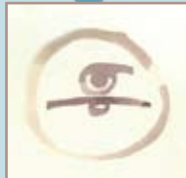


The new Labor Contract Law of the People's Republic of China: a real step forward for Chinese trade unions?

Ivan Franceschini

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via Bogino 9

10123 Torino

Tel +39.011.6704384/4417

Fax +39.011.67044378

www.cascc.eu

info@cascc.eu

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THE NEW LABOR CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA: A REAL STEP FORWARD FOR CHINESE TRADE UNIONS?

On June 29th 2007 the Standing Committee of the National People's Congress (NPC) approved the new Labor Contract Law of the People's Republic of China, a decision that finally put an end to the long and troubled legislative process, which had started with a popular consultation in March 2006¹, when the NPC received more than 192,000 comments about the contents of the first draft of the new law, 65% of which were forwarded by ordinary citizens and workers², a number with just one precedent in modern China history, namely the Constitution passed in 1954³. Following this consultation, the first draft of the law was changed in such a substantial way that in December 2006 a second draft was released. This was a much less innovative text, which at the time received a lot of criticisms from those who thought that it had been shaped in order to discourage the flight of capital threatened by some representative organizations of foreign enterprises, in particular the American Chamber of Commerce in Shanghai (Amcham)⁴, the US-China Business Council (USCBC)⁵ and the European Chamber of Commerce in China (ECCC)⁶. A third draft was then discussed in April 2007, while the final version of the law was approved by the Chinese parliament on June 29th. Since it is a law that involves the basilar principles of the legislation on labor in the PRC, with the explicit aim of "improving the labor contract system, specifying the rights and obligations of the parties to labor contracts, protecting the legitimate rights and interests of workers, and building and developing harmonious and stable employment relationships"⁷, the legislators had to pay a special attention to the role of trade unions. In fact, some of the main critical points which emerged in the hot debate about the new law were related to the functions of the unions.

TASKS AND PROTECTIVE MEASURES FOR CHINESE TRADE UNIONS

The Labor Contract Law sets some specific functions for the trade unions, integrating – but more often simply confirming the existing legislation. In first place, the Law reaffirms the fact that the trade unions have the duty to assist and guide workers in the conclusion and performance of labor contracts with their employer, in order to protect their lawful rights and interests⁸, functions that are already written in the Labor law of 1994 and in the Trade Union Law modified in 2001⁹. In second place, the Law defines the position of trade unions

1 Standing Committee National People's Congress, "Guanyu Gongbu "Zhonghua Renmin Gongheguo Laodong Hetongfa (Cao'an)" Zhengqiu Yijian de Tongzhi" (Notice on the seeking of opinions from the public about the Draft Labor Contract Law of the People's Republic of China) in *Laodong Hetongfa (Cao'an) Cankao*, Zhongguo Minzhu Fazhi Chubanshe, Beijing 2006, pp. 1-2.

2 Guan Huai, "Goujian Hexie Laodong Guanxi yu Laodong Fazhi Jianshe" (The establishment of harmonious labor relations and the edification of the labor juridical system), in *Faxue Zazhi*, 2007 n. 3, pp. 29-32.

3 Zhu Zhe, "New Labor Law Aims to Cap Damages", in *China Daily*, 25 aprile 2007, p. 2. As a matter of fact the practice of submitting to the public the drafts of the most important laws has been in use for a long time in the PRC. In April 2008 the Standing Committee of the National People's Congress announced that from then on every draft law would be published.

4 American Chamber of Commerce in Shanghai (Amcham), *Comments and Suggestions on Revision to Labor Contract Law*, <www.amcham-shanghai.org/NR/rdonlyres/A18F268D-6EE8-4221-B075-4F00282E8623/1427/AmChamShanghaiLaborContractLawCommentsToNPCApr2006.pdf>.

5 US- China Business Council (USCBC), *Comments on the Draft Labor Contract Law of the People's Republic of China (draft of March 20, 2006)*, <www.uschina.org/public/documents/2006/04/uscbs-comments-labor-law.pdf#search=%22USChina%20Business%20Council%20Comments%20of%20the%20Draft%20Labor%22>.

6 European Chamber of Commerce in China (ECCC), *Statement on the Draft Labor Contract Law*, www.eurochamber.com.cn/events/news.php?id=286>.

7 See article 1 of the new Labor Contract Law, in *Zhonghua Renmin Gongheguo Laodong Hetongfa* (Legge sui contratti di lavoro della Repubblica Popolare Cinese), Zhongguo Fazhi Chubanshe, Beijing 2007. For all the English quotations from the Labor Contract Law see the unofficial translation by Lehman, Lee and Xu corporate commercial law firm, <<http://www.lehmanlaw.com/resource-centre/laws-and-regulations/labor/labor-contract-law-of-the-peoples-republic-of-china.html>>.

