

## Comparative Alternative Dispute Resolution for Individual Labor Disputes in Japan, China, and the United States: Lessons from Asia?

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# COMPARATIVE ALTERNATIVE DISPUTE RESOLUTION FOR INDIVIDUAL LABOR DISPUTES IN JAPAN, CHINA, AND THE UNITED STATES: LESSONS FROM ASIA?

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## INTRODUCTION

Resolving individual labor rights disputes in East Asia and the United States in recent years has taken on new significance and prominence for both domestic and multinational corporations.<sup>1</sup> New laws and approaches have been put into place in Japan, China, and the United States that deal with individual rights under either individual and/or collective contract or statutory labor disputes. In 2004, Japan passed the judicial labor tribunal system,<sup>2</sup> and in 2007, China implemented a new mediation and arbitration law,<sup>3</sup> each with heralded success. In 2009, the United States Supreme Court completed its approval of the use of private arbitration under individual and collective contracts to resolve both contractual and statutory labor disputes.<sup>4</sup>

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<sup>1</sup> Labor *rights* are to be distinguished from labor *interests*, which are not discussed in this paper.

<sup>2</sup> See Kobetsu funsou kaiketsu sokushin hou [Law on Promoting the Resolution of Individual Labor Disputes], Law No. 112 of 2001 (Japan), *translated at* [http://www.jil.go.jp/jil/laborinfo-e/docs/llj\\_law8.pdf](http://www.jil.go.jp/jil/laborinfo-e/docs/llj_law8.pdf); see also Kazuo Sugeno, *The Birth of the Labor Tribunal System in Japan: A Synthesis of Labor Law Reform and Judicial Reform*, 25 COMP. LAB. L. & POL'Y J. 519, 525 (2004); Takashi Araki, *Establishment of the Labor Tribunal System: Lay Judge Participation in Japanese Labor Proceedings* 6, <http://www.j.u-tokyo.ac.jp/~sota/info/Papers/Araki%20Labor%20Tribunal%20final080907.pdf> (last visited Nov. 11, 2012).

<sup>3</sup> See Law on Mediation and Arbitration of Labor Disputes (promulgated by the Standing Comm. Nat'l People's Congress, Dec. 29, 2007, effective May 1, 2008) (China), *translated at* <http://tradeinservices.mofcom.gov.cn/en/b/2007-12-29/27880.shtml>; see also RONALD C. BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA 299 (2010).

<sup>4</sup> See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

There are common themes and comparative contrasts in the uses of mediation and arbitration in the approaches of each country. They may use governmental and/or private structures to house dispute settlement processes of individual and/or collective labor disputes, and mediation falls both inside and outside the arbitration process. There are some interesting differences, with China and Japan keeping the processes largely under government regulation and institutions, whereas the U.S. provides legal authority to privatize much of the labor and employment law dispute resolution processes. However, in practice that has not yet been widely implemented, with most *statutory* disputes resolved through administrative processes, and most non-union employment contracts resolved through the courts.

The processes of resolving labor rights disputes in the U.S., China, and Japan, while appearing to use diverse approaches, actually have common themes, as well as their comparative contrasts. Understanding their functionalities may present an opportunity for countries to choose the best practices from among these processes. This may also afford the many multinational companies (“MNCs”) and others doing business in these countries the vantage point of evaluating the different methods of alternative dispute resolution (“ADR”) processes and keeping the benefits of in-house mediation processes and their time and cost-saving mediation settlements—even while using external neutrals.

The variables in these ADR procedures include the degree of governmental regulation, if any, and whether to house the institutional processes within the government, in the private sector, or in some combination of the two. ADR procedures vary on defining “labor disputes” for channeling into specific ADR processes; they may include individual and/or collective disputes, which can arise from either or both of contractual—individual or collective bargaining contracts—and/or statutory labor rights.

The usual mechanisms of mediation, arbitration, and litigation are employed by all, though in different ways and with different legal effects. While arbitration decisions may or may not be legally binding in different settings and in different countries, mediated settlements almost always are legally enforceable regardless of when or where they occurred—inside

the company or in the mediation process preceding an arbitration, or in or after the arbitration process itself, or in judicial proceedings before, during, or after any litigation.

Existing mediation and arbitration institutional procedures each have their own time and cost considerations. This Article proposes that perhaps consideration of the models of ADR used in labor disputes in Japan, China, and the U.S. may provide some guidance in possible redesigning of current ADR systems. Also, this Article proposes that MNCs consider the advantages of increased use of meaningful internal mediated settlement procedures in terms of time, cost, and finality through the bypassing of outside institutional procedures. Whether they may legally displace regulatory requirements is another question and may vary by country and by the final method of settlement. Employees can also be benefitted when these internal mediation and arbitration processes contain sufficient due process-like protections, including an unbiased decisionmaker operating outside the control of the employer.

## I. OVERVIEW

### A. *United States*

For *individual* employees in the U.S., employment contract disputes have traditionally been taken to the courts to be resolved.<sup>5</sup> For statutory claims, an individual can grieve with a government administrative agency established to enforce the particular statute in question, such as the Equal Employment Opportunity Commission (“EEOC”) and the National Labor Relations Board (“NLRB”).<sup>6</sup> In recent years, however, the courts have allowed employees to accede to employer demands to contractually substitute a private labor arbitration forum for the judicial forum on both contractual and statutory claims.<sup>7</sup> This

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<sup>5</sup> See, e.g., Donald J. Farole, Jr., *Contract Bench and Jury Trials in State Courts, 2005*, BUREAU JUST. STAT. BULL., Sept. 2009, at 1, 1–7, 9–10, 13, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbajts05.pdf>.

<sup>6</sup> Instructions for filing a charge can be found online. See *Filing a Charge*, EEOC, [www.eeoc.gov/facts/howtofil.html](http://www.eeoc.gov/facts/howtofil.html) (last modified June 10, 1997); *Frequently Asked Questions*, NLRB, <https://www.nlr.gov/faq/nlr> (last visited Nov. 1, 2012).

<sup>7</sup> See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

forecloses the usual path for resolving statutory claims through the administrative agency forum, as it is bypassed and the court usually defers to arbitration.

If an individual employee falls under the collective bargaining contract of a *unionized workplace*, then overlapping individual contract rights are replaced by the collective contract rights.<sup>8</sup> Almost always, these collective contracts include private, *non-governmental labor arbitration processes* to resolve individual or group labor disputes arising out of the collective contract. However, since in the U.S. fewer than ten percent of private workers are union members, collective labor contract (“CBK”) arbitration, while very significant—and available to non-members under the CBK—does not affect a majority of American employees in the private sector.<sup>9</sup>

In addition, courts almost always defer to arbitration awards under CBKs.<sup>10</sup> Likewise, when *statutory labor disputes* are included, an appeal of the arbitration award will also be deferred to by the court.<sup>11</sup> In 2009, the U.S. Supreme Court allowed unions, under a collective contract—like those under an individual labor contract—to agree to substitute a private labor arbitration forum for the court forum, foreclosing the usual administrative review and resulting in court deference to the arbitration decision.<sup>12</sup>

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<sup>8</sup> See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334–36 (1944). Currently in the United States, in the private sector, fewer than ten percent of eligible workers are union members. Economic News Release, Bureau of Labor Statistics, Union Members Summary (Jan. 27, 2012) [hereinafter Union Members Summary], available at [www.bls.gov/news.release/union2.nr0.htm](http://www.bls.gov/news.release/union2.nr0.htm).

<sup>9</sup> In 2011, 6.9 percent of private workers belonged to unions, while the total percentage was 11.8 percent with 14.8 million members. Union Members Summary, *supra* note 8.

<sup>10</sup> Likewise, there often is administrative deferral. For example, the NLRB has a long-standing policy of deferring to arbitration dealing with the resolution of pending unfair labor practices that factually overlap with the collective bargaining agreement if it is adequately resolved by the arbitration process and decision. See *United Techs. Corp.*, 268 N.L.R.B. 557, 559–60 (1984); *Olin Corp.*, 268 N.L.R.B. 573, 573 (1984).

<sup>11</sup> *Gilmer*, 500 U.S. at 26 (individual employment contract); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (collective bargaining contract).

<sup>12</sup> 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009). Currently, such contract provisions authorizing statutory claims to be arbitrated are not popular with unions for a number of reasons, including increased responsibilities and liabilities. Additionally, a bill has been introduced in Congress, the Arbitration Fairness Act (“AFA”), proposing a law that would amend the Federal Arbitration Act (“FAA”),

The collective bargaining contract issues arbitrated by private arbitrators are comprehensive and expansive, ranging from affirmative action to working conditions. In recent years, the number of Federal Mediation & Conciliation Service (“FMCS”)<sup>13</sup> labor arbitration panel requests has decreased from 19,023 in 2003<sup>14</sup> to 16,486 in 2010.<sup>15</sup> At the same time that the number of FMCS panel requests has been decreasing, the number of collective labor disputes has declined. It decreased from twenty-two major work stoppages involving 99,600 workers in 2005<sup>16</sup> to eleven major work stoppages involving 45,000 workers in 2010.<sup>17</sup>

In sum, the American system of resolving individual labor disputes can be identified as having the following general characteristics:

- (1) *Individual contractual labor disputes* of employees in the U.S. are typically resolved in the courts, not in labor arbitration.
- (2) *Statutory labor disputes* in the U.S. are primarily dealt with by government administrative agencies, with review by the courts.
- (3) *Collective contractual labor disputes of individuals* in the U.S., under contracts negotiated by unions, use non-governmental labor arbitration to resolve labor disputes over contract interpretations.

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9 U.S.C. §§ 1–16 (2006), to prohibit most pre-dispute agreements to arbitrate employment claims or civil rights claims. Arbitration Fairness Act, S. 931, 111th Cong. (2009). There also has been a bill in Congress, the Employee Free Choice Act (“EFCA”), which would enable unions to get bargaining rights through signed authorization cards rather than a secret-ballot election; it would provide for the arbitration of first-contract terms if negotiations failed to produce an agreement after four months. Employee Free Choice Act, S. 560, 111th Cong. (2009).

<sup>13</sup> *Arbitration Statistics Fiscal Year 2010*, FED. MED. & CONCILIATION SERV., [http://fmcs.gov/assets/files/Arbitration/FY\\_2010\\_Statistics/Issues\\_Arbitrated.doc](http://fmcs.gov/assets/files/Arbitration/FY_2010_Statistics/Issues_Arbitrated.doc) (last visited Nov. 1, 2012).

<sup>14</sup> *Panel Requests by Region*, FED. MED. & CONCILIATION SERV. (Oct. 21, 2005), <http://www.fmcs.gov/assets/files/Arbitration/FY2005PanelRequestsbyState.doc>.

<sup>15</sup> *Panel Requests by Region*, FED. MED. & CONCILIATION SERV. (Oct. 1, 2010), [http://fmcs.gov/assets/files/Arbitration/FY\\_2010\\_Statistics/Panel\\_Requests\\_by\\_State\\_2010.doc](http://fmcs.gov/assets/files/Arbitration/FY_2010_Statistics/Panel_Requests_by_State_2010.doc).

