of enterprise-based unions—especially those affiliated to the moderate Federation of Korean Trade Unions—even agreed to give up the right to strike or to waive bargaining rights, leaving wage adjustments to the unilateral decision of the employer.

**Table 6 Concession bargaining, by category (January–April 2009)**

Total number of agreements	Wage reduction	Wage freeze	No strike	No bargaining	In-house flexibility increase	Reduction of welfare and fringe benefits
927	207	587	39	38	49	5

Source: See Table 5 above.

## **5. 5 Government Initiatives to Deregulate the Labour Market**

### *Government support for concession bargaining*

The Korean government has not left adjustment to the employment crisis solely to the social partners, but has launched a number of initiatives of its own. Government intervention in the labour market has followed the strategy of keeping wages low to maintain or increase employment. One policy is to urge trade unions to accept concession bargaining and to agree to wage freezes or cuts in wages or benefits for a while.

### *Salary cuts for newly employed graduates*

As a second measure to maintain or increase employment, the government announced that the entry-level pay of newly recruited graduates in the public sector will be cut and the money saved will be used for additional employment or for graduate interns. The thirty largest companies belonging to the Federation of Korean Industries quickly followed suit,



setting the cut in graduates' entry-level salaries at 28 per cent, announcing: 'We shared a view that downward wage stabilisation in general is necessary in order to overcome the current severe employment crisis and retain our economic potential for growth' (Koilaif, *Labour News*, 26 February 2009). This measure is likely to spread to other branches of the private sector.

#### *Legislation on temporary employment*

Legislation on temporary employment was enacted at the end of 2006 and came into force at large firms with 300 or more employees and public sector establishments from July 2007. The extension of the law to smaller firms with fewer than 100 employees, where many more temporary workers are employed, was postponed until 1 July 2009.

The government plans to extend the permissible period for employing temporary workers from two to four years and to do away with the right of temporary workers to be awarded open-ended contracts thereafter. There is currently a heated debate about whether the extension of the temporary work legislation to firms with fewer than 100 employees will lead to massive losses in temporary jobs. Trade unions and civil groups have criticised the government and employers, both of which are trying to reform the temporary employment legislation.

#### *Other initiatives*

There have been other attempts by the government to deregulate the labour market, including lowering the national minimum wage for older workers and, more fundamentally, revising the Labour Standards Act to make redundancies easier.

### **5. 6 Tripartite Agreements and Work-sharing**

The current government originally did not favour tripartite dialogue, which it regards as encouraging the politicisation of trade unions, and did



not support the establishment of a platform for regulating industrial relations at national level. In the face of the current employment crisis, however, it has changed its position and is actively promoting tripartite agreements on work-sharing.

Proposed by the Federation of Korean Trade Unions (FKTU) and the Korean Employers' Federation (KEF), the government, employers, labour and some civil groups, meeting on 23 February 2009, reached agreement on wage freezes or wage cuts in return for work-sharing. The government promised to actively expand the social safety net for vulnerable groups (see Koilaf, *Labour News*, 23 February 2009).

Korea does not have a strong tripartite tradition and the first tripartite agreement was reached only in the teeth of the financial crisis in 1998. The 2009 agreement (see Table 7 for more details) could turn out to be very important, depending on how effectively it is implemented. One serious shortcoming, however, is that the more militant trade union confederation, the Korean Confederation of Trade Unions (KCTU), with a strong presence in large firms and in the public sector, is not a party to the agreement. As on previous occasions, the KCTU has been unwilling to participate in tripartite negotiations.

The agreement of 23 February has shortcomings which critics have not been slow in pointing out. It has been argued that there is no parity in the application of policy recommendations, as the unions and the employees have handed over to the employers the power to freeze or even cut wages, while the employers need only to promise to maintain employment and can still push for voluntary redundancies, if necessary.

The exclusion of the powerful KCTU can be seen as an indication that the agreement is not supported by all relevant stakeholders and that implementation is likely to meet resistance from important segments of the labour movement.



## 5. 7 Government Social Policies

The cutting of wages in order to maintain jobs can be categorised as classic deregulation policy and fits in with the government's original stance of reducing taxes for the rich and creating a 'business-friendly environment'. Under pressure due to the employment crisis, however, the government performed a U-turn, away from its originally passive and minimalist approach. It is now actively promoting employment retention policies and, as outlined in the tripartite agreement of 23 February, has also increased the unemployment benefit budget by nearly 10 per cent. The major employment retention policies are as follows:

### *Employment retention benefits extended*

- Employment insurance compensates employers for up to 75 per cent (in the case of small and medium-sized enterprises or SMEs) or two-thirds (for large firms) of wages paid and all training costs for employment retention purposes when companies do not have much work but maintain employment.
- Employment insurance compensates employers for up to two-thirds (for SMEs) or 50 per cent (for large firms) of non-work wages when companies maintain employment during temporary closures.

### *Unemployment benefits extended*

- The period of receiving unemployment benefits for various groups has been increased from 6–9 months to 8–11 months.
- Unemployment benefits are now paid for more than six months when workers quit their jobs voluntarily.

### *Extension of social security provisions to the vulnerable*

- Loans are available for unemployed family breadwinners to finance living costs.



- Loans are available for the unemployed and temporary workers to cover training and living costs.
- When firms become bankrupt, the government will pay back wages for up to three months and retrenchment payments for three years' service.

## **6. Outlook**

The global financial crisis has thrown the world into an economic depression of a kind not seen for many decades. State intervention in economic management, state bailouts of huge financial institutions and the re-regulation of financial markets may be significant steps during a transition period away from neoliberalism. Hopefully, the future may bring a new combination of the state and the market, new regulation of markets and a fairer distribution of income than before.

In Korea, the government and employers have so far predominantly tried to muddle through the crisis with ad hoc policies, including the extension of subsidies for employment maintenance, the use of graduate interns and unemployment benefits and pushing tripartite agreements on work-sharing. These policies may indeed bring some alleviation to Korean workers and people, and tackle some of the unemployment and poverty issues to a certain extent, but they are not a recipe for moving forward to more socially balance development.

There are two major policy approaches which, in the context of our discussion, need reformulation. Korea needs a medium- or long-term approach to unemployment. Relaxing temporary employment legislation is unlikely to be the answer to rising unemployment or to making employment flexible in relation to economic cycles. One major area for improvement is working time management in response to the economic crisis. Korean management and government have not developed sophisticated strategies for the flexible use of working time, linked to the age of workers, their shifting preferences or changes in the structure and size of the labour force. Although average working hours have been



reduced significantly since the introduction of the 40-hour working week in 2004, the long-hours culture has remained one of the main features inherited from the developmental phase between the 1960s and the mid-1980s.

Interestingly, part-time working which is particularly suitable for married women with child care responsibilities, is much less utilised in Korea (8.9 per cent) than in most other OECD countries (15.3 per cent on average in 2007). Part-time work by women in Korea accounts for only 12.5 per cent of women's employment, whereas in OECD countries it accounts for 25.3 per cent (OECD 2008). Inflexibility on the part of Korean management in providing part-time jobs has kept many married women out of the labour market.

The shortening of working hours and the even distribution of the workload among the workforce may be the main solution to the job crisis for young people and the low labour-force participation of married women. The social partners must look afresh at how to distribute working time evenly between groups. Non-organised groups must feature prominently in any work-sharing concept. A new approach is needed to working time, which takes into account new lifestyles, increased labour force participation on the part of married women, child care responsibilities for married couples and other personal or domestic needs. The changing age structure of the labour force poses new challenges. In a rapidly ageing society, as in Korea, more older workers must be kept in active employment and flexible working time arrangements are needed to take care of the elderly. These new forms of working time management will definitely increase the number of jobs and the employment rate of women, as well as contributing to a more even distribution of work opportunities.

The other area requiring urgent reform is the building of a more comprehensive social welfare system for workers. Korea has established two kinds of welfare provision: general welfare for everybody at a very basic level and a company-based system, which is often based on plant-level collective bargaining or company welfare provisions. Much company-based welfare has benefited only a relatively small number of permanent



workers at large firms, excluding large groups (for example, temporary workers) in those same firms and many workers at small and medium-sized companies. Many small firms are still not willing to contribute to social insurance for their employees, although the government has made significant efforts to force them to do so.

It is high time that Korea expanded its social security system to cover workers at small firms and to move from a company-based welfare concept to general social welfare. Social policies should not merely supplement corporate welfare, but provide comprehensive protection for the unemployed and the poor in general. Related to reform of the social security system, the tax system and other economic policies also need an overhaul. The employment system must be combined with comprehensive social welfare to provide basic living standards for all workers and a flexible mechanism able to respond to economic fluctuations.

