

## NEWSLETTER

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This newsletter contains information on **Arbitration of Labor Disputes in China.**

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#### Disclaimer:

This newsletter is intended to provide general information on Arbitration of Labor Disputes in China.

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## Arbitration of Labor Disputes in China

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### 1. Brief introduction to labor arbitration in China

Under the Law of the People's Republic of China on Mediation and Arbitration of Labor Disputes effective as of May 1<sup>st</sup>, 2008 (hereinafter referred to as “**Labor Arbitration Law**”) and other related laws and regulations, arbitration proceedings are a pre-requisite for the settlement of any labor dispute. Such disputes must undergo arbitration before it can be submitted to a court of competent jurisdiction for judgment. Before arbitration, however, an employee may take action against unjust treatment by an employer through consultation or mediation proceedings. But pursuing these two legal avenues may not always bring about a result in the employee’s favor. Therefore, where a labor dispute arises between an enterprise/organization and its employee(s), arbitration is the normal procedure for settlement of the dispute, and it is also the first avenue an employee would usually prefer to pursue to obtain redress.

## **2. General rules of labor arbitration in China**

### **2.1 Formation and functions of arbitration commissions**

Arbitration commissions are composed of representatives from the labor administrative department, representatives from the labor union and representatives from enterprises. Labor dispute arbitration commissions are made up of an odd number of members, for example, one, three or five members.

The functions and duties of labor dispute arbitration commissions include:

- the appointment and dismissal of full-time or part-time arbitrators;
- the acceptance of labor dispute cases;
- discussion of major or complicated labor dispute cases; and
- supervision of arbitration activities.

### **2.2 Pre-requisites of an arbitrator**

If one intends to be an arbitrator in a labor dispute arbitration commission, he/she must fulfill at least one of the following pre-requisites:

- Have served as an adjudicator prior to serving as an arbitrator;
- Been engaged in legal research or teaching with a designation of middle level or above;
- Have legal knowledge and have engaged in human resources management, labor union work or other related professional work for five (5) full years; or
- Been practicing as a lawyer for three (3) full years.

### **2.3 Jurisdiction of the arbitration commission**

The arbitration commission has jurisdiction over the labor disputes arising in the district where the commission is located. In the event that the district where the labor contract is performed differs from the district where the business premises of an enterprise is located, arbitration commissions of both districts have equal jurisdiction. When parties to the labor dispute apply for arbitration in different arbitration commissions, the arbitration commission located in the district where the labor contract is performed has jurisdiction to hear the dispute.

### **2.4 Publicity of arbitration proceedings**

As a general principle, arbitration proceedings are open to publicity, and non-publicity is an exception. As provided in the Labor Arbitration Law: “The arbitration of labor disputes shall be conducted openly, unless the parties agree not to conduct proceedings openly or where state secrets, trade secrets or personal privacy is involved”.

### 3. Application of labor arbitration in China

The time limit for applying for arbitration is complex pursuant to the Labor Arbitration Law, which states that:

“The time limit for application for arbitration is one (1) year commencing from the date when the applicant knows or shall have known the infringement of his/her rights.

The time limit as prescribed in the previous paragraph shall be interrupted when either party claims his/her rights against the other party, or seeks remedies from relevant departments, or the other party agrees to perform his/her obligations. Where such interruption occurs, the time limit of arbitration application shall commence therefrom.

Where the applicant is not able to apply for arbitration within one (1) year due to force majeure or other proper reasons, the time limit shall be suspended until the said reasons are removed.

Where, within the subsistence of labor relations, a dispute arises due to labor remunerations in arrears, the laborer who applies for arbitration shall not be restricted by the time limit prescribed in Paragraph One of this article. However, where the labor relations are terminated, the one-year time limit for arbitration application shall commence from the date of termination of the labor relations.”

In comparison with this new law, the time limit for arbitration application under the old regulations was only six (6) months, which was not as beneficial to employees.

*Case example on application of time limits under current laws:*

*Company B has employed Mr. A as a manager. The labor contract is a fixed-term one from January 1<sup>st</sup>, 2008 to January 1<sup>st</sup>, 2010. When Mr. A began to work in Company B on January 1<sup>st</sup>, 2008, he found that his post was “assistant manager” instead of “manager”. For one month, he was negotiating with the management of Company B as to what his proper post was. Company B promised to give him an answer on February 1<sup>st</sup>, 2008. When the management gave him an answer on that date, Mr. A became even angrier because he was told that his post was that of “manager*

