

OCCUPATIONAL ACCIDENT INSURANCE FOR ALL WORKERS: THE NEW CHALLENGES FOR CHINA

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INTRODUCTION

Although the statistics in relation to Chinese occupational injury and disease are difficult to verify, they do point towards a significant problem. The data available is clearly susceptible to significant under-reporting based on the experiences from other jurisdictions. For example, although estimates vary, official government data reveals that in 1997 at least 18,439 accidents occurred in China per annum involving at least 26,369 workers. Of this number, 17,558 workers are reported to have died.¹ The data alone suggests the potential for huge under-reporting of occupational injury and disease, given the fact that the figure for accidents appears to almost match the number of deaths. This suggests that accidents which do not result in the death of a worker are not recorded. In addition, the death rate also appears to be under-reported in a major way. The International Labour Organization ("ILO") figures show that China reported only 73,615 occupational related accidents for the year 2003,² but unofficial estimates are as high as 120,000.³ Still other sources put the number of accidents at 350,000 per annum, with some 50,000 fatalities.⁴ The last figure appears the closest to the expected rates of accident and death given the large size of the Chinese workforce.

There is now a growing body of research dealing with the development of Occupational Health and Safety ("OHS") in China,

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¹ Wang Dongjin, *Zhongguo shehui baozhang shidu de gaige yu fazhan* [Reform and development of the social security system in China] (2001) (P.R.C.), cited in Yanyuan Cheng & Barbara Darimont, *Occupational Accident Insurance Reform and Legislation in China*, 58 INT'L SOC. SEC. REV. 85, 86 (2006).

² Päivi Hämäläinen, Jukka Takala & Kaija L. Saarela, *Global Estimates of Occupational Accidents*, 44 SAFETY SCI. 137, 144 (2006).

³ John Fabian Witt, *Can China Improve Work Safety?*, BANGKOK POST, May 8, 2004.

⁴ M. Schüller, *Forderung nach Verbesserung der Arbeitsplatzsicherheit*, China akutell 7 (2001) (F.R.G.), cited in Cheng & Darimont, *supra* note 1, at 86.

although little has been written in relation to those laws and regulations governing the rights of workers to compensation and medical care following the occurrence of an occupational injury or disease.⁵ This Article attempts to provide a preliminary analysis of the Occupational Accident Insurance Scheme which commenced implementation in China in 2004. The Article is divided into five parts: Part I provides a brief outline of the Chinese legal system. Part II discusses the civil laws applicable to enterprise in China. Part III provides an overview of employment law in China. Part IV details workers' compensation and work injury insurance. Part V outlines the new Occupational Accident Insurance Scheme, provides the international context as its backdrop, and identifies certain challenges in its implementation. Lastly, the Article concludes with a summary of these issues and the reflections of the authors.

I. A BRIEF OUTLINE OF THE CHINESE LEGAL SYSTEM

The history of China's legal system is, as for many other nations of the world, inextricably linked with its socio-political culture. After the collapse of the Qing Dynasty in 1911, the legal reforms that took place in China reflected, and were strongly influenced by, the European civil law system, as the Soviet law itself, upon which the Chinese legal system is principally based, was modeled after those of Germany, France and Switzerland.⁶ Civil law, criminal law and other major laws in China were codified as early as 1911.⁷ The origins of Chinese legal doctrines and the Chinese legal system are undoubtedly steeped in Marxist-Leninist ideology. The Communist Party of China ("CPC") came into power in 1949 and on October 1, 1949, the People's Republic of China ("P.R.C.") was established under Chairman Mao with Zhou Enlai as

⁵ The authors would like to acknowledge the particularly useful work of Cheng & Darimont, *supra* note 1. See also Meei-shia Chen & Anita Chan, *Employee and Union Inputs into Occupational Health and Safety Measures in Chinese Factories*, 58 SOC. SCI. & MED. 1231 (2004); Tim E. Pringle & Stephen D. Frost, *The Absence of Rigour and the Failure of Implementation: Occupational Safety and Health in China*, 9 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 309 (2003).

⁶ WILLIAM E. BUTLER, *SOVIET LAW* (1983).

⁷ See Kui-Hua Wang & Danuta Mendelson, *An Overview of Liability and Compensation for Personal Injury in China Under the General Principles of Civil Law*, 4 TORTS L. J. 137 (1996); see also CHINA: A COUNTRY STUDY (Frederica M. Bunge & Shinn Rinn-Sup, eds., 3d ed. 1981).

Premier. The CPC was the party of the "working class"; over 90% of its members were of peasant origin.⁸

Lawmaking in the P.R.C. at that time was modeled on the Soviet legal process, which was itself based on civil law, and reflected the socialist norms of the one-party controlled state.⁹ The CPC, upon coming to power, abolished the previous legal system of China and established a Soviet-based model that aimed to protect what the CPC called the common working people's interests. The judicial system, therefore, reflected and was influenced by Soviet law, Marxist ideology, and the CPC's interpretation of law and justice.¹⁰

With the birth of the first Constitution of the P.R.C. in 1954, the National People's Congress ("NPC") was given supreme powers to represent the people and create laws to protect their rights. The Constitution of 1982 and its amendments are currently in force. It takes a two-thirds majority of the NPC to change the Constitution. This has been done only on three occasions, the most recent of which marked the introduction of the concept of the "Socialist Market Economy" in 1993.¹¹ This was a significant catalyst for the introduction of fresh legal reforms intended to meet the needs of a labor force that has undergone major transformations from an erstwhile centrally planned economy to a market-based one.

Chinese history reveals that party policy has been shaped by the various political movements that have taken place—specifically, key political milestones that demonstrated and articulated the vision of its leaders.¹² From 1966 to 1976, Chinese workers were subjected to the Cultural Revolution in an attempt to develop China's vast rural endowments more efficiently. Prior to this, in 1958, was the initiation of the "Great Leap Forward,"¹³ an economic plan developed to utilize the country's large population to rapidly transform the P.R.C. from a principally agrarian economy into a modern, industrialized society. An unstable political environment ensued, which led to the proliferation of right-wing ideals within the CPC (albeit within the dictates of party

⁸ CHINA ECONOMIC REVIEW, CHINA BUSINESS HANDBOOK (2003).

⁹ Wang & Mendelson, *supra* note 7.

¹⁰ CHINA: A COUNTRY STUDY, *supra* note 7.

¹¹ CHINESE LAW (Wang Guiguo & John Mo eds., 1999).

¹² KENNETH SCOTT LATOURETTE, A HISTORY OF MODERN CHINA (1954).

¹³ Wang & Mendelson, *supra* note 7.

policy lines). The "Hundred Flowers Blooming and Contending Movement" and the "Anti-Rightist Movements"¹⁴ originating from within the party provided a response to these ideals in a bid to realign party policy and stem the rise of these right-wing ideals within party machinations.

If the goal of economic growth, which was common to both sides of the idealistic polarization within the CPC, was to be pursued, common platforms had to be found which would allow the broader party ideology to prosper. To that effect, the 1970s saw the Chinese government heralding the Four Modernization Movements of Agriculture, Industry, Science and Technology, and National Defense.¹⁵ These changes ushered in a new era of reform, one that necessitated fresh law-making. Subsequently, in 1978, when the "Open Door Policy" was introduced, the momentum in the law-making process gathered.¹⁶ Laws affecting workers' rights expanded in number and scope from then on.

As in other one-party state systems, the legislature is subordinate to the ruling party, that is, the CPC.¹⁷ Law-making powers are vested in the CPC and laws are made based on party policy. The supreme organ of the CPC is the NPC, which passes laws and ratifies treaties, nominates the Executive arm of government, and approves the Constitution. NPC representatives are replaced every five years.¹⁸ The NPC elects, or in effect selects, the President of the Supreme People's Court, which is the highest source of judicial power in China. The Supreme People's Court was established in 1950–51 and a Soviet-style Department of the Procurator-General, responsible for criminal cases and public prosecutions, was created.¹⁹ The Supreme People's Court is made up of

¹⁴ See CHINA: A COUNTRY STUDY, *supra* note 7.

¹⁵ KUI HUA WANG, CHINESE COMMERCIAL LAW (2000).

¹⁶ Announced by Deng Xiaoping in December 1978, the "Open Door Policy" was a program of reform and openness with the goal of introducing free-market mechanisms into the command economy. See generally Shue Tuck Wong & Sun Sheng Han, *Whither China's Market Economy? The Case of Lijin Zhen*, 88 GEOGRAPHICAL REV. 29, 31 (1998) (reviewing the economic reforms and policies initiated by Deng Xiaoping in 1978); see also Andrew S. Quach & Elaine A. Anderson, *Implications of China's Open-Door Policy for Families: A Family Impact Analysis*, 29 J. FAM. ISSUES 1089, 1091-93 (2008) (describing the strategy and results of the Open Door Policy).

¹⁷ Economist.com, Country Briefings: China, Sept. 30, 2008 (last visited Oct. 20, 2008) ("The [Communist Party] dominates the government.").