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# Workers' Rights in an Economic Crisis: Germany

Wolfgang Däubler

## 1. Introduction

In times of economic crisis, workers' rights do not change as a matter of course. The labour contract continues, as do collective agreements. What has been laid down must be adhered to, especially when one party or the other has difficulty fulfilling the contract. The risks are distributed between the parties. The employee cannot demand a wage increase just because the enterprise makes extra profits—the employer cannot reduce wages just because the results of his activities are less satisfying than expected.

However, a crisis of the enterprise, the branch or the whole economy inevitably has repercussions for the employment relationship. In many cases, legally binding agreements are in place under which some portion of the wage is linked to the economic results of the enterprise; workers may, for example, receive an additional half a month's salary if profits increased during the preceding year; or fringe benefits may be reduced if the results were worse than expected. Over the years, wages have been made flexible in a manner comparable to working time, giving rise to the notion of the 'breathing enterprise'. In Germany, a ceiling has been set: the Federal Labour Court has stated that the flexible part of wages must not exceed 25 per cent of the whole salary—more flexibility would be unacceptable since



it would make it more difficult for workers to plan the economic side of their lives. Obviously, in times of crisis employers will try to use all these freedoms in response to the deteriorating economic situation.

In enterprises in which such clauses do not exist (because most of their employment contracts date from the period before flexibility made its debut), or in which management and workers are not sufficiently flexible to adapt employment relationships to the changed economic situation, the employer may be entitled to dismiss workers for economic reasons. Most EU member state legal systems have, however, developed various means of avoiding the stark alternatives of full continuation of the contract (with corresponding losses for the employer) and dismissal. These means are sometimes entirely ‘de facto’, without a specific legal basis. Considering the German situation in particular, there are a number of ‘soft means’ that normally do not provoke any resistance (see Section 2 below). However, if they are not sufficient, short-time working can be instigated, a practice with a history dating back more than 80 years (Section 3). In some branches, collective agreements permit the reduction of working time from 38 hours to 30 hours a week (Section 4). Finally, if none of these instruments are sufficient, there is the possibility of establishing a firm financed by the Federal Agency of Labour that takes over the employees and gives them additional qualifications to make it easier for them to find new jobs (Section 5).

## **2. Soft Instruments as a First Step**

The most widely acceptable reaction to a crisis is a freeze on overtime. A second is not renewing expiring fixed-term contracts, which usually does not create legal problems. Much more important is the cancelling of temporary agency work. The contracts between employers and agencies usually provide for very short notice periods – workers may be forced to return to the agency within two or three days. If no other work is available at the agency they will normally be dismissed. According to



German legislation adopted in February 2009, short-time working is now possible even with labour agencies, but so far it has not been practiced.

Another way of coping when there is less work is enterprise flexibility. Many companies have established schemes that enable employees to build up so-called 'working time accounts'. If regular weekly working time is – let's say – 38 hours, they often work between 42 and 46 hours and so accumulate between 100 and 250 hours over a year. This is the equivalent of between two and six weeks of full-time work, which can then be 'consumed'. There is no legal provision on this form of flexi-time, but it exists in many enterprises. Where this option is used, one must distinguish between normal working time accounts and 'long-term accounts' which are accumulated in order to reach a particular target. It may make it possible to receive wages while remaining at home for educational leave, or to stop working at the age of 64 instead of waiting for the legal pensionable age, which is now between 65 and 67 years. These long-term accounts can be maintained even if there is not enough work at the workplace.

Finally, one can use annual leave. Regulated by means of collective agreements, almost all workers have the right to six weeks' paid annual leave. At least part of this can be used in times of low enterprise activity. To take the whole annual leave in one go may not be acceptable to workers who already have holiday plans. It may also not suit the employer, either, because they may find it difficult, in a crisis, to pay full wages over six weeks without getting anything in return. In practice, therefore, usually one or two weeks of annual leave are taken in such a situation.

### **3. Short-time Working**

If all these means are exhausted (or if they are not available in certain cases) so-called short-time working can be implemented. The idea is simple: working time is reduced – for example, to 20, 15 or even zero hours – and wages are reduced accordingly. However, the Federal Agency



of Labour steps in and workers receive benefits in accordance with the working time reduction. The benefits are considerable for both sides. The employee is not dismissed, while the employer retains a well-trained workforce, enabling him to restart under good conditions when the economic situation improves. This model was used for the first time in 1924 and is generally accepted. There are a number of reasons for this success story, but there are also limits that can manifest themselves fairly rapidly in practice.

Short-time working requires a number of conditions as laid down in labour law and social security law.

Labour law requires that the employer must be explicitly entitled to reduce the working time stipulated in a labour contract. In collective agreements and work agreements between works councils and employers, clauses may often be found that give the employer such powers – in their absence the individual worker has to agree. This condition is easy to fulfil, however, because the alternative would be dismissal. The second condition is much more important: the works council has to give its consent.<sup>①</sup> Negotiations are required between employer and works council about the extent and duration of short-time working, and sometimes about a prohibition on dismissing workers for economic reasons during the period of reduced working. If the employer believes that the lack of work is not merely a short-term problem, but the works council does not share this view, the conciliation board<sup>②</sup> has to decide whether short-time working is acceptable or not.

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① The works council is a body elected by all employees working in a given establishment (that is, a part of the enterprise with specific technical or organisational tasks). It is not a trade union body, but in practice there is close cooperation between works councils and unions. The works council has codetermination rights in certain fields such as overtime and short-time working. This means that the employer requires the consent of the works council; a unilateral decision would be without any legal effect. If an agreement cannot be reached, a conciliation board has to decide – it comprises an equal number of representatives of both sides (usually two or three) and an impartial chair, who is appointed by both parties or by the relevant labour court.

② See footnote 1.



Under social security law, benefits related to short-time working paid by the Federal Agency of Labour are granted only if certain conditions are fulfilled;

- The lack of work must be due to the general economic situation, not to difficulties of the individual enterprise.
- The problems must be of a provisional nature. In the current economic situation the Federal Agency of Labour is inclined to consider all difficulties as being provisional; the crisis would deteriorate further if the prevailing sentiment was pessimistic (although probably more realistic).
- The working time reduction must lead to a wage reduction of more than 10 per cent. In the past, this condition had to be fulfilled by a whole section of the enterprise. Now it is sufficient that an individual worker suffers this kind of loss.
- All other means must be exhausted. There is, however, no need to dissolve all working time accounts completely or to require workers to take the whole annual leave in one go. The Federal Agency of Labour is quite generous on these points under the current economic circumstances.

If all these conditions are fulfilled, workers are entitled to short-time benefits. They receive 60 per cent of the difference between the former full working-time wage and the now reduced wage. If the employee has to take care of at least one child, however, the rate is increased to 67 per cent. The short-time benefits may be paid for a maximum period of 18 months, though discussions are currently being held on increasing the period to two years.<sup>①</sup> If after a period of short-time working the enterprise goes back to normal for a period of at least three months, a new period of short-time working may begin thereafter. However, the crucial condition is still the Federal Agency of Labour's assessment of the provisional

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<sup>①</sup> This has been done in July 2009.



nature of the economic circumstances. This may become more complicated the longer the benefits are paid.

The limits of this approach become clear when we consider that a considerable part of wage costs remain with the employer. The company continues to pay the whole wage for annual leave and for national holidays such as Christmas, Easter or 1 May – over a year, this is the equivalent of nearly two months' 'ordinary' wages. In addition, the employer has to pay social security contributions, especially health and pension insurance. Normally these contributions are shared, with each side paying 50 per cent, but for hours not worked because of short-time working the employer has to pay for both sides. Until the recent change in the legislation the employer's only concession was that the contributions were calculated on the basis of 80 per cent of the hours not worked – this has now been reduced to 50 per cent of the contributions previously required. However, the employer is exempt from payment if a worker participates in a course providing an additional qualification. So far, these qualification measures have been difficult to organise, so most employers pay the 50 per cent, a considerable amount of money in Germany because social security contributions represent more than 40 per cent of wage costs. Current discussions are tending towards generally reducing social security contributions to zero in all cases of short-time working.<sup>①</sup> In future, the state will have to increase subsidies to the social security bodies.

#### **4. Reduction of Working Time besides Short-time Working**

In some branches, collective agreements have been concluded that permit the enterprise to reduce working time to 30 hours in case of economic difficulties. Some 20 years ago, Volkswagen even introduced a 28.8 hour

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<sup>①</sup> In July 2009, the reduction to zero was realized for the time exceeding six months of short-time working.



working week in order to avoid dismissals for economic reasons.

This model applies only if there is still enough work for 30 hours a week. It has the advantage that it can be applied also in cases in which the lack of work is not merely provisional. Collective agreements provide an additional protection against dismissal; for as long as the reduced schedule is in place dismissals for economic reasons are prohibited.