*assistant". Subsequently, on May 12<sup>th</sup>, 2008, Mr. A had to go on a business trip to Sichuan and suffered slight injury when he was trapped in the earthquake ruins for one week. After being saved from the ruins, Mr. A lay in hospital for fifteen (15) days before recovery. When is the last date for Mr. A to apply for arbitration as regards the issue of his post?*

*The date that Mr. A knew or should have known about the infringements of his rights was January 1<sup>st</sup>, 2008. He then negotiated with Company B on this issue for one (1) month and Company B gave its answer on February 1<sup>st</sup>, 2008. The one-year time limit for an arbitration application therefore commenced on February 1<sup>st</sup>, 2008. However, the one-year time frame would not end one year from that date because due to the earthquake in Sichuan, which was a force majeure, Mr. A was not able to apply for arbitration during the 34 days from May 12<sup>th</sup>, 2008 to June 3<sup>rd</sup>, 2008. During those 34 days, the time frame for applying for arbitration was suspended, as provided in the Labour Arbitration Law. Therefore, since the one-year time limit for arbitration application commenced on February 1<sup>st</sup>, 2008, and was suspended from May 12<sup>th</sup>, 2008 to June 3<sup>rd</sup>, 2008, the last day for an arbitration application would be March 6<sup>th</sup>, 2009.*

#### **4. Hearing and awards of labor arbitration in China**

##### **4.1 Arbitral tribunal system**

The arbitration commission adopts an arbitral tribunal system to settle labor disputes. An arbitral tribunal comprises three arbitrators and has a chief arbitrator. Simple labor dispute cases may be arbitrated solely by one arbitrator, and awards are made in accordance with the opinions of the majority of the arbitrators. The differing opinions of the arbitrators in the minority are recorded. Where the arbitral tribunal cannot form a majority opinion, the award is made in accordance with the opinion of the chief arbitrator.

##### **4.2 Mediation first**

The arbitral tribunal mediates between the parties before making an award. Where an agreement is reached after mediation, a statement of mediation is prepared by the arbitral tribunal. The statement of mediation states the request for arbitration and the result agreed by the parties. The statement of mediation is signed by arbitrators and sealed by the labor dispute arbitration commission and served to the parties. The statement of mediation carries legal effect after being signed by the parties.

#### **4.3 Time limit for the arbitral tribunal to make award**

The arbitral tribunal is obliged to make an award within forty-five (45) days of acceptance of an arbitration application. If an extension is needed due to the complexity of the case, it may be allowed with the approval of the director of the arbitration commission. The disputing parties shall be informed in writing, and the extension may not exceed fifteen (15) days. If no arbitral award is made within the time extension, the parties may initiate litigation in the People's Court.

#### **4.4 Award final and binding**

In respect of the following labor disputes, the arbitral award is the final award and has legal effect from the date of its making, unless otherwise stated below:

- disputes in relation to claims of labor remunerations, medical expenses for work-related injury, economic compensation or damages which do not exceed the total sum of the relevant employee's salary for twelve (12) months (based on the minimum local monthly salary);
- disputes arising with regards to working hours, rest days, leave days and social insurance when implementing state standards whereof.

#### **4.5 Chance to sue in court**

Where an employee is dissatisfied with an arbitral award, he/she may initiate litigation in the People's Court within fifteen (15) days of receipt of the award.

*Case example on arbitration procedure:*

*A labor dispute arises between Mr. C and the company he works for. If Mr. C intends to apply for arbitration to settle the dispute, what is the general procedure involved? How and when can he get a final result?*

*First, Mr. C has to prepare an arbitration application in writing and submit it to the arbitration commission having proper jurisdiction. This application must be made within one (1) year after he knows or should have known of the infringement of his rights. Then, an arbitration tribunal will be formed to hear the case. After that, an award should be made within forty-five (45) days (extendable for another fifteen (15) days) of the acceptance of the arbitration application. Finally, if no award is made during the aforesaid forty five (45) days (or maximum sixty (60) days), Mr. C can initiate litigation in court.*

*Therefore, Mr. C can get a final resolution of his dispute with the company:*

- *either through arbitration within a maximum of sixty (60) days after his application for arbitration; or*
- *through litigation after the aforesaid sixty (60) days (with the time limit for resolution through litigation being subject to the relevant laws and regulations).*

## **5. Conclusion**

Arbitration of labor disputes is a special kind of arbitration. No arbitration clauses need necessarily be included in the labor contract, but arbitration proceedings are a mandatory pre-requisite to submission of the dispute to a court. The arbitration award is final and binding to both parties. However, if there is dissatisfaction with the award, either party can, in certain circumstances and conditions provided for under the Labor Arbitration Law, file a suit against the other in a court having proper jurisdiction.