¹⁸ *Id.*

¹⁹ RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY:

three divisions: the Criminal Division, the Economic Division and the Civil Division. Claims for personal injury and workers' compensation are heard in the Civil Division.

II. CIVIL LAW APPLICABLE TO ENTERPRISES IN CHINA

To cope with the newly introduced economic reforms of 1986, a compilation of civil laws generally known as the General Principles of Civil Law ("GPCL") was introduced.²⁰ Prior to 1986, courts in China had used a variety of statutes, such as the Environmental Protection Law of 1979,²¹ to provide relief by way of damages to victims' claims for compensation. Other statutes which courts had recourse to in conferring benefits included the Provisional Law on Food Hygiene of 1982 and the Public Security Administration and Punishment Act of 1986 that required citizens to observe public order and provided compensation for personal injuries suffered by victims of assault. The Trademark Law of 1982 protected rights in intellectual property²² and the Patent Law of 1984²³ provided a wide scope of remedies to those whose patent-protection rights had been infringed. Together with the Contract Law of the P.R.C., passed on the 15th of March 1999, the GPCL governs commercial relationships in the marketplace.²⁴

With the introduction of the GPCL, civil liability for various kinds of damages was formally brought under a single banner. In particular, Chapter 6 of the GPCL focuses on civil liability, and addresses

AN INTRODUCTION TO COMPARATIVE STUDY OF LAW (1985).

²⁰ General Principles of Civil Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), *translated in* LAWINFOCHINA (last visited Oct. 20, 2008) [hereinafter GPCL].

²¹ For example, in the case of Villagers' Committee of Chunyang Village v. Hua'nan Gold Mine Bureau (Sup. People's Ct. 1988), *available at* <http://www.court.gov.cn/popular/200303260097.htm> (last visited Oct. 20, 2008) (P.R.C.), *cited by* Wang & Mendelson, *supra* note 7, damages were awarded to victims' farms in the event of damage due to pollution of the environment.

²² Trademark Law of 1982 (promulgated by the Standing Comm. Nat'l People's Cong., and effective Aug. 23, 1982), arts. 37-40, *translated in* ISINOLAW (last visited Oct. 20, 2008).

²³ Patent Law of 1984 (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, effective Apr. 1, 1985), art. 51, *translated in* LAWINFOCHINA (last visited Oct. 20, 2008).

²⁴ WANG, *supra* note 15, at 51.

compensation for personal injury,²⁵ and tortious liability arising out of injury occasioned through construction activity and excavations (Article 125).²⁶ In all, there are nine chapters to the GPCL, each comprehensively outlining the basic principle as to which persons constitute "citizens" and "legal persons," and what can be construed as "civil legal acts," "agency," "civil rights," and "civil liability."²⁷ Time limits for bringing an action are also specified. The GPCL also prescribes the circumstances in which the application of law to foreign legal relationships will apply. The GPCL is not subject to jurisprudential interpretation or revision.

The judicial committee of the Supreme People's Court, under powers granted to it by the CPC, has issued an Opinion (considered a supplementary law) designed to clarify the application of the GPCL.²⁸ This Opinion is used when further clarification on points of law are required by the Courts. Case law, which is used in common law countries for statutory interpretation, is not relevant for purposes of judicial interpretation under the current legal system.

III. EMPLOYMENT LAW IN CHINA

Prior to the reforms that began in 1986, all applications for employment had to go through the local recruitment bureau that allocated jobs to persons without considering their preferences (*danwei*).²⁹ Managers enjoyed very little discretion in terms of recruiting and dismissing employees. However, this system did provide guarantees (mostly for urban workers) of employment security, including life-long employment and a range of benefits such as housing, medical, dental, child-care, and retirement benefits. These benefits were referred to as the "iron rice bowl" (*tie fanwan*), basically a de-facto standard for all urban

²⁵ GPCL, *supra* note 20, art. 119.

²⁶ *Id.* art 125. *See also* Wang & Mendelson, *supra* note 7.

²⁷ GPCL, *supra* note 20.

²⁸ Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (promulgated by the Sup. People's Ct., effective Jan. 26, 1988), *translated in* LAWINFOCHINA (last visited Oct. 20, 2008); *see also* SANZHU ZHU, SECURITIES DISPUTE RESOLUTION IN CHINA 10 (2007).

²⁹ Mohamed Branine, *Change and Continuity in Chinese Employment Relationships*, 22 N.Z. J. INDUS. REL. 77, 80 (1997).

workers.³⁰ It was by nature rigid, and the legal framework was often flouted.³¹ This system led to huge inefficiencies, low staff morale and low levels of productivity due to the mismatch of skills and overstaffing.³² Poor outcomes from this system consequently led to decentralization of the staffing system, providing managers with room to implement measures for more efficient reallocation of workers in a bid to improve the production function.

The period from 1949 to 1956 nonetheless was described as the "establishment and formation period" in the development of Chinese labor legislation.³³ It was not until 1976, when the CPC announced China would begin economic reform,³⁴ and with the subsequent introduction of foreign investments in 1979,³⁵ that the laws that had been established in the 1950s for the protection of workers' rights came under greater scrutiny. In the early 1980s, the reform process saw the collapse of the work-unit system and the "iron rice bowl" policy noted above.³⁶ Under a liberalized open-door policy, the provision of benefits to workers stipulated via the Labor Insurance Regulations of 1951³⁷ was no longer feasible.

A range of new policies and regulations targeted at making enterprises more efficient was introduced.³⁸ The Contract Management Responsibility System was launched in 1986 to separate the ownership of an enterprise from the authority to operate and manage it.³⁹ The Law of

³⁰ Michaela Grimm, *The Chinese Welfare System – Still Under Construction*, in ECON. & MARKETS, Mar. 2005, at 33, 34.

³¹ Ying Zhu & Iain Campbell, *Individual Labour Contracts in People's Republic of China*, 18 INT'L J. COMP. LAB. L. & INDUS. REL. 5, 8 (2002).

³² Olivia K.M. Ip, *Changing Employment Systems in China: Some Evidence from the Shenzhen Special Economic Zone*, 9 WORK EMP. & SOC'Y 269, 271 (1995).

³³ Lin Feng, *Labour Law*, in INTRODUCTION TO CHINESE LAW (Chenguang Wang & Xianchu Zhang eds., 1997).

³⁴ *Id.* at 458.

³⁵ WANG, *supra* note 15, at 83-84.

³⁶ John Knight & Lina Song, TOWARDS A LABOUR MARKET IN CHINA (2005).

³⁷ Labor Insurance Regulations (promulgated by the Gov't Admin. Council, Feb. 23, 1951, effective Feb. 26, 1951), translated in LAWINFOCHINA (P.R.C).

³⁸ Helen De Cieri et al., *The Reform of Employee Compensation in China's Industrial Enterprises* 7 (Ctr. for Advanced Human Res. Studies, Working Paper No. 98-05, 1999), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1117&context=cahrswp> (last visited Oct. 20, 2008).

³⁹ Chongwoo Choe & Xiangkang Yin, *Contract Management Responsibility System and Profit Incentives in China's State-Owned Enterprises*, 11 CHINA ECON. REV. 98, 110

the P.R.C. on Industrial Enterprises Owned by the Whole People ("Law of Industrial Enterprises"),⁴⁰ coupled with the Regulations for Changing the Methods of Operations of State-Owned Enterprises of 1992, further strengthened and regulated the autonomy given to enterprises.⁴¹ The autonomy granted to enterprises under the Law of Industrial Enterprises resulted in entities taking responsibility for their own business and operations, profits or losses, development and expansion, and legal compliance.⁴² Furthermore, the Law of Industrial Enterprises states that enterprises have the authority to determine bonus distribution and the form of wages as appropriate to its particular conditions.⁴³ Consequently, enterprises have become relatively independent business units.

The two major sources of employment law in contemporary China are the 1994 Labor Law and the 1992 Trade Union Law.⁴⁴ The statutes apply to all enterprises, both domestic and foreign. These laws, together with regulations and rules issued periodically by the State Council, form the basis of employment law in China.

As found in most Western nations, China's workers' rights are guaranteed constitutionally, but such rights cannot be directly enforced unless they are incorporated into specific legislation.⁴⁵ While the 1994 Labor Law does precisely that, it also grants considerable autonomy to employers in matters relating to employment contracts, including determining wages and laying down conditions that govern them. Labor relations, which were previously based on "dependence, deference and particularism," are now based on "independence, contract and universalism."⁴⁶ Importantly, the 1994 Labor Law requires the creation of labor contracts (*laodong hetong*) which are intended to specify the

(2000).

⁴⁰ Industrial Enterprises Owned by the Whole People Law (promulgated by Standing Comm. Nat'l People's Cong., Apr. 13, 1988, effective Aug. 1, 1988), *translated in* LAWINFOCHINA (last visited Oct. 20, 2008) [hereinafter Law of Industrial Enterprises]; *see also* Lay Hong Tan, *Corporate Law Reform in the People's Republic of China*, 1, 7, 8, 9, 10, 11, 19, 20, 21 (Nanyang Tech. Univ., Working Paper No. TLH01/02, 1999), *available at* <http://ssrn.com/abstract=325441> (last visited Oct. 20, 2008).