On the other hand, there are many disadvantages for the workers. For example, they do not receive short-time benefits, their wage during annual leave is reduced and social security contributions (the amount of which is important for future pensions) are calculated on the basis of wages for 30 hours. Recently, an additional disadvantage was abolished; if the employee goes to short-time working after a period of reduced working time, the short-time allowances are calculated on the basis of the original working time. For example, if the employee has reduced his or her working time from 38 to 30 hours for six months and then proceeds to short-time working on the basis of 20 hours, the short-time allowance will be calculated on the basis of the 18 hours not worked. However, this kind of reduction is possible only if employees receive relatively high wages. In the case of Volkswagen the monthly wage remained unchanged despite the working time reduction, but all bonuses and fringe benefits were cancelled.

## **5. Dismissal for Economic Reasons**

If short-time working is no longer possible, or if the cost of it would lead the employer to bankruptcy, dismissals for economic reasons can no longer be avoided. The employer has to observe certain periods of notice between issuing the letter of dismissal and ending the employment relationship. After ten years' service, four months are stipulated, rising to seven months after 20 years' service. During this period the employer has to pay the regular wage; short-time working ends with dismissal on the grounds that the lack of work is no longer merely provisional.



If a worker, a group of workers or even a whole part of the workforce are to be dismissed for economic reasons the employer has to make his selection in accordance with certain social criteria, following a number of specified steps. The first step is an analysis of which employees perform comparable functions, enabling some employees to take over the work of others. Once such a group is identified, the employer has to apply four criteria: age, years of service, family obligations and handicap. Those who are 'socially the strongest' are to be dismissed first, though with two exceptions: persons with special knowledge important to the enterprise and high performers can be taken out of the group selected for dismissal. The same procedure can be applied in order to retain a 'balanced' workforce composition, for example, to ensure that not only older workers remain with the enterprise. According to a recent decision by the Federal Labour Court, the employer can divide the workforce into 'groups' of comparable workers on the basis of age: people aged 30 or below, between 30 and 40, 40 and 50, and so on. A certain percentage of workers can be dismissed from all these groups; the affected individuals are of course selected according to the relevant social criteria. A person aged 51 can be dismissed because he is 'socially strong' within the group of workers aged between 50 and 60, but the same individual would not risk dismissal if social selection were implemented among all comparable workers.

The system of social selection is quite complex. Together with the works council, the employer can lay down rules that make such selection easier to implement, however. For example, points can be awarded for years of service, being over 40 years of age, and so on; those with the lowest number of points are dismissed. The situation of the employer becomes even more comfortable if he is able to reach agreement with the works council on a list of names of all the persons to be dismissed. This is normally possible only if the employees to be dismissed receive higher compensation, based on the so-called 'social plan'.

In Germany, unlike in many other countries, dismissed workers do



not automatically receive compensation. They are entitled to unemployment benefits at 60 per cent of the former wage (67 per cent if they are responsible for at least one child). Duration is normally one year (though for older workers with many years' service it may be more); after that, social assistance which permits only a very low standard of living is the only alternative if the worker is unable to find a new job. However, before applying for social assistance workers have to consume most of their savings, including even life insurance and most old-age pensions. Only a small flat which is the worker's place of residence can be retained—less modest homes have to be sold.

The works council can ask for the implementation of a so-called social plan if the reduction of workplaces is taking place within the framework of collective redundancies or caused by some other fundamental change in the enterprise. As in other instances of codetermination, the works council and the employer negotiate an adequate solution. If they are unable to reach agreement the conflict must be solved by a conciliation board (see note 1), as in the case of short-time working. Two important points must be mentioned concerning the contents of social plans.

The first is compensation, which is normally calculated on the basis of age and years' service; the family situation and any handicap are also considered but usually give rise only to a small additional payment. Some jurists consider this to be discrimination against single mothers and the handicapped. The amount of compensation can be as much as one month's salary for each year of service, but normally it will be less than that.

The second is the creation of a so-called 'transfer' company. Workers conclude a new employment contract with such a company, which offers training that results in qualifications. The idea is to qualify workers for new jobs, alongside other measures to improve their labour market situation. During the time spent at the transfer company workers receive short-time 'transfer' benefits, which are calculated in the same way as the normal short-time allowance. The duration may be up to one year, but currently the government is discussing increasing this to two years.



Transfer companies have frequently been used in eastern Germany. The success of such schemes obviously depends on the number of vacant posts, which in times of crisis are few. Often the only positives in such a situation are the acquisition of additional qualifications and being together with colleagues in the same circumstances instead of being stuck at home and on the dole. Transfer companies are often financed by the Federal Agency of Labour. In 2007, the European Commission established a so-called ‘globalisation fund’, with a budget of 500 million euros, for the specific purpose of financing measures to facilitate adaptation to the market situation. Discussions are currently being held on increasing the budget to one billion euros. <sup>①</sup>

## **6. Reinstatement**

The question arises of whether dismissed workers can seek reinstatement if the situation of their former employer improves. Unlike French law, under which reinstatement is possible for two years after dismissal, German law is more restrictive. There are only three cases in which reinstatement can be requested, but all three are of minor importance in practice:

- (a) The reason for dismissal ceases to apply during the period of notice. Especially during economic crises, such developments will be rare.
- (b) The employer re-employs many former workers but excludes worker X seemingly arbitrarily. Worker X can ask for equal treatment.
- (c) The social plan provides for reinstatement for one or two years after dismissal. Such provisions are rare, however. Employers do not like them, while workers prefer higher compensation to the small chance that they will be able to return to their former

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<sup>①</sup> This has been realized in June 2009.



enterprise.

Under German law, employers' interest in retaining their workforce seems to be largely satisfied by the rules on short-time working. But in the current situation, this will not be sufficient. Much more attention should be paid to dismissed employees and their reintegration into the enterprise they are familiar with.



# **Part IV**

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## **Atypical Employment**



# **Atypical Employment in Korea – Beyond the Standard Working Contract**

Kiu Sik Bae

## **1. Introduction**

The issue of atypical employment has been something of a hot potato since the start of the new millennium in Korea, both between employers and trade unions and between neoliberals and progressives.

Atypical employment has always been a feature of the labour market in Korea but it did not become a major problem until the financial crisis in 1998. The crisis was something of a watershed for the labour market: many firms collapsed or restructured drastically in order to survive. Atypical employment surged during this process of corporate restructuring. A fierce debate raged around flexibility and security in the labour market for more than six years, at the end of which Korea introduced legislation to regulate atypical employment.

During the debate employers argued for the deregulation of the labour market so that they could hire and fire workers almost at will. The employers claimed that the labour market in Korea was too rigid and overregulated by the Labour Standards Act, making it too difficult to lay off workers even when there was little work to do. They put their case to both the government and the general public, asking who would invest in



Korea and try to create more jobs under such conditions. Their position was supported by many neoliberal economists and the mainstream media. They argued in favour of the Anglo-Saxon labour market model, in contrast to the Japanese or European ones. They opposed legislation on atypical employment, but if it could not be avoided, called for light regulation at most.

Trade unions and workers pointed to the rapid increase in the number of atypical workers in the wake of the 1998 financial crisis and corporate restructuring, and argued that atypical workers were being used by employers primarily to substitute permanent workers and to reduce labour costs. They claimed that the labour market had polarised in terms of atypical and permanent workers, as well as workers in small and medium-sized companies (SMEs) and those in large firms, and that even minimum security for atypical workers was under threat. As a consequence, the very fabric of Korean society was in jeopardy. In contrast to the employers, they looked to social regulation in continental European labour markets rather than to the Anglo-Saxon model. The then government was urged to introduce regulations to protect atypical workers. When the draft bill appeared, they denounced the government for regulating atypical employment too lightly.

When in 2008 the new government announced that it would reform the current legislation on atypical employment, another round of debate commenced. This debate is still going on, with arguments for and against reform.

In section 2, I give an overview of trends in atypical employment and the sectors involved, presenting some relevant statistics, before outlining the main regulations in the two laws governing atypical employment in section 3. In section 4, some survey results are presented in order to show how temporary employees are treated compared to permanent employees. Other survey results are used in sections 5 and 6 to explain why atypical employees are systematically excluded from the normal employment system. Section 7 focuses on a new phenomenon known as ‘in-house



subcontracting’. In section 8, I present the current debate on the reform of atypical employment legislation in detail. I conclude with a look at the debate’s policy implications.

## **2. The Trends and Current State of Atypical (Non-standard) Employment**

Standard employment is defined here as permanent employment based on a labour contract with no time restrictions. Non-standard or atypical employment is defined as labour relations under which the employee is hired with time or other restrictions. Non-standard employment is sometimes referred to as precarious employment.