<sup>16</sup> News Release, Bureau of Labor Statistics, *Major Work Stoppages in 2006*, (Feb. 27, 2007), available at [http://www.bls.gov/news.release/archives/wkstp\\_02272007.pdf](http://www.bls.gov/news.release/archives/wkstp_02272007.pdf).

<sup>17</sup> News Release, Bureau of Labor Statistics, *Major Work Stoppages in 2011*, (Feb. 8, 2011), available at <http://www.bls.gov/news.release/pdf/wkstp.pdf>.

- (4) U.S. courts permit the substitution of the arbitration forum for the judicial forum in statutory and contractual labor rights of employees. While still a minority view, there is a growing trend in its use, particularly in individual (rather than collective) employment contracts.
- (5) The U.S. uses both government and non-government forums to resolve labor disputes depending on whether the source of the labor right in dispute is contractual or statutory, and, in the former, usually whether it is an individual or collective contract.
- (6) U.S. courts generally defer to the labor dispute decisions of labor arbitrators and administrative agencies.<sup>18</sup>

### B. *China*<sup>19</sup>

China's labor arbitration system that resolves labor disputes is much broader and more centralized than the system in the U.S. In China, except for challenges to bureaucratic decisions—for example, disputes over the certified percentage of a work-related injury—most “labor disputes,” *contractual and statutory*, arising out of the employment relationship are taken to the *government-provided* labor arbitration process.<sup>20</sup> Contractual claims can arise from individual or collective labor contracts.

Labor disputes arising from statutory or contractual bases are resolved by the labor mediation and arbitration processes. The mediation process is voluntary, begins within the enterprise, and involves the union, the employer, and the employee.<sup>21</sup> Arbitration is also available, and claims must be filed within time limits.<sup>22</sup> The Labor Mediation and Arbitration Law (“LMA”)

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<sup>18</sup> An “exception” is illustrated by EEOC decisions that are not deferred to, but rather given appropriate weight. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974). Likewise, an arbitration decision will not preclude the EEOC from prosecuting a case, though the available remedy is affected. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 301 (2002).

<sup>19</sup> See BROWN, *supra* note 3, at 168–83.

<sup>20</sup> Law on Mediation and Arbitration of Labor Disputes, *supra* note 3, art. 2; see also BROWN, *supra* note 3, at 168; *Labour Arbitration Law Welcome but Systemic Change, Investment Needed*, CHINA LAB. BULL. (Apr. 23, 2008) [hereinafter *Labour Arbitration Law Welcome*], <http://www.clb.org.hk/en/node/100244>.

<sup>21</sup> BROWN, *supra* note 3, at 171–72.

<sup>22</sup> The former sixty-day filing deadline was extended to one year. See Law on Mediation and Arbitration of Labor Disputes, *supra* note 3; see also BROWN, *supra* note 3, at 172–73; *Labour Arbitration Law Welcome*, *supra* note 20.

became effective on May 1, 2008.<sup>23</sup> It provides increased accessibility for employees and greater finality to the arbitration process.<sup>24</sup> It also clarifies the relationship of arbitration awards to judicial appeal and review.<sup>25</sup> Certain exceptions to the usual requirement of exhaustion of arbitration before judicial review are now included where more direct access to the court is permitted.<sup>26</sup> The new law has spurred an increased use of arbitration. For example, many courts and arbitrators handled more labor disputes in 2009 than a year earlier, after introduction of rules giving workers more rights and making arbitration free.<sup>27</sup>

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<sup>23</sup> Law on Mediation and Arbitration of Labor Disputes, *supra* note 3, art. 54; see also *Labour Arbitration Law Welcome*, *supra* note 20.

<sup>24</sup> Law on Mediation and Arbitration of Labor Disputes, *supra* note 3, arts. 47–50.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* arts. 16, 29. Expedited access to the courts is possible through Article 44 for certain categories of cases that authorize the arbitration tribunal to send the decision directly to the court for execution. *Id.* art. 44.

<sup>27</sup> Edward Wong, *Global Crisis Adds to Surge of Labor Disputes in Chinese Courts*, N.Y. TIMES, Sept. 16, 2010, at A9. Interestingly, in 2010, the number of arbitrations nationally has leveled off, see *id.*, whereas the number of labor dispute cases in court has risen. It is reported that “[i]n 2009 labor dispute arbitration organizations . . . nation-wide handled 875,000 cases. Some 684,000 cases were accepted for arbitration, a decrease of 1.3 percent compared to the previous year. The cases involved 1.017 million workers, a decrease of 16.3 percent compared to the previous year.” *China’s Human Resources*, GOV.CN, [http://www.gov.cn/english/official/2010-09/10/content\\_1700448\\_16.htm](http://www.gov.cn/english/official/2010-09/10/content_1700448_16.htm) (last visited Nov. 1, 2012). Also, it was reported that in 2008, the courts handled about 286,000 labor dispute cases, an increase of 94 percent from 2007; whereas the 2009 figure was up to about 317,000 cases. See *China’s Labour Dispute Resolution System*, CHINA LAB. BULL. (Nov. 26, 2009), available at <http://www.clb.org.hk/en/node/100618>; *Chinese Courts Complete 317,000 Labor Dispute Cases in 2009*, CHINA.ORG.CN (Sept. 13, 2010), [http://www.china.org.cn/china/2010-09/13/content\\_20917787.htm](http://www.china.org.cn/china/2010-09/13/content_20917787.htm). Additional examples in specific areas were reported as follows: “[I]n Jiangsu Province, the total number of labor disputes heard by Courts at all levels in 2007 was 12,480. This number increased to 29,862 in 2008, 33,362 in 2009 and 34,111 in 2010. In Shanghai, the total number of labor disputes heard by the Shanghai No. 2 Intermediate Court in 2010 was 2,607, 17.12% higher than the number in 2009.” Jonathan M. Isaacs et al., *Government Encourages More Mediation in Light of Drastic Increase in Labor Disputes*, CHINA EMP. L. UPDATE, June 2011, at 4, 5, available at <http://www.bakermckenzie.com/NLChinaEmploymentLawUpdateJun11/> (noting also that pre-2008 statistics of cases filed in arbitration show the dramatic increase in cases in 2008); see also *Number of Cases Accepted by Labour Dispute Arbitration Committees 1996–2008*, CHINA LAB. BULL., [http://www.clb.org.hk/en/files/share/File/statistics/disputes/number\\_of\\_disputes\\_1996-2008.pdf](http://www.clb.org.hk/en/files/share/File/statistics/disputes/number_of_disputes_1996-2008.pdf) (last visited Nov. 1, 2012).

The scope of subjects of labor arbitration is large and increasing, often varying by region.<sup>28</sup> The number of labor arbitration cases grew from 10,326 in 1989 to about 693,000 in 2008, an increase of more than six thousand percent and an annual rise of 10.4% from 2006 to 2007 and ninety-eight percent from 2007 to 2008.<sup>29</sup> In 2007, the 350,182 cases involved 653,472 workers, and in 2008, the 693,000 cases involved 1,200,000 workers.<sup>30</sup> In addition, "labor dispute arbitration organizations at various levels nationwide handled 875,000 cases . . . involv[ing] 1.017 million workers . . ."<sup>31</sup> At the same time the number of arbitration cases has been increasing, the number of *collective* labor disputes has also increased. It increased from 15,464 cases in 2006 involving 81,639 workers to 30,385 cases in 2009 involving 68,649 workers.<sup>32</sup>

In sum, the Chinese system of resolving labor disputes can be identified as having the following general characteristics:

- (1) *Individual contractual labor disputes* of employees in China are mostly resolved in labor arbitration within government administrative agencies, with limited access to the courts.
- (2) *Statutory labor disputes* in China are mostly resolved in labor arbitration within government administrative agencies, with limited access to the courts.

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<sup>28</sup> RONALD BROWN, FOUND. FOR L., JUST., & SOC'Y, CHINA LABOUR DISPUTE RESOLUTION 2 [hereinafter CHINA LABOUR DISPUTE RESOLUTION], available at <http://www.fljs.org/uploads/documents/Brown%231%23.pdf>.

<sup>29</sup> *Id.* at 3; *Number of Cases Accepted by the Labour Dispute Arbitration Committees 1996-2008*, *supra* note 27.

<sup>30</sup> *Number of Cases Accepted by the Labour Dispute Arbitration Committees 1996-2008*, *supra* note 27. In view of this increase and the strain it places on the arbitration tribunals, the Chinese government is proposing an increased use of mediation. The Ministry of Human Resources and Social Security ("MOHRSS") issued the draft *Measures Concerning Enterprise Labor Dispute Consultation and Mediation* on June 3, 2010. Isaacs, *supra* note 27, at 4. Under these measures, "enterprises that have more than 300 employees shall . . . establish their own labor dispute mediation committees." *Id.* However, currently no penalty is provided for non-compliance. *Id.*

<sup>31</sup> Info. Office of the State Council of the People's Republic of China, *China's Human Resources*, BEIJING REV. (last updated Oct. 13, 2010), [http://www.bjreview.com.cn/document/txt/2010-10/13/content\\_303463\\_4.htm](http://www.bjreview.com.cn/document/txt/2010-10/13/content_303463_4.htm).

<sup>32</sup> CHINA LABOUR DISPUTE RESOLUTION, *supra* note 28; see also Cheng-Guan Hwang, *Labor-Capital Disputes in Taiwan: Statistics and Handling Mechanism*, AP-IRNET, [http://ap-irnet.ilobkk.or.th/resources/labour-dispute-resolution-in-china/at\\_download/file3](http://ap-irnet.ilobkk.or.th/resources/labour-dispute-resolution-in-china/at_download/file3) (last visited Nov. 1, 2012).

- (3) *Collective contractual labor disputes of individuals* in China, under contracts negotiated by unions, are mostly resolved in labor arbitration within government administrative agencies, with limited access to the courts.
- (4) Mediated settlements occurring before, during, or after arbitration are common, and courts generally defer to them.
- (5) Chinese courts generally defer to the labor dispute decisions of labor arbitrators, except in prescribed areas.

