



East Asian Labor and Employment Law

International and Comparative Context

Ronald C. Brown

CAMBRIDGE

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INTERNATIONAL AND COMPARATIVE CONTEXT

RONALD C. BROWN

University of Hawaii Law School



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Preface

EAST ASIAN LABOR AND EMPLOYMENT LAW: INTERNATIONAL AND COMPARATIVE CONTEXT

Introduction

A mid-sized U.S. employer in Toledo, Ohio, contemplated investing somewhere in China, South Korea, or Japan. Its goal was to reduce its costs in manufacturing and supplying certain products. It currently has a collective-bargaining agreement with its employees and needs to decide whether to close its U.S. plant, subcontract with a foreign company, or set up operations overseas; but where and how can profits be maximized and competitive advantages enhanced? Must seniority be followed in selecting which key employees can be offered relocation to the foreign facility? Whose laws apply? Do those countries have labor and employment laws? Are they enforced? Certainly many business decisions will need to be made, but how significant are the labor issues that must be considered and how costly if mistakes are made?

Within the developing world, the populous Asia and Pacific region dominates, accounting for more than fifty-seven percent of all employment. The two giants, China and India, have 26.0 percent and 14.8 percent of world employment, respectively.¹

This book discusses international labor and employment law in the East Asia Region (EA), particularly with regard to Japan, South Korea, and China. Part I introduces globalization – economic integration, cross-border business involving capital, labor, and global production and assembly lines. Also discussed are the effects of globalization on labor, labor unions, business, human resource management, law, and lawyers. From this globalization and its effects come the need for international lawyers, business personnel, and human resource directors who are knowledgeable

¹ CHANGING PATTERNS IN THE WORLD OF WORK 19, *citing*, ILO: Global Employment Trends Model database (Geneva, 2006). See www.ilo.org/public/english/employment/strat/wrest.htm.

and culturally sensitive and who understand the issues that can arise in dealing in EA trade and investment. Not all issues are legal, but they still have clear implications for a company's wellness (e.g., cheap labor may be viewed by some as exploitive labor), as Sears, NIKE, and Liz Claiborne learned in earlier years. Practitioners soon discover that in today's global economy they need at least a basic awareness of not only U.S. or home-country labor and employment laws, but also of international and foreign legal issues that often are implicated.

Part II of the book deals with global legal standards and their interplay with domestic and foreign labor and employment laws. Understanding labor and employment law in its international context reveals that law itself is becoming globalized, as is an increasing percentage of the labor force. The book addresses how these changing demographics also change the dynamics of regulation; and, as the Eastern and Western cultures mix, new perspectives are raised concerning whether *labor rights* and practices may cross over into *human rights*. Some thoughtful analysis may be required to set aside one's own biases and understand another culture's approach to legal rights, as for example protecting the safety of a pregnant woman in the workplace involving issues of gender discrimination. The laws in EA derive from legal heritages and legal systems that embrace different pieces of Western traditions. Knowing how a civil law system or one blended with common law or socialist law characteristics operates facilitates successful lawyering involving foreign trade and investment. Whether there has been an "*Asianization*" of law in EA is debatable, but the impact in EA of globalization causing a convergence of global labor standards and local labor and employment laws is real.

Confronting the international labor and employment lawyer are three levels of law: domestic, international, and foreign. For example, a U.S. company needs to consider and coordinate gender issues in the workplace under Title VII of the Civil Rights Law, International Labor Organization (ILO) standards, and the particular EA country's laws. Also in play may be industry or company codes of conduct, extraterritorial application of U.S. laws, or the Alien Tort Claims Act. Wal-Mart has been embroiled in litigation in California touching on some of these issues.

Part III, for comparative purposes, examines global approaches to four "agenda items": a) regulatory sources, structures, and administration; b) workers' labor rights and benefits; c) labor unions, national and international; and d) dispute resolution of labor rights and interests.