The level of atypical employment increased alarmingly between 2001 and 2007, by nearly two million workers (see Table 1). Atypical employment as a proportion of total wage earners rose from 26.8 per cent in 2001 to 35.9 per cent in 2007. Since the 1998 financial crisis, employers have restructured their operations by cutting their workforce, often replacing permanent employees with temporary ones. Tertiarisation (the shift of jobs from industry to services) and flexibilisation of the labour market have gained ground since 1998. Among OECD countries Korea has the second largest share of atypical employment in total dependent employment (after Spain).

Between 2007 and 2008 atypical employment—which includes temporary employment—declined (by 258,000) for the first time since 1998. It is not clear whether this indicates a halt to—or even a reversal of—the growth in atypical employment.

Atypical employment includes all forms of non-standard or precarious employment. In Table 1, atypical employment is divided into temporary employment, part-time and other atypical employment. Temporary employment comprises fixed-term contracts, temporary contracts renewed and temporary contracts whose renewal is not expected. ‘Other atypical employment’ comprises agency workers, subcontracted workers, special



forms of work, home workers and daily workers.

**Table 1**      **Types and Extent of Atypical Employment (various years)**

Year	2001	2004	2007	2008
Wage earners (total)	13540 (100%)	14584 (100%)	15882 (100%)	16104 (100%)
Permanent employment	9905 (73.2%)	9190 (63.0%)	10180 (64.1%)	10658 (66.2%)
Atypical employment	3635 (26.8%)	5394 (37.0%)	5703 (35.9%)	5445 (33.8%)
Atypical employment				
a. Temporary employment	1865 (13.8%)	3597 (24.7%)	3546 (22.3%)	3288 (20.4%)
Fixed-term contract	1477 (10.9%)	2491 (17.1%)	2531 (15.9%)	2365 (14.7%)
Temporary contract renewed	*	580 (4.0%)	555 (3.5%)	923 (5.7%)
Temporary contract renewal not expected	*	526 (3.6%)	460 (2.9%)	
b. Part-time employment	878 (6.5%)	1072 (7.3%)	1201 (7.6%)	1228 (7.6%)
c. Other atypical employment	1702 (12.6%)	1948 (13.4%)	2208 (13.9%)	2137 (13.3%)
Agency workers	135 (1.0%)	117 (0.8%)	174 (1.1%)	139 (0.9%)
Subcontracted workers	307 (2.3%)	413 (2.8%)	593 (3.7%)	641 (4.0%)
Special forms of work	810 (6.0%)	711 (4.9%)	635 (4.0%)	595 (3.7%)
Home workers	256 (1.9%)	171 (1.2%)	125 (0.8%)	65 (0.4%)
Daily workers	298 (2.2%)	666 (4.6%)	845 (5.3%)	818 (5.1%)

Note: Figures on atypical employment sub-groups do not add up to 100% due to some double-counting. Some workers grouped under 'special forms of work' do not strictly belong to the 'dependent employment' category but could be classified somewhere between dependent employment and self-employment.

\* Statistics on some categories of temporary employment are not available for 2001, when the survey started.

Source: National Statistical Office, Supplementary Survey to the Survey of the Economically Active Population each year since 2001.

Temporary employment, especially fixed-term contracts, accounts for the most significant share of atypical employment. Compared to other countries, the proportion of part-time workers in all dependent employment has remained relatively low in Korea. As long as employers are able to use permanent employees flexibly in terms of working time and to resort to other types of temporary employment, they have no need to



increase part-time working.

Table 2 shows the trends in atypical employment by various categories over the period 2001–2008. There is a strong link between the quality of the labour contract and gender. Women are more likely to be engaged as temporary employees than men. Atypical employment is positively correlated also with age group, and is much higher for workers in their sixties than for those in their thirties or forties. Education is another important factor in relation to the type of employment contract. Workers with fewer years of schooling are more likely to be employed as atypical employees, while college and higher education graduates have a better chance of finding a permanent employment contract. The various economic sectors differ substantially in terms of their reliance on atypical workers. The proportion of atypical employees is below average in manufacturing, transport and public administration, while construction, finance and business services depend more on temporary contracts. There is also a significant correlation with size of establishment; the smaller the establishment, the higher the share of temporary employees in the total workforce. Establishments with fewer than 30 employees have nearly twice as many temporary employees as establishments with at least 300 employees.

**Table 2** Trends and Current State of Atypical Employment (%)

	2001	2003	2005	2006	2007	2008
Atypical employment	3635000	4606400	5482500	5456500	5702600	5445000
Atypical employment	26.8	32.6	36.6	35.5	35.9	33.8
Sex						
Male	21.8	27.6	31.5	30.4	31.5	28.8
Female	35.4	39.6	43.7	42.7	42.1	40.8
Age						
15—29	n. a.	31.7	35.0	33.0	33.5	32.9
30—39		26.3	30.4	29.8	29.8	26.7



**Table 2: cont'd**

	2001	2003	2005	2006	2007	2008
40—49		31.1	36.3	34.1	34.1	31.6
50—59		39.9	42.8	41.9	42.6	39.6
60 and above		65.9	66.6	69.0	65.9	65.7
Education						
Up to middle school		51.2	56.8	55.5	56.7	55.4
High school graduates		33.5	38.2	36.5	37.5	36.8
College graduates		23.9	27.1	29.1	28.1	23.1
University graduates and above		20.3	24.7	24.1	24.8	
Economic sectors						
Manufacturing		17.3	20.7	20.3	20.7	16.7
Construction		63.5	63.1	58.0	57.9	54.6
Wholesale, retail		32.4	35.3	32.7	33.5	33.4
Hotels and restaurants		39.4	48.4	39.8	38.9	37.9
Transport		18.3	25.6	24.1	24.3	20.7
Finance		40.0	46.4	51.5	50.6	44.6
Property, leasing		36.6	40.4	38.9	38.7	36.9
Business services		47.8	53.5	54.2	56.4	55.6
Public administration		19.6	21.8	23.8	24.5	24.0
Education services		31.2	36.9	36.3	34.3	33.4
Size of establishment						
1—4	31.8	46.6	50.4	46.6	47.2	—
5—9	19.9	38.5	40.5	38.5	38.2	—
10—29	21.5	33.7	37.5	37.8	38.2	—
30—99	15.8	28.7	33.3	32.8	33.0	—
100—299	5.6	21.8	28.8	27.7	28.9	—
300+	5.4	14.7	19.7	20.0	19.5	—
Duration of work contract						
Less than one year		52.0	55.3	52.0	52.7	—
1—2 years		29.5	35.3	35.1	35.1	—
2—3 years		26.8	32.8	31.3	33.4	—
At least 3 years		13.9	18.8	19.5	20.0	—

Source: National Statistical Office, Supplementary Survey to the Survey of the Economically Active Population each year since 2001.



Temporary employees are supposed to be engaged in short-term work. However, 20 per cent of atypical employees already have at least three years' service as temporary employees. This percentage has been growing in recent years. This means that temporary employees who are supposed to be used, literally, temporarily are in practice being used on a permanent basis by means of temporary contract renewals without interruption. In such circumstances temporary employees are clearly being misused.

### **3. Two Major Laws on Atypical Employment**

Although atypical workers have always existed in Korean workplaces, for a long time their numbers were relatively low and the issues of contract duration, wages and working conditions were not controversial. There was no legislation to regulate atypical employment until 1998. However, in response to employers' calls for the legal right to employ agency workers the Act on the Protection of Agency Employees was passed in 1998, which allows employers to use agency workers in designated sectors. As already mentioned, the number of atypical employees has grown significantly in the 2000s. The gap between permanent and atypical employees in terms of wage levels, social protection, training and other benefits has continued to widen, even in cases in which both groups perform the same jobs or tasks. Atypical employment became a major social issue under Presidents Kim Dae Jung (1998–2002) and Roh Moo Hyun (2003–2007).

In 2000 the government took the issue of atypical employment to the Tripartite Commission, which is composed of representatives of the employers, the trade unions and the government, alongside experts charged with representing the public interest. The Tripartite Commission held many meetings and looked at the various forms of temporary



employment, trends, relative wage levels and social insurance coverage, as well as studying foreign examples of atypical employment and regulations. However, employers' and trade unions' representatives in the Commission could not reach agreement on how to regulate atypical employment, despite much discussion over almost five years.

There were three major sticking points in respect of the introduction of legislation on atypical employment:

(1) whether the use of atypical work should be restricted, and whether such restrictions should be laid down in the law;

(2) how long temporary (atypical) employees can be used without the employer having to transform a temporary into a permanent, open-ended contract;

(3) if employers continue to employ temporary (atypical) workers for longer than the permitted period, should those temporary employees be regarded automatically as employed on open-ended contracts, or do the employers merely have the obligation to employ them on a permanent basis (without necessarily paying the wages and benefits due to permanent workers)?

