Chinese Labour Law Rules Viewed with European Eyes

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1. Introduction

In July 2007, the People´s Republic of China enacted a new Labour Contract law which came into force on January 1 2008. Unlike its predecessor of 1994, it offers considerable protection to employees. One of its outstanding characteristics is the reduction of fixed-term contracts and a well elaborated protection against dismissal. These rules described below seem to be counterbalanced by the provisions on part-timers who can be fired at any moment without giving notice. This paradox needs some explanation. We shall then ask the question how one would deal with such a law in Europe and how Chinese lawyers approach a new situation. The difference will lead us to some considerations about the function of lawyers in the framework of the separation of powers.

2. Some extraordinary new rules

2.1. Fixed-term contracts

Fixed-term contracts are currently the rule in China; even state-owned enterprises use this kind of contract frequently.[1] There were little limits: After ten years employer and employee had to decide whether they would continue the relationship for an indefinite time or end it.[2] For the worker, it was very difficult to plan his life. Now there is in Sec. 14 of the Labour Contract Law a new legal framework:

- After ten years of service, the employee is entitled to contract for an indefinite time.
- Employer and employee have already concluded two fixed-term contracts consecutively: The third one has to be without time limit.

[1] The number of fixed-term contracts is estimated 60 % of all employment contracts. S. Wang Qian, China aktuell Heft 1/2008

[2] Geffken, Arbeit in China, Baden-Baden 2004, p. 60

- If after a year of service, there is no written contract, the labour relationship is considered to be for an unlimited period.

If the employer, despite these rules, concludes a fixed-term contract, he has to pay 200 % of the salary agreed in the contract.

Another important point is that fixed-term contracts do not always end at the moment agreed upon. During pregnancy and one year after the birth of the child the contract continues automatically.[3] The same applies in case of illness: There is a "legally recognized time of treatment" which varies between 3 and 24 months according to the length of service giving immunity against any expiry of the labour contract.[4] If the illness may be the consequence of an accident at work or related to the work conditions, the employment relationship continues until this question has been solved.

At the end of a fixed-term contract the employer has to pay an indemnity of one month´ salary for each year of service, a kind of compensation for precarious work. In order to restrict the burden for the employer, the law counts only the time after the beginning of 2008.

2.2. Protection against dismissal

Like other labour laws, the new Chinese act admits in Sec. 39 a dismissal without notice in case of grave misconduct of the worker. As to the "ordinary" resolution of the employment relationship one has to distinguish between individual and collective dismissals.

Sec. 40 defines three different conditions for individual dismissal:

- Sickness of the employee for non-work-related reasons making him unable to fulfil his tasks after the end of the legally recognized time of treatment or to do another work offered by the employer.

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[3] The one year´s period derives from the State Council´s provisions on health protection of female workers, dated September 1 1988.

[4] The legally recognized time of treatment is based on provisions of the Labour Ministry dated January 1 1995

- Incompetence of the worker even after receiving training or being transferred to another post.
- The objective situation has changed considerably after the conclusion of the employment contract so that the contract can be no more performed the parties failing to reach an agreement about another work to be done.

Neglecting duties is no admitted reason in this context; it can only justify a dismissal without notice based on Sec. 39.

Sec. 41 deals with collective or mass dismissals defined in a way that at least 20 employees or more than 10 % of the total number of employees are laid off. In this case, the employer shall explain the situation to the labour union or to the employees concerned 30 days in advance. After having solicited the opinion of the union or the workers, the employer has to give a report to the labour administration. If this procedure is exhausted, a mass dismissal is allowed under the following conditions:

- Reorganization according to the Enterprise Bankruptcy Act
- Serious difficulties in business operation
- Change of technology and products
- The objective economic situation has changed considerably after the conclusion of the employment contract making its performance impossible.

In mass dismissals there is often a problem of selection. The act provides that certain categories of workers are given priority to stay with the enterprise:

- Those having concluded a fixed-term contract for a long time period,
- Those who have concluded a contract for an indefinite time,
- Those who are the only employed person in the family having to care at the same time for old-aged persons or minors.

Individual and collective dismissals have to observe a notice of 30 days. In both cases, the employer has to pay compensation. For each year of working with the employer the employee receives one month´s salary, but not more than three times the local average wages (Sec. 46 and 47). In case of an illegal dismissal the employer has to pay twice the compensation prescribed in Sec. 47 as damages if the worker does not want to continue.

Under specific circumstances the dismissal is prohibited. These are according to Sec. 42 the situations in which a fixed-term contract does not expire, but the law adds two other cases.