### C. Japan

Individual labor rights disputes arise in many ways, including from discipline, termination, and contract violations. They may arise from contractual or statutory labor rights and may involve an individual or collective labor right. The processes of dispute resolution in Japan are housed in government institutions and vary, depending on whether the right is individual or collective.<sup>33</sup> Collective labor disputes are resolved

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<sup>33</sup> Although an individual covered by a collective bargaining agreement can file a grievance under its collective contract, as noted in the following comments, it is not a widely used or effective means of individual ADR for individual labor disputes. While individual labor grievance-arbitration provisions may be used, *see, e.g.*, RENGU Model Contract, labor arbitration must, under law, be *advisory* only, since the two options available to an individual are civil proceedings or the Labor Tribunal. *See* Makoto Ishida & Ryo Hosokawa, *Developments in 2004—Major Legislation & Treaties: Labor Law*, 24 WASEDA BULL. COMP. L. 59, 59–61 (2006), available at <http://www.waseda.jp/hiken/jp/public/bulletin/pdf/24/ronbun/A02859211-00-000240059.pdf>; *see also* JAPAN INST. FOR LAB. POL'Y & TRAINING, LABOR SITUATION IN JAPAN AND ANALYSIS: GENERAL OVERVIEW 2009/2010 104 (2009) [hereinafter LABOR SITUATION IN JAPAN], available at <http://www.jil.go.jp/english/laborsituation/general/2009-2010.html>; JAPAN INST. FOR LAB. POL'Y & TRAINING RES. REP., RESEARCH ON SUPPORT FOR DEVELOPMENT OF IN-HOUSE DISPUTE SETTLEMENT SYSTEMS (2008), available at [www.jil.go.jp/english/reports/documents/jilpt-research/no.98.pdf](http://www.jil.go.jp/english/reports/documents/jilpt-research/no.98.pdf); Interview with Judge Kazutaka Tanaka, Labor Tribunal, Tokyo District Court (Nov. 14, 2010).

Labor conflict resolution machineries have concentrated on collective dispute settlement in Japan. Grievance procedures stipulated in labor contracts have not been working effectively. The center of gravity of labor-management relations has shifted from collective bargaining with labor unions to individual labor contracts with individual workers both in the unorganized sector and the non-union members within the organized sector . . . Vague demarcation between rights and interest disputes as well as between collective and individual disputes characterize the dispute settlement machineries in Japan.

by the Labor Commission, although *individual* complaints arising under the collective agreement may be brought by the individual in the courts or Labor Tribunal, as described below.<sup>34</sup>

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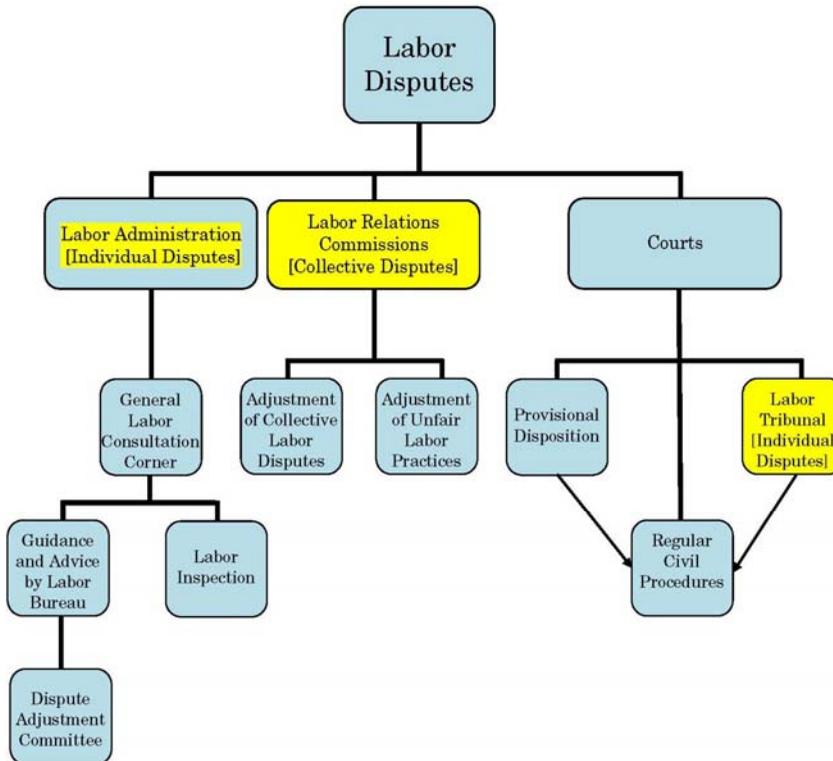
Kazutoshi Koshiro, *Formal and Informal Aspects of Labor Dispute Resolution in Japan*, 22 LAW & POL'Y 353, 353 (2000). Indeed, it is reported that grievance procedures usually "do not function effectively. Arbitration of individual grievances, or minor dispute[s] (dispute[s] of rights), [are] almost alien to Japan." *Id.* at 355. Also, "[a]ccording to the Ministry of Labor's *Survey on Labor-Management Communications in 1999* published in June 2000, only 25.2 percent of the undertakings surveyed had grievance procedures." *Id.* "Only 37.4 percent of the workers surveyed presented their grievances or complaints to their employers or supervisors." *Id.* "Because of the ineffectiveness of these grievance procedures in Japan [in 2002], the most important route to resolve labor disputes of rights [was by] civil lawsuits." *Id.* at 358. For law dealing with collective bargaining contract disputes, see Labor Relations Adjustment Act, Law No. 25 of 1946, art. 29 (Japan), translated at [http://www.jil.go.jp/english/laborinfo/library/documents/lj\\_law3.pdf](http://www.jil.go.jp/english/laborinfo/library/documents/lj_law3.pdf), and Labor Union Act, Law No. 174 of 1949 (Japan), translated at [www.jil.go.jp/english/laborinfo/library/documents/lj\\_law2.pdf](http://www.jil.go.jp/english/laborinfo/library/documents/lj_law2.pdf).

<sup>34</sup> On occasion, a Prefectural Labor Relations Commission ("LRC"), whose essential role is to deal with *collective* disputes, also has authority to conduct mediation for *individual* labor disputes (except for in Tokyo, Hyogo, and Fukuoka). In this case, the panel of mediators is tripartite. See Act on Promoting the Resolution of Individual Labor-Related Disputes, *supra* note 2, art. 21. In 2010, the Central Labor Relations Commission reported the number of conciliation cases of individual labor disputes by forty-four Prefectural Labour Relations Commissions in 2010 to be 423, decreasing by 111 cases or 20.8% from the previous year. *Recent Statistical Survey Reports*, JAPAN INST. FOR LAB. POL'Y & TRAINING (May 2011), <http://www.jil.go.jp/english/estatis/esaikin/2011/e201105.htm>. Collective labor disputes, including unfair labor practices, are dealt with by the Labor Commission (that is, the Japanese "National Labor Relations Board"). Koshiro, *supra* note 33, at 356-57; see also WILLIAM B. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 27 (1984). The Labor Relations Commission is a tripartite system under the Trade Union Law comprised of commissioners representing the public, employers, and workers. Araki, *supra* note 2, at 2. In order to bring a dispute before the Commission, a union must qualify for recognition under Article 2 of the Trade Union Law. Labor Union Act, *supra* note 33, arts. 2, 5. The procedures for the resolution of collective disputes are set forth in the Labor Relations Adjustment Act, which emphasizes voluntary settlement of disputes. Labor Relations Adjustment Act, *supra* note 33, art. 34. If the Prefectural Labor Relations Commission determines that an unfair labor practice has occurred, the Commission may issue a remedial order (such as reinstatement of an employee, ordering an employer to bargain in good faith, et cetera). *Japan's Labour Relations Commission System*, MINISTRY OF HEALTH, LAB. & WELFARE, <http://www.mhlw.go.jp/english/org/policy/dl/08.pdf> (last visited Nov. 1, 2012). An employer may appeal the order of a Prefectural Labor Relations Committee to the Central Labor Commission or seek judicial review. *Id.* Mediation and conciliation results may be rejected by the parties. *Id.* Arbitration awards are binding. *Id.*; see Labor Relations Adjustment Act, *supra* note 33, art. 34; KAZUO SUGENO, JAPANESE EMPLOYMENT AND LABOR LAW 554 (Leo Kanowitz trans., 2002). The reference to "binding" relates only to collective disputes under the Trade Union Law, as individual labor disputes can be taken to the courts and its Labor Tribunal, where arbitration is binding only upon mutual agreement of the parties.

As to resolving disputes over individual labor *rights*, there are several alternatives available. First, an *individual* can claim a violation with the Labor Administration Offices and seek resolution by adjustment or conciliation or mediation. Second, a complaint can be resolved by the court in a regular civil procedure presided over by a judge. Or third, since 2006, a complaint can be filed with the court, and a procedure for the appointment of a Labor Tribunal Panel can be initiated that utilizes mediation and non-binding arbitration to resolve the dispute.<sup>35</sup> If the Tribunal does not resolve the dispute, the case can proceed to the court's usual civil process.<sup>36</sup>

## 1. Overview of Labor Dispute Resolution System

FIGURE 1:  
OVERVIEW OF LABOR DISPUTE RESOLUTION SYSTEM<sup>37</sup>



<sup>35</sup> See Araki, *supra* note 2, at 2–3.

<sup>36</sup> *Id.* at 10.

<sup>37</sup> *Id.* at 2.

Labor administration offices are available for alleged violations of individual labor rights (employment law). The prefectural Labor Offices, which are the local offices of the Ministry of Health, Labor and Welfare, provide counseling and mediation services on labor issues.<sup>38</sup> “Since the Labor Offices launched such services, the number of complaints received by the Labor Offices has also been increased annually . . . .”<sup>39</sup> The issues involved in individual labor disputes are comprehensive, ranging from wage increases to objections to the discontinuance, shutdown, or contraction of a business.<sup>40</sup> The total number of labor consultations grew from 824,000 in 2004 to 1,141,000 in 2009, while the number of individual labor and management dispute consultations also grew from 160,000 in 2004 to 247,000 in 2009.<sup>41</sup>

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<sup>38</sup> *Id.* at 6.

<sup>39</sup> *Id.*

<sup>40</sup> JAPAN INST. FOR LABOR POL'Y & TRAINING, JAPANESE WORKING LIFE PROFILE 2010/2011—LABOR STATISTICS 74–75 (2010), available at <http://www.jil.go.jp/english/workinglifeprofile/2010-2011/all.pdf>.

<sup>41</sup> *Id.* at 74. Labor consultations included termination (24.5%), change of work conditions (13.5%), bullying and harassment (12.7%), inducements toward retirement (9.4%), and recruitment and hiring (1.1%). *Id.* Labor disputes by principal demands in 2008 included objections to discharge or issues of reinstatement (173), wage increases (111), temporary allowance (99), and revision of working hours (8). *Id.* at 75. The Individual Labor Dispute Solution System is based on the 2001 Act on Promoting the Resolution of Individual Labor-Related Disputes. It clarifies the jurisdictional application of the later law and states:

Article 3[:] The Director of the Prefectural Labor Bureau, in order to prevent the occurrence of individual labor-related disputes, and to promote the voluntary resolution of individual labor-related disputes, shall provide workers, job applicants and business operators with information on matters concerning labor relationships and matters concerning the recruitment and employment of workers and give consultations and other assistance.

. . . .