⁴¹ De Cieri, *supra* note 38, at 7.

⁴² *Id.*

⁴³ Law of Industrial Enterprises, *supra* note 39, art. 30.

⁴⁴ Feng, *supra* note 32, at 447.

⁴⁵ *Id.* at 446-47.

⁴⁶ ANDREW G. WALDER, COMMUNIST NEO-TRADITIONALISM: WORK AND AUTHORITY IN CHINESE INDUSTRY (1986).

rights, duties, and benefits of an employee.⁴⁷ While the 1994 Labor Law sets a minimum level of benefits, enterprise level negotiations determine any benefits above the floor established by the law. Implicitly, this led to the decline of the lifelong system of benefits previously provided, as contracts under this system can be for a fixed term. The Labor Law, via regulations, also establishes dispute resolution mechanisms based on consultation, mediation and arbitration.⁴⁸ Other provisions include: freedom to participate in and organize trade unions,⁴⁹ promotion of labor exchanges,⁵⁰ enforcement of labor contracts,⁵¹ arrangements for settlement of disputes,⁵² vocational training,⁵³ and the introduction of guaranteed minimum wage.⁵⁴ However, contracts must be guided by the minimum wage set by the local authorities according to local living standards. The Labor Law also mandates no more than forty-four hours per work week and a maximum of one hour of overtime daily.⁵⁵ Payment for overtime is 150% of normal pay, "over 200% on holidays, and over 300% on public holidays."⁵⁶

The Labor Law also gave the Ministry of Labor the power to set up an Occupational Accident Insurance Scheme ("Scheme").⁵⁷ All enterprises were required to contribute towards the Scheme. The labor insurance fund is managed by labor unions and provides for pension, medical, accident and disability, maternity, and unemployment insurance.⁵⁸

Today, the 2003 Regulations on Occupational Accident Insurance ("ROAI")⁵⁹ cover insurance generally. Workers are covered provided

⁴⁷ Labor Law (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), art. 16, *translated in* LAWINFOCHINA (last visited Oct. 20, 2008).

⁴⁸ See Feng, *supra* note 312, at 484.

⁴⁹ Labor Law, *supra* note 46, art. 7.

⁵⁰ *Id.* art. 11.

⁵¹ *Id.* arts. 16-35.

⁵² *Id.* arts. 77-84.

⁵³ *Id.* art. 5.

⁵⁴ *Id.* art. 48.

⁵⁵ See Branine, *supra* note 29, at 88.

⁵⁶ *Id.* at 88-89.

⁵⁷ See Cheng & Darimont, *supra* note 1, at 86.

⁵⁸ Anne Stevenson-Yang, *Re-vamping the Welfare State: China Aims to Weaken the Link Between Employers and Benefits*, CHINA BUS. REV., Jan.-Feb. 1996, at 8, 9.

⁵⁹ Gong shang bao xian tiao li [Rules on Occupational Accident Insurance] (promulgated by the State Council P.R.C., Apr. 27, 2003, effective Jan. 1, 2004), art. 5,

that over one year's insurance has been paid prior to claiming, the suspension is not voluntary, and the claim is registered after the application for re-employment has been made.⁶⁰ Prior to that, legal instruments protecting workers included the 1991 Provisions on the Report and Handling of Casualty Accidents to Enterprise Employees⁶¹ and the 2001 Law of the P.R.C. on Prevention and Control of Occupational Diseases.⁶² Later, in 2002, Measures of Control of Occupational Healthcare,⁶³ Diagnosis and Appraisal of Occupational Diseases and Measures of Investigation⁶⁴ and Disposal of Accidents from Harmful Occupational Diseases were promulgated.⁶⁵ These measures and the 2002 Law on Work Safety⁶⁶ were the precursors to the current ROAI.⁶⁷

A. Workers Representation in China

While the Labor Law grants rights to workers to form trade unions, these must be controlled by the official trade union organization, the All

available at <http://china.findlaw.cn/fagui/sh/23/42690.html> (last visited Oct. 20, 2008) [hereinafter ROAI].

⁶⁰ Chinese Government, *Labor and Social Security in China* (2002), http://english.gov.cn/official/2005-07/27/content_17750.htm (last visited Oct. 20, 2008).

⁶¹ Regulations on Reporting and Handling Fatal Accidents of Workers and Employees in Enterprises (promulgated by the State Council, and effective May 1, 1991), translated in LAWINFOCHINA (last visited Oct. 20, 2008).

⁶² Law on Prevention and Treatment of Occupational Diseases (promulgated by the Standing Comm. Nat'l Cong., Oct. 27, 2001, effective May 1, 2002), translated in LAWINFOCHINA (last visited Oct. 20, 2008).

⁶³ Measures of Control of Occupational Healthcare (promulgated by Ministry of Health, Mar. 28, 2002, effective May 1, 2002), translated at http://www.chinalaw.gov.cn/jsp/jalor_en/index.jsp?id=menuhtcwzy31 (select "Department Rules," then search for "occupational healthcare") (last visited Oct. 20, 2008).

⁶⁴ Measures of Control of Diagnosis and Appraisal of Occupational Diseases, translated at http://www.chinalaw.gov.cn/jsp/jalor_en/index.jsp?id=menuhtcwzy31 (select "Department Rules," then search for "diagnosis and appraisal") (last visited Oct. 20, 2008).

⁶⁵ Measures of Investigation and Disposal of Accidents from Harmful Occupational Diseases, translated at http://www.chinalaw.gov.cn/jsp/jalor_en/index.jsp?id=menuhtcwzy31 (select "Department Rules," then search for "investigation and disposal of accidents") (last visited Oct. 20, 2008).

⁶⁶ Law of the People's Republic of China on Work Safety (promulgated by the Standing Comm. Nat'l Cong., June 29, 2002, effective Nov. 1, 2002), translated at http://english.gov.cn/laws/2005-10/08/content_75054.htm (last visited Oct. 20, 2008).

⁶⁷ See Peter S. Barth, *Workers' Compensation in the People's Republic of China*, IAIABC J. Summer 2007, at 69.

China Federation of Trade Unions ("ACFTU"), which is subordinate to the CPC and whose policies are strictly guided by party policy.⁶⁸ As in other socialist systems, China has its workers' councils whose origins date back to 1949 and which are collectively referred to as the Staff and Workers' Representative Congress ("SWRC").⁶⁹ At the enterprise level, the SWRC elects its own executive council, consisting of workers, management, and trade union representatives.⁷⁰ The general manager of an enterprise has the power to reject decisions of the SWRC if the decisions are not in the organization's interest.⁷¹ Hence these councils have proved to be an arena for much political power play.

In the history of China since 1949, the interaction between workers' councils and ACFTU has varied, largely due to the influences exerted by rightist factions within the CPC. From as early as 1957, workers have had the right to decide matters related to social welfare and the workplace, but these powers have been curtailed somewhat by the Anti-Rightist Tendency Campaign.⁷²

In 1978, the CPC under Deng Xiaoping revived the SWRC. The CPC, taking into consideration developments in other socialist states such as Poland and Yugoslavia, recognized the need to grant workers "some leverage vis-à-vis management" if managers were to be given autonomy and discretionary powers over workers.⁷³ The ACFTU for its part played a significant role in ensuring greater efforts were made to incorporate pro-worker provisions in the Law of Industrial Enterprises, culminating in widening the role of the SWRC in the "right to democratic management."⁷⁴ However, the controlling power of the CPC over both the ACFTU and SWRC is supreme whether on matters of policy, practice, or allocation of roles for worker representation.

⁶⁸ Sean Cooney, *A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops*, 28 MELB. U. L. REV. 290, 297 (2004).

⁶⁹ Zhu Xiaoyang & Anita Chan, *Staff and Workers' Representative Congress: An Institutionalized Channel for Expression of Employees' Interests?*, CHINESE SOC. & ANTHROPOLOGY, Summer 2005, at 6, 8.

⁷⁰ See Branine, *supra* note 29, at 84.

⁷¹ *Id.*

⁷² Xiaoyang & Chan, *supra* note 69, at 8.

⁷³ *Id.* at 9.

⁷⁴ *Id.* at 10.

