

The Construction of Specialized Institution for Cross-Border Labor Arbitration in the Guangdong-Hong Kong-Macao Greater Bay Area

Li Qinlin^{1,a}

¹School of Law, Guangzhou College of Commerce, Guangzhou, China

^aliqinlin23@gmail.com

Abstract: As the main means of resolving labor disputes, labor dispute arbitration has played an important role in resolving labor disputes in China, protecting the legitimate rights and interests of the parties, and promoting harmonious and stable labor relations. The governments and social organizations of Guangdong, Hong Kong and Macao are building a social governance pattern of co-construction and co-governance and a multi-dispute handling mechanism of labor disputes. In this context, the existing labor dispute arbitration institutions in China are no longer sufficient to solve the problems of cross-border labor disputes. It is feasible and necessary to build a specialized institution for cross-border labor arbitration in the Guangdong-Hong Kong-Macao Greater Bay Area. Based on this, the article puts forward feasible suggestions on the positioning, construction mode, personnel composition and supporting mechanism setting of specialized agencies, to make up for the deficiencies of the current labor dispute resolution mechanism, and to promote the construction of Guangdong-Hong Kong-Macao labor relations and the legalization process in the Greater Bay.

Keywords: Guangdong-Hong Kong-Macao Greater Bay Area; Cross-border labor disputes; Arbitration; Specialized agencies

Since 2019, the Joint Mediation Center for Labor Disputes in the Guangdong-Hong Kong-Macao Greater Bay Area has been found in Zhuhai, Shenzhen, and Guangzhou. Guangdong Province has taken the lead in building a collaborative labor dispute management mechanism in Guangdong, Hong Kong, and Macao. The collaborative governance mechanism is an alternative settlement mechanism for cross-border labor and employment disputes established on the basis of the existing dispute resolution mechanisms in Guangdong, Hong Kong and Macao, aiming to resolve labor and employment disputes in an internationally accepted way.[1] Among them, labor dispute arbitration, as the main means of resolving labor disputes, has played an important role in resolving disputes, protecting the legitimate rights and interests of the parties, and promoting harmonious and stable labor relations. Currently, China has not yet established a specialized institution for handling cross-border labor dispute arbitration. Therefore, it is feasible and practical to conduct research on the structural organization and supporting facilities in the context of relevant practices in the Greater Bay Area.

1. The Current Situation of The Establishment of Cross-Border Labor Arbitration Institutions in The Guangdong-Hong Kong-Macao Greater Bay Area

Cross-border labor disputes are labor disputes between employers and employees related to Chinese mainland and Hong Kong or Macao. Cross-border labor disputes are unavoidable due to the development of the Greater Bay Area. Therefore, the governments of provinces and cities in the Greater Bay Area are exploring a path to optimize the current mechanism of labor dispute arbitration institutions.

1.1 Current Establishment of Labor Dispute Arbitration Institutions

Labor dispute arbitration implements special regional jurisdiction in China, and does not implement hierarchical jurisdiction or agreement jurisdiction. Labor dispute arbitration institutions are established in accordance with the principles of overall planning, rational layout, and adaptation to actual needs,

and are not related to administrative divisions.¹ At present, Guangdong Province has labor dispute arbitration institutions at the provincial, municipal and district (county) levels. Provincial, municipal, and district (county) labor dispute arbitration institutions try dispute cases in the area where they are located according to the level and nature of the employer and the subject matter of the case.² Accordingly, the Labor Dispute Arbitration Commission still uses the subject amount and area as the basis for determining the jurisdiction of a case, and a special arbitration institution for special types such as cross-border labor disputes or for special geographical areas such as the Greater Bay Area has not been found yet.

1.2 The Construction of the Collaborative Governance Mechanism for Labor Disputes in Guangdong, Hong Kong and Macao

According to the "*Guangdong-Hong Kong-Macao Greater Bay Area Development Plan*", in December 2019, the Hong Kong-Macao Greater Bay Area Labor Dispute Joint Mediation Center and the Zhuhai (Hengqin) Fast Mediation and Fast Arbitration Service Station were unveiled in Zhuhai. Subsequently, another two Fast Mediation and Fast Arbitration Service Stations were established in Guangzhou (Pazhou) and Shenzhen (Qianhai) in 2021 and 2022. The Fast Mediation and Fast Arbitration Service Station adopts the mode of dispatching the arbitration institution to the arbitration tribunal in the area where it is located, and employing people from Hong Kong and Macao as arbitrators in a targeted manner. The Fast Mediation and Fast Arbitration Service Station provides consultation, mediation, arbitration, dispute prevention and other labor relations-related services to Hong Kong and Macao-related laborers, Hong Kong and Macao-funded enterprises in the Greater Bay Area, and both employers and employees who work in the area where the Service Station is located.