- If the worker has partially or completely lost his capacity to work due to an occupational disease or a work-related injury his employment relationship ends only on the basis of the rules on insurance against accidents.
- If the employee has been working for the employer continuously for at least 15 years being now less than 5 years before the retirement age. This group of workers can be dismissed only for grave misconduct.

2.3. The hire-and-fire relationship of part-time workers

Let´s have a look at the other side of the coin. Part-timers are persons whose average working hours may not exceed 4 hours a day and must not exceed 24 hours a week (Sec. 68). In 2003, this group had been defined in a broader way (6 hours daily and 30 hours weekly).[5] Sec. 71 provides that either of the parties to the part-time employment may inform the other side of the termination of the contract at any time. There is no notice to be observed and no compensation to be paid. The employment contract needs no written form. The employee has to receive at least the local minimum wage and shall be paid every 15 days or in shorter intervals.

The employment-at-will doctrine has been obviously exported. Lawmakers tell that this rule had been an urgent desire of the employers´ side. Will it lead to a boom in part-time work because employers want to avoid the application of the protective rules on fixed-term contracts and dismissal? If one takes European experiences, this seems to be quite probable in all cases in which part-timers can do the job in the same way as full-timers. On the other hand, the still more generous rule existing until 2008 did not create many such attempts of evasion despite the fact, that dismissals were restricted even at that time and compensation (outside fixed-term contracts) was compulsory. It is probable to assume that the legislator wanted to create a second-class-employment relationship which can perhaps bring jobs to unemployed

[5] The legal basis was a so-called opinion of the Labour Ministry relating to some questions of part-time work, dated May 30 2003

people on a very low basis. If this possibility is really used, it will, however, deepen the segmentation of the labour market.

3. Interpretation Problems – how to deal with them in Europe?

The legal text described above contains numerous notions which need interpretation. To start with an easier one: What does it mean that an employee has been working for the employer during 10 years “consecutively”? Is the real work important or the existence of the legal relationship? Would the rule be inapplicable if there was a weekend between two contracts? What is the legal effect of an interruption initiated by the employer in order to prevent the application of the rule? A big Chinese firm (Huawei) behaved in this way last year but finally gave up because of public protests. What does “serious difficulties in business operation” mean exactly? If the turnover is reduced by 10 percent – would that be enough? Is the introduction of a new generation of software a sufficient technological change?

Any lawyer will find a lot of questions which are not dealt with in the legal text. What about the remuneration of part-time-workers? Can they claim equal treatment with full-time-employees doing the same kind of work? The law provides it for temporary workers but is that the expression of a general principle or just a specific rule? What about limits to the freedom of firing? Will Chinese law follow the American example and recognize dismissals for good reasons, for bad reasons or for no reasons? Or will it follow the continental way of integrating this kind of agreement into the general system of contract law? Arbitrary dismissals would then be illegal. A waitress refusing to work as a prostitute could not be dismissed for such a reason. To take a German case: A worker had an accident in the factory and was transported to the hospital. Just before the operation he got his employer´s letter of dismissal. The Bremen Court ruled that such a behaviour would be in contradiction with elementary ethical principles; the dismissal was declared null and void.[6]

Some doubts will also arise as to the politics of the law. It will according to its Sec. 1 establish and develop a “harmonious and stable employment relationship” – a scope which can be found in the rules on fixed-term contracts and on dismissal protection

[6] LAG Bremen, decision dated 10-29-1985, AuR 1986, 248 = BB 1986, 393

but not at all in the treatment of part-time workers. Could that goal lead to a restrictive interpretation of Sec. 71? Would it perhaps be possible to admit a part-time contract only on the ground of a substantial justifying reason? German law followed a similar way as to fixed-term contracts which by their nature put aside protection against dismissal. They were accepted only for a “sound reason” which could legitimate the absence of protection.[7] Why not follow the same idea in the actual context?

The German, the Dutch or the French legislator will perhaps avoid such a contradiction, but they would create others. The quality of recent legislation is by no way better than in China. Lawyers are in Europe confronted with similar problems. They react in a specific way.

A comparable law enacted in one of our countries would create a lot of publications. Professors, collaborators of the ministry and other civil servants, lawyers working in law firms and those attached to unions or employers´ associations would publish numerous articles discussing the few problems mentioned above and many others. Several professors would write books. In some countries judges would publish their personal opinion, too. After six months, there would be a sort of consensus on most of the questions. On some very prominent points controversies would arise, neoliberals and social democrats would take different positions. Courts of the first instance would produce their first judgments. After three years, a lot of questions would be solved by the highest court in labour matters. They would be largely influenced by the prevailing interpretation. If most of the well-known lawyers share the same or nearly the same view on a certain problem it would be fairly improbable that a court decides in another way. Formally, these decisions bind only the parties of the lawsuit; in reality they give a decisive orientation to the citizens. They have a comparable effect as judge-made law in Anglo-American countries. By dominating the discussion about the rules to be created, the lawyers´ “community” gets the position of an unofficial legislator. Six or ten well-known and respected persons can determine the contents of rules which are at least as important as the framework established by the parliamentary legislator. The existing law is completed – if the framework is very general like the “grave misconduct” or the “serious difficulties of business operations” the main decision-makers are judges and lawyers, not deputies.