Article 5[:] In a case where one or both parties (hereinafter referred to as “disputing parties”) to an individual labor-related dispute set forth in paragraph 1 of the preceding article (except disputes with respect to a matters [sic] concerning the recruitment and employment of workers) files an application for mediation with respect to said individual labor-related dispute, if the Director of the Prefectural Labor Bureau finds it necessary for the resolution of said individual labor-related dispute, the Director shall have the Dispute Coordinating Committee conduct mediation.

Act on Promoting the Resolution of Individual Labor-Related Disputes, *supra* note 2, arts. 3, 5.

At the same time that the number of consultations has been increasing, the number of *collective* labor disputes has declined. It decreased from 118 disputes in 2000 involving 15,000 workers to 52 disputes involving 8,300 workers in 2008.<sup>42</sup>

When there is a possible violation of employment law, the Labor Office will refer the matter to the Labor Standards Inspection Office for further investigation, which may in turn either issue a notice of recommendation—usually a request for an apology or other minor remedial action—to the respondent on behalf of the complainant, or refer the complainant and respondent to the Dispute Adjustment Commission for mediation/conciliation.<sup>43</sup> “The Dispute Adjustment Committee can provide a mediation proposal but it is up to the parties whether or not to accept it.”<sup>44</sup> The parties are free to pursue remedies in the court in a *de novo* hearing.<sup>45</sup>

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<sup>42</sup> JAPAN INST. FOR LABOR POL’Y & TRAINING, DATABOOK OF INTERNATIONAL LABOUR STATISTICS 2011 209–10 (2011), available at [http://www.jil.go.jp/kokunai/statistics/databook/2011/07/p209-210\\_t7-3.pdf](http://www.jil.go.jp/kokunai/statistics/databook/2011/07/p209-210_t7-3.pdf).

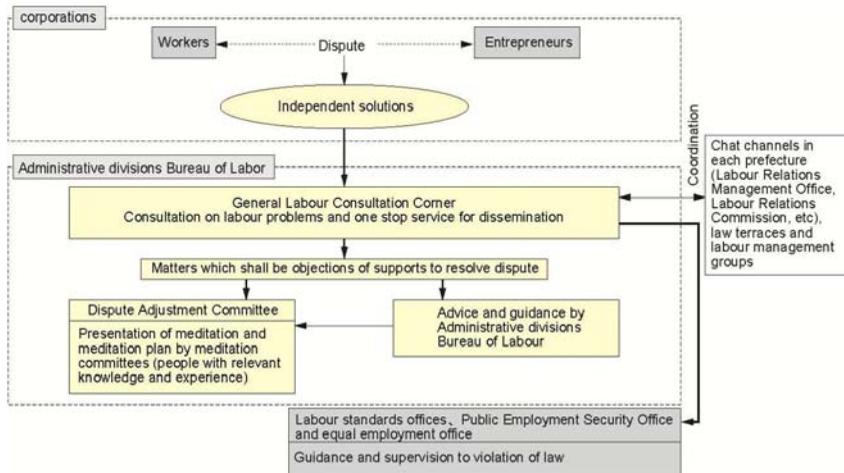
<sup>43</sup> Sugeno, *supra* note 2.

<sup>44</sup> Araki, *supra* note 2. The Dispute Adjustment Commission is comprised of three to twelve commissioners serving two-year terms, part-time. Law on Promoting the Resolution of Individual Labour Disputes, *supra* note 2, arts. 6–8. Mediators are typically practicing lawyers and law professors. Sugeno, *supra* note 2. In 2003, out of approximately 170,000 consultation cases handled by all of the national labor offices, about 4,500 were resolved with notices of recommendation and 5,000 cases were mediated. Sugeno, *supra* note 2, at 525–26. In 2008, 8,457 applications for mediation were received, and procedures were completed for 7,920. *State of the Operation of Individual Labour Dispute Solution System*, MINISTRY OF HEALTH, LAB., & WELFARE, available at <http://www.mhlw.go.jp/english/wp/wp-hw3/dl/4-43.pdf>. Agreement was reached in 2,647 cases, 4,654 were discontinued, and 587 had the applications withdrawn. *Id.* On occasion, a Prefectural Labor Relations Commission, whose essential role is to deal with *collective* disputes, also conducts mediation for *individual* labor disputes (except for Tokyo, Hyogo, and Fukuoka). In this case, the panel of mediators is tripartite. See Act on Promoting the Resolution of Individual Labor-Related Disputes, *supra* note 2, art. 12.

<sup>45</sup> *Outline of Civil Litigation in Japan*, SUPREME COURT OF JAPAN, [http://www.courts.go.jp/english/proceedings/civil\\_suit\\_index/civil\\_suit/index.html#i](http://www.courts.go.jp/english/proceedings/civil_suit_index/civil_suit/index.html#i) (last visited Nov. 1, 2012) (explaining the Code of Civil Procedure of 1996).

## 2. Labor Administration Offices

FIGURE 2:  
INDIVIDUAL LABOR DISPUTE SOLUTION SYSTEM<sup>46</sup>



<sup>46</sup> *The Outline Chart of Individual Labour Dispute Solution System*, MINISTRY OF HEALTH, LAB. & WELFARE, <http://www.mhlw.go.jp/english/wp/wp-hw3/dl/4-42.pdf> (last visited Nov. 1, 2012).

**FIGURE 3:**  
**STATE OF THE OPERATION OF INDIVIDUAL LABOR DISPUTE SOLUTION SYSTEM<sup>47</sup>**

(Apr 1, 2008 - Mar 31, 2009)  
The bracketed numbers are of FY 2007

<b>1. Consultations delivered to General Labour Consultation Corner 1,075,021 (997,237)</b>				
Status of those who asked for advice				
Workers	657,847 (594,365)	Entrepreneurs	314,516 (300,954)	Other 102,658 (101,918)
<b>2. Number of consultations on civil individual labour dispute 236,993件 (197,904)</b>				
① Status of those who asked for advice				
Workers	190,720 (159,850)	Entrepreneurs	29,541 (23,104)	Other 16,732 (14,950)
② Labour's status				
Regular-workers	108,972 (94,993)	Part-time workers	38,728 (34,096)	Dispatched workers 19,733 (13,615)
Contract employees for definite period	19,589 (13,715)	Other	49,971 (41,485)	
③ Contents of dispute (※Since there are breakdowns ranging to other matters, the total is 268,401 matters.)				
Ordinary dismissal	46,536 (39,490)	Layoff	14,960 (6,837)	Punitive dismissal 5,734 (5,422)
Deterioration of working condition	35,194 (28,235)	Encouragement to retire	22,433 (17,410)	Temporary transfer and reshuffling 9,262 (8,188)
Cancel of informal decisions	2,007 (1,555)	Termination of employment	12,797 (7,886)	Other labour conditions 41,634 (39,164)
Child care and family-care leave	1,985 (1,785)	Recruitment and adoption	3,433 (3,255)	Employment management and others 4,098 (3,888)
Bullied and harassed	32,242 (28,335)	Other	36,086 (35,010)	
<b>3. Number of advice and guidance from the head of administrative divisions Bureau of Labour</b>				
(1) Number of which advice and guidance were accepted 7,592 (6,652)				
① Workers' s status				
Regular-workers	3,761 (3,449)	Part-time workers	1,536 (1,406)	Dispatched workers 731 (594)
Contract employees for definite period	980 (693)	Other	584 (510)	
② Contents of dispute (※Since there are breakdowns ranging to other matters, the total is 268,401 matters.)				
Ordinary dismissal	1,457 (1,325)	Layoff	421 (209)	Punitive dismissal 99 (98)
Deterioration of working condition	826 (809)	Encouragement to retire	598 (521)	Temporary transfer and reshuffling 375 (315)
Cancel of informal decisions	109 (107)	Termination of employment	429 (295)	Other labour conditions 1,182 (1,082)
Child care and family-care leave	3 (2)	Recruitment and adoption	102 (64)	Employment management and others 135 (107)
Bullied and harassed	997 (759)	Other	1,132 (1,108)	
(2) Number of advice and guidance were proceeded 7,546 (6,592)				
Conclusive results				
Implementation of advice	7,339 (6,409)	Implementation of guidance	7 (8)	
Withdrawal	135 (100)	Discontinuance	38 (45)	Other 27 (30)
<b>4. Number of meditation from dispute adjustment committees</b>				
(1) The number of which meditation's application was accepted 8,457 (7,146)				
① Workers' s status				
Regular-workers	2,542 (2,191)	Part-time workers	832 (452)	Dispatched workers 129 (128)
Contract employees for definite period	1,012 (828)	Other	489 (359)	
② Contents of dispute (※Since there are breakdowns ranging to other matters, the total is 268,401 matters.)				
Ordinary dismissal	2,542 (2,191)	Layoff	832 (452)	Punitive dismissal 129 (128)
Deterioration of working condition	751 (641)	Encouragement to retire	606 (590)	Temporary transfer and reshuffling 281 (238)
Cancel of informal decisions	235 (182)	Termination of employment	526 (380)	Other labour conditions 711 (762)
Child care and family-care leave	3 (5)	Employment management and others	82 (84)	
Bullied and harassed	1,340 (1,118)	Other	798 (640)	
(2) The number of which meditation's procedure was completed 7,920 (7,034)				
Conclusive results				
Formulation of agreement between parties	2,647 (2,700)	Withdrawal of application	587 (522)	
Discontinuance	4,654 (3,777)	Other	32 (35)	

<sup>47</sup> *State of the Operation of Individual Labour Dispute Solution System, supra note 44.*

### 3. Courts and Labor Tribunal System<sup>48</sup>

In addition to and without prior administrative conciliation or mediation, an individual worker may proceed in district court with a civil claim under a labor statute or contract, individual or collective.<sup>49</sup> In 2008 and 2009, 4,493 and 6,686 labor cases, respectively, were filed in civil court, including 2,441 and 3,218 cases, respectively, proceeding in the Labor Tribunal.<sup>50</sup> Since the effective date of 2006, workers may choose to take the case to court and first utilize the Labor Tribunal System that employs mediation and arbitration procedures in attempts to bring the parties to settlement.<sup>51</sup> It has a very high success rate: As of 2009, 3,500 cases per year were filed with the Tribunal, with two and one-half months being the average duration for the procedures and eighty percent of the filed cases being settled.<sup>52</sup> Typical disputes covered under the courts and the labor tribunals involve “disputes over rights between individual employees and employers,”<sup>53</sup> such as “dismissals, job changes, pay claims, retirement allowance claims, disciplinary actions and the

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<sup>48</sup> See generally Katsutoshi Kezuka, *Significance and Tasks Involved in Establishment of a Labor Tribunal System*, 3 JAPAN LAB. REV. 13 (2006), available at [http://www.jil.go.jp/english/JLR/documents/2006/JLR09\\_Kezuka.pdf](http://www.jil.go.jp/english/JLR/documents/2006/JLR09_Kezuka.pdf).