8 See art.6 of the Labor Contract Law.

9 See art. 20 clause 1 of the Trade Unions Law (*Gonghui fa*) of 2001 in *Laodongfa Xiaoqueanshu*, Falü Chubanshe, Beijing 2005, pp. 40-45.

in the stipulation of collective contracts, providing that they have the duty to establish a collective consultation mechanism with the employer¹⁰ and that a collective contract shall be concluded by the labor union, representing the enterprise's employee, and the employer, unless the employer still has to establish a labor union, in which case it shall conclude the contract with a representative nominated by the employees under the guidance of the labor union at the next level up¹¹. Even this formulation is consistent with the previous legislation, in particular with the Trade Unions Law¹² and with the Regulations on Collective Contracts of 2004¹³. As far as collective contracts are concerned, the only innovation worth mentioning is the fact that now the trade unions can conclude local or sectoral collective contracts in areas below the county level, industry-based or area-based collective contracts in industries such as construction, mining, catering services, etc¹⁴. This is an important innovation in Chinese labor law, since the previous legislation always provided for collective contracts just at the enterprise level¹⁵. In third place, in the new Law the trade unions maintain their traditional role of supervisors of the employer's performance, safeguarding the lawful rights and interests of workers in accordance with the law, and supervising the application of labor contracts and collective contracts¹⁶. The Law provides that if an employer violates any labor laws or regulations or breaches a labor contract or collective contract, the labor union will have the right to put forward its opinions or request that the matter be rectified; if a worker applies for arbitration or institutes legal proceedings, the labor union will provide support and assistance in accordance with the law¹⁷. In a specific article, it is further specified that if an employer breaches the collective contract and infringes upon the employees' labor rights and interests, the labor union may, in accordance with the law, demand that the Employer assumes liability; if a dispute arising from the performance of the collective contract is not resolved after friendly negotiations, the labor union may apply for arbitration and institute legal proceedings in accordance with the law¹⁸. In any case, these procedures are nothing new in the Chinese juridical system, since they are perfectly consistent with the provisions of the Trade Unions Law¹⁹.

Besides establishing these tasks for the Chinese trade unions, the Labor Contract Law introduces some protective measures for the action of workers' organizations. In first place, it establishes that the labor administrative

10 See art. 6 of the Labor Contract Law.

11 See art. 51 clause 2 of the Labor Contract Law. From this point of view, the Labor Contract Law can also be seen as a step back compared with the existing legislation, since the Trade Unions Law of 2001, the Labor Law of 1994 and the Regulations on Collective Contracts of 2004 all provide that collective contract shall be signed by the trade union on behalf of the workers and, when the employer has not established a union yet, by representatives democratically elected by the workers and the staff.

12 See art. 20 of the Trade Unions Law.

13 For the Regulations on Collective Contracts (*Jiti Hetong Guiding*) see *Laodongfa Xiaoquanshu*, pp. 154-159.

14 See art. 53 of the Labor Contract Law.

15 The caution of Chinese government on this matter is easily understandable if we consider the potentially destabilizing nature of local and industrial collective contracts. For a criticism of the decision of limiting the collective contracts to the company level see Wang Quanxing e Wang Min, *Gonghuifa 2001 Nian Xiugai de Chenggong yu Buzu*, (The successes and the flaws of the 2001 amendment to the Trade Unions Law), in *Huadong Falü Pinglun*, 2002 n.1, pp. 114-138. The decision to allow local and industrial collective contracts is the natural outcome of a decade of experimentations. Without any legal basis, since 1999 the Chinese government and the All-China Federation of Trade Unions (ACFTU) have been testing of these instruments. Even if in the Regulations on Collective Contracts of 2004 there is no mention about local and industrial collective contracts, in August 2006 the former Ministry of Labor and Social Security (MLSS) promulgated a document entitled "Opinion on the development of the work about local and industrial collective contracts", which defines the area of application of these contracts (the highest level is the township), the procedures for the selection of workers and employers' representatives, the possible contents of the collective contract (which can be specific or comprehensive), the procedures for the collective bargaining, etc. In the 2006 Chinese Trade Unions Statistics Yearbook (*Zhongguo gonghui tongji nianjian*) we can see that in 2005 68,862 local collective contracts were signed, which covered 529,749 enterprises and 21,214,859 workers; 21,128 industrial collective contracts, which covered 111,736 enterprises and 9,280,919 workers; 251,749 local wage-only collective contracts signed by trade unions above grass-root level, which covered 170,645 enterprises and 5,583,207 workers; 7,575 industrial wage-only collective contracts signed by trade unions above grass-root level, which covered 33,606 enterprises and 1,547,913 workers.