[7] BAG (Federal Labour Court), AP Nr. 16 zu § 620 BGB Befristeter Arbeitsvertrag

It seems unusual to ask the question whether this way of law-building is compatible with democratic structures. Judges are elected by Parliament (or its commissions) in some countries; in others you will find a form of cooptation. In both cases the right to be elected or chosen is not a citizens´ right but a chance given to a small number of very qualified persons with legal education. The lawyers preparing and often dominating the contents of court decisions lack any kind of democratic legitimacy. There is just a small group of professionals who establish the rules which will have binding effect on the whole society.

4. Interpretation problems – how to deal with them in China?

Expecting a comparable process in China would be a big mistake. Articles and commentaries exist, but they are normally restricted to describe the decisions of the legislator. It is quite unusual to anticipate problems of application even of the relatively obvious kind mentioned above. Lawyers explain what has been said during the elaboration of the law. If the ministries and the Parliament did not take notice of a certain aspect, it is up to them to look for relief. If you like to use formulas, lawyers just reproduce what has been said; own ideas would leave the traditional framework.

The reasons have to be examined. The education of lawyers is based on knowing many things by heart. In the state examination, the candidate has to solve concrete cases without being entitled to use the text of the law. One important part deals with standardized letters and decisions; the better you know official forms by heart the better will be your results. To my opinion, a second reason is tradition. In the Confucian society each person has its well defined place. A lawyer must not be wiser than the ministry or the Parliament. In personal conversations with colleagues and friends it would, of course, be possible to call lawmakers stupid neglecting evident questions. But a publication is subject to different rules. In a certain way, you would be a pompous fellow if you would point at the loopholes of a law or its inherent contradictions which parliamentarians did not see. This is a general principle which is observed even in fields where enterprises would have a clear interest of having a better orientation. In a market economy, one will always find the phenomenon of unfair competition. Where is the limit a publicity campaign has to observe? In

Germany or the US, the firm would consult a specialized lawyer having access to all relevant court decisions in this field. He would give an answer which at least permits to evaluate possible legal risks. European lawyers practicing in Shanghai since many years will tell you that this kind of advising is not feasible in China. You would find no precedents, even not in the European sense, and no elaborated reasoning. It would be so easy to pick up all relevant case law from developed industrialized countries because it seems quite probable that comparable problems will arise in China. But nobody does it despite the fact that many lawyers have studied in Europe or the US and would have no linguistic barriers to get acquainted with the details of European or US competition law. The general attitude is still stronger than the interests of the enterprises.

One could presume that the restrictions of publishing new ideas have something to do with the leading role of the Communist Party. I have found no concrete facts underlining such a hypothesis. The Party has no concrete directives which will determine e.g. the interpretation of the new labour contract law; people are free to develop their own ideas. That may be different in politically sensible fields. If one would publicly advocate the distribution of Dalai Lama´s books, that would not be a contribution to a good professional career (in some way comparable to a US journalist´s demand to make Bin Laden´s ideas accessible for everybody). But the question whether a misconduct justifies a dismissal without notice or whether a reduced turnover can lead to a mass dismissal have no direct political impact. There would be some people in the Party inclined more to the workers´ interests and some others supporting more the employers´ side – the Party is no more an institution defining the truth for all fields of society.

The general attitude of lawyers gives a very large margin of interpretation to the courts. Without any “preparation” they have to find solutions in giving concrete contents to vague notions and in filling up loopholes. They will, however, hesitate to do that and find means to avoid a judgment. The aim of a lawsuit is not to execute the law, to delimit the frontiers between legal and illegal behaviour. Outside penal law, it has to re-establish good relationships between the parties, it has to conciliate the diverging interests of the two sides. Courts want to have a settlement. They use

time as a means of pressure. After two years of lawsuit without any decision, it may be better to solve the question by compromise instead of waiting another four years.

The “uninterpreted law” is a good condition for that kind of conciliation; the risk to lose the case is very high for both sides in such a situation. You may call that form of dealing with law “steering by uncertainty”. As a general rule, it is in some way embarrassing for a European, but one should not forget that we can find similar phenomena in our countries, too. To take an example from the German labour courts: The system of protection against dismissal is so complicated and the judgments, therefore, often unforeseeable so that less than 10 percent of the cases are decided by judgment. Without any compensation provided for in the law, the employee would get out of the lawsuit empty-handed if the judge would declare the dismissal being well founded. On the contrary, the employer would have to pay the salary for the whole time of the lawsuit if the court is on the employee´s side. Is the compromise not the better world?