The government drafted a temporary employment bill based on the proposals of labour experts who participated in the discussions on temporary employment regulations at the Tripartite Commission. The bill met with a lukewarm reception from the employers and one of the two trade union confederations (FKTU), but was strongly opposed by the other confederation (KCTU) and its affiliated members. The bill was finally passed by the parliament as the 'Act on the Protection of Fixed-Term Contract Work and Part-time Employees' at the end of 2006.



**Table 3** Provisions of the ‘Act on the Protection of Fixed-Term Contract Work and Part-time Employees’

Restrictions on the use of temporary workers	<ul style="list-style-type: none"> <li>• no restrictions*</li> </ul>
Anti-discrimination	<ul style="list-style-type: none"> <li>• ban on discrimination against atypical employees (fixed-term contract, part-timers and agency employees) vis-à-vis permanent workers</li> <li>• no definite clause on ‘equal pay for work of equal value’</li> <li>• setting up procedures for dealing with cases of discrimination and discriminatory practices</li> <li>• only the atypical workers concerned, not the trade union representing temporary workers can file a case of discrimination against the employer</li> </ul>
Limitation on the period during which temporary work can be used	<ul style="list-style-type: none"> <li>• up to two years</li> <li>• the employer is obliged to employ temporary workers on open-ended contracts after their continuous employment for two years</li> </ul>
Implementation of the law	<ul style="list-style-type: none"> <li>• three stages of implementation: (a) large firms with more than 300 employees/public sector organisations, (b) medium-sized firms and (c) small firms with fewer than 100 employees</li> <li>• from July 2007 to July 2009</li> </ul>

Note: \* There are significant limitations on the use of agency workers. Agency workers can be used in some 16 designated sectors, excluding manufacturing.

The key provisions of the new Act are as follows. First, the new Act does not regulate the reasons for using atypical workers; that is, employers can use fixed-term contracts and part-timers freely. Second, the new Act introduces anti-discrimination measures for temporary workers and part-timers to be applied when such workers do the same job as permanent ones but are treated unfavourably in terms of pay, terms and conditions. There is no clear provision in the law on ‘equal pay for work of equal value’, which was called for by the trade unions and some experts during discussions on how to regulate atypical employment. The law lays down the procedures whereby discrimination cases are filed, handled and corrected, if discrimination is found to exist. According to the law anti-discrimination cases involving temporary or part-time workers can be filed only by the workers concerned and their legal representatives (lawyers or certified labour attorneys), but not by the relevant trade union.



According to the National Labour Relations Commission (which deals with rights disputes – including the discrimination disputes of temporary workers – or interest disputes arising from employment relationships by means of mediation, arbitration and adjudication), 1,954 anti-discrimination cases were filed in 2008 alone.<sup>①</sup> Third, the Act limits the continuous use of fixed-term contracts, part-timers and agency workers to a maximum of two years. Its purpose is to prevent employers from using atypical workers on a permanent basis while failing to treat them like permanent employees. If employers use workers on fixed-term contracts, part-timers or agency workers continuously for at least two years they are obliged to employ them on open-ended contracts. Fourth, implementation of the law is scheduled to take place in three stages, from large firms with more than 300 employees and public sector organisations in July 2007, through medium-sized firms, to small firms with fewer than 100 employees in July 2009.

Although a significant number of discrimination cases against employers has been brought before the Labour Relations Commission, there have been few high-profile discrimination cases with national impact. Trade unions that represent mostly temporary workers argue that there are significant barriers in the law to correcting discriminatory practices. They argue that unequal treatment is still widespread, but it is very difficult for temporary employees to file a suit against their employer as this may provoke retaliation. What really constitutes ‘work of equal value or similar work’ in relation to permanent and temporary employees is still not clear.

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① According to the National Labour Relations Commission, the cases filed for discrimination were resolved as follows: in 850 instances the case was withdrawn, 477 were resolved through mediation, 32 were accepted as discriminations, and 577 were rejected. About 40 companies were involved in cases of discrimination in which a number of individual workers filed cases at the same time for the same reasons (Quarterly Mediation and Adjudication, Spring 2009, published by the National Labour Relations Commission).



#### 4. Treatment of Atypical Workers in Comparison with Permanent Ones

Table 4 shows wage differences between temporary and permanent workers. With the exception of some temporary workers whose contract was repetitively renewed, the wages of most atypical workers are significantly lower than those of permanent workers. In particular, the wages of part-timers, daily workers and temporary workers who cannot expect a renewal of their contracts receive very low wages.

**Table 4** Wage Levels of Temporary Workers as a Percentage of Those of Permanent Workers, 2007

Size of establishment (employees)	All atypical employment	Temporary employment			
		All temporary employment	fixed-term contract	repetitive renewals of temporary contracts	Renewals of temporary contracts not expected
1—99	65.6	73.0	72.4	97.6	53.1
100—299	74.8	75.2	73.5	89.2	41.8
At least 300—	74.5	78.0	71.7	102.6	29.1
total	63.5	71.7	70.6	97.0	47.0
1—99	31.2	61.2	72.1	56.7	50.4
100—299	30.6	68.1	78.1	50.4	27.2
300—	20.0	42.4	50.2	41.5	21.3
Total	27.9	55.4	66.8	51.0	44.4

Note: wage level of permanent workers in each size is assumed to be 100

Source: National Statistical Office, 2007. Supplementary Survey to the Survey of Economically Active Population.

Trade unions and labour experts have argued that such huge wage differentials constitute discrimination against atypical workers. Some scholars used econometric methods to prove that atypical workers are subject to discriminatory practices, even taking into account the nature of



temporary workers' jobs, tenure and skills. However, others argue that permanent workers' jobs are qualitatively different from those of temporary workers and that their wages cannot be compared properly without taking these differences into account.

Almost all atypical workers seem to feel that they are underpaid compared to permanent workers. Recognition that atypical workers are being discriminated against in relation to permanent workers is increasingly becoming conventional wisdom despite counterarguments from neoliberal economists and employers.

### **5. Atypical Workers, Social Insurance Coverage and Corporate Welfare**

Table 5 shows that there are systematic differences between atypical and permanent employees in terms of state pension, health care insurance and unemployment insurance coverage. While more than 70 per cent of permanent workers join and are covered by a state pension plan, state health insurance and state unemployment insurance, the majority of workers on atypical contracts fall outside social insurance coverage and are left without protection when their employment contract ends, when they fall sick or when they reach retirement age. There has been some progress for workers on fixed-term contracts (temporary workers), whose social insurance coverage has improved substantially over the years, narrowing the gap with permanent employees. However, the coverage of part-timers and other atypical workers has remained stagnant at a very low level, far below the coverage of permanent employees.



**Table 5**                      **Social Insurance Coverage for Temporary Workers**  
**Compared with Permanent Employees**                      (%)

	State pension			Health care insurance			Employment insurance		
	2003	2007	2008	2003	2007	2008	2003	2007	2008
All dependent employees	57.7	63.2	64.3	59.5	64.4	65.6	49.8	55.3	56.8
Permanent workers	70.8	76.3	77.3	72.5	76.7	78.0	59.7	64.3	65.8
Atypical workers	30.5	40.0	39.2	32.6	42.5	41.5	29.2	39.2	39.2
temporary workers	39.1	57.2	56.4	41.1	60.0	59.8	37.1	55.5	56.0
part-time workers	2.1	3.3	6.4	2.7	4.0	6.1	3.0	3.7	6.3
other atypical workers	22.4	23.0	23.6	26.4	27.7	28.2	21.9	23.9	25.8

Source: National Statistical Office, Supplementary Survey to the Survey of the Economically Active Population.

Corporate welfare refers to various employee benefits that are not regulated by labour law but often by collective agreements, or are provided by employers in the absence of a trade union in order to boost employees' morale or commitment to the firm. Corporate welfare benefits are increasingly regarded as part of overall compensation and tend to be provided even where there is no trade union. These benefits are rarely performance-related and as part of the compensation package they are flexible enough for the company to be able to withdraw them at will. Bonuses, which used to compensate employees according to company performance, are increasingly becoming fixed payments mainly for permanent workers. They include cash bonuses, payment of school or university tuition fees for employees' children, regular health check-ups, support for individual employees' cultural activities, family allowances, transport allowances or holiday benefits, and many other things, depending on the firm. Temporary workers are not likely to be entitled to any of these company benefits or welfare programmes. As Table 6 shows, the number of atypical workers receiving bonuses was less than half that of permanent workers.