2. Necessity and Feasibility Analysis of Constructing Specialized Institution

2.1 Insufficiency of Existing System in Solving Problems of the Adjudication of Cross-Border Labor Disputes

Against the backdrop of deepening cooperation and increasing labor mobility among Guangdong, Hong Kong and Macao, the number of cross-border labor disputes will also increase accordingly. However, limited by the different judicial systems of Guangdong, Hong Kong and Macao, cross-border judicial assistance and conflict rules, limitations of the existing labor dispute arbitration mechanism become increasingly prominent. The foregoing limitations include: the lack of specialized institutions and personnel for trial, difficulties in obtaining evidence and certification when dealing with cross-border labor disputes and problems caused by mediation when it does not serve its purpose.

2.1.1 The Lack of Specialized Institutions and Personnel for Trial

Arbitration institutions and arbitrators have limited expertise in handling cross-border labor disputes. According to the current regulations, labor disputes between workers and employers shall be under the jurisdiction of the labor dispute arbitration institution at the place where the labor contract is performed or where the employer is located. If both parties apply for arbitration to the labor dispute arbitration institution at the place where the labor contract is performed and where the employer is located, the labor dispute arbitration institution at the place where the labor contract is performed shall have jurisdiction. Taking the territory as the connection point to determine the jurisdiction achieves the purpose of facilitating the participation of laborers and employers in court hearings as well as the investigation and ruling of the facts of the case by the arbitration institutions. However, for cases involving multiple legal fields such as cross-border labor disputes, existing arbitration institutions still lack experiences in handling cases with frequent occurrence of new situations. At the same time, the existing arbitration institutions, especially the district (county) level labor arbitration institutions, often face the problem of trial pressure because the number of cases that need to be heard is very large, and the types of cases are relatively complicated. It is difficult for arbitrators in these arbitration institutions to conduct in-depth research or receive special training when faced with cross-border labor disputes. Thus, the professionalism of the arbitration results cannot be guaranteed.

¹ See *Law of the People's Republic of China on Labor-dispute Mediation and Arbitration, Article 18*: The administrative department of labor under the State Council shall formulate arbitration rules in accordance with the relevant provisions of this Law. The administrative departments of labor of the people's governments of provinces, autonomous regions and municipalities directly under the Central Government shall provide guidance in labor-dispute arbitration within their own administrative areas.

² See *Notice on Adjusting the Jurisdiction of Guangdong Provincial Labor and Personnel Dispute Mediation and Arbitration Court*. Issuing authority: Guangdong Provincial Department of Human Resources and Social Security & Guangdong Provincial Labor and Personnel Dispute Arbitration Commission.

The configuration of the arbitral tribunal is unreasonable. Although Article 19 of the "*Labor Dispute Mediation and Arbitration Law*" stipulates that the labor dispute arbitration institution shall be composed of representatives of labor administrative departments, trade unions and enterprises, it does not specify how the collegial panel will be allocated when a specific case is adjudicated. For cases involving complex legal issues such as mixed employment by cross-border affiliated enterprises, even an arbitral tribunal composed of three arbitrators cannot effectively solve the legal issues involved in such cases if they do not have Hong Kong and Macao work or research backgrounds .

2.1.2 Difficulties in Obtaining Evidence, Presenting Proof and Certification

Under the current Guangdong-Hong Kong and Guangdong-Macao judicial assistance arrangements and civil evidence rules, in the process of adjudicating cross-border labor disputes, there are difficulties for mainland parties to obtain evidence formed in Hong Kong or Macao. Problems in evidence system arose due to the disputes over evidence systems in the civil law system and the common law system. It is difficult to predict the identification of evidence formed in Hong Kong or Macao and the time for obtaining evidence for evidence formed in Hong Kong or Macao. The aforementioned problems, on the one hand, are due to the differences in the judicial systems of Guangdong, Hong Kong and Macao, and the incomplete judicial assistance system; on the other hand, it also involves issues such as the business registration and personnel flow information of Guangdong, Hong Kong and Macao, has not being shared in a common platform.

2.1.3 The Mediation System Still Needs to Be Improved to Make Mediation Substantive

Resolving labor disputes through mediation can simplify labor dispute resolution procedures and reduce the time and cost of arbitration and litigation in the procedural and substantive trials. After the promulgation of the "*Guangdong-Hong Kong-Macao Greater Bay Area Cross-border Dispute Mediation Model Rules*", it is necessary to improve the current mediation system and truly play the role of mediation in properly resolving cross-border labor disputes.