<sup>49</sup> The process is as follows:

The employee files a complaint with the District Court as a court of first instance. Each District Court has jurisdiction over a region which in general corresponds to the given prefecture. Cases at the District Court are presided over by a single judge but may be heard by a panel of three equal judges, if it decides that the gravity of the case warrants it. The losing party in the first instance may appeal (*Koso*) the judgement [*sic*] of the District Court to a High Court. There are 8 High Courts in Japan, each with an [*sic*] own territorial jurisdiction. The court of appeal inquires into the fact [*sic*] and law once more and decides in a panel of three judges. The party dissatisfied with the High Court's judgement [*sic*] may appeal (*Jokoku*) to the Supreme Court as the court of last resort but needs to succeed [on] the procedure of admission first, since the Supreme Court can refuse the appeal in view of a lack of importance. In the Supreme Court, the case is usually heard by the Petty Bench consisting of 5 judges.

Liliane Jung, *National Labour Law Profile: Japan*, INT'L LAB. ORG. (June 17, 2011), [http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS\\_158904/lang-en/index.htm](http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158904/lang-en/index.htm).

<sup>50</sup> Takashi Araki, *Japan's Labor Tribunal System Established in 2006: From "Precise-Justice" To "Resolution-Oriented Justice"?* (Univ. of Tokyo), [http://islls.huji.ac.il/110106Final%20Jerusalem\(Araki\).ppt](http://islls.huji.ac.il/110106Final%20Jerusalem(Araki).ppt) (last visited Nov. 1, 2012).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Ishida & Hosokawa, *supra* note 33, at 62.

working condition changes.”<sup>54</sup> In addition, “when disputes occur over the rights of individual employees concerning discrimination, changes of working conditions and layoffs,” the labor tribunal has jurisdiction over the individual’s dispute, “even if it is a group dispute.”<sup>55</sup>

Upon hearing the complaint, the district court organizes a labor tribunal composed of a career judge, a representative from labor, and a representative from management.<sup>56</sup> Labor and management representatives are appointed to the district court on a part-time basis for a two-year term before they are assigned to individual cases.<sup>57</sup> The tribunal sends a copy of the complaint to the respondent and notifies both parties of their appearance date.<sup>58</sup> Proceedings are informal and generally not open to the public.<sup>59</sup> To limit the time to a final decision, hearings are limited to three sessions intended to take no more than three to four months from start to finish.<sup>60</sup> At the third session, the tribunal will propose a settlement.<sup>61</sup> If either party rejects this, the tribunal will issue a decision.<sup>62</sup> If neither party rejects the decision or if they mutually accept it, the decision becomes binding.<sup>63</sup> If both parties reject the decision, it is not binding and the matter will be returned to the district court where the parties may continue with civil litigation if so desired.<sup>64</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 63.

<sup>56</sup> See Sugeno, *supra* note 2, at 530.

The Labor Tribunal Committee (LTC), thus, comprises one professional judge and two lay members, both of whom are experts in labor relations. Although these two experts are recommended by *Rengo* (Japanese Trade Union Confederation) and *Nippon Keidanren* (Japan Business Federation), in practice, they must be fair and impartial in the handling of the case. These experts participate in decision making on equal footing with the professional judge member.

Araki, *supra* note 2, at 9–10.

<sup>57</sup> Law on Promoting the Resolution of Individual Labor Disputes, *supra* note 2, art. 8; Sugeno, *supra* note 2, at 530.

<sup>58</sup> Sugeno, *supra* note 2, at 530.

<sup>59</sup> Araki, *supra* note 2, at 8.

<sup>60</sup> *Id.*

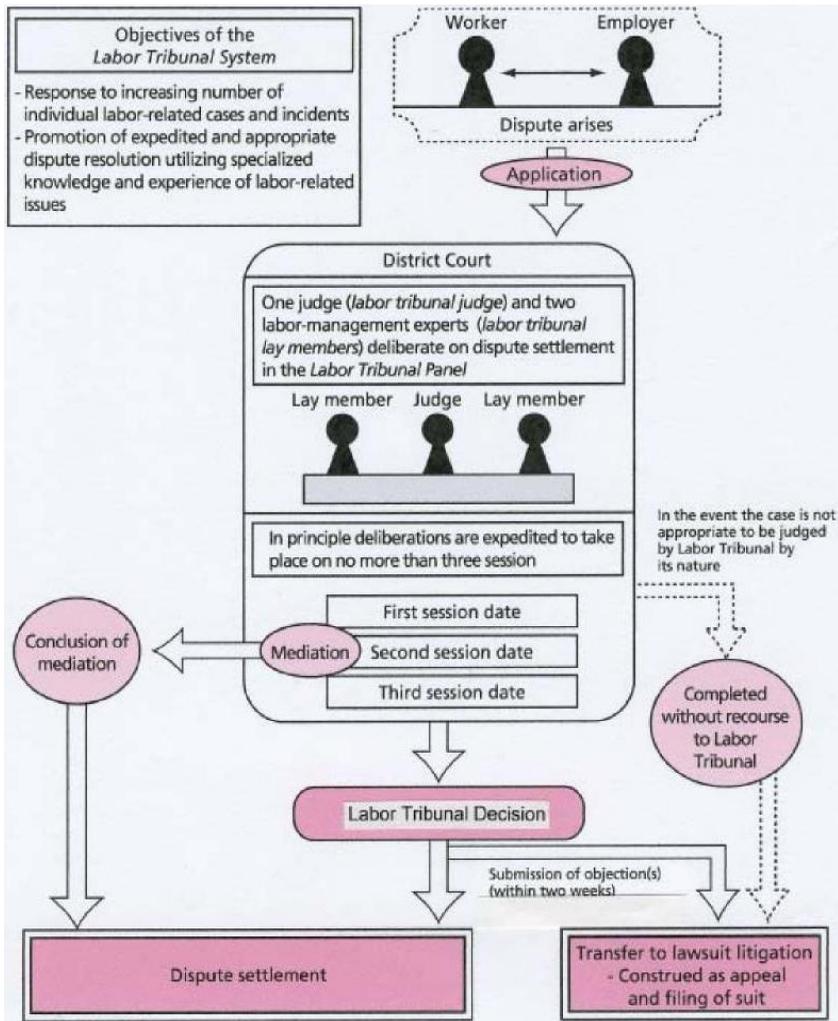
<sup>61</sup> *Id.* at 14.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 10.

<sup>64</sup> SUGENO, *supra* note 34, at 681; Araki, *supra* note 2, at 10. From April 2006 to March 2007 “nearly 80%” of the cases filed with the Labor Tribunals “were resolved through the Labor Tribunal procedures.” *Id.* at 11 (citing Akihiko Ohtake, *Kaishi-go 1 nen wo heta Rodo Shinpan Seido no Genjo to Kadai* [The Current Situation and

FIGURE 4:  
OVERVIEW OF THE LABOR TRIBUNAL SYSTEM<sup>65</sup>



*Future Issues after One Year Operation of the Labor Tribunal System*] 217 KIKAN RODO-HO 53 (2007)). Likewise, this high percentage of case resolution at 80% or above continued through 2009. *Employment Litigation in Japan*, ORRICK, [www.orrick.com/fileupload/3716.pdf](http://www.orrick.com/fileupload/3716.pdf) (last visited Nov. 1, 2012). See generally LABOR SITUATION IN JAPAN, *supra* note 33, at 99–107.

<sup>65</sup> Araki, *supra* note 2, at 9 fig.6.

In sum, the Japanese system of resolving individual labor disputes can be identified as having the following general characteristics:

- (1) *Individual contractual labor disputes* of employees in Japan can be ultimately resolved in the courts or in the court's Labor Tribunal System.
- (2) *Statutory labor disputes* in Japan are primarily dealt with by government labor administration offices, in the courts, or in the court's Labor Tribunal System.
- (3) *Individual* labor disputes arising under *collective* contracts negotiated by unions can have the individual labor dispute rights resolved by courts or in Labor Tribunals.
- (4) Mediation is used by the administration labor offices and the Labor Tribunal to permit mediated settlements for the individual labor rights of employees. A high percentage of cases heard in the Labor Tribunal result in successfully mediated settlements.<sup>66</sup> Japanese courts generally honor and defer to the mediated settlements arising from the labor administration offices and the Labor Tribunals and to the agreed-upon arbitrations of the Labor Tribunals.

## II. COMPARING CHARACTERISTICS OF THE U.S., CHINA, AND JAPAN IN RESOLVING INDIVIDUAL LABOR DISPUTES

### A. *Venue: Government or Private?*

*In the U.S.*, the primary venue for resolving individuals' *contractual* employment disputes traditionally has been the courts, though for unionized workers—a small percentage of the work force—the private arbitration venue is used. A small percentage of cases, but growing, percentage of cases use private arbitration in individual employment agreements.<sup>67</sup>

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<sup>66</sup> See Araki, *supra* note 2, at 11.

<sup>67</sup> See John-Paul Alexandrowicz, *A Comparative Analysis of the Law Regulating Employment Arbitration Agreements in the United States and Canada*, 23 COMP. LAB. L. & POL'Y J. 1007, 1009 (2002).

For disputes under labor *statutes*, the primary avenue for resolution is the use of labor administrative agencies.<sup>68</sup> There is a small but growing trend to consensually agree to substitute private arbitration for administrative agencies and the courts, but this approach is not yet in wide use.<sup>69</sup>

*In China*, labor dispute resolution is institutionalized by the government, with most labor disputes, contractual and statutory, resolved in the government-provided mediation-arbitration system, though a significant number still reach and are resolved in the courts.<sup>70</sup>

*In Japan*, workers may seek to consult over labor disputes or resolve *statutory* labor disputes with a labor administrative agency or with the courts or within the court's labor tribunals.<sup>71</sup> Likewise, workers may also bring *contractual*—as well as *statutory*—employment labor disputes *directly* to the courts and/or its labor tribunals; these can include individual labor rights arising under a collective bargaining agreement.<sup>72</sup>

### B. *Source of Labor Disputes*

As discussed above, the *type* of labor dispute controls the available avenues for resolution of the labor dispute. *Individual* employment *contracts* are dealt with by courts or *government* institutions in the U.S., China, and Japan, albeit with some use of private arbitration in the U.S. in individual employment agreements and in unionized settings, where private arbitration is the norm.<sup>73</sup>

*Statutory* labor disputes of individuals may be resolved, in the first instance, by government administrative agencies in the U.S., Japan (labor administration offices), and China (in labor arbitration commissions).<sup>74</sup> Alternatively, in Japan, these may be resolved in the first instance by the courts or by labor

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<sup>68</sup> See, e.g., *Filing a Charge*, *supra* note 6.

<sup>69</sup> See Kia C. Franklin, *The Injustice of Private Arbitration*, WASH. POST, Apr. 21, 2008, at A14; see also Ross Runkel, *Arbitration of Employment Disputes: The New Privatization of the Judicial System*, LAWMEMO (Apr. 1, 2004), <http://www.lawmemo.com/articles/arb.htm>.

<sup>70</sup> See *supra* notes 20–27 and accompanying text.