**Table 6 Recipients of Corporate Welfare and Workers' Rights, August 2008** (%)

	Retrenchment payments	Bonuses	Overtime payments	Paid leave
All dependent employees	61.4	56.6	42.4	52.8
Permanent workers	74.5	71.2	53.5	65.4
Atypical workers	35.6	27.9	20.7	28.0
temporary workers	51.7	41.1	30.2	41.5
fixed-term contracts	57.9	45.3	33.6	46.1
non-fixed-term	35.8	30.4	21.2	29.8
Part-time workers	3.7	3.6	2.2	2.4
Other atypical workers	24.3	14.9	11.2	15.5

Source: National Statistical Office, Supplementary Survey to the Survey of the Economically Active Population Each Year since 2001.

The proportion of recipients of some legal rights among atypical workers remains less than half that among permanent workers. They have equal legal entitlement to retrenchment payments, overtime payments and paid leave, which are guaranteed for all workers, atypical or permanent, by the Labour Standards Act, as long as the requirements are met. Nevertheless, atypical workers are less likely to enjoy these benefits and rights than permanent workers because permanent employees are first in line for overtime, and atypical workers are often not employed long enough to claim retrenchment payments and paid leave (both require at least one year's continuous service). As a consequence, the proportion of atypical workers who receive retrenchment payments, overtime payments and paid holidays is much lower than that of permanent workers.

More fundamentally, the reason why the majority of atypical workers are not covered by social insurance or entitled to company welfare, overtime or paid leave lies above all in the nature of the enterprise-based employment system. This system differentiates between insiders and outsiders. Insiders are employees with open-ended contracts, while outsiders are the various types of atypical workers. Insiders,



furthermore, have a psychological affinity to their firms; under the enterprise-based employment system employees do not identify with their job, skills or professions but with their companies. This distinction between insiders and outsiders applies largely to large and medium-sized firms. Although the previous two governments extended social insurance coverage and the social security system to include these outsiders to some degree, national social policies and arrangements are not sufficiently developed to narrow the gap with insiders.

The enterprise-based employment system has become institutionalised, mostly in large and medium-sized firms, and employers and permanent employees alike have an interest in maintaining it, thereby perpetuating the large gap between insiders and outsiders. This institutional inertia may clash with more comprehensive social security plans premised on extending insiders' benefits to outsiders. For example, there are in-house welfare funds at a number of large firms managed by both employers and employees. The total size of these funds – at about 1, 150 firms – was KRW 7,400 billion (US \$ 7.8 billion) at the end of 2007. The in-house welfare funds at these firms were mostly funded by their respective firms (contributions were exempt from taxation). The beneficiaries of these in-house welfare funds are permanent workers, mostly at large firms.

## **6. Atypical Workers and Trade Unions**

The employment system based on the enterprise has a direct impact on the organisational structure of trade unions. Korea has an enterprise-based trade union system that has been institutionalised with the legal and administrative support of the state. Major trade unions at large and medium-sized firms have limited their membership to permanent employees. Permanent employees tend to identify themselves as employees of a specific firm rather than as working people in general. This identity reflects the internal labour market and the enterprise-based



employment system.

**Table 7 Trade Union Density by Type of Employment Contract, August 2008 (%)**

	Non-union establishments	Unionised establishments		
		Workers not entitled to join	Did not join	Joined
Dependent workers	74.2	7.6	5.5	12.7
Permanent workers	69.3	6.6	7.1	17.0
Atypical workers	83.6	9.7	2.3	4.4
temporary workers	77.0	13.1	3.5	6.4
part-time workers	88.4	10.6	0.6	0.3
other atypical workers *	91.9	4.8	0.9	2.4

Note: \* Including agency work, subcontracting, domestic work, daily work.

Source: National Statistical Office, 2008. Supplementary Survey to the Survey of Economically Active Population.

Trade unions at large firms in Korea have become enterprise unions and are integrated in the enterprise-based employment system.

Over the years many enterprise-based trade unions affiliated to the KCTU have reorganised to form branches of newly created industry unions (see the contribution by Yoon on collective bargaining). However, their enterprise-based union practices still linger. According to some, these new industry unions are ‘industry unions in form only, not in substance’. As a result of strong criticism that the trade unions have neglected atypical workers’ interests, a number of trade unions have tried to embrace precarious workers, but with little success. Union density among atypical workers remains about a quarter of that of permanent workers, as shown in Table 7. However, most trade unions, whether enterprise- or industry-based, have made little effort to organise atypical workers. Those workers are sometimes not even entitled to join trade unions, whose membership is composed of permanent employees. As atypical workers are not trade union members, they are not likely to be covered by collective agreements, even at large firms, and are excluded



from company welfare and other benefits.

In summary, atypical workers have to a large extent been excluded from the enterprise-based employment system in terms of corporate welfare, benefits, social insurance and even trade union membership.

### **7. In-house Subcontracting as another Form of Temporary Employment**

Subcontracting usually refers to work performed outside the contractor's premises. In-house subcontracting, as its name suggests, involves work carried out on those premises. In-house subcontractors are legally and formally independent of the contractor but to a large extent dependent upon on him. In many instances in-house subcontractors are actually established by the contractor as legally separate units so that the contractor can subcontract work to them as if they were separate companies. In legal terms in-house subcontractors are different from labour agencies but function in a similar way.

Part of production processes, as well as some jobs, lines or functions are subcontracted to in-house subcontractors. In-house subcontracting firms depend entirely upon contracts with contracting firms and the duration of subcontracts is determined unilaterally by the contractor in most cases. Employees of in-house subcontracting firms work side by side with permanent employees of contracting firms on the latter's premises. In-house subcontracting is widespread in manufacturing and some service sectors. According to the estimates of a workplace panel survey in 2005, the total number of workers in in-house subcontracting firms was about 112,000 across all sectors. Employees of in-house subcontracting firms are regarded as standard employees of in-house subcontracting firms in a formal, legal sense, but in practice they are temporary workers.



**Table 8**                      **Distribution of In-house Subcontracting**

	No. of establishments			No. of employees		
	Total	In-house sub -contracting	%	Total	In-house sub -contracting	%
total	36066	1524	4.2	5396919	111963	2.1
by industry						
Manufacturing	17367	1027	5.9	2254182	100232	4.4
Communication	243	14	5.8	53683	2314	4.3
Property/leasing	209	59	28.4	20069	2059	10.3
Other personal services	1099	73	6.6	135732	1286	0.9
by size of establishment						
Fewer than 30 employees	15	0	0.0	409	0	0.0
30—99	26606	961	3.6	1671596	14524	0.9
100—299	7157	371	5.2	1403234	23399	1.7
300—499	1170	73	6.3	512276	10477	2.0
500 and above	1118	118	10.6	1809405	63564	3.5

Note: The survey was conducted at establishments with at least 50 employees.

Source: Korea Labour Institute. 2006. Workplace Panel Survey 2005.

In-house subcontracting firms operate as follows. The owners are often former senior managers or relatives of the owners of the contracting firm. Close cooperation is needed between in-house subcontracting firms and the contracting firm to ensure the smooth running of the operation. The contracting firm is often tempted to control in-house subcontracting firms and their workers as much as possible in order to ensure that its operations run as efficiently as possible and to check the quality of products. Direct control or direction of the employees of in-house subcontracting firms by the contracting firm, however, constitutes an illegal use of agency workers. The suspicion is widespread that in-house subcontracting may actually veil the illegal use of agency workers in manufacturing or services.

In-house subcontracting can be an effective way of avoiding the direct employment of temporary workers and thereby the regulations on



temporary employment. It can also circumvent trade unions which organize temporary or permanent workers. In the manufacturing sector the use of agency workers is not permitted; in-house subcontracting is one way of getting around this restriction. In-house subcontracting can be an easier and more flexible buffer against falling demand than the use of temporary workers during periods of economic crisis. When subcontracting relationships end, the employment contract between in-house subcontracting firms and their employees also ends.

There has been some debate on whether it is necessary to regulate the use of in-house subcontracting. Employees of in-house subcontracting firms are not protected and may be misused by contracting firms. One persuasive argument is that where in-house subcontracting is used as a means of avoiding temporary employment regulation, there is a need to impose some obligations on contractors rather than on in-house subcontracting firms. There are already some instances of this, for example, in the construction sector, in which general contractors have certain legal obligations concerning work safety and payment of the wages of workers employed by their subcontracting firms if wages get into arrears or as a result of industrial injury. As of March 2009, no measures had been taken to protect vulnerable workers in in-house subcontracting firms.

## **8. Current Debate on the Reform of Temporary Employment Legislation**

Current government plans appear to be aimed at reforming atypical employment legislation in order to extend the period during which atypical workers can be used from two to four years and to allow employers in more sectors to use agency workers. The rationale of the proposed reform of atypical employment legislation is the possibility of massive job losses among temporary employees when the act is applied to small and medium-sized firms (SMEs) with fewer than 100 employees from 1 July 2009.



However, the government's argument does not seem to be supported by hard evidence. The gist of the reform is more flexible use of temporary workers, thereby increasing the number of jobs, even if the newly created jobs are only temporary.