2.2 The Feasibility to Establish a Specialized Institution

The establishment of the Fast Mediation and Fast Arbitration Service Stations provides experiences for the establishment of a specialized institution for cross-border labor dispute trials. The establishment of a specialized institution is realistically possible. At the same time, in Japan, Switzerland, Germany, Hong Kong and other countries and regions, there have been precedents for the establishment of specialized institutions and the introduction of specialized personnel to improve the labor dispute resolution mechanism, providing experiences for the Greater Bay Area. After the establishment of a specialized institution, the cross-border labor dispute resolution mechanism can be continuously improved by setting up a research department and introducing specialized personnel to conduct adjudication, so as to resolve labor disputes in a fair and timely manner.

3. Strengthening the Attributes of Private Arbitration of the Specialized Institution

3.1 The Value of Private Arbitration in Settling Labor Disputes

The reason why arbitration is adopted in solving labor disputes is its convenience, professionalism and efficiency. The negotiation, mediation and arbitration of labor disputes in our country all belong to ADR (Alternative Dispute Resolution, ADR). The advantages of arbitration in resolving labor disputes are more obvious: fairness, confidentiality, speed, economy, professionalism, flexibility, etc. For this reason, arbitration has become an important way to resolve labor disputes.[2]The fast value comes from the need of economic activities to pursue benefits. The professional value comes from the need for the complexity of economic activities. The flexible value comes from the variability of economic activities needs. Even though labor dispute arbitration is different from private and business arbitration due to its administrative attributes, when constructing specialized institutions, it is still necessary to strengthen its attribute of private arbitration.

3.2 Specific Measures in Strengthening the Attributes of Private Arbitration

First of all, labor arbitration should be strictly abided by the simple, fast and efficient attributes of civil arbitration. Due to the unreasonable design of the existing labor dispute arbitration procedures, it does not fully reflect the superiority of ADR. In the process of resolving cross-border labor disputes, the parties will not only face procedural and substantive issues in the trial process of ordinary labor dispute cases, but also face issues such as cross-border evidence collection, delivery, and enforcement. If the procedures for handling labor disputes are complicated and too long, it will be detrimental to the

protection of laborers' rights and discourage the enthusiasm of laborers to protect their legitimate rights and interests through judicial channels. Quick and efficient attributes, avoiding the road of "homogenization" with the litigation mechanism.

Secondly, it is necessary to distinguish the administrative, quasi-judicial and non-governmental relations of labor arbitration. Administrative, quasi-judicial, and civil nature can coexist in labor dispute arbitration. Each feature is actually indispensable for labor dispute arbitration, but there is always a dominant characteristic.[3] As an important manifestation of government intervention in labor relations, labor arbitration must have a certain administrative nature. However, labor arbitration must not become administrative, so as to avoid situations where excessive government intervention leads to unfair labor dispute adjudication.

3.3 Institutional Construction with Reference to the Hong Kong Model

During the construction of specialized institution, the model of the Labor Tribunal of the Hong Kong Special Administrative Region can be used for reference. In Hong Kong, individual labor disputes are mainly handled by arbitration institutions, which are divided into the Small Salary Claims Arbitration Office and the Labor Tribunal according to the number of people and the number of targets. The Labor Tribunal has both day courts and night courts to flexibly handle various labor dispute cases in a non-court-style way, providing citizens with a fast and easy way to resolve disputes.

4. The Path to Build a Specialized Institution for Labor Arbitration

4.1 Construction Mode and Personnel Composition of the Specialized Institution

4.1.1 Introduction of Specialized Personnel to Hear Cross-Border Labor Disputes

In 2019, Guangdong Province gradually carried out the pilot work of hiring Hong Kong and Macao arbitrators, aiming to give full play to the role of Hong Kong and Macao arbitrators, resolve labor disputes involving Hong Kong and Macao enterprises in a timely and effective manner in accordance with the law, and serve the construction of the Greater Bay Area.[4] Hiring lawyers, scholars and other legal practitioners who are Hong Kong or Macao nationality, or have research experience in Hong Kong or Macao as full-time or part-time arbitrators can make up for the lack of professional knowledge of conflict of laws, Hong Kong or Macao labor law among mainland labor arbitrators, and better protect employers and the legitimate rights and interests of workers. At the same time, the joining of Hong Kong and Macao personnel can increase the understanding and recognition of Hong Kong and Macao employers and workers on the Mainland's labor laws and employment policies, better determine points and stop disputes, so as to promote the harmonious and stable development of the relationship between the three places.