B. *Settlement of Labor Disputes*

Under the Chinese legal system, the settlement of labor disputes involves voluntary conciliation, mediation, and compulsory arbitration and litigation.⁷⁵ Mediation is conducted by the work unit's labor dispute mediation committee, which consists of representatives of the workers, management, and trade union. Parties can either opt for arbitration or litigation.⁷⁶ In 2000, the numbers of applications for mediation stood at a low 31,193 and applications for arbitration at 131,127, though these numbers are said to be on the rise.⁷⁷

The current arbitration system allows workers access to the court system only if mediation fails. China's legislature adopted the Law on Mediation of Labor disputes, which took effect on May 1, 2008, and was fashioned to address concerns about the growing number of annual labor disputes.⁷⁸ It focuses on the role of local mediation mechanisms dealing with individual issues in an effort to develop harmonious relations between employers and workers. This law will provide for arbitration of disputes regarding compensation, pensions, and medical expenses incurred by job-related injuries.⁷⁹ When employers fail to comply with such arbitration agreements, workers will have the right refer the matter to the People's Court for enforcement (payment warrant) although this right appears to be limited because if the employer agrees to the arbitration in writing, the right of referral abates.⁸⁰

Courts will have jurisdiction only after the mechanisms of alternative dispute resolution have been exhausted. Occupational Accident Insurance benefits are legally regulated whereas compensation in civil

⁷⁵ See Feng, *supra* note 33.

⁷⁶ *Id.*

⁷⁷ China Labor and Social Security Statistical Yearbook 1997-2000, *cited in* Yanyuan Cheng, *The Development of Labour Disputes and the Regulation of Industrial Relations in China*, 20 INT'L J. COMP. LAB. L. & IND. REL. 277, 279 (2004).

⁷⁸ Law on Labor Dispute Mediation and Arbitration (promulgated by the Standing Comm. Nat'l Cong., Dec. 29, 2007, effective May 1, 2008), *translated in* LAWINFOCHINA (last visited Oct. 20, 2008).

⁷⁹ Jim H. Young & Lin Zhu, *Overview of China's New Labor Dispute Mediation and Arbitration Laws*, available at http://www.dwt.com/practc/sha_chi/bulletins/01-08_ChinaLaborDispute.htm (last visited Oct. 20, 2008).

⁸⁰ Law on Mediation and Arbitration of Labor Disputes, *supra* note 78, arts. 5, 16; *see also* Young & Zhu, *supra* note 79.

action is subject to negotiation.⁸¹ Again, the over-arching control of the CPC is supreme in the workings of these machinations, prompting academic commentary on the CPC tactics, described as "brutal" and "repressing."⁸² According to O'Rourke and Brown,⁸³ the Government is more interested in attracting foreign investment and promoting industry than in protecting workers.⁸⁴ Although negotiation is mentioned in various P.R.C. laws, there is no formal requirement for negotiation—compromise must be reached in a manner that is "most attuned to Chinese culture and attitudes."⁸⁵

IV. WORKERS' COMPENSATION AND WORK INJURY INSURANCE

The Contemporary Occupational Accident Insurance Law of China has its historical roots in The Labor Insurance Regulations of 1951, which provided a social security system for workers administered by individual industrial enterprises called "work units."⁸⁶ These units initially were in state-owned enterprises such as postal services, aviation and mining where the employer engaged more than one hundred workers. As a consequence, the Labor Insurance Regulations covered very few workers.⁸⁷ The work units had the power to mediate on behalf of members to settle personal disputes. Under the so-called "iron rice-bowl" policy, the workers who were covered by the Scheme were provided with many benefits such as retirement benefits, survivor benefits, payments of medical costs, subsidies for workers on low incomes, and workplace welfare facilities—provision for life, from cradle to grave. Those injured in occupational accidents were entitled to recovery of costs of medical treatment and, if necessary, a disability

⁸¹ J. Lin, *Theory, Practice and Innovation in Social Security Law* (2002), cited in Cheng & Darimont, *supra* note 1, at 93.

⁸² Dara O'Rourke & Garrett D. Brown, *Experiments in Transforming the Global Workplace: Incentives for and Impediments to Improving Workplace Conditions in China*, 9 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 378, 379 (2003).

⁸³ *Id.*

⁸⁴ *Id.* at 378.

⁸⁵ KUI HUA WANG, *supra* note 15, at 280.

⁸⁶ Doug Guthrie, *Organizational Uncertainty and Labour Contracts in China's Economic Transition*, 13 SOCIOLOGICAL FORUM 457, 458, 467 (1998) (describing the responsibilities of work units, and explaining how "responsibilities were starting to be pushed down the administrative hierarchy of the former command economy").

⁸⁷ See Cheng & Darimont, *supra* note 1, at 85.

pension.⁸⁸

Chinese industrial enterprises fall under four main groups: (1) state-owned enterprises ("SOEs"); (2) collectively-owned enterprises ("COEs"); (3) privately-owned enterprises ("POEs"); and (4) foreign-invested enterprises ("FIEs"). Previously, only workers in SOEs had the privilege of benefits and protection under labor regulations, which were administered by the National Trade Union Federation, and held monies on account for distribution by the local workers union.⁸⁹ This situation began to change in the 1990s. With the changeover to a market economy in 1993, the Chinese government began to recognize that workers in all forms of enterprises must be provided with a range of adequate benefits if the economy was to be expanded; and in 2003 the ROAI were introduced.

As noted earlier, Occupational Accident Insurance has hitherto been provided under the Labor Law of 1994 which stipulated that the Chinese state undertakes to set up an Occupational Accident Insurance Scheme. In 2001, further legislation was created to meet the escalating need to enhance workplace safety and occupational health.⁹⁰ The ROAI, which came into effect on January 1, 2004, now cover all employees of enterprises of "all nature[s]."⁹¹

Official figures reveal that by the end of June 2004, as many as 49.96 million employees had claimed insurance for work-related injuries.⁹² The main qualifying criteria for claims were that the employee must have been injured as a result of a work-related accident or have contracted an occupational disease during his or her working hours and within the place of work.⁹³

The Labor Law stipulates that all work relations must be governed by a contract.⁹⁴ Furthermore, benefits on workers' compensation claims can only be conferred if the application for a claim is accompanied by a copy of the work contract or any other valid proof of the employment relationship. Disappointingly though, official figures show that, out of

⁸⁸ See De Cieri et al., *supra* note 38, at 6.

⁸⁹ See Cheng & Darimont, *supra* note 1, at 86.

⁹⁰ Law on Prevention and Treatment of Occupational Diseases, *supra* note 61.

⁹¹ ROAI, *supra* note 59, art. 2.

⁹² Chinese Government, *China's Social Security and Its Policy (2004)*, http://english.gov.cn/official/2005-07/28/content_18024.htm (last visited Oct. 20, 2008).

⁹³ *Id.*

⁹⁴ Labor Law, *supra* note 47, art. 16.

an economically active population of 760,650,000⁹⁵ at the end of 2003, only 635,000 collective contracts had been concluded covering only about 80 million employees.⁹⁶ There are no simple explanations for why this is so. The laws themselves are elegant and provisions are made in theory for protection of workers' rights, however the challenge appears to be in applying them. One reason may be that in a climate of attracting foreign investments, enforcing bureaucratic rigidity and strict policing of enterprises as to whether laws are adhered to by the letter may be perceived to be disincentives to potential investors. Another reason may be due to the fundamental difference between the ROAI and social security provisions in Western countries—that labor insurance in the P.R.C. is non-contributory. All costs are borne in full by the enterprises.⁹⁷ The official unemployment rate currently stands at 4% and the registered jobless total has risen from 3.5 million in 1991 to 8.1 million in 2004.⁹⁸ The level of coverage has remained low; among all persons employed in 2003, only 14% had unemployment insurance, 16% had pension insurance and 11% had health insurance.⁹⁹ This reflects hesitancy on the part of employers to contribute to insurance premiums.

Further, while laws designed to protect workers are made centrally, they are intended to apply at all levels—i.e. state, county and provincial levels—but it is not often that the laws specify the mechanism to implement them. This is illustrated in the wording of Article 5 of the ROAI, which states that an administrative organ must be created to administer occupational accident insurance nationwide.¹⁰⁰ However, the regulations do not provide details as to how such an organ is to administer its affairs locally. Instructions from central government may need to be issued to ensure that proper implementation of rules and

⁹⁵ CHINA STATISTICAL YEARBOOK (2004), available at <http://www.stats.gov.cn/english/statisticaldata/yearlydata/yb2004-e/indexeh.htm> (last visited Oct. 20, 2008).

⁹⁶ Information Office of the State Council, *China Employment Situation and Policies* (White paper, Xinhua 2004), available at http://news.xinhuanet.com/english/2004-04/26/content_1440248.htm (last visited Oct. 20, 2008).

⁹⁷ Irene Hau-siu Chow, *Chinese Workers' Attitudes Towards Compensation Practices in the People's Republic of China*, 14 EMP. REL. 41, 42 (1992).

⁹⁸ Grimm, *supra* note 30, at 35.

⁹⁹ *Id.* at 37. The total number of economically active persons for 2003 was 760,750,000, out of which 256,390,000 were in an urban area. CHINA STATISTICAL YEARBOOK, *supra* note 95.

¹⁰⁰ ROAI, *supra* note 59, art. 5.

regulations are made at the locality level.