As already mentioned, there was a long debate and a number of confrontations concerning the introduction of the legislation on atypical employment between 1999 and 2006. The government's plan to reform the legislation on atypical employment has met with opposition from trade unions and civil groups who favour more protection of temporary workers. The intended reform bill by the government has revived the old debate not only on how to regulate atypical employment but on how to regulate the labour market in general. The trade unions and the opposition Democratic Party have vehemently opposed reform of the legislation on atypical employment. Even the ruling Grand National Party has been lukewarm toward the government's drive to reform the legislation. It is still unclear whether the government can successfully revise the legislation and thereby prevent temporary workers from suffering massive job losses.

## **9. Conclusions**

The labour market in Korea has become polarised as the proportion of atypical workers has increased as a result of market opening, deregulation, intense competition in relation to costs and quality, and free movement of capital, especially finance capital. We cannot avert our eyes from the reality of large gaps between permanent and atypical workers, as well as between employees at large firms and those at small ones in terms of wage levels, and coverage of social insurance and corporate benefits/welfare. Moreover the current economic crisis has badly hit the employment of many self-employed and atypical workers. The gaps between the two have also increased as a result of the enterprise-based employment system in Korea. There is an urgent need to tackle polarisation and the vulnerability of atypical workers in the Korean labour



market.

The ongoing collapse of the global financial system shows that the excesses of neo-liberalism have produced economic bubbles and polarisation and social inequalities, too. The financial crisis has increased the number of bankruptcies and led to a decline in consumer demand, with a subsequent increase in unemployment. Moreover, the current economic downturn will probably widen the gaps even further because atypical workers and workers at SMEs are the first to lose their jobs and so have to bear the blunt of the crisis.

New economic rescue packages and stimulus measures are being implemented in order to rectify the debt situation and policy failures. In light of these fundamental changes, government policies should not only be directed towards overcoming market failures but also take care of the socially vulnerable more systematically. First of all, the current government should stop its attempt to revise the legislation on atypical employment and instead, focus on helping the unemployed and atypical workers susceptible to the crisis. Secondly, to address the large differences and discrimination between atypical and permanent employment, we need to put in place a comprehensive and universal social security system to cover atypical workers in place of the current enterprise-based employment system that covers mainly permanent employees at large and medium-sized firms.

Together with government efforts mentioned above, trade unions in Korea must also free themselves of the enterprise-based straightjacket, organise and integrate atypical workers in their organisations and re-establish themselves as more inclusive bodies. However, it may be impossible to reform the entrenched enterprise-based employment system and build a more integrative employment system from scratch. We will probably be compelled to rely on a mixed enterprise-based and socially integrative system in which the state guarantees some social security for atypical workers, while enterprises provide more corporate benefits for permanent workers on top of social security.



Unfortunately, the current government's policy objectives are not to correct discriminatory elements, alleviate polarisation and secure minimum living standards for temporary workers and the vulnerable, but to make the labour market more flexible and to reduce national minimum wages for older people.<sup>①</sup> The rationale behind the new policies is that they will create more, if not decent jobs. The government has claimed that what is particularly needed in the current economic crisis is to create and provide more jobs, irrespective of quality. The government has made some rather desultory efforts to support the socially weak and unemployed. All in all, its approach to social policy is still patchy and neoliberal in its orientation. Many trade unions, including enterprise-level unions, are little interested in new ideas about inclusive trade unionism and the building of more comprehensive social security systems, and may resist solidarity objectives and retreat within the boundaries of their enterprise. This enterprise-orientedness of Korean trade unions is often praised by employers, the mass media and government officials, but they view the new trade union attempts to reorganise as industry unions sceptically and antagonistically. There still seem to be many hurdles in the way of more comprehensive employment systems covering most atypical workers.

Despite the recent progress in tripartite agreements on work sharing and other things, it remains to be seen whether recent efforts—by trade union representatives, employers' representatives, government officials and some labour experts representing the public interest—to help the country survive the economic downturn by maintaining the existing enterprise-based employment system will help vulnerable workers or not. The initiatives driven by the government seem to help freezing of wages and cutting of salaries of newly recruited graduate employees but do not

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① National Minimum Wages are supposed to be applied to workers across all sectors. The new plan to lower National Minimum Wages by 10 per cent for people aged 60 years and over was designed to increase the employment of older people. However, the government's plan has been heavily criticised, not just by trade unions but by other groups as well.



address long working time and contain no momentum for shortening working hours and sharing work among workers.

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# Beyond the Standard Labour Contract – Experiences from Germany

Wolfgang Däubler

## 1. Overview

In Western Europe, the development of labour law since the Second World War centred on the so-called ‘standard employment relationship’: full-time work for an indefinite period at a place of employment where representation of the workers’ interests is at least possible. The salary will normally be sufficient for a decent life for both the worker and his or her family.

This kind of labour relationship not only provides social protection to workers but, in most cases, also serves the interest of employers. Employees’ productivity increases the longer they stay with the enterprise, among other reasons, because they come to identify themselves with their job. This is considered to be one of the best ways of generating innovation.

The standard labour relationship is still the dominant pattern in Western countries, but its importance has diminished over the last 20 years. The proportion of ‘atypical’ labour relationships has grown considerably and now comprises up to one-third of the whole workforce, and in the United Kingdom, even more. In what follows, we shall



describe the main features of these ‘new’ forms of employment. Five patterns seem to be the most important:

- (1) **Part-time contracts:** the weekly working hours agreed upon are less than the hours normally worked in the branch.
- (2) **Fixed-term contracts:** this form comprises employment contracts which expire at a certain date or which end after a task has been completed.
- (3) **Temporary agency work:** the employer is an agency which sends its employees to different firms at their request.
- (4) **Work in small enterprises,** in which numerous labour law rules do not apply and where joining a union is difficult.
- (5) **Self-employed workers** who depend on one major customer.

## **2. Part-time Work**

Normally, the duration of part-time work ranges from 10 to 20 hours a week, but, different from Chinese law, there is no specific time limit. An EU Directive prohibits any discrimination against part-time in comparison to full-time workers. Part-timers must be paid the same amount of money per hour and must have the same protection against dismissal. Exceptions can be made only on reasonable grounds. In Europe, most part-timers are women, so that the question also arises whether there is indirect discrimination by reason of sex, which can be justified only under certain conditions. Despite this kind of protection, however, part-time workers normally cannot earn a living based on their wages. This phenomenon could be described as ‘inherent’ (and undisputed) discrimination by the very nature of the employment relationship.

In Germany, the legislator has established special rules for part-timers who do not earn more than 400 euros a month. They are normally people working up to 10 or 12 hours a week. They are only partially integrated into the social security system and, to a considerable extent,



exempt from taxes. This is the case, even if the 400-euro contract is only a second job and the main employment provides sufficient income. The state subsidises this kind of employment, even where it is not necessary.

The extent of the subsidisation becomes clear if we take social security contributions into account and compare them with what is normally paid under the standard (full-time) employment relationship. The general rule is that half of the social security contribution is paid by the employer and the other half by the employee. The total amount makes up more than 40 per cent of wage costs. If the monthly salary is 3,000 euros, the employer will have to pay some 600 euros in social security contributions, while another 600 euros are deducted from the worker's salary and transferred to the social security system. In addition, the employee has to pay taxes, depending on family situation, which can easily amount to another 600 euros.

Compare to this the case of a 400-euro contract: only 28 per cent has to be paid in social security contributions and taxes make up only 2 per cent. That makes this kind of job much less expensive. The details of the rules are quite complex and discussion of them goes beyond the scope of this chapter. The concept has been criticised for creating a low-wage sector which defers current problems to the future; as workers in this employment category grow older they will not receive a sufficient pension, having paid only very modest contributions, and will be forced to rely on income support.

Part-time workers often face problems owing to the flexibility of their working time. This is particularly the case with so-called 'on-call work'. The employee must work, for instance, ten hours a week but the specific schedule is determined by the employer: he may choose Monday afternoon, Wednesday morning and Saturday evening or, alternatively, six hours on Tuesday and two hours on both Thursday and Friday. Apart from anything else, the uncertainty of working hours makes it impossible to take up a second part-time job and also makes maintaining any sort of work-life balance very difficult. In Germany, the legislator has intervened



by restricting extreme forms of flexibility. It is mandatory to fix the minimum weekly working time in the labour contract; in cases where this has not been done, 10 hours are automatically considered to be part of the agreement. In addition, a working period must not be shorter than three hours and the worker must be informed at least four days in advance. These minimum provisions do not help very much, however, because part-timers on call are normally low qualified people without any bargaining power; they are unlikely to go to court to invoke their (modest) rights. In establishments with works councils, the situation may be better because the works council has a right of codetermination with regard to the beginning and ending of working time and can therefore seek a reasonable timetable. Only about 50 per cent of German employees are represented by works councils, however.