4.1.2 Improving the Staffing Mechanism of the Arbitral Tribunal with Reference to the Germany Model

When staffing the collegial panel, it is feasible to learn from the German honorary judge system to improve the current mechanism. In addition to the constitutional court, courts in Germany also have five different systems of courts, namely ordinary courts, administrative courts, labor courts, social courts and fiscal courts. A prominent feature of labor courts that differ from ordinary courts in handling ordinary civil cases is that the courts of labor courts that hear labor dispute cases adopt a combination of professional judges and honorary judges. Honorary judges come from enterprises, represent the interests of both employers and employees, and are familiar with labor conditions. At the same time, honorary judges have the right to inquire and vote, which can help to investigate cases and limit judges' discretion.

According to Germany's honorary judge system, the specialized institution could introduce legal workers from enterprises, especially from Hong Kong-funded, Macao-funded and Sino-Hong Kong and Sino-Macao joint ventures as part-time arbitrators, to form a collegial panel to adjudicate the case. The above-mentioned personnel have working backgrounds in cross-border enterprises. Therefore, they could understand the development of enterprises and their industries as well as the psychology of employees, so that they can better ascertain the situation of the case and enable both parties to labor disputes to increase their trust in the arbitral tribunal psychologically.

4.2 Improving the Arrangements for commissioned evidence collection between Mainland and Hong Kong/Macao

The burden of proof plays an important role throughout the civil litigation process. In the event of a labor dispute, the parties concerned have the responsibility to provide evidence for their claims. If the proof cannot be provided, the laborer will bear the corresponding adverse consequences. Although the "*Labor Dispute Mediation and Arbitration Law*" stipulates the rules for the inversion of the burden of proof in labor disputes, in cross-border labor disputes, the laborer still has to bear the responsibility of providing the registration information of the employer and evidences to provide the existence of an affiliated enterprise, the existence of the labor relationship and the amount claimed and so on.³ For enterprises established overseas, it is difficult for the employees to obtain relevant evidence. Even if they can be obtained, the time for obtaining evidence is difficult to predict, resulting in too long arbitration time, which is not conducive to the efficiency of the trial and the protection of the rights of the parties. Therefore, it is necessary to introduce special arrangements for the settlement of cross-border labor disputes, taking into account fairness and efficiency, and strengthening the protection of workers.

Firstly, the rules for taking evidence outside the territory should be improved, and the channels for the labor arbitration institution and Hong Kong and Macao courts to entrust each other to obtain evidence should be unblocked. In the process of hearing labor disputes, if the parties cannot collect evidence by themselves due to objective reasons, the arbitration institution may collect evidence based on the application of the parties and with reference to the relevant provisions of civil procedures; if the arbitration institution deems it necessary, it may also decide to collect evidence in accordance with the relevant provisions of civil procedures.[4] However, according to the current regulations, both the client and the trustee of mutual extraction of evidence between the Mainland and Hong Kong or Macao are the court. There is no provision for labor arbitration institutions to use judicial assistance to extract evidence formed in Hong Kong or Macao. In the absence of relevant institutional arrangements, the arbitration commission will face various unknown difficulties when investigating and collecting evidence. Therefore, within the framework of the existing judicial assistance arrangements between the Mainland, Hong Kong and Macao, special provisions on judicial assistance between labor arbitration institutions and courts in Hong Kong and Macao should be added, so as to unblock dispute resolution channels and resolve labor disputes in a fair and timely manner.

Secondly, the labor arbitration institution should build a network with other departments to broaden the channels for obtaining evidence. At present, China has established a relatively complete enterprise information publicity system. The National Enterprise Credit Information Publicity System publicizes the information formed during the production and operation activities of enterprises registered with the administrative department for industry and commerce, as well as the information that can reflect the status of enterprises generated by government departments in the process of performing their duties. At the same time, Hong Kong and Macao have also established corresponding publicity systems, allowing the public to inquire about corporate publicity information. However, for ordinary workers, the ability to understand such information and make inquiries is not sufficient, and assistance is needed. Therefore, the labor arbitration institution can learn from the experiences of China's courts in carrying out network investigation and control, and build a network with other departments to broaden the channels for obtaining evidence.

4.3 Applying and Improving the Mediation Procedure with reference to the Japanese Model

To improve the labor dispute mediation system, it is feasible to learn from the experience of Japan's good offices and mediation system for labor dispute resolution and introduce the mechanism to the specialized institution to solve cross-border labor disputes.