A. Key features of the 2003 Rules on Occupational Accident Insurance (ROAI)

Article 1 of the proposed regulations outlines the intent of the legislation—to provide workers with medical care and financial compensation in the event of work injury or occupational disease, to promote work injury prevention and occupational rehabilitation, and to disperse the employer's exposure to risks concerning work injury.¹⁰¹ Article 2 appears to do a number of things: First, it appears to limit the coverage of the Scheme to employees, and this term is used in deference to workers in this article, although throughout the rules the terms "employee" and "worker" are used interchangeably.¹⁰² Article 2 should be read with Article 61, which appears to clarify the scope of coverage by referring to the need for an employment relationship.¹⁰³ The regulations will apply to government and non-government workers.¹⁰⁴ Second, it declares that all enterprises shall join the Scheme and pay its premium cost,¹⁰⁵ whilst Article 60 provides that employers who do not join the Scheme will be liable to make payments in accordance with the regulations in any event.¹⁰⁶ Third, the regulations appear to delegate the detailed application of the Scheme to the "people's government of provinces, autonomous regions, and direct municipalities directly under the central government."¹⁰⁷

It follows that the most significant aspect of the preceding provisions is the extension of coverage to all enterprises. In particular, these provisions cover rural workers who previously had no social security protections. That said, the Rules make it clear that in order to satisfy the initial requirement, it is necessary to show the existence of an employment relationship, which must be in written form in accordance with the Labor Law.¹⁰⁸ Cheng and Darimont note that the cost of

¹⁰¹ *Id.* art. 1; *see also id.* art. 43 (regarding recurrences of injury or disease).

¹⁰² *Id.* art. 2.

¹⁰³ *See id.* art. 61 (referring to work relationship).

¹⁰⁴ *Id.* art. 62.

¹⁰⁵ *Id.* art. 2.

¹⁰⁶ *Id.* art. 60.

¹⁰⁷ *Id.* art. 2.

¹⁰⁸ *Id.* art. 61.

obtaining the necessary papers is prohibitive and the processes to obtain these documents are unwieldy.¹⁰⁹ As a consequence, this provision, which apparently is intended to provide protection to new classes of workers, may be rendered worthless by the Labor Law requirements.¹¹⁰ Nevertheless, it is anticipated that the number of workers covered as a result of private companies joining the Scheme will increase.¹¹¹

Article 3 provides that the collection of premiums will be in accordance with the Provisional Regulations on Collection and Payment of Social Insurance Premiums.¹¹² Article 4 appears to require the employer to give notice to all employees that they are part of the compensation scheme, and places liability upon the employer to provide medical care to the employee in the event of an occupational injury or disease.¹¹³ This article also requires the employer to take action to prevent injury and disease by complying with OHS norms and procedures.¹¹⁴ The Scheme is to be administered by the Ministry of Labor and Social Security ("LSS") administration under the State Council, which at the local level is divided into Operating Agencies.¹¹⁵ Pursuant to Article 6, the administration of the Occupational Accident Insurance Scheme will be based on tripartite consultation with employer and union representatives.¹¹⁶

An Occupational Accident Fund (the "Fund") is to be established and will comprise the premiums paid by employers, interest on those amounts, and any capital accumulated by the Fund.¹¹⁷ Article 8 sets out the broad parameters for the calculation of employer premiums.¹¹⁸ According to Article 9, the LSS is to take into account information from the financial, health (Ministry of Health) and Occupational Accident

¹⁰⁹ See Cheng & Darimont, *supra* note 1, at 87 ("they need all sorts of permits and certificates which can take a lot of time and cost up to a total of three months' wages to obtain, such as a temporary residence permit (*zan zhu zheng*) and an itinerant workers' license (*liudong renkou zheng*), a work permit (*jiuye zheng*) and, for women, a birth quota certificate (*jihua shengyi zheng*).").

¹¹⁰ *Id.*

¹¹¹ *Id.* at 88.

¹¹² ROAI, *supra* note 59, art. 3.

¹¹³ *Id.* art. 4.

¹¹⁴ *Id.*

¹¹⁵ *Id.* art. 5.

¹¹⁶ *Id.* art. 6.

¹¹⁷ *Id.* art. 7.

¹¹⁸ See *id.* art. 8 (discussing differentials in setting rates).

administration in setting the premium.¹¹⁹ In general terms, the LSS must set premiums with regard to the income and expenditure of the Fund. Employers are to be levied based on the number of their employees, the assessed risk of their particular industry, and the risk profile of that particular employer. The last aspect is referred to as being calculated based on the amount drawn by the employer from the Fund.¹²⁰ The employee is not required to contribute to the fund, but the employer must pay premiums in a timely manner.¹²¹

The Fund is administered at local levels insofar as an employer needs to select which pool is appropriate to join.¹²² Employers who operate in a number of areas may select the social pool to which they contribute.¹²³ The Fund can only be used for the purpose of payment of benefits, but the Scheme includes facility for catastrophic claims whereby the rules provide that the local government shall make the payment of benefits pending reimbursement from the Fund.¹²⁴ Cheng and Darimont observe that the calculation of the premium is similar to most other jurisdictions and is now formalized in the Issues in Relation to Occupational Accident Insurance Contribution Rates issued by the LSS.¹²⁵ This communication divides industries into three broad risk categories: The lowest risk categories (level one) include, for example, clerical work, and the higher risk categories (level three) include mining and other typically dangerous occupations. Those employers in the higher risk categories have premiums adjusted according to accident rates with incentives for strong performance and levies for poor performance. The premium rate is calculated individually for each particular business.¹²⁶ Individual adjustment of premiums is designed to provide incentives for individual employers to reduce occupational accidents.¹²⁷

The Scheme is to be administered by the Operating Authority, which is required to consult widely on issues related to the administration of the

¹¹⁹ *Id.* art. 9.

¹²⁰ *Id.*

¹²¹ *Id.* art. 10.

¹²² *Id.* art. 11.

¹²³ *Id.*

¹²⁴ *Id.* arts. 12, 13.

¹²⁵ See Cheng & Darimont, *supra* note 1.

¹²⁶ *Id.*

¹²⁷ Although there is some strident criticism of this theory, see Terrence G. Ison, *The Significance of Experience Rating*, 24 OSGOODE HALL L. J. 723 (1986).

Fund and the Scheme, and to monitor and check the applicable laws in relation to the Scheme.¹²⁸ Specifically, the Operating Authority is required to:

- Collect insurance premiums and liaise with the LSS on premium determinations;
- Verify the payroll and employee details of the employers;
- Handle Occupational Accident Insurance registrations;
- Keep records of the premiums paid by the employer and work injury benefits paid by the Fund;
- Make public the financial details of the Fund;
- Conduct surveys and gather statistics in relation to work injury insurance;
- Administer the expenditures of the Fund;
- Ratify work injury benefits in accordance with applicable regulations; and
- Provide free advice to injured workers or their direct dependents.¹²⁹

Workers are also supposed to monitor their employers by comparing lists of injured workers with insurance contributions, although workers have no right of inspection of employer documents, so it is unlikely this approach will yield any results.¹³⁰

B. The Scope of Claims

Chapter 3 of the regulations sets out the scope of coverage for employees. Article 14 sets out the boundaries for work-related injury or disease following the traditional fashion: This allows coverage for the employee where the accident occurs during working hours at a work place and arises out of the employment.¹³¹ This appears to be similar to the traditional formulation where workers are covered when the accident arises out of the employment, but is probably more limited because it is specific to working hours and uses the term "work" rather than employment, the latter being a broader concept taking into account the employment relationship rather than a specific time or place which is

¹²⁸ ROAI, *supra* note 59, arts. 48-50.

¹²⁹ *Id.* art. 44.

¹³⁰ See Cheng & Darimont, *supra* note 1, at 88.

¹³¹ ROAI, *supra* note 59, art. 14.

encompassed by the concept of "work." Accidents that occur whilst carrying out employment related preparation or activities prior to or post working hours at the work place are, however, covered in a separate part of the regulations, suggesting a broadening of the scope for claims.

Occupational diseases are referred to without specificity as being within the scope of the Scheme.¹³² The Scheme is also intended to cover accidents that occur whilst traveling on a journey directly connected to work, as well as motor vehicle accidents that occur on the way to and from work.¹³³ The latter formulation has recently been removed from many jurisdictions on the grounds that the employer should not be burdened with risks they cannot control.¹³⁴ Article 15 provides some additional specific areas of coverage, which include the death of an employee due to work related causes, the injury to an employee as a consequence of work performed in a national disaster and re-injury of a disabled serviceman.¹³⁵ The first two of these inclusions appear to entitle the employee (or his/her dependents) to a lump sum as financial compensation.

Article 16 excludes claims where the injury at work arises out of crimes or violations against security administration regulations committed by the employee; intoxication; and self-inflicted injury or suicide.¹³⁶ These limitations are consistent with most accident insurance schemes. Benefits which might otherwise be payable are disallowed where the injured worker refuses to receive working ability determination (as detailed below), refuses medical treatment, or is sentenced to jail.¹³⁷ These disentitling provisions are common to most schemes.