### **3. Fixed-term Contracts**

According to an EU Directive of 1999, fixed-term contracts are admissible only under certain conditions. However, such conditions can easily be met.<sup>①</sup>

To take German law as an example, there are two categories of conditions.

The first group of conditions which allow fixed-term contracts calls for ‘reasonable grounds’. There is a non-exhaustive catalogue in the law, ranging from the replacement of an absent worker to a ‘project’ which requires a limited time. The explicit desire of a worker who requests fixed-term employment and is not influenced by the employer will also be sufficient.

The second group of rules does not require ‘reasonable grounds’, but only a time limit. There are three main cases to be considered. In general,

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<sup>①</sup> EU Directives are binding on Member States, obliging them to transpose their contents into national law.



fixed-term contracts are legal if they do not exceed two years. However, newly founded enterprises are granted special permission to extend fixed-term contracts up to four years. If an employer recruits an employee who is older than 52 years of age, the fixed-term contract can be further extended up to five years. In all three cases, shorter periods are possible. In the first case, a contract of fewer than two years can be followed immediately by up to three successive short-time contracts as long as the total duration does not exceed two years. In the two other cases, there is no limit on the number of follow-up contracts, but they must not be longer than a total of four or five years, respectively.

Workers with fixed-term contracts have the same rights as workers with standard employment relationships. As a general rule, any discrimination is forbidden, but an exception is made if there are 'reasonable grounds'. However, the principle of equal treatment applies only to the period of the fixed-term contract. The fact that the contract is limited is itself never regarded as an instance of discrimination. However, the fundamental disadvantage of such employment is obvious: employees are normally in danger of becoming unemployed after the expiry of the contract and they may not dare to exercise their labour law rights in order not to jeopardise the—sometimes very small—chance of extending their contract and remaining longer at the current workplace. This becomes clear in particular in the German system. Here, the implementation of labour law rules relies on workers invoking their rights in court; with the exception of health protection, labour inspectors have no authority to check whether the rules have been observed or not.

#### **4. Temporary Agency Workers**

Private agencies employing workers and sending them to other enterprises were legalised only in 1972, when the German Constitutional Court ruled that this kind of activity could be regarded under the freedom to pursue a profession, guaranteed by Article 12 of the Constitution. When the



German Parliament took up the Court's ruling, it restricted agency work to cases of temporary demand not exceeding three months. This rule was intended to prevent the use of agency workers simply to replace workers with stable labour relationships. The danger of full-time workers being substituted by agency workers has always been substantial, as the latter normally earn 40 per cent less. After 1982, the longest period for which someone may legally work at another firm was set at six months, but later raised to nine months and then one year. In 2001, the period was extended to two years, with the restriction that, during the second year, the agency worker was entitled to equal pay and equal treatment in comparison to workers in a standard employment relationship in the company where the work was performed. In 2003 and 2004, agency work was again 'liberalised'; since then, no time limit has been applied. Other protective rules were also abolished. The only social 'compensation' for agency workers was the legal demand that the equal pay and equal treatment principle should be observed from the first day. In practice, however, the clauses on equal pay and equal treatment were devoid of substance because the law also provided that collective agreements could set different conditions. Employers exploited this provision by turning to small unions which were ready to conclude an 'amenable' collective agreement; large unions followed suit, however, because employers threatened to conclude only labour contracts which referred to the (moderate) collective agreement. By such manoeuvres, temporary agency workers remained on a wage level of 60 per cent of that of employees working on the basis of a standard employment relationship.

The number of temporary agency workers increased considerably after 2003. Whereas in 2001, only 150,000 people were working on such an employment basis, by mid-2008 the total had reached about 800,000. The expansion of agency work has been an important factor in reducing average wage costs in Germany. The price paid by agency workers has been quite high: they have had to accept lower wages, when regular employees were able to attain (albeit modest) wage increases. Agency workers have been



described as second-class employees. This has been emphasised yet again during the current economic crisis. The overall number of temporary agency workers fell from 800,000 in July 2008 to 500,000 in March 2009. Not only are they poorly paid, but their risk of unemployment is much higher.

### **5. Work in Small Enterprises**

A traditional group of underprivileged workers are those working in small enterprises of up to 20 employees. They suffer disadvantages both legally and in practice.

In many countries, the protection of labour laws applies only to companies above a certain size. In Germany, the ‘general rule’ that a dismissal must be ‘socially justified’ applies only to establishments which employ more than 10 workers. The establishment of a works council requires at least five employees; in some other countries, the threshold for such workers’ representation is even higher.

In small companies, it is usually more difficult to claim certain rights, even when they are legally granted. If the salary is not paid, the worker may have difficulties obtaining it; employees taking their employer to court may face all kinds of repercussions, including dismissal. A comparable situation might arise if a worker informs the labour inspectorate that a health protection rule is not being observed.

Workers in small companies do not have protection from trade unions or works councils and, therefore, depend on the good will of their employer. As a rule, their only means of exerting pressure is the possibility of leaving for another employer, which can be a very empty threat in times of mass unemployment.

Unions normally have members in larger enterprises. This is mainly due to the fact that even union membership is often not welcomed by employers. As a consequence, not only are individual workers unable to rely on trade union support, but also the unions themselves are less



interested in devoting resources to try to improve the work situation of employees in small companies. For example, union publications only rarely present ideas on how to solve problems in small establishments or how to establish joint representation for workers in different enterprises. A positive exception is the French ‘conseil de site’, which represents all employees working in a certain, limited area, such as a small technology park.

## **6. Self-employed Workers**

Labour law rules do not apply to the self-employed. Architects, lawyers or plumbers are not ‘employees’ of their customers. The situation changes, however, if such independent workers have only one main customer, who cannot be readily replaced by another. This applies, for example, to freelance journalists who work regularly for the only radio station in a particular region, as well as, say, private teachers of Vietnamese, who might be able to offer their services only to a certain institution. Nevertheless, the legal possibility of treating such people as ‘employees’ is, in most cases, not provided for. An employee is normally defined as a person who is unable to organise his or her own work and who is obliged to follow the directives of another person, namely the employer. According to the law, the journalist or the teacher in question retains the right to organise their work, and their ‘autonomy’ is not diminished by the fact that they are economically dependant. Their real situation, however, is very similar to that of an employee proper. If they lose their single customer, in effect they lose their ‘job’ and they become ‘unemployed’, just like anyone else. If they fall ill, they need social benefits; if a female worker becomes pregnant, the same problem arises.

Some legal orders do not take this into account. Where there is general insurance against illness and unemployment for everybody, the situation may be acceptable, but in most European countries this is far from being the case. Some countries have developed the notion of an



‘employee-like person’ ( ‘*Arbeitnehmerähnliche Person*’ in Germany, ‘*lavoratore parasubordinato*’ in Italy), to whom some labour law rules apply. In Germany, rules on health protection, annual leave, prohibition of discrimination, additional pension schemes and leave to look after severely ill family members apply to ‘employee-like persons’. Collective agreements are possible for this group, too. They can go to the labour courts, whereas the ordinary courts are competent if other independent workers sue their customers. Important parts of labour law do not apply, however; this group is still excluded from most of the rules concerning protection against unfair dismissal and they are not integrated into the system of legal representation of workers’ interests—they have no right to participate in the election of works councils and elected bodies cannot speak in their name or pursue their interests.

The major problem, however, is participation in the social security system. As independent workers are generally not included in the social security system, the labour costs for the employer are some 40 per cent lower. This is a high incentive to hire independent instead of salaried workers. There are, of course, limits related to the kind of work and the political framework, but it cannot be excluded that a lorry-driver will be ‘employed’ as a freelance ‘distribution manager’. In France and Austria, this kind of incentive does not exist because the social security system reaches out to all all workers and all income levels. In Germany and Holland, where the problem arises in a very pronounced manner, there are few ideas on how the situation might be improved. One could imagine establishing a principle of non-discrimination in this field, but it would be difficult to implement: self-employed persons would have to pay contributions to private social insurance schemes, which should be included when calculating the cost of the work, but it would be difficult to quantify.

If an employer is caught treating an individual as a self-employed person, when in reality he or she is an employee, the sanctions can be considerable: the social security authorities will demand that the employer



pay social security contributions, backdated to the commencement of the work (but no more than four years) and the employer has to pay, not only his own share, but also that of the employee. In order to avoid such risks an ‘employer’ can formally ask the authorities to assess a specific employment relationship and provide guidance. Misuse is thereby prevented. The most important problem remains, however: genuinely self-employed persons are excluded from many labour law rights and the social security system. Their economic situation is almost neglected and they, too, risk becoming low wage earners.



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