4.3.1 The Enlightenment of Japan's Labor Dispute Resolution Model to China

The agencies that handle labor disputes in Japan are labor bureaus and labor institutions of prefectures. Among them, labor bureaus are responsible for resolving individual labor disputes, while labor institutions are responsible for resolving individual labor disputes and collective labor disputes. The labor institution is composed of representatives from labor, capital, and public welfare. The specific procedures for handling labor disputes are four steps: good offices, mediation, arbitration, and

³ See *Law of the People's Republic of China on Labor-dispute Mediation and Arbitration, Article 6*: Where a labor dispute arises, the parties have the responsibility to give evidence for their own claims. Where the evidence relevant to the matter under dispute is kept and controlled by the employing unit, the said unit shall provide such evidence. Where the employing unit refuses to do so, it shall bear any unfavorable consequences.

emergency adjustment.[5]

Good offices. Good offices are equivalent to reconciliation, and its main purpose is to urge the two parties to negotiate further. Generally, labor, capital, or both parties should first apply. In special circumstances, even without an application, the director of the labor institution can decide to enter the mediation process. The method of mediation is mainly to propose a mediation plan after listening to the arguments of the labor and management, so as to promote the two sides to agree and reach a settlement. Due to the simple procedure of mediation, Japan attaches great importance to it. 90% of the cases accepted by the labor institution are resolved through mediation. The mediation plan is not mandatory, and both employers and employees have the right to refuse.

Mediation. Mediation is conducted by a tripartite mediation institution. Generally, both employers and employees should apply. However, for public welfare enterprises, the institution may decide to mediate even without the application of both parties. For public welfare enterprises or particularly serious cases, the Minister of Labor has the right to decide to mediate. After the institution understands and listens to the opinions of both employers and employees, it proposes a mediation plan. Theoretically speaking, both employers and employees have the right to reject the mediation plan, but since the institution has the right to make the results of the mediation public and create public pressure on the company, it is beneficial for the company to accept the mediation. For labor disputes in public welfare enterprises, due to the great social impact, the Minister of Labor also actively intervenes, and generally the mediation results must be accepted.

4.3.2 Improvement with the reference to the Japanese Model

On the basis of the existing labor dispute mechanism, good offices and mediation can be introduced. On the premise of fully listening to the opinions of both parties, social supervision could be helpful in promoting the two parties to reach and perform a mediation agreement, fundamentally resolve labor disputes, and make mediation substantive.

At the same time, during the mediation process, in addition to the participation of the employer, employee and arbitrator, the Hong Kong and Macao Affairs Office can be contacted for assistance when necessary. It would be easier to reach a mediation agreement when both the laborers and stakeholders gain a fully understanding of laws and policies related to labor dispute mediation and implementation of mediation agreement.

5. Conclusion

The resolution of cross-border labor disputes involves not only the understanding of substantive rules such as labor law, labor contract law, and company law, but also the application of procedural laws such as labor dispute mediation and arbitration law, civil procedure law, and inter-regional judicial assistance and conflict rules. It is also closely related to inter-regional talent flow and economic development. In the face of the development opportunities and challenges brought about by the construction of the Guangdong-Hong Kong-Macao Greater Bay Area, it is necessary and realistic to establish a specialized institution to handle cross-border labor dispute arbitration. In the process of system construction, it is necessary to conduct a comparative study of the labor dispute resolution models in Japan, Germany and Hong Kong. When constructing a specialized institution, it is necessary to solve the problems of personnel composition, evidence rules and perfect mediation system. By establishing a specialized institution, introducing specialized personnel, and improving evidence rules and mediation systems, it will give full play to the advantages of arbitration in resolving labor disputes and help the development of the Bay Area.

References

- [1] Wan Zhijun et al. *In-depth cooperation in innovative mechanisms to promote collaborative governance of labor disputes in the Greater Bay Area*. *China Labor Security News*. <https://www.clsn.com/2022/04/14/995834.html>. Access date: 2023 2 25th.
- [2] Zhai Yujuan. *Research on ADR of Labor Disputes—and Interpretation of "Labor Dispute Mediation and Arbitration Law of the People's Republic of China"*. *Law Review*, No. 4, 2009.
- [3] Zhou Huyong. *Research on Labor Dispute Arbitration System*. Beijing Law Press, August 2020.
- [4] Guangdong Provincial Department of Human Resources and Social Security. *The Guangdong Provincial Department of Human Resources and Social Security's 2019 Labor and Personnel Dispute Mediation and Arbitration Work Points*. Release time: March 11, 2019.
- [5] Hua Yingfang. *Adjustment of collective labor relations in Japan*. *China Labor*, No. 3, 2002.