<sup>71</sup> See *supra* notes 33–34 and accompanying text.

<sup>72</sup> See *supra* notes 33–36 and accompanying text.

<sup>73</sup> See *supra* notes 5, 7, 20, 33–34 and accompanying text.

<sup>74</sup> See *supra* notes 11, 20, 34 and accompanying text.

tribunals.<sup>75</sup> In the U.S., there is also a small but growing use of private arbitration being voluntarily substituted for the administrative and judicial processes.<sup>76</sup>

### C. Mediation Processes

*Mediation* is a widely used approach in each country's handling of labor disputes, including in the courts. In the U.S., China, and Japan, it may begin in variant forms within companies—possibly through the use of committees—that operate more like *negotiations* or *conciliation* between or among the parties seeking accommodations and settlements.<sup>77</sup> In unionized settings, mediation is provided in coordination with the union, often in the preliminary steps of the grievance arbitration procedures.<sup>78</sup> Otherwise, it is a procedure established by the employer on a non-mandatory basis seeking to encourage accommodations and settlements. In China, this process is available *intra-company* on a voluntary basis.<sup>79</sup> In all settings, it makes sense in the context of human resource management to have a system such as mediation to defuse and possibly resolve labor disputes.

Institutionalized mediation procedures (and/or conciliation) outside any employer procedures, are available in each country, though to varying extents. Government-provided mediation services are available in Japan in all forums—the administration labor agency, courts, and labor tribunals. As discussed above, the percentage of mediated settlements in the Labor Tribunal has been exceptionally high, at eighty percent.<sup>80</sup>

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<sup>75</sup> See Koshiro, *supra* note 33, at 356.

<sup>76</sup> See *supra* text accompanying note 7.

<sup>77</sup> See, e.g., Susan K. Hippensteele, *Revisiting the Promise of Mediation for Employment Discrimination Claims*, 9 PEPP. DISP. RESOL. L.J. 211, 232 (2009); Hilary K. Josephs, *Measuring Progress Under China's Labor Law: Goals, Processes, Outcomes*, 30 COMP. LAB. L. & POL'Y J. 373, 385 n.68 (2009); Kristina T. Geraghty, Note, *Taming the Paper Tiger: A Comparative Approach to Reforming Japanese Gender Equality Laws*, 41 CORNELL INT'L L.J. 503, 511 (2008).

<sup>78</sup> See, e.g., ADVISORY, CONCILIATION & ARBITRATION SERV., *MEDIATION: A GUIDE FOR TRADE UNION REPRESENTATIVES* 3, 8 (2010), available at [http://www.acas.org.uk/media/pdf/m/7/Acas\\_TUC\\_Mediation\\_Guide\\_AUGUST\\_2010\\_\(Final\).pdf](http://www.acas.org.uk/media/pdf/m/7/Acas_TUC_Mediation_Guide_AUGUST_2010_(Final).pdf).

<sup>79</sup> CHINA LABOUR DISPUTE RESOLUTION, *supra* note 28, at 3.

<sup>80</sup> Araki, *supra* note 2, at 11.

Likewise, in China, the use and success of mediation and mediated settlements is high, and it is used extensively in arbitration, as well as in the courts.<sup>81</sup>

In the U.S., mediation is available but infrequently employed in individual employment *contract* disputes.<sup>82</sup> For *statutory* labor disputes, conciliation is used extensively in the procedures of administrative agencies prior to appeals for post-decision, judicial determination.<sup>83</sup> Courts also use mediation.<sup>84</sup>

#### D. Arbitration Processes

In the U.S., labor arbitration of *contract* labor disputes is a creature of contract, wherein the employer and worker may voluntarily enter into an agreement to resolve workplace labor disputes through private arbitration. These agreements are enforceable by the courts, which generally defer to the parties' choice of forum and the decision therein.<sup>85</sup>

Arbitration decisions generally are not overruled unless they are determined by the courts to be against public policy or there is a significant flaw in the arbitration process; this is so even where the court may not agree with the merits of the decision.<sup>86</sup> In the case of arbitration of individual labor disputes, the clear trend of the courts is to more closely scrutinize the fairness of the arbitration process.<sup>87</sup>

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<sup>81</sup> In 2006, over ninety percent of the cases in mediation/arbitration were resolved. See BROWN, *supra* note 3, at 172, 173 tbl.14.1. In litigation, employees prevailed in over one half of the cases in 2005. *Id.* at 180.

<sup>82</sup> In unionized settings, the U.S. government makes available the Federal Mediation Conciliation Services ("FMCS") to help resolve labor *interest* disputes. "[T]he core mission of FMCS has been, and remains, to assist labor and management to settle their disputes through mediation . . ." Carolyn Brommer et al., *Cooperative Bargaining Styles at FMCS: A Movement Toward Choices*, 2 PEPP. DISP. RESOL. L.J. 465, 465 (2002). See generally 29 U.S.C. §§ 172–173 (2006) (authorizing FMCS); Richard Barnes, *FMCS on the Cutting Edge*, 2 PEPP. DISP. RESOL. L.J. 321 (2002) (discussing in detail the history and current state of FMCS). FMCS also provides a list of potential private arbitrators that the parties may voluntarily utilize. *Arbitration FAQs*, FED. MEDIATION & CONCILIATION SERV., <http://www.fmcs.gov/internet/faq.asp?categoryID=133&itemID=16546#Q16529> (last visited Nov. 7, 2012).

<sup>83</sup> See *supra* Part B.1.

<sup>84</sup> See *supra* Part C.1.

<sup>85</sup> See, e.g., *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 133 (1971).

<sup>86</sup> FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 46 (Alan Miles Ruben ed., 6th ed. 2003).

<sup>87</sup> See, e.g., *Plasterers' Local*, 404 U.S. at 133. However, a recent U.S. Supreme Court decision in *AT&T Mobility, LLC v. Concepcion* held that a California

*In China*, the arbitration is regulated by the government, though designated arbitrators may be government or non-government employees.<sup>88</sup> A labor tribunal is established and, if

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unconscionability law banning class waivers in contracts of adhesion could be used to avoid the enforcement of an arbitration provision in a cell phone contract containing such a waiver. 131 S. Ct. 1740, 1748–53 (2011). The Supreme Court found that, in this instance, the Federal Arbitration Act preempted California contract law. *Id.* at 1753. Some have concerns this ruling could limit the courts' ability to supervise labor and employment arbitration agreements for unconscionability and fairness. The ABA's Section on Labor and Employment has noted:

*Concepcion* applies only to arbitration subject to the FAA; it does not apply to arbitration agreements construed in state courts (for example, when the underlying claims do not present a basis for federal jurisdiction). State courts remain free to apply state law unconscionability principles to arbitration clauses that are challenged in state court litigation, and they frequently do so. *See, e.g. Muhammad [sic] v. County Bank of Rehoboth Beach*, 189 N.J. 1, 912 A.2d 88 (N.J. 2006), and *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 857 N.E.2d 250 (Ill. 2006).

. . . *Concepcion* is limited to situations where the FAA preempts state law. To the extent federal common law includes the principles of unconscionability of contracts—and courts have suggested as much in other contexts[,] [see, e.g., *Operating Engineers Local 39 Health Benefit Fund v. Gustafson Constr. Co.*, 258 F.3d 645, 655 (7th Cir. 2001); *Husman Constr. Co. v. Purolator Courier Corp.*, 832 F.3d 459, 461 (8th Cir. 1987), and *Fairfield Mfg. Co., Inc. v. Hartman*, 132 F.Supp.2d 1142 (N.D. Ind. 2001)—*Concepcion* may not insulate an arbitration clause from an unconscionability challenge. Such a challenge may be difficult, of course, in light of: (i) *Concepcion*'s strong language that arbitration clauses are to be enforced as agreed upon, and (ii) *Concepcion*'s rejection of arguments that consumers should be protected from adhesion contracts. In any event, if Congress passes legislation defining the role of arbitration in consumer and employment disputes, the state law preemption analysis from *Concepcion* could fall by the wayside.

*AT&T Mobility LLC v. Concepcion et ux.*, No. 09-893, Argued November 9, 2010, Decided April 27, 2011, AM. BAR ASSOC., [http://www.americanbar.org/content/newsletter/groups/labor\\_law/ll\\_hottopics/2011\\_aball\\_hottopics/11\\_aball\\_att\\_concepcion.html](http://www.americanbar.org/content/newsletter/groups/labor_law/ll_hottopics/2011_aball_hottopics/11_aball_att_concepcion.html) (last visited Nov. 8, 2012).

In the United States, there are institutional codes of conduct and procedures provided by the FMCS and the American Arbitration Association for the arbitrators to follow in those cases where the parties have chosen to utilize arbitrators from a list provided by them. *Employment Due Process Protocol*, AM. ARB. ASS'N, INC. (2011), available at [http://www.adr.org/aaa/ShowPDF?url=/cs/groups/lee/documents/document/mdaw/mdaz/~edisp/adrstg\\_004368.pdf](http://www.adr.org/aaa/ShowPDF?url=/cs/groups/lee/documents/document/mdaw/mdaz/~edisp/adrstg_004368.pdf); see also *Little v. Auto Stiegler, Inc.*, 63 P.3d 979 (Cal. 2003) (discussing whether an arbitration clause is unconscionable); Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. DISP. RESOL. 165, 171–72 (2005).

<sup>88</sup> BROWN, *supra* note 3, at 173–75.

mediation fails, a binding arbitration decision may be made.<sup>89</sup> There are prescribed rules for arbitration procedures.<sup>90</sup>

In *Japan*, *private* arbitration is the exception. However, the court's Labor Tribunal uses arbitration with procedures, though its decision is enforceable *only* if the parties agree to it or fail to reject it within time limits.<sup>91</sup>

An interesting comparative aspect of the use of arbitration in China, Japan, and the U.S. is the role and background of the arbitrators. They may be private or governmental in Japan, China, and the U.S.<sup>92</sup> How they are selected and trained (or not), or whether they have a code of ethics, are all variables to consider in the assessment of the integrity of the process.

### *E. Legal Effect of Mediation Settlements and Arbitration Decisions*

*In the U.S.*, mediation agreements entered into by the parties are treated as settlements, which are binding contracts; likewise, arbitration decisions are typically binding and enforceable by the courts. Some limited exceptions that permit the setting aside of decisions exist in cases of corruption, clear conflicts of interest by the arbitrator, or decisions found to be against public policy.<sup>93</sup>

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<sup>89</sup> See *id.* at 179 & nn.70–71; Law on Mediation and Arbitration of Labor Disputes, *supra* note 3, arts. 5, 14, 42, 47.

<sup>90</sup> BROWN, *supra* note 3, at 302–305.

<sup>91</sup> See Araki, *supra* note 2, at 10.