16 See art 78 of the Labor Contract Law.

17 *Ibid.*

18 See art. 56 of the Labor Contract Law.

19 See art. 20 clause 4 and art. 22 of the Trade Unions Law.

departments of the people's governments at the county level or above shall solicit the opinions of the labor unions, enterprise representatives and the authorities in charge of the industries concerned in the course of supervising and managing the implementation of the labor contract system²⁰. This can be seen as an integration to the advisory function of the trade unions as provided by the Trade Unions Law, where it affirms that government departments have the duty to listen to the opinion of trade unions when organizing people to draft or revise laws, regulations or rules directly related to the immediate interests of workers and staff members, or when studying and working out policies and measures on employment, wages, occupational safety and health, social insurance, and other questions related to the immediate interests of workers and staff members²¹. These provisions underline the effort, already expounded by the article 5 of the new Law and the article 34 of the Trade Unions Law, to set up a tripartite coordination mechanism between government, trade unions and enterprises at all levels for the co-ordination of employment relationships, in order to jointly study and resolve material issues relating to employment relationships²².

In the Labor Contract Law we can find one last protective measure for Chinese trade unions, that is the explanation that placed workers have the right to join labor unions through staffing firms or accepting entities or organize such unions in accordance with the law, so as to protect their lawful rights and interests²³. This provision has raised some perplexity in the entrepreneurial world. USCBC in its comment to the second draft of the law suggested amending this article, eliminating the possibility for the dispatched worker to form a trade union within the receiving employer and giving him only the right to participate in an existing trade union, while confirming the formulation of the draft when it comes to the labor service agency²⁴.

THE FIRST CRITICAL POINT: THE APPROVAL OF COMPANY POLICIES AND REGULATIONS

The aspects of the new Labor Contract Law related to the trade unions listed above did not raise any great controversy in the Chinese and foreign entrepreneurial world, since they are nothing new from a juridical point of view. On the contrary, other provisions on trade unions which were perceived as more innovative (at least in the first draft of the Law) received a very different reception. That was the case of the provisions on three really important aspects of Chinese trade unions' activities, namely the approval of company policies, the negotiation of mass layoffs and the unilateral resolution of the labor contract by the employer.

First of all, let's consider the approval of company policies and regulations. The 4th article of the Labor Contract Law establishes that "employers shall formulate and improve labor rules and regulations in accordance with the law, so as to ensure that employees enjoy their labor rights and perform their labor obligations. The formulations, amendments and decisions made by employers with respect to rules on labor compensation, working hours, leave and rest, occupational safety and hygiene, insurance and welfare, training, work discipline or work quota management, etc., which have a direct impact on employees' immediate rights and interests, or other material matters, shall be presented to and discussed with the employee representative congress or all the employees, and the proposal and advice thereof shall be determined after consultation with the labor union or employee representative on the basis of equality. If, during the implementation of a rule or regulation or decision on a material matter, the labor union or any of the employees deems it inappropriate, they will be entitled

20 See art. 73 clause 3 of the Labor Contracts Law.

21 See art. 33 clauses 1 and 2 of the Trade Unions Law.

22 On the purposes of the tripartite mechanism in China see Information Office of the State Council of the People's Republic of China, *Labor and Social Security in China*, April 2002, available on <<http://www.china.org.cn/e-white/20020429/index.htm>>. On the same topic there is also Clarke Simon, Lee Chang-hee, "The Significance of Tripartite Consultation in China", in Michael Warner, *The Future of Chinese Management*, Routledge, London 2003, pp. 61-80. For an analysis of the influence of International Organizations (especially the ILO) on the choice of establishing tripartite mechanisms in China see Chan Anita, Unger Jonathan, China, "Corporatism and the East Asian Model", in *The Australian Journal of Chinese Affairs* n. 33 of 1995, pp. 29-53.

23 See art. 64 of the Labor Contracts Law.

24 USCBC, *Comments on the Draft People's Republic of China Law on Employment Contracts (draft of December 24 2006)*, <<http://www.uschina.org/public/documents/2007/01/comments-employment-contracts-english.pdf>>, p. 4.

to raise the issue with the employer and have it amended after consultation”²⁵.

This provision is written on a normative background largely unbalanced in favor of the employer. As a matter of fact, Chinese Labor Law affirms that the employer has the duty to establish and perfect rules and regulations in accordance with law and guarantees that laborers enjoy labor right and fulfill labor obligations²⁶. Besides, it provides that if the rules and regulations on labor formulated by the employer run counter to the provisions of laws and regulations, it will be given a warning by labor administrative departments, ordered to make corrections, and asked to hold responsibility over harm that may be done to laborers²⁷. In an official document on administrative penalties for the violation of the Labor Law promulgated by the former Ministry of Labor and Social Security (MLSS) in December 1994, at article 3 we can read that employers who enact company policies and regulations which violate the labor laws should be given a warning and a period of time to correct their behavior; if they fail to correct it, they should be given notice of criticism²⁸. The fact that the corrective action by government officials can take place only afterward, together with the confusion about the tasks of workers’ representative bodies (such as the staff and workers congress and the staff and workers representative congress)²⁹, indeed empties this provision of any practical value.