Overall, the coverage of employees is generally congruent with most other international jurisdictions, for example the United States, Canada

¹³² *Id.*

¹³³ *Id.*

¹³⁴ AUSTL. SAFETY AND COMP. COUNCIL, COMPARISON OF WORKERS' COMPENSATION ARRANGEMENTS IN AUSTRALIA AND NEW ZEALAND (2007), available at http://www.ascc.gov.au/NR/rdonlyres/0DE24A48-028D-49A1-9631-000C899580AC/0/Aust_NZ_Comparison_07.pdf (last visited Oct. 20, 2008) (giving overview of workers' compensation arrangements across Australia); *Harlan Collieries v. Shell*, 239 S.W.2d 923, 924 (Ky. Ct. App. 1951) (requiring employer to have some degree of control over employee for compensation to be payable under Kentucky law).

¹³⁵ ROAI, *supra* note 59, art. 15.

¹³⁶ *Id.* art. 16.

¹³⁷ *Id.* art. 40.

and Australia which all have similar formulations in their respective jurisdictions. The Chinese formulation probably falls into a narrower range of claims. This is for two reasons: First, the reference to work activity rather than the employment relationship as a threshold requirement in most instances will limit claims that might be compensable in other jurisdictions. For example, it is well-established in most jurisdictions that a worker will have a claim where an injury occurs in circumstances not directly related to work activity, but due to some activity which the employer has encouraged, supported or sponsored.¹³⁸ Cheng and Darimont point to evidence emerging from cases showing that general activities with no causal link with work are not covered by the Scheme.¹³⁹ Secondly, compensable occupational diseases are prescribed, thus necessarily limiting the range of diseases that might be claimable. In most jurisdictions in the United States, Canada and Australia, provision is made for claims for unspecified gradual onset conditions (diseases) in addition to prescribed diseases.

C. Dispute Resolution

The ROAI establishes time limits for claims: The onus is on the employer to make a claim to the LSS within thirty days of the determination of a work injury or occupational disease according to the

¹³⁸ In Australia, *see e.g.*, *Hatzimanolis v. ANI Corp.*, 173 C.L.R. 473 (1992), <http://austlii.edu.au> (last visited Oct. 20, 2008) ("the appellant sustained injury during an interval occurring within an overall period or episode of work and while engaged, with his employer's encouragement, in an activity which his employer had organised."). In the United States, *see e.g.* *Lovin Mood, Inc. v. Bush*, 687 So. 2d 61, 62 (Fla. Dist. Ct. App. 1997) (finding "the necessary causal connection between" the plaintiff's injuries and her employment to trigger the workers' compensation exclusivity bar to negligence action where, during store hours, a customer lured the plaintiff-employee to the back of the store and raped her); *Winn Dixie Stores, Inc. v. Parks*, 620 So. 2d 798, 799-800 (Fla. Dist. Ct. App. 1993) (holding that injury and subsequent death of an assistant manager of a grocery store 'arose out of his employment when the manager was kidnapped while driving home from work, forced to return to the store to open the store's safe, and then stabbed); *Feraci v. Grundy Marine Const. Co.*, 315 F. Supp. 2d 1197, 1204-05 (N.D. Fla. 2004), *quoting* *Turner v. PCR, Inc.*, 754 So. 2d 683, 686 (Fla. 2000) ("workers' compensation is the exclusive remedy for accidental injury or death arising out of work performed in the course and the scope of the employment.") (internal quotes omitted); *and Pendergrass v. R.D. Michaels, Inc.*, 936 So. 2d 684, 689 (Fla. Dist. Ct. App. 2006). In Canada, *see generally* TERRENCE G. ISON, *WORKERS COMPENSATION IN CANADA* 24-38 (2d ed. 1989).

¹³⁹ *See* Cheng & Darimont, *supra* note 1, at 95.

Law on the Prevention and Cure of Occupational Diseases.¹⁴⁰ If the employer does not submit the claim within thirty days, the employee has a right to make a claim to the LSS within one year from the time of injury or disease.¹⁴¹ Furthermore, if the employer does not submit a claim within the time limits, the employer will not be indemnified by the Fund.¹⁴² Time limits may be extended in appropriate cases.¹⁴³ It is implicit that the documents submitted by the employer to the LSS under Article 17 will include a form of application by the employee because Article 18 requires the employer to submit to the LSS an application form for Work Injury Determination (which provides basic information about the accident, including time, place, reasons for the accident, and extent of injury); an Employment Certification (including de facto employment relations); and a Medical Diagnosis Certification or Occupational Disease Diagnosis Certification (or Occupational Diseases Diagnosis Letter).¹⁴⁴ The LSS is obliged to notify the worker that the documents have been received and to advise whether additional documents are required.¹⁴⁵

Upon receipt of the application, the LSS authority may conduct an investigation and seek information from the employer, employee, labor union, medical care provider and related organizations.¹⁴⁶ In the case of occupational disease, a certificate pursuant to the Law on the Prevention and Care of Occupational Diseases shall be binding on the LSS.¹⁴⁷ The onus will be on the employer to provide evidence to show that the injury or disease is not covered by the Scheme where there is evidence presented by the employee to this effect.¹⁴⁸ The LSS is required to make a decision within sixty days of receiving the application.¹⁴⁹

Chapter 4 sets out a novel approach to the determination of incapacity. Article 21 requires an assessment of disability and

¹⁴⁰ *Id.* art. 17.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* art. 18.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* art. 19.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* art. 20.

impairment to be made.¹⁵⁰ This is done by applying a scale set out in Article 22 which is in two parts: A ten-unit scale (with ten as the least severe) relates to impairment of working ability, and a three-unit scale relates to disability or "impairment in living."¹⁵¹ A locality level Working Ability Determination Committee is to determine issues relating to this Chapter.¹⁵² The Committee shall consist of employers and union representatives as well as LSS and health authority representatives.¹⁵³ The Committee shall also establish a pool of health experts whose advice will be sought on the claim. After receiving this advice, the Committee will make a determination of the matter within sixty days of receipt of the application.¹⁵⁴ If the employee is not satisfied with the decision, the employee may seek reconsideration within fifteen days,¹⁵⁵ but the reconsideration will be final and binding¹⁵⁶ although the employee can seek a review of the determination a year after the final determination.¹⁵⁷ In the United States and Australia, impairment tables determine levels of loss of function but are not used to determine disability or loss of work capacity.¹⁵⁸

Article 52 suggests that the procedure for settlement of disputes, other than those specified above, should be in accordance with the general principles applicable to labor disputes.¹⁵⁹ This is consistent with the Article 77 of the Labor Law and Article 2(2) of the Rules of the People's Republic of China on the Treatment of Labor Disputes in Enterprises 1993.¹⁶⁰ Article 53 attempts to prescribe the parameters for other disputes by allowing administrative reconsideration of disputes in relation to the rights to contracted medical services, premium rates,

¹⁵⁰ *Id.* art. 21.

¹⁵¹ *Id.* art. 22.

¹⁵² *Id.* art. 23.

¹⁵³ *Id.* art. 24.

¹⁵⁴ *Id.* art. 25.

¹⁵⁵ *Id.* art. 26.

¹⁵⁶ *Id.* art. 27.

¹⁵⁷ *Id.* art. 28.

¹⁵⁸ E.A. Spieler et al., *Recommendations to Guide Revision of the Guides to the Evaluation of Permanent Impairment*, 238 JAMA 519 (2000); see generally AUSTL. SAFETY AND COMP. COUNCIL, *supra* note 134 (giving overview of workers' compensation arrangements across Australia).

¹⁵⁹ ROAI, *supra* note 59, art. 52.

¹⁶⁰ See Cheng & Darimont, *supra* note 1, at 94.

worker benefit rates and dependents claims.¹⁶¹ This procedure differs from employer/employee disputes which were previously dealt with by the Administrative Procedure Law of 1989.

D. Benefits

An employee who is injured or contracts a disease is entitled under the ROAI to medical benefits, including emergency care, from a contracted provider.¹⁶² The LSS is responsible for establishing a regime of medical care through the creation of a Catalogue of Diagnosis and Care Items Covered under Occupational Accident Insurance, Occupational Accident Insurance Drugs Catalogue, and Occupational Accident Insurance In-patient Service Standard in order to determine which treatments will be covered by the Fund.¹⁶³ The Operating Agency is charged with the responsibility of negotiating and entering into contracts for the provision of such services and setting appropriate fees.¹⁶⁴ The employee will be entitled to meal allowance whilst in the hospital and some travel allowances.¹⁶⁵ The costs of prosthetics, orthotics, artificial eyes, teeth, and wheelchairs needed for employment or general living are covered if confirmed by the Working Ability Determination Committee.¹⁶⁶

Financial benefits are to be paid based on the ten-point impairment of working ability scale. Depending on the severity of the impairment, the employee will be paid on a monthly basis according to this sliding scale, with the maximum benefits payable to those workers who suffer the most severe injury.¹⁶⁷ The maximum benefit payable to a worker who suffers a level one impairment is a lump sum of twenty-four months' salary.¹⁶⁸ Where the employee is in need of nursing care, the payment for such care will again be made subject to the level of impairment based on the three-point impairment of living ability scale.¹⁶⁹ These payments are

¹⁶¹ ROAI, *supra* note 59, art. 53.