<sup>92</sup> In the United States, to be listed as an arbitrator with the Federal Mediation Conciliation Service you must meet the following qualifications: “(1) [Be] experienced, competent and acceptable in decision-making roles in the resolution of labor relations disputes; or (2) Ha[ve] extensive and recent experience in relevant positions in collective bargaining; and (3) [Be] capable of conducting an orderly hearing, [be able to] analyze testimony and exhibits and [be able to] prepare clear and concise findings and awards within reasonable time limits.” *Becoming an FMCS Arbitrator*, FED. MEDIATION & CONCILIATION SERV., <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=184&itemID=16436> (last visited Nov. 8, 2012). In China, you can be appointed by the government, but the law sets forth the following qualifications: (1) former judge; (2) research or teaching in the area; (3) knowledge or experience in human resource management; or, (4) lawyer for three years. BROWN, *supra* note 3, at 303.

<sup>93</sup> See Michael H. LeRoy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 262 & n.79 (2003); see also Eric Sposito, *Judicial Standards for Enforcement and Vacatur of Labor Arbitration Awards*, 7 RUTGERS CONFLICT RESOL. L.J. 1, 6, 18–19 (2009).

*In China*, mediation agreements entered into by the parties within any of the forums—in-house, arbitration, or courts—are legally enforceable by the courts. Most arbitration decisions are directly enforceable by the courts. However, certain categories of cases may be taken to the court for consideration. In those cases, the arbitration decisions are not binding without court determination.<sup>94</sup>

*In Japan*, mediation agreements have “the same effects as the compromises which are made in and authorized by the court.”<sup>95</sup> Thus, “a formal court-connected mediation [conciliation] agreement . . . has the same effect as an absolute judgment.”<sup>96</sup> In the absence of a mediated agreement, the labor dispute determination committee or the judge makes a determination “[that] loses its effect” if a party “file[s] an objection to [that] decision within two weeks.”<sup>97</sup> If no such objection to the settlement is filed, then that determination is legally enforceable, similar to a judicial settlement.<sup>98</sup>

### III. MULTI-NATIONAL COMPANIES AND ADR

Multi-national companies usually do not provide nor utilize traditional employee grievance procedures that end in a third-party decision that finally settles an employment dispute. Rather, absent a collective bargaining contract with its grievance procedures, these companies must rely on the availability of local laws and procedures. Somewhat frequently, internal procedures may be provided, most often designed to *expose* violations of standards or law rather than *resolve* them, under the clear auspices of the employer that then determines the final outcome. Internal mediation also may be available.

Below are illustrations of International Labour Organization (“ILO”) principles, SA8000 standards and procedures, and Nike provisions used for its contractors—not its employees.

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<sup>94</sup> These include appeals by the workers. BROWN, *supra* note 3, at 178.

<sup>95</sup> Ishida & Hosokawa, *supra* note 33, at 62.

<sup>96</sup> Katja Funken, *Comparative Dispute Management: Court-Connected Mediation in Japan and Germany*, 3 GERMAN L.J. ¶ 23 (2002), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=130>.

<sup>97</sup> See *Outline of Civil Litigation in Japan*, *supra* note 45.

<sup>98</sup> *Id.*

## A. ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

Multinational as well as national enterprises jointly with the representatives and organizations of the workers whom they employ should seek to establish voluntary conciliation machinery, appropriate to national conditions, which may include provisions for voluntary arbitration, to assist in the prevention and settlement of industrial disputes between employers and workers. The voluntary conciliation machinery should include equal representation of employers and workers.<sup>99</sup>

## B. SA8000 Standards<sup>100</sup>

The Standards provide guidance on workers' rights to a representative to present the workers' position on employment issues, on eliminating discrimination, and on proper discipline and corrective action.<sup>101</sup> For example, see below:

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<sup>99</sup> *Codes of Conduct for Multinationals*, ACTRAV-TURIN LAB. EDUC. PROGRAM, <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/main.htm#Summ> (last visited Nov. 8, 2012).

<sup>100</sup> *SA8000 Standards and Procedures* utilize an externally-monitored system, are voluntary, and most often are used by contractors to become "eligible" for an award of a MNC contract. See *SA 8000 Procedures*, QUALITYMANAGEMENT.HRVINET.COM, <http://qualitymanagement.hrvinet.com/sa-8000-procedures/> (last visited Nov. 8, 2012); *SA 8000 Standards*, QUALITYMANAGEMENT.HRVINET.COM, <http://qualitymanagement.hrvinet.com/sa-8000-standard/> (last visited Nov. 8, 2012); see also Michael J. Hiscox et al., *Evaluating the Impact of SA8000 Certification*, in SOCIAL ACCOUNTABILITY 8000: THE FIRST DECADE—IMPLEMENTATION, INFLUENCE, AND IMPACT 147, 147 (Deborah Leipziger ed., 2009), available at <http://www.people.hbs.edu/mtoffel/publications/HiscoxSchwartzToffel2009.pdf>.

<sup>101</sup> SA8000 Worker Representative:

9.3 The company shall recognize that workplace dialogue is a key component of social accountability and ensure that all workers have the right to representation to facilitate communication with senior management in matters relating to SA8000. In unionised facilities, such representation shall be undertaken by recognized trade union(s). Elsewhere, workers may elect a SA8000 worker representative from among themselves for this purpose. In no circumstances, shall the SA8000 worker representative be seen as a substitute for trade union representation.

SOC. ACCOUNTABILITY INT'L, SOCIAL ACCOUNTABILITY 8000 8 (2008), available at [http://www.sa-intl.org/\\_data/n\\_0001/resources/live/2008StdEnglishFinal.pdf](http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf).

More specific standards provide:

### 5. Discrimination rules in SA 8000

The company shall not engage in or support discrimination in hiring, remuneration, access to training, promotion, termination or retirement based on race, caste, national origin, religion, disability, gender, sexual orientation, union membership, political affiliation, or age.

15. Addressing Concerns and Taking Corrective Action: The company shall investigate, address, and respond to the concerns of employees and other interested parties with regard to conformance/non-conformance with the company's policy and/or the requirements of this standard; the company shall refrain from disciplining, dismissing or otherwise discriminating against any employee for providing information concerning observance of the standard.<sup>102</sup>

SA8000 provides pertinent implementing *procedures*, as well as standards. Its procedures are focused on ADR within the enterprise.<sup>103</sup>

.....

#### 7. Disciplinary practices in SA 8000

The company shall not engage in or support the use of corporal punishment, mental or physical coercion, and verbal abuse.

.....

#### 15. Addressing Concerns and Taking Corrective Action

The company shall investigate, address, and respond to the concerns of employees and other interested parties with regard to conformance/non-conformance with the company's policy and/or the requirements of this standard; the company shall refrain from disciplining, dismissing or otherwise discriminating against any employee for providing information concerning observance of the standard.

SA 8000 Standards, *supra* note 100.

<sup>102</sup> SA 8000 Standards, *supra* note 100.

<sup>103</sup> *Id.*

Reviewing procedure for complaint and discipline

#### 1. PURPOSE:

To examine and give complaint about the implementation of discipline on employee and to protect the employee's right as regulated by laws about exposing and complaining.

#### 2. SCOPE:

This procedure applies to the examination of discipline implementation and complaint in the company.

.....

#### 4. CONTENT:

##### 4.1. Examine the implementation of discipline:

4.1.1. All the violations of regulation of the company are recorded as form No: 0012. The recorder has responsibility to note down all the violation content and asked [sic] related parties to sign. If the violator refuses to sign, write down the reasons.

4.1.2. The violation record will be sent to the head of the division where the violator works in [sic] to commend (if have) and forward to the Administrative Department for solving.

4.1.3. The violator has responsibility to make a statement about what happened, give the divisional head to commend and then send to the Administrative Department.

C. *Nike ADR Provisions in Its Code of Conduct for Contractors*<sup>104</sup>

6. EFFECTIVE GRIEVANCE PROCESS

The contractor shall establish an effective grievance process that enables employees to address their concerns regarding working conditions and terms and conditions of employment. The specific grievance process will vary from factory to factory depending upon its size, local laws, culture, etc. But in general, an effective grievance process includes:

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4.1.4. This Department has responsibility to collect all the opinion [sic], evaluate the violation[,] then invite the violator and related parties to come to discuss about [sic] the problem.

4.1.5. This department has responsibility to write down the solving opinions and present to the Board for considering and deciding. Then, it has to send the decision to the violator within 2 days since the decision is made.

4.1.6. If the problem is too serious and complex, the administrative department makes a report and present [sic] to the General Director for approval to organize a meeting to discuss about [sic] the problem. Attendants are: [t]he General Director or the representative, [l]abor union representative, head of [a]dministrative department, violator, and deponent (if have), defendant (if have) and the representative of people who made the report.

4.1.7. The decision to dismiss the employee of labor union must have opinion [sic] from the Union chairman and from the higher level Labor Union (if the violator is the union chairman).

4.2. Complain and consider implementing the discipline

The complaint period is 15 days since the violator receives the decision. When receiving complaint, [t]he Administrative Department will invite the board representative (one person), [A]dministrative [D]epartment (one person), violator's divisional head (one person), and [l]abor union representative (one person) and make a mediation board. Invite the violator as well as the deponent to the meeting and ask for their opinion. This board makes a [sic] successful or unsuccessful mediation minutes. This [sic] minutes will be kept along with the case record. After that, the claimant may send another complaint to the Labor Union, Labor office . . . to solve if not satisfied.

*Reviewing Procedure For Complaint And Discipline,*  
 QUALITYMANAGEMENT.HRVINET.COM,  
<http://qualitymanagement.hrvinet.com/reviewing-procedure-for-complaint-and-discipline/> (last visited Nov. 8, 2012).

<sup>104</sup> Note that these provisions are used for Nike's contractors—not its employees. NIKE INC., NIKE CODE LEADERSHIP STANDARDS (2011), available at [http://nikeinc.com/system/assets/6276/Nike\\_Code\\_Leadership\\_Standards\\_Jan2012\\_original.pdf?1325287549](http://nikeinc.com/system/assets/6276/Nike_Code_Leadership_Standards_Jan2012_original.pdf?1325287549). Nike employees have their own standards with violations enforced by the employer. See generally NIKE, INC., INSIDE THE LINES: THE NIKE CODE OF ETHICS (2008), available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTkyfENoaWxkSUQ9LTF8VHlwZT0z&t=1>.

- a. A written grievance policy and implementing procedures. The policy should include. [sic]
  - i. Multiple channels for employees to raise concerns and provide input to management. For example: grievance/suggestion boxes; supervisors/team leaders; HR department/counselors; trade union/worker representatives; “open door” policy; company “hotlines”; third-parties, worker committees, meetings between management and worker’s representatives, etc; and
  - ii. The ability to raise concerns confidentially (or anonymously), subject to the requirements of country law, if the employee so desires without fear of retaliation.
- b. Effective communication of the grievance policy to employees so that employees are aware of the grievance process and their right to raise concerns.
- c. Training of staff responsible for responding to grievances regarding the policy and their roles and responsibilities; and
- d. A means to document and track grievances to ensure there is a timely response back to the employee.