Yet the first draft of the Law seemed to be very promising, since it gave the trade unions a substantial right of veto in the matter of company policies and regulations. Article 5 item 2 provided that company policies and regulations which directly related to the interests of employees should be discussed *and approved* by the trade union, the congress of employees or their representatives, or be made after consultation on equal footing³⁰. Article 51 item 1 also provided that the unilateral bylaw made by the employers should be considered invalid if the issue had already been discussed and differently deliberated by the trade union or by the congress of employees or their representatives, in which case the issue should be solved by the resolution of the latter³¹. This was a real step forward in the direction of the strengthening of the position of trade unions in Chinese industrial relations. The Trade Unions Law actually just provided that if an enterprise or institution acts in contravention to the system of the congress of workers and staff members or other systems of democratic management, the trade union shall have the right to demand rectification so as to ensure the workers and staff members the exercise of their right in democratic management as prescribed by law³². Moreover it affirmed that for matters which should be submitted to the assembly or congress of workers and staff members for deliberation, adoption or decision, as prescribed by laws and regulations, enterprises or institutions shall do so accordingly³³. As can be seen, it is not written anywhere that the employers have the duty to respect and apply the deliberations of workers’ representative bodies.

The entrepreneurial world expressed strong dissent about the contents of the first draft Labor Contract Law relating to company policies and regulations. Amcham affirmed that “to formulate rules and policies is an important right of enterprises” and that “the full and effective realization of [this] right lays foundation to the existence of enterprises and warrants [their] development and success”³⁴. In Amcham analysts’ opinion, the

25 See art. 4 clauses 2 and 3 of the second and third draft.

26 See art. 4 of the Labor Law.

27 See art. 89 of the Labor Law.

28 Ministry of Labor and Social Security, *Weifan “Laodongfa” Xingzheng Chufa Banfa* (Methods for combining administrative sanctions for the violations of the Labor Law), <http://www.molss.gov.cn/gb/ywzn/2006-02/20/content_107422.htm>.

29 The activity of workers’ congresses and other bodies aimed at democratic management is plagued by a generic and lacking legislation. It is often the management that selects workers’ “representative” among its “loyalists”, if it is not the managers themselves that sit in the congress, taking advantage of the excessive vagueness of the definition of “workers and staff members” (*zhigong*). In 2006 the ACFTU tried to redress this situation, adopting an experimental regulation on the activities of grass-roots trade unions, while recently the State Council has decided to start the legislative iter of a set of new regulations on democratic management. For the ACFTU document see *Qiye Gonghui Gongzuo Tiaoli (shixing)*, 6 July 2006, Zhongguo Falü Chubanshe, Beijing 2006.

30 See art. 5 clause 2 of the first draft.

31 See art. 51 clause 1 of the first draft.

32 See art. 19 clause 1 of the Trade Unions Law.

33 See art. 19 clause 2 of the Trade Unions Law.

34 See Amcham, *cit.*, p. 32.

existing legislation “effectively [protected] all rights and interests of laborers and, at the same time, [ensured] the corporation’s utmost independence of employment under the condition of respecting employees’ legal rights and interests”³⁵. For these reasons they raised the following criticisms: “That article [art. 51 item 1] in practice will put the employers in such a position that they surrender to the will of the labor group in the circumstance of failed negotiation or there would be no effective rules and policies. It is necessary to introduce democratic management mechanisms into labor relationship, however, the abovementioned articles do not explicitly express ‘the rules and policies which directly relate to the interest of the employees’ so that they cannot be put into practice of democratic consultative mechanism or materialize the essence of democratic consultation. In addition, labor relationship is a kind of interest-related relationship and contradiction exists for all time. In the process of labor, the employer is active and the employee is passive. If the decision of formulating rules and policies of the corporation is endowed to the laborers and the imbalance of the consultative mechanism more disputes are inevitable. Also, if in reality all rules and policies take effect after the approval of the employees, the corporation management will come into chaos and no rule is followed when the two sides cannot come to agreement. Finally, the Draft does not give clear definition of what makes up ‘the immediate interest of laborer’ thus this provision is hardly operative in implementation”³⁶. Moreover, Amcham gave voice to other concerns, such as the possibility of an abuse of the absolute veto by the trade union and a supposed contradiction between the draft law and the provisions of Chinese Corporation Law³⁷.

USCBC expressed very similar concerns, proposing the deletion of article 5 clause 2 (on the need to obtain the approval of trade unions and workers’ congresses for company policies and regulations) and article 51 clause 1 (about the substantial right of veto of workers representative bodies)³⁸. It also suggested rewriting article 5 clause 3 (which compelled the employers to communicate to employees company policies and regulations) as follows: “Regulations and policies of employers, which shall not be in conflict with existing laws and regulations, shall be announced to all employees internally from time to time, and such regulations and policies shall be part of the employment contract and shall be equally effective as the employment contract terms”³⁹. Finally, even Chinese employers, through their official representative bodies (the China Enterprise Confederation and the China Enterprise Directors Association) expressed their criticisms, proposing to eliminate article 51 and that article 5 clause 2 should be rewritten as follows: “For company policies and regulations which directly related to the interests of employees, the employer shall ask the opinion of the trade union, congress of employees or their representatives”⁴⁰.