¹⁶² *Id.* art. 29.

¹⁶³ *Id.*

¹⁶⁴ *Id.* arts. 45-46.

¹⁶⁵ *Id.* art. 29.

¹⁶⁶ *Id.* art. 30.

¹⁶⁷ *See id.* arts 33-35 (describing compensation by level of injury severity).

¹⁶⁸ *Id.* art. 33.

¹⁶⁹ *Id.* arts. 32-35.

in addition to the payment of salary and benefits paid when the employee has to stop work for a period of time, which should be at the pre-accident rate, and is generally paid for up to twelve months; but for a severe injury or special reasons, this period could be extended for up to twenty-four months as determined by the Working Ability Determination Committee.¹⁷⁰ When the level of impairment is determined, the salary benefit expires, although medical care benefits continue.¹⁷¹ In the event of the death or the disappearance of an employee, funeral benefits, dependency payments and lump sum payments are available.¹⁷²

There are now Provisions on the Level of Maintenance Provided for the Dependents of Workers Killed in Occupational Accidents, which require that the deceased worker must have been liable to pay maintenance and the recipient must be aged between eighteen and fifty-five for women and between eighteen and sixty for men.¹⁷³ The rate of weekly benefits is clarified in Article 61, which provides that the salary referred to in the regulations means the average salary in the previous twelve months prior to the work injury or occupational disease.¹⁷⁴ The maximum payment will be up to 300% and the minimum payment above 60% of the social average salary.¹⁷⁵

E. Extension of Employer Liability

It is not explicit in the ROAI whether a worker is entitled to proceed with a civil action in addition to an application under the Rules. In the absence of such a provision, it is arguable that both claims are maintainable, although there is some dissent on this aspect.¹⁷⁶ Article 41 makes an employer and any merged employer or successor organizations liable for the outstanding claims of the original employer.¹⁷⁷ An employer is not liable for any injury or disease to an employee who has been outsourced to another employer, but the employer is liable where the employee has been lent to another employer; in such a case the

¹⁷⁰ *Id.* art. 31.

¹⁷¹ *Id.*

¹⁷² *Id.* arts. 37-39.

¹⁷³ See Cheng & Darimont, *supra* note 1, at 91.

¹⁷⁴ *Id.* art. 61.

¹⁷⁵ *Id.*

¹⁷⁶ See Cheng & Darimont, *supra* note 1, at 93.

¹⁷⁷ ROAI, *supra* note 59, art. 41.

principal employer can seek an indemnity from the employer in control of the worker at the time of the injury or disease.¹⁷⁸ Employees are entitled to priority of payment where the employer becomes bankrupt.¹⁷⁹ Claims may still be made against an employer even where the employer ceases to hold the appropriate business licenses; however, it appears this might be limited to one-off payments of compensation.¹⁸⁰ Child labor is prohibited; however, in the event of injury or death of a child worker, the employer is still liable for any claims.¹⁸¹

F. *Offenses in Relation to the Work Insurance Scheme*

Chapter 7 creates a number of offenses in relation to the Scheme. These include:

- Embezzlement;¹⁸²
- Administrative fraud and bribery;¹⁸³
- Failure of the Scheme administrators to keep proper records and pay appropriate benefits;¹⁸⁴
- Failure to provide proper medical care and treatment;¹⁸⁵
- Failure of an employer to keep proper records, punishable by payment of three times the appropriate premium levy;¹⁸⁶ and
- Providing false medical certification or work ability determinations.¹⁸⁷

These offenses, most of which are foreign to traditional workers' compensation schemes, give an insight into some of the challenging issues for the Chinese administration. The embodiment of offenses such as embezzlement and administrative fraud and bribery anticipate concerns over the administration of the Scheme and the Fund which supports it, focusing on administrators as potential transgressors. As noted at the outset, data collection in relation to Chinese occupational

¹⁷⁸ *Id.* art. 42.

¹⁷⁹ *Id.* art. 41.

¹⁸⁰ *Id.* art. 42.

¹⁸¹ *Id.* art. 63.

¹⁸² *Id.* art. 54.

¹⁸³ *Id.* art. 55.

¹⁸⁴ *Id.* art. 56.

¹⁸⁵ *Id.* art. 57.

¹⁸⁶ *Id.* art. 58.

¹⁸⁷ *Id.* art. 59.

injury, disease and death is unreliable. One can surmise that, in part, this is due to the low level of employees who are eligible to make claims in relation to the large workforce, as well as the more sinister suspicions that there are incentives for some of the participants to avoid claims in whatever manner they can. Cheng and Darimont assert that some of the anomalies might be accounted for through corrupt practices.¹⁸⁸ Interestingly, the ROAI do not appear to have corresponding provisions for fraudulent claims by workers.

V. INTERNATIONAL CONTEXT OF THE CHINESE OCCUPATIONAL ACCIDENT INSURANCE SCHEME

There are two aspects to consider in the international context of the Chinese Scheme: First, the analysis of the regulations in comparison to existing international conventions that are related to occupational injury and disease. This is done principally by reference to the ILO conventions. Second, consideration should also be given to the Chinese system in the context of major compensation jurisdictions such as the United States, Canada and Australia. These three jurisdictions have long-standing workers' compensation systems, some of which operate on a private-underwriting basis and others on a State-underwriting basis.¹⁸⁹

The ILO requires that each ratifying country of its 12th Convention provide compensation for workers regarding personal injury by accident arising out of or in the course of their employment.¹⁹⁰ As noted previously, the ROAI provisions limit the scope of claims to specific work activities and do not specifically provide for claims that fall outside work activity but within the range of the employment relationship.

The ILO's 17th Convention also requires that each ratifying country will be obliged to provide compensation to workers, or their dependents, in the event of a personal injury that arises from an industrial accident,¹⁹¹

¹⁸⁸ See Cheng & Darimont, *supra* note 1, at 96.

¹⁸⁹ AUSTL. SAFETY AND COMP. COUNCIL, *supra* note 134; ISON, *supra* note 138; DEBORAH R. HENNSLER, ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES (1991), available at <http://www.rand.org/pubs/reports/2006/R3999.pdf> (last visited Oct. 20, 2008).

¹⁹⁰ Convention (ILO No. 12) Concerning Workmen's Compensation in Agriculture, Nov. 11, 1921, 38 U.N.T.S. 165.

¹⁹¹ Convention (ILO No. 17) Concerning Workmen's Compensation for Accidents art. 1, June 10, 1925, 38 U.N.T.S. 229.

but expands upon this requirement in Article 2 so as to require that the benefits apply to all workmen, employees or apprentices who are employed by public or private enterprise.¹⁹² Article 2 allows for exemptions for casual employees (employed for a purpose other than the employer's trade or business), out-workers, members of the employer's family, non-manual workers whose income exceeds a national limit, seamen, agricultural based workers, and workers who would otherwise be covered by a more favorable scheme than is offered under such a convention.¹⁹³ The ROAI provisions lack a comprehensive approach to coverage, and it is likely that both in practice and theory, many Chinese agricultural workers will not gain coverage under the current provisions. Article 3 of the Convention prescribes that periodical payments (regular payment/lump sum) are to be paid no later than five days post injury.¹⁹⁴ No specific provision is made in the ROAI for the requirement to pay within five days, although the regulations do provide for timely payments. Importantly, Article 9 of the Convention establishes that medical and rehabilitation expenses are to be paid (including pharmaceutical),¹⁹⁵ which is provided for in the ROAI.

The ILO's 19th Convention specifies that each ratifying country agrees to grant any member of a fellow ratifying country, who suffers personal injury as a result of an industrial accident, the same treatment in respect of workers' compensation as it grants to its own nationals.¹⁹⁶ The ROAI provisions are silent on this aspect; however, if a worker obtained a written contract in accordance with the Labor Law, this *prima facie* allows coverage for such a worker. In implementing the ROAI provisions, China has now complied with ILO's 24th Convention, which provides that each ratifying country shall institute a compulsory system providing sickness insurance for employees.¹⁹⁷ This convention also requires that all workers, for example, manual and non-manual, apprentices, out-workers and domestic servants, are covered.

¹⁹² *Id.* art. 2.

¹⁹³ *Id.*

¹⁹⁴ *Id.* art. 3.

¹⁹⁵ *Id.*

¹⁹⁶ Convention (ILO No. 19) Concerning Equality of Treatment for National and Foreign Workers As Regards Workmen's Compensation for Accidents, June 5, 1925, 38 U.N.T.S. 257.

¹⁹⁷ Convention (ILO No. 24) Concerning Sickness Insurance for Workers in Industry and Commerce and Domestic Servants, June 15, 1927, 38 U.N.T.S. 327.