#### IV. COMMON THEMES AND COMPARATIVE CONTRASTS

Common themes are found in each country’s approach to resolving individual labor disputes. Mediation, occasionally conciliation, arbitration, and litigation are used by all, though at times placed in different ADR forums and utilized by differently trained personnel. Also, government regulatory frameworks and a government forum are most often used to bring and resolve labor claims. Most provide multiple avenues in seeking redress, often distinguishing between labor rights originating in contract or statute.

Comparative contrasts are highlighted by China’s “one-stop” forum for resolving labor claims using mediation and arbitration and Japan’s successful Labor Tribunal System used by its courts. By contrast, the U.S., except in the case of collective bargaining contracts, traditionally uses the courts in individual employment contract disputes and the administrative processes for statutory claims, with the right of judicial review. The latter requires using a *particular* administrative agency, among many, and its procedures and methods of ADR. Private arbitration is used where there is a collective bargaining *contract* or an individual agreement between the employee and the employer to use the arbitration forum. The U.S. Supreme Court also has sanctioned

the use of private arbitration for resolving both individual and collective *statutory* labor rights, though at this time it is not widely utilized.

While each country uses mediation in resolving labor disputes, unsuccessful mediation in the initial steps in the U.S., China, or Japan does not foreclose further steps in ADR. In fact, in most cases the next step in redressing employee claims, again, is the mediation process in a different forum. For example, in the transition from the administrative process to the judicial process, the judges will first try mediation. In Japan, unsuccessful mediation in the Labor Tribunal will lead to a non-binding, recommendatory arbitration decision to which the parties must agree, or else it moves on to court procedures, which itself may first utilize mediation.

The finality of arbitration decisions varies. For example, the last step in Japan's Labor Tribunal System is a *recommendatory* settlement (non-binding arbitration?): If not accepted, it moves into the court proceedings for adjudication. China, like the U.S., has a system of finality for most cases, but court enforcement may be required; and, in China's case, there may be court jurisdiction for a certain limited number of categories.

The MNCs, thus far, have not generally embraced traditional private, internal grievance procedures for their employees' labor claims, though there is a hint that there may be some to come, especially the use of mediation, even including external mediation.<sup>105</sup> Rather, the MNCs rely on local laws and practices in resolving employee grievances where normal discussions or internal mechanisms under the employer's control do not produce resolution.

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<sup>105</sup> Some small experimentation project is taking place in China using law students as the external mediators.

<b>Labor Rights</b>	<b>U.S.</b>	<b>Japan</b>	<b>China</b>
<b>Individual Contract</b>	Court some private Arbitration	Court or Labor Tribunal (some consultations in Labor Admin.)	“One-Stop” for all labor rights Mediation (voluntary) and Arbitration Courts enforce; or on limited topics, decide
<b>Collective Contract</b>	Arbitration Court deference	Same as above	Same as above
<b>Statutory</b>	Admin. Process Possible Arbitration Court deference	“One Stop” Labor Admin. (consultation and mediation) Court or Labor Tribunal	Same as above
<b>Arbitration</b>	Binding when available	Recommendatory	Binding unless court jurisdiction

### V. LESSONS AND QUESTIONS?

Certainly, comparative study of other country’s approaches can provide ideas for rethinking and perhaps redesigning approaches in one’s own country. Is there a “best approach” for ADR to resolve employment disputes—one that can serve as a model or a guide for a country or an MNC?

In the search for the best approach, an old idea of a “labor court” in the U.S. might resurface. These courts would combine the many labor laws and their multiple administrative ADR approaches under a common umbrella with the same general procedures used for resolving the disputes, whether they originate in contract or statute—perhaps a *super agency*—housed in either an administrative or judicial forum. Or, in the U.S., after the Supreme Court in *14 Penn Plaza* authorized the private arbitration model for labor contracts and statutory rights disputes, could the private arbitration system be a model?

The rethinking could benefit from knowing that the Japanese Labor Tribunal System has been very successful within the Japanese culture, which values mediation. Though housed in the court, it also utilizes non-judges in its mediation and recommendatory arbitration decisions. Japan also provides a worker-friendly “one stop” consultation and mediation agency to deal with the myriad of worker employment-related complaints.<sup>106</sup>

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<sup>106</sup> As discussed in above text (with chart and statistics), employees can go to the agency instead of going to all the various agencies as is done in the United States. The alternative is to go to court.

The Chinese labor arbitration system offers employers and employees a single institution to resolve most employment disputes. It also can and does utilize non-government arbitrators.

In the U.S., private arbitration is highly touted and prized, and authorized for use by the U.S. Supreme Court.<sup>107</sup> How devastating would it be to house or regulate an arbitration system under a more government-regulated system of procedures, possibly paralleling the sets of rules of the private American Arbitration Association and/or the government's FMCS? Could there be *government* institutions with expanded jurisdiction using "*private*" arbitrators (like the FMCS?), or *private* arbitration with "*government*" arbitrators or *government-regulated* arbitrators?

Debate and evaluation could be the possible advantages of a government-housed, "single court/tribunal." The increased efficiency and possible cost savings in replacing some of the functions of overlapping administrative agencies would need to be balanced against the possible loss in expertise in subject matters and in statutory balances, though perhaps the impact is less in contract disputes where judges accept every type of employment contract matter.<sup>108</sup>

Complementary to the above is to consider increased emphasis on meaningful, non-employer-dominated internal procedures used by employers to address the inevitable labor disputes and to diminish the use of the typical legal ADR processes. Advantages to employers, including MNCs, of using internal, private ADR procedures that might use expert external mediators would be to substitute this process for the external administrative and judicial procedures with their inevitable attendant vagaries and delays. On the other hand, an argument can be made that the expertise and legal institutional structures which use mediation are already in place and available, so why duplicate them with a private system? And should statutory labor rights really be privatized?

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<sup>107</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25-26 (1991); Alexandrowicz, *supra* note 67, at 1041.

<sup>108</sup> Could the functions of the U.S. agencies' approach of using rule-making and providing "guidelines" be consolidated, eliminated, or replaced with "adjudication" as, to some extent, is the practice with the NLRB? Could it make sense to re-locate a consulting/advising/conciliating function into a "one-stop shop," with specialized departments, as is done in Japan?

For the MNCs and likely most employers, the reality is that they are quite resistant to any voluntary procedure that causes relinquishment of control over their employees. Thus, mediation—utilizing external mediators—rather than arbitration, could be a viable alternative to dealing with employees' labor disputes, perhaps depending on the cost factor. Currently, there is some experimentation underway in China utilizing this approach.<sup>109</sup>

In the final analysis, the “take away” from understanding the ADR approaches of Japan, China, and the U.S. might be to think of ways to improve present systems. Perhaps “borrowing” and “learning” from other countries' experiences and creating “something new”: the perennial, “better mouse trap?”

The MNCs—and employers generally—might find that a modest relinquishment of authority over labor dispute settlement by utilizing more mediation can have positive effects on employee morale, human resource management practices, and productivity. Likewise, consideration could be given to whether there might be sufficient advantages in utilizing more arbitration processes: the binding and private U.S. model, the recommendatory and governmental Japanese model, or the binding and governmental Chinese model. MNCs should also consider whether the utilized mediation and arbitration provisions should embrace all individual labor disputes, only contractual disputes, or only statutory disputes.

If an American group of academics, legislators, practitioners of law and industrial relations were tasked to consider possible *reconfiguration* of the best system of individual labor dispute resolution for the most workers, with due consideration of management's interests, and excluding political considerations, what recommendations would likely be made? Drawing upon the international experiences in Japan and China, and the new authority in the U.S. for “privatizing” the arbitration of labor disputes, which dominant themes for reform, if any, would emerge and what recommendations could be predicted, considering a labor court, an industrial tribunal, private or government decisionmakers, binding or recommendatory decisions, status quo, et cetera?

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<sup>109</sup> See *supra* note 105 and accompanying text.

Some private experiments in ADR are already underway, for example with former Chair of the NLRB, William B. Gould IV, serving as an independent monitor selected by an internationally-based employer, FirstGroup, to investigate and recommend remedies for alleged individual labor rights in the workplace tailored to labor relations.<sup>110</sup> Perhaps other privately-

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<sup>110</sup> William B. Gould IV, *Using an Independent Monitor To Resolve Union-Organizing Disputes Outside the NLRB: The FirstGroup Experience*, 66 DISP. RESOL. J. 46, 48 (2011). In 2007, FirstGroup purchased Laidlaw International, Inc. for \$3.6 billion. *Id.* at 50. Laidlaw was the largest operator of yellow school buses, "making First Group America's school bus unit (First Student) the leading student transportation provider in North America, serving more than 1,500 school districts with more than 60,000 buses." *Id.* "The deal also increased operations at the transit management unit (First Transit), which employs 15,500 people and operates 7,000 buses out of 235 locations in 41 states, Canada and Puerto Rico." *Id.* The author wrote of the "Independent Monitor Program:"

Facing an aggressive union organizing campaign at its U.S. subsidiary, a multi-national company implemented an unprecedented ADR program to address complaints that management violated the company's corporate social responsibility policy and its commitment to the right of employees to associate with a union. The program, known as the Independent Monitor[,], could be a model for other companies.

....

Complaints needed to be submitted within 60 days of the alleged violation, and submitting a complaint did not affect the right to file a ULP charge or to complain to any public agency.

....

After the investigation . . . the investigator prepared a preliminary report for the Independent Monitor that laid out the facts of the case . . . . If the Independent Monitor found a violation of the FoA Policy, he made recommendations for actions to be taken by the company to cure the violation.

The company had to decide how to respond to the Independent Monitor's recommendations. It did not have to accept any recommendations. Within 30 days it could adopt, reject, or modify them. It could decide to accept some recommendations and reject the rest from the same report. To provide transparency, the company would send its response to the report to both the Independent Monitor and the complaining party.

....

During the IM Program's three-year tenure, the Independent Monitor received complaints alleging 372 violations of the FoA Policy and issued 143 written reports. Complaints alleged, among other things, that a manager or supervisor discriminated against an employee based on union activity, made anti-union comments, enforced overly broad no talking, solicitation, and distribution rules, or prohibited the wearing of union insignia.

Of the 372 alleged violations, 32 were withdrawn prior to the issuance of a report, and 72 were found to be outside the jurisdiction of the Independent Monitor because they asserted general workplace grievances that did not involve union activity, or were not filed within 60 days of the

based experiments, including employers' internal third-party monitoring system procedures such as those just described, or use of other third-party monitoring programs like SA8000 for example, could lead to broader reforms?

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incident, as required by the program. In those instances, the Independent Monitor informed the complaining party of the company's confidential employee hotline.

.....

Slightly over one-half of the complaints were filed by employees while the rest were filed mainly by unions. Five complaints were referred to the program directly by the company.

.....

Complaints were promptly investigated and reported on within 45 days, on average, and 85% of the cases were completed in less than 90 days.

*Id.* at 46, 53.