THE SECOND CRITICAL POINT: MASS LAYOFFS

The second critical point was on mass layoffs. Article 41 clause 1 of the new Labor Contract Law is formulated as follows: “If any of the following circumstances makes it necessary to reduce the workforce by 20 persons or more, or less than 20 persons but accounting for 10% or more of the total number of employees of the Employer, the Employer may only proceed in this way after explaining the situation to the labor union or to all of its employees 30 days in advance, considering the opinions of the labor union or the employees, and submitting its workforce layoff plan to the labor administrative department: a) restructuring pursuant to the Enterprise Bankruptcy Law; b) serious difficulties in production and/ or business operation; c) the enterprise switches production, introduces significant technological innovation or adjusts its business model, and still needs to reduce

35 *Ibid.* See art. 18 clause 3 of the Company Law (*Gongsifa*), in Laodongfa Xiaoquanshu, *cit.*, pp. 57-79. This article provides that “to make a decision on restructuring or any important issue related to business operation, or to formulate any important regulation, a company shall solicit the opinions of its labor union, and shall solicit the opinions and proposals of the employees through the meeting of the representatives of the employees or in any other way”.

36 See Amcham, *cit.*, p. 32.

37 *Ibid.*, p. 33.

38 USCBC, *cit.*, p. 3

39 *Ibid.*

40 China Enterprise Confederation (CEC) and China Enterprise Directors Association (CEDA), *Guanyu Yongrendanwei Neibu Guizhang Zhidu de Zhiding Chengxu* (On the process of formulation of the system of company internal policies and regulations), <<http://www.cec-ceda.org.cn/channel/ldhtf/contents/5232.html>>.

its workforce after amending the labor contracts; or d) a material change in the objective economic conditions relied upon at the time of conclusion of the labor contracts makes it impossible for the parties to perform”⁴¹. It is evident that in the case of mass layoffs Chinese trade unions have a consultative role, just as before.

The Labor Law of the People’s Republic of China was approved in 1994, in a period of great reforms for the Chinese industrial system, when State Owned Enterprises (SOEs) were forced to adapt their structures to new market mechanisms, with just one purpose: to improve their economic

efficiency⁴². An important part of the reform process was the reduction of the surplus workforce in the public sector, a now unwelcome consequence of the “full employment policies” adopted during the Maoist period, when in China there was no labor market and human resources were allocated following political principles⁴³. The smashing of the “iron rice bowl” (*tiefanwan*), the metaphorical image which is conventionally used to describe the lifetime of employment which was a main feature of the old State sector, was one of the prominent components of the reforms and led to the layoff of tens of millions of public employees in just a few years⁴⁴. Adopted in such a context and since then never amended, the Labor Law of 1994 naturally cannot contain exceedingly restrictive measures for a process which was considered painful but necessary, therefore it just provides that “in case it becomes a must for the employer to cut down the number of workforce during the period of legal consolidation when it comes to the brink of bankruptcy or when it runs deep into difficulties in business, the employer shall explain the situation to its trade union or all of its employees 30 days in advance, solicit opinions from its trade union or the employees, and report to the labor administrative department before making such cuts”⁴⁵. All the same, the Trade Unions Law has no specific provisions on the role of Chinese unions in mass layoffs, except for a generic reference to the fact that “when discussing major issues on operation, management and development, the enterprise or institution shall listen to the opinions of trade union, while the trade union in an enterprise or institution shall have its representatives attending any meetings held by the enterprise or institution to discuss matters on wages, welfare, occupational safety and health, social insurance and other questions related to the immediate interests of the workers and staff members”⁴⁶.

In November 1994 the Ministry of Labor adopted a specific regulation on the reduction of the workforce for economic reasons⁴⁷ and in August 1995 it published a detailed regulation on the implementation of the Labor Law⁴⁸. In these documents we can find some more specific provisions on the administrative procedure to follow in the case of mass layoffs, but they do not change the fact that the trade unions have no voice in mass layoffs.

Indeed, even if the trade union thinks that a reduction of the workforce is totally unjustified, it cannot react,

41 See art 41 clause 1 of the second and third draft.

42 The Labor Law of 1994 is the first law which regulates labor relations without any distinction as regards the kind of property of the enterprise. A lot has been written about the restructuring of Chinese industrial system, among others see Garnaut Ross, Song Ligang and Yao Yang, “Impact and Significance of State-Owned Enterprise Restructuring in China”, in *The China Journal* n. 55 of January 2006, pp. 35-63.

43 For an extremely accurate reconstruction of labor market reform in China see Luigi Tomba, *Paradoxes of Labor Reform*, University of Hawai’i Press, Honolulu, 2002.