Exemptions may apply for those workers who are employed on a temporary or casual basis (for whom the work is not for the direct purpose of the employer's business), out-workers (where the work does not reflect similar tasks to workers who are wage earners), seamen, agricultural workers, individuals earning above a certain national limit, and workers who are above or below a nationally nominated age. The ROAI provisions may not satisfy this requirement.

The 24th Convention requires that payments of compensation may be made for twenty-six weeks, but they may be withheld where the worker is entitled to compensation from another source, where the worker fails to comply with doctor's orders relating to their rehabilitation, and where the worker is guilty of gross misconduct.¹⁹⁸ These exclusions have been specifically included in the ROAI provisions.¹⁹⁹ This Convention also requires payment of medical expenses, although this may be limited by national requirements.²⁰⁰ Limits are implicit in the ROAI by reason of the requirement that the worker's medical treatment must fall within the range of contracted medical fees and treatments. Importantly, this Convention provides that the sickness/accident insurance must be administered by self-governing authorities under the supervision of a competent public authority and prohibits this form of insurance being administered by private enterprise with the view of making a profit.²⁰¹ The Chinese system complies with this provision, although there must be some uncertainty about the level of independence of the administration of the Scheme. Finally, this Convention requires that a worker has the right of appeal relating to any decision made by the self-governing authority and that a competent public authority should handle the appeals.²⁰² Again the ROAI provisions allow for a system of appeals in the event that the claim is declined.

The ILO's 121st Convention allows a ratifying country to apply to have seamen, public servants, casual employees (who are employed for work not regularly associated with the employer's trade or business), out-workers, and any other person who may be in receipt of insurance benefits higher than provided by this Convention excluded from the

¹⁹⁸ *Id.* art. 3.

¹⁹⁹ See ROAI, *supra* note 59, art. 16.

²⁰⁰ ILO No. 24, *supra* note 197, art 5.

²⁰¹ *Id.* art. 6.

²⁰² *Id.* art. 9.

coverage provided for by the Convention.²⁰³ Otherwise the Convention requires that all employees, including apprentices, regardless of whether they are employed in the public or private sectors, be covered and includes beneficiaries of deceased workers; however, such beneficiaries may be limited to prescribed categories. The Convention requires inclusion of provision to cover injury and occupational diseases and to define those terms.²⁰⁴ Importantly, disease should be defined to include morbid conditions (now recognized in most jurisdictions as "gradual onset diseases").²⁰⁵ The ROAI provisions may not comply with these requirements as the definition of disease does not include morbid or gradual onset conditions and thereby limits the scope for claims not falling under the specified occupational diseases. Article 9 of the ILO's Convention requires countries to legislate in detail the medical and cash benefits available to injured workers, which should not be limited by length of service.²⁰⁶ Interestingly, this Convention requires that benefits shall be payable after three days.²⁰⁷ The ROAI provisions are silent on this aspect.

The 121st Convention reiterates the requirement for payment of the full range of medical care and funeral expenses.²⁰⁸ The Convention requires periodic payments to be made where illness is of a temporary nature and allows for lump sum payments to be made in circumstances where this is in the best interest of the injured worker to do so.²⁰⁹ Notably, this Convention provides for cessation or reduction of payments where the worker's capacity for work varies.²¹⁰ The ROAI likewise allow for variation of payments, but do not make explicit the right of an employer to seek variation of payments. The Convention provides that a claim made for workers' compensation may be suspended in the event that a person has made a fraudulent claim; where the injury has been caused by criminal offense; where the injured worker was voluntarily intoxicated or commits gross misconduct; or in the event the injured

²⁰³ Convention (ILO No. 121) Concerning Benefits in the Case of Employment Injury arts. 3, 4, July 8, 1964, 602 U.N.T.S. 258.

²⁰⁴ *Id.* art. 8.

²⁰⁵ *Id.* art. 6.

²⁰⁶ *Id.* art. 9.

²⁰⁷ *Id.*

²⁰⁸ *Id.* art. 10.

²⁰⁹ *Id.* arts. 14-15.

²¹⁰ *Id.* art. 17.

worker fails to comply with medical direction, thus hindering their rehabilitation and return to work.²¹¹ These requirements have also been included in the ROAI.²¹² Article 23 of the Convention modifies the right of appeal to allow an exception where a special tribunal has been established and has made a binding decision in relation to the claim.²¹³ This provision probably applies to the ROAI provisions as the determinations are made by specialist panels—in particular, the reference to experts for the purposes of assessment of impairment and disability.

The Convention requires steps to be taken to prevent industrial accidents, and to provide rehabilitation to allow the injured person to return to work.²¹⁴ In the event the injured person is not able to return to his or her former duties, it is anticipated that alternative duties that match the aptitude and capacity of the worker should be provided.²¹⁵ While the ROAI do make some reference to accident prevention—and there are complementary Occupational Health and Safety rules²¹⁶—there is a noticeable lack of detail in the ROAI provisions relating to return-to-work and rehabilitation. Coincidentally, the ILO's 158th Convention provides that temporary illness or absence from work shall not constitute a valid reason for termination.²¹⁷ In the context of workers' compensation, the injured worker may not at any time during his or her rehabilitation be terminated and must be fully rehabilitated to the best of the worker's ability. Again, the ROAI are relatively silent on this aspect.

There is general recognition of international standards embedded in the ROAI, but the lack of detail in key areas inevitably leads to the impression that some important elements of these international standards may not be met under these new regulations. It may be dubious to compare the ROAI with major international workers' compensation jurisdictions such as the United States, Canada and Australia, given that these developed countries have on average about one hundred years' experience in relation to compensation schemes. The size of China's

²¹¹ *Id.* art. 22.

²¹² ROAI, *supra* note 59, arts. 29-30.

²¹³ ILO No. 121, *supra* note 203, art. 23.

²¹⁴ *Id.* art. 26.

²¹⁵ *Id.*

²¹⁶ Zhi Su, *Occupational Health and Safety Legislation and Implementation in China*, 9 INT'L J. OCCUPATIONAL & ENV'TL HEALTH, 302 (2003).

²¹⁷ Convention (ILO No. 158) Concerning Termination of Employment at the Initiative of the Employer art. 6, June 22, 1982, 1412 U.N.T.S. 158.

massive workforce requires that the administration of its workers' compensation Scheme be devolved to an Operating Authority in each relevant province, and the regulations themselves foreshadow difficulties in the administration of the Scheme.

Thus, at the very outset, the Chinese workers' compensation scheme is presented with the challenge of establishing a robust administration. Not surprisingly, the style of benefits is tailored with this challenge in mind. As a consequence, the disputes process is simplified; there is minimum reliance placed on tribunals, and a good portion of the claims process is in the hands of medical panels whose determinations are heavily dictated by subordinate regulations. Likewise, the calculation of benefits can be distinguished from workers' compensation schemes in developed countries, which are often intricate and complex. The Chinese system of benefits is calculated by reference to a relatively arbitrary determination of impairments. Interestingly, many jurisdictions in developed countries are now tending towards this approach in an effort to reduce disputes.²¹⁸

CONCLUSION

The ROAI provisions have limits in relation to the coverage of employees and the nature of injury. This is largely due to related industrial laws. A realignment of industrial regulations would be required to provide an increase in the coverage of employees.

Given China's poor OHS record, the potential for large numbers of claims under the new workers' compensation scheme is obvious. Therefore, a robust claims procedure is required, as well as a robust bureaucracy to deal with the claims. There must be some doubt about whether these can be successfully established in the short-term, given that there is no history of having to deal with claims on this scale.

Workers' compensation schemes need a level of worker knowledge and advocacy in order to work properly, and this expertise may not yet be available on a large scale in China. This is likely because of the small numbers of workers currently covered under official registered employment contract, the fact that the Scheme is administered differently

²¹⁸ R. Guthrie, *Compensation: Problems with the Concept of Disability and the Use of the American Medical Association Guides*, 9 J.L. & MED. 185 (2001); Spieler et al., *supra* note 158.

in each province, and the high mobility of Chinese workers across provinces, means that workers have reduced opportunities to gather expertise. Serious consideration needs to be given to this issue in order that the ROAI is not rendered worthless by the inaccessibility of advice and advocacy.

Workers' compensation schemes often expose levels of power imbalance implicit in the employment relationship. This is magnified by the labor laws in China, which previously promoted the growth of private employers, resulting in the loss of life-long employment relationships. This trend could inevitably involve levels of coercion not to make workers' compensation claims.

There are both structural and philosophical challenges ahead for China in relation to the ROAI provisions. Even when these challenges are eventually met, the looming issues of adequacy of funds and the underwriting of the Scheme need to be addressed. At present, the Scheme creates a proliferation of employer mutual funds to aggregate a sufficient pool of fund for claims. Over time these employer mutual funds may not be able to sustain a rapid growth in claims or an increase in benefits unless they are adequately administered.