5. A legal framework for judge-made law

In a developing industrial society, there will be conflicts which cannot be solved by individual compromise. The legal rules need to be more and more complex to give the necessary orientation to citizens as well as to firms. The Chinese legislator has, therefore, enacted special rules about the creation of judge-made law.

In 1997, the Supreme People´s Court enacted provisions “on the interpretation by supreme court judges” which were amended in 2007.[8] The decisions enacted by the “jurisdictional commission” of the Supreme Court are legally binding in the same way as any legal source. All other court decisions have the same value as in continental Europe. Two points need to be explained. The first one concerns initiative and procedure how to come to a binding interpretation. The second one deals with the methods the jurisdictional commission has to apply.

The right to propose a binding interpretation is given numerous institutions and even citizens. The commission itself or a panel of the Supreme People´s Court can make a

[8] The Text is available in German translation in: Zeitschrift für Chinesisches Recht (ZChinR) 1997 p. 130 ff. and 2007, 322 ff.

proposal as well as courts of second instance and deputies of the National People´s Congress. State organs and organizations like the unions and "citizens" enjoy the same privilege. At the Supreme Court, there is a so-called Scientific Service which examines whether the proposal shall be pursued or not. If it comes from the commission itself the procedure shall be continued automatically. The Scientific Service drafts a plan for the decisions to be taken in the following year. It is up to the competent panel to make a draft after having consulted different persons. If interests of the people are concerned or if it is a very grave problem a public consultation can be organized: The proposal will be put on internet offering every citizen the possibility to send his or her opinion.[9] In all cases, the competent commission of the National Peoples´ Congress has to be consulted. Its opinion is of considerable value because the Parliament can overrule a decision taken by the Supreme Court. The competent panel of the Supreme Court has to integrate this in-put into the proposal and send the modified version to the Scientific Service who can ask for additional improvement and changes. If both agree, the draft is sent to the jurisdictional commission which deliberates on it within three months. If it comes to a positive result, the interpretation is published in the Official Journal of the Supreme Court. The commission is, however, free to postpone the discussion or to give up the project.

The decisions of the jurisdictional commission deal with concrete questions emerging at the application of laws by the courts (Sec. 2 of the provisions). According to Sec. 3 the interpretation has to follow the "spirit" of the legislation and take into account practical needs. This gives a very wide margin of appreciation and evaluation to the judges, but narrower formulas would probably have no real effect. The methods applied by European courts could not be put into a stricter framework. The development of law is conferred explicitly to the judges; in other legal frameworks this is done implicitly.

The Chinese way of creating judge-made law avoids some difficulties which exist in European legal orders and which we accept as (good or bad) customs. The "scientific community" has no direct influence on the building of new rules. Of course, a professor can send his opinion within a general consultation process. Perhaps he will

[9] A similar procedure was followed at the elaboration of the labour contract law: In April 2006, the first draft was published and some 190 000 comments came in by internet. This kind of participation of the citizens may surprise a Western observer.

even find a journalist who makes an interview with him, but he will normally have no special authority. The “completion” of the law is conferred to judges who are elected by Parliament. According to the rules, these persons can get much more information than a high court judge or even a constitutional judge in European countries: The consultation of the Parliament, of certain organizations and even of the population may improve the quality of decisions to be taken. The traditional liberal model of civil procedure hopes that the contrasting interests of the parties will give a high incentive to bring in all relevant aspects but even in the model the public interest risks to be neglected. In reality there are many additional obstacles to see the dimension of the conflict and to evaluate its impact on third parties. In China, the procedure in which judge-made law is created corresponds to the procedure of legislation; the binding effect of the outcome is thus taken seriously.

6. Problems of comparison

Some glances at the Chinese legal system may confirm the difficulties we encounter in comparing labour laws. The evident social protection which the text of the law gives to most employees is a necessary condition for real improvement, but not a sufficient one. A correct point of reference will exist only in some years when many abstract rules shall be concretized by the courts or by other state authorities. Even in that moment, we should bear in mind that labour relations in China are much less juridified than in most European countries. Defending one´s rights and beginning a conciliation procedure or going to court is still an exceptional behaviour. This is not only a question of information or legal knowledge. China tries to become a harmonious society – harmony shall prevail in the family as well as between human beings in general and in the relation between society and environment. Whether this goal can also be attained by going through conflicts, lawsuits or strikes is quite unclear for the moment. In some ten years we will probably have much more insight.

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