44 On the impact of labor market reform on employment in the public sector see Dorothy Solinger, “Why we cannot count the unemployed”, *The China Quarterly*, n.167, September 2001, pp.671-688; Hong Yung Lee, “Xiangang, the Chinese Style of Laying Off Workers”, in *Asian Survey* volume 40 n. 6 of 2000, pp. 914-937; Linda Wong and Kinglun Ngok, “Social Policy between Plan and Market: Xiangang (Off-duty Employment) and the Policy of the Re-employment Service Centres in China”, in *Social Policy & Administration*, vol. 40 n. 2 April 2006, pp. 159-173; Ivan Franceschini, “La disoccupazione nascosta dei lavoratori xiangang: un problema risolto?”, *Mondo Cinese* n. 135, April 2008, pp. 33-47.

45 See art. 27 clause 1 of Labor Law.

46 See art. 38 clause 1 of the Trade Unions Law.

47 Ministry of Labor and Social Security, *Qiye Jingjixing Caiyuan Guiding* (Regulation on the reduction of the workforce for economic reasons), < http://www.molss.gov.cn/gb/ywzn/2006-02/15/content_106668.htm>.

48 Ministry of Labor and Social Security, *Laodongbu guanyu Guanche Zhixing “Zhonghua Renmin Gongheguo Laodongfa” Ruogan Wenti de Yijian* (Opinions of the MLSS on some questions about the implementation of the Labor Law), < www.chinalaw.gov.cn/jsp/contentpub/browser/contentpro.jsp?contentid=co1762522273>. See article 27.

since it lacks a fundamental instrument such as the right to strike⁴⁹. As many researchers have pointed out, the ACFTU could not play an active role in the industrial restructuring the Nineties, often being reluctant even to give legal counseling to laid-off workers who were considered as an undesirable consequence of policies which were seen as inevitable and arriving at most to negotiating with the employers the adoption of non-discriminatory measures in order to reduce the impact of layoffs on women and other disadvantaged social groups⁵⁰. Since they could not count on a strong union able to protect their interests, laid-off workers had no other choice but to resort to extreme collective actions such as petitions and demonstration, often targeting corrupted managers and local officials: in fact Chinese workers know how to exploit the weakest points of the communist political system, especially the accountability of the lower officials to their superiors⁵¹. If so far in China there has not been enough upheaval to endanger the stability of the current political system, this is due to three reasons: the first is the fact that the reforms of the Nineties have involved just the small and medium sized SOEs with their smallest and least developed social networks; the second is the adoption of a sequential mode of layoff instead of a more dangerous simultaneous one; the last one is the repressive measures adopted by the Chinese government against autonomous workers' organizations since the Tiananmen incident of 1989⁵².

The provisions on mass layoffs contained in the first draft of the Labor Contract Law would have reinforced the role of the trade unions in the workplace. Article 33 affirmed that "when the labor contract cannot be fulfilled due to dramatic changes in the objective circumstances on which the labor contract is based and it's necessary to lay off more than 50 workers or staff members, the employer shall explain the situation to its trade union or all the staff, reaching a consensus (*xieshang yizhi*)"⁵³. Such a formulation implied that the Chinese government was ready to give the ACFTU a stronger role and a real power of say on company decisions to downsize the workforce, a change of mind that arrived a little late if we think that in 1993, at the dawn of the reforms, the state sector and the collective sector altogether gave employment to 141,310,000 people, a number that by 2006 had fallen to 68,960,000, with a total drop of more than 50% or 72,350,000 jobs⁵⁴. This opening to a stronger role for the trade unions could be read as an attempt by Chinese government to create a safety valve between itself and the workers, in order to maintain social stability while the reforms bite deeper.

The fact that the first draft established some relatively restrictive mechanisms for mass layoffs once again attracted a lot of criticism by the entrepreneurial world. USCBC criticized the draft affirming that it was inconsistent with article 27 of the Labor Law, since the latter simply stated that employers must inform the trade unions but not negotiate with them⁵⁵. Amcham further commented that "it's irrational to prescribe the standard of firing 50 staff, for some enterprises of small size will never reach the standard with the total staff number of 3 to 5. For those big enterprises with the staff number of hundreds of thousands, it is impractical and unfair to follow the standard of firing 50 staff as the Draft requires with no regards of difference, for those enterprises have

49 On the right to strike see Chang Kai, "Bagongquan Lifa Wenti de Ruogan Sikao" (Some remarks on the legislation of the right to strike in China), in *Xue Hai*, 2005 n. 4, pp. 43-55; Wang Quanxing e Wang Min, *Gonghui fa 2001 Nian Xiugai de Chenggong yu Buzu*, cit.; Liu Yunya, Zhang Li, "Xunzhao Shiluo de Bagongquan", (In search of the lost right to strike), *Nanjing Linye Daxue Xuebao*, Vol. 7 n. 1, March 2007, pp. 33-39 and my "Perché il sindacato cinese non può alzare la voce?", in *Mondo Cinese* 131, April 2007, pp. 18-32.

50 Chen Feng, "Between the State and Labor: The Conflict of Chinese Trade Unions' Double Identity in Market Reform", in *China Quarterly* n.176 (December 2003), pp.1006-1028; Chen Feng, "Legal Mobilization by Trade Unions: The Case of Shanghai", in *The China Journal* n.52 (July 2004), pp.27-45; Sek Hong Ng, Ip Olivia, "Unemployment in China and the All-China Federation of Trade Unions", in Lee Grace, Warner Michael (edited by), *Unemployment in China*, Routledge, London 2007, pp.65-86; Cai Yongshun, *State and Laid-Off Workers in Reform China*, Routledge, London 2006.

51 On this matter see Cai Yongshun, "The Resistance of Chinese Laid-off Workers in the Reform Period", in *China Quarterly* n. 170 of June 2002, pp. 327-344. Another interesting work on workers' protests in China is Lee Ching Kwan, *Against the Law: Labor Protests in China's Rustbelt and Sunbelt*, University of California Press, Berkeley 2007.

52 Cai Yongshun, *cit.* (2002), pp. 340-344.

53 See art. 33 of the first draft.

54 *Zhongguo Laodong Tongji Nianjian 2007* (China Labour Statistical Yearbook 2007), Zhongguo Tongji Chubanshe, Beijing 2007, p. 24.

55 USCBC, *cit.* (April 2006), p. 4.

hundreds of staff everyday who have reached their term of contract”⁵⁶. The conclusion of Amcham analysts was that “the requirements in the Draft cannot improve the competition of enterprises by firing staff, so that the enterprise finally has to choose bankruptcy or total disbandment. It cannot fulfill the purpose of protecting the old staff, while it fails to protect either new staff or old staff”⁵⁷. Even the Chinese entrepreneurs of the China Enterprise Confederation and the China Enterprise Directors Association (CEC-CEDA) expressed their perplexities about the arbitrariness of the number written in the Draft, suggesting that the entire article should be rewritten the entire article as follows: “When the labor contract cannot be fulfilled due to dramatic changes in the objective circumstances on which the labor contract is based and it’s necessary to lay off a quite big number (*jiao da shuliang renyuan*) of workers or staff members, the employer shall explain the situation to its trade union or all the staff and pay an adequate compensation to laid-off workers. This ‘quite big number’ of workers or staff members shall be calculated according to the dimensions of the employer and shall be confirmed by the Office for Labor and Social Security in the State Council”⁵⁸.

Obviously the comments of ordinary people went in a completely different direction. One citizen had pointed out the fact that the procedure described in the Draft offered fewer guarantees than the old Labor Law, since it specified the otherwise indefinite threshold of 50 layoffs for the compulsory notification to the trade union and cancelled the obligation to notify the action 30 days in advance⁵⁹. Others observed that in the case of a massive layoffs, if fewer workers were involved, they would need greater help, so they suggested that the threshold of 50 layoffs should be completely erased and that the intervention of the trade union should be made compulsory even for the firing of a single worker⁶⁰. Finally there were some people who held the opinion that the definition of “dramatic changes in the objective circumstances” was too vague and demanded that the Law established more restrictive conditions⁶¹.

THE CRITICAL POINTS: THE UNILATERAL RESOLUTION OF THE LABOR CONTRACT BY THE EMPLOYER

Article 43 of the Labor Contract Law provides that “if an employer is about to terminate a labor contract unilaterally, it shall first inform the labor union about the reasons. The labor union shall have the right to demand that the employer makes the necessary adjustment if the employer violates laws, administrative regulations or the labor contract. The employer shall consider the opinions of the labor union and notify the labor union in writing about the outcome of its handling of the matter”. This formulation remained substantially unchanged, with the exception of some lexical variations and the removal of a passage in which the legislators affirmed that the trade union had the right to demand that the employer makes the necessary adjustment even when it thought that the resolution of the contract was simply “inadequate” (*bu shidang*)⁶².

In Chinese labor legislation there are some procedural discrepancies about the resolution of individual labor contracts, in particular between the Labor Law of 1994 and the Trade Unions Law of 2001. In fact, article 30 of the Labor Law gives the trade unions just the *right* to air their opinion on the matter, if they consider as inappropriate the revocation of a labor contract by the employer, while article 21 clause 2 of the Trade Unions Law

56 Amcham, *cit.*, p. 39.

57 *Ibid.*

58 China Enterprise Confederation (CEC) and China Enterprise Directors Association (CEDA), *Guanyu Qiye Da Guimo Caiyuan de Chengxu* (On the process of massive layoffs in enterprises), on <<http://www.cec-ceda.org.cn/channel/ldhtf/contents/5222.html>>.

59 See the section XIV of the document *Renmin Qunzhong dui Laodong Hetongfa Cao'an de Yijian Huizong* (Collection of opinions from the masses about the Draft Labor Contract Law), <http://news.xinhuanet.com/newscenter/2006-04/06/content_4392500.htm>. It is a collection of the most significant opinions among the 32,791 comments received by the government between March 28th and April 6th.

60 *Ibid.*

61 *Ibid.*

62 This formulation is present in all three Draft of the Law, but has been erased from the final version which was discussed by the Parliament in June.

assigns to the employer the *duty* to inform its trade union on the reasons for the resolution. The new Labor Contract Law just takes up the latter formulation, assigning to the employer the obligation to inform its trade union in advance, and in so doing it does not distinguish itself for its originality.

After the publication of the first draft of the Law, USCBC clung to the discrepancy between Labor Law and Trade Unions Law and, choosing to ignore the latter, expressed the opinion that the article in the Draft was in contradiction with the existing legislation and arrived at the point of asserting that “adopting alternative wording in the final version of the Draft Law that mirrors the existing language used in the PRC Labor Law would strengthen PRC law while protecting both the rights and responsibilities of trade unions and employers”⁶³. A criticism of a completely different nature came from Chinese entrepreneurs who, assuming that a lot of private, foreign or town and village-owned enterprises hadn’t established a trade union yet, suggested rewriting the article as follows: “If an employer is about to terminate a labor contract and the employees have already established a trade union, it shall inform the union in advance”⁶⁴.

CONCLUSIONS

Even if many have wondered what the purpose is of adopting new laws which should raise labor standards when not even the lower standards of the existing laws are complied with⁶⁵, with the Draft Labor Contract Law the Chinese government has shown which concessions it is ready to make and which ones are beyond dispute, at least for now. It has made clear that it is ready to give the ACFTU greater power on the workplace and in the processes of industrial restructuring, but on the other hand concessions such as the right to strike and unions autonomy are still out of the bounds. If we look at the limitations of Chinese trade unions, in particular their structural dependence on company management and administrative bodies⁶⁶, the openings of the first Draft look very shallow, to such an extent that there was someone who even suggested eliminating any reference to trade unions on the questions of negotiations with the employers is concerned, the approval of company policies and regulations and the signing of collective contracts, since the ACFTU is just “a body of the management completely indifferent to workers’ rights and interests”⁶⁷. Nevertheless, these little openings were enough to rouse bitter controversies within the Chinese and foreign entrepreneurial world.

The Chinese government, restrained in its sovereignty by a “social pact”⁶⁸ which binds stability not so much to a political investiture as to economic growth, had to make substantial modifications to the contents of the first Draft, erasing the critical points and limiting itself to reiterating norms and principles already contained in the existing legislation. This is enough to point out the strength of the resistance that a radical reform of the trade unions structure would face: it is not only political resistance by the CCP, but also – and maybe most of all – economic resistance by employers who take great advantage in the status quo of Chinese industrial relations. In the present circumstances, Chinese citizens are compressed in the exercise of their legitimate rights: in such a situation not only cannot their air their dissent against the work of the government, but they cannot express their support for the same either. Hence it is obvious that their contribution to the legislative process is minimum. There is just one way Chinese government can free its work from the interests of entrepreneurial world, that is the recognition of the right to strike and the creation of authentic democratic mechanisms in trade unions. Only with these instruments will Chinese society be able to react strongly and autonomously to any attempt to violate or restrict its rights, independently from the direction it comes from.

63 USCBC, *cit.* (April 2006), p. 4.

64 China Enterprise Confederation (CEC) and China Enterprise Directors Association (CEDA), *Guanyu Laodong Hetong Jiechu Fanwei yu Chengxu* (On the scope and the process of resolution of labor contracts), <<http://www.cec-ceda.org.cn/channel/ldhtf/contents/5223.html>>.

65 This doubt has been aired by Amcham and the European Chamber of Commerce in China, but also, on the opposite front, by the International Trade Unions Confederation (ITUC). The latter wrote an open letter to Hu Jintao, <www.ituc-csi.org/IMG/pdf/CHINA_-_ITUC_to_President_Hu_Jintao_on_draft_contract_law_24_May_2007.pdf>.

66 See my “Perché il sindacato cinese non può alzare la voce?”, *cit.*

67 See section VII of *Renmin Qunzhong dui Laodong Hetongfa Cao'an de Yijian Huizong*, *cit.*

68 Luigi Tomba talks of “social pact” in his *Storia della Repubblica Popolare Cinese*, Bruno Mondadori, Milano 2002, pp. 220-222.

THE AUTHOR

Thanks to a scholarship awarded by the Italian Ministry of Foreign Affairs, Ivan Franceschini has been conducting researches on Chinese labor issues at People's University of China from 2006 to 2008. In 2008 he has graduated in Language and Financial and Legal Institutions of Eastern Asia from Ca'Foscari University of Venice, but since then he hasn't stopped researching independently. His researches mainly focus on Chinese labor relations, especially on Chinese trade unions. Now he's working on a research project on Chinese migrant workers unemployment.