Part IV examines the EA legal regimes of Japan, South Korea, and China (including reference to Hong Kong and Taiwan) as they regulate their labor and employment. Also considered are global institutions' measurements of these countries' compliance with international global standards.

Lastly, Part V provides a number of illustrative issues or themes common within the EA countries and raises questions about the various approaches that would be taken by the labor and employment laws of each. These approaches are then compared to each other through questions to see where the "best practice" or

comparative advantage might lie or identify an area needing reform. The issues examined include: a) hiring and discrimination; b) labor contracts, individual and collective; c) working conditions and benefits; and d) employer discipline, termination, and alternative dispute resolution (ADR).

Although this book is useful as a textbook or source book, it is also written for those interested in gaining *competitive* advantages in the Asian markets by better understanding the *comparative* advantages of the various labor law regimes in China, Japan, and South Korea. The readings and text are organized and written to provide the reader with a broad understanding and insight into first the global dimensions of the fast-emerging area of labor and employment issues and second how in specific Asian countries these laws and approaches play out. In this regard, the book should be of interest not only to lawyers, students, human resource personnel, and government officials, but also to business investors, managers, and members of the public interested in the growing phenomenon of changing labor laws and societies in Japan, South Korea, and China.

International Labor and Employment Law: From Periphery to Core²

Marley S. Weiss

If we were to rank areas of labor and employment law by the level of change in the past twenty-five years, international labor and employment law would surely be near the top. It is no exaggeration to say that this field has been transformed during the past two and a half decades. As an area of specialty practice, international labor and employment law has fully emerged. This time period witnessed the information and telecommunication revolution, paralleled by quantum leaps forward in the global trade order and regional integration regimes. Internationalization of markets for and supply chains in goods and services has profoundly affected the practice of domestic labor and employment law, the balance of power between capital and labor, and the content of the employment relationship. The globalization of markets in goods, services, capital, and labor has led to the embedding of comparative labor and employment law within the practice of domestic labor and employment law. The globalization of labor markets also has resulted in the incorporation of elements of immigration law into the heart of employment law practice.

Changes in international trade law, as well as technology-driven changes in the economics of trade and investment, have stimulated new approaches to the substantive, procedural, and remedial aspects of international labor law. The content of law school curricula and continuing legal education programs increasingly responds to these new bodies of law and legal practice. Cumulatively, these dramatic changes in law, economics, and society have brought American labor and employment law practice to the

² Marley S. Weiss, *International Labor and Employment Law: From Periphery to Core*, 25 *ABAJ of Labor & Employment Law* 487–88 (2010). [Footnotes omitted.] The author, Professor of Law at the University of Maryland School of Law, has served as the academic/employee co-chair of the International Labor and Employment Law Committee of the ABA Section of Labor and Employment Law.

cus of an immense transformation in how employment and labor law is practiced in connection with transnational activities.

....

IV. The Next Step: Strategic Thinking in the Practice of Labor and Employment Law

Finally, the coming of age of international labor law is increasingly reflected in practitioners' resort to the type of strategic and comparative thinking more familiar in U.S. domestic law. Strategic planning to minimize labor/employment obligations, economic burdens, and liability exposure, heretofore used by businesses in site selection and plant relocation decisions about moving from one U.S. state to another, now plays a role in decisions of multinationals about whether to outsource work from the United States to a Brazilian subcontractor. Even smaller businesses engage in comparative analysis of national law, industrial relations systems, and international obligations in making decisions about mergers, acquisitions, joint ventures, offshoring or outsourcing business activities, brand licensing, and other transnational transactions.

Transnational trade union confederations and global workers' rights networks are deploying countervailing corporate campaigns, consumer boycott appeals, and legal strategies on the international plane. As in a domestic labor dispute or corporate campaign, unions and workers' rights advocates strategically analyze potential sources of economic pressure, such as consumer boycotts, withholding of investment by sovereign wealth funds with corporate social responsibility mandates, and publicity campaigns. They utilize both domestic and international legal proceedings for the legal remedies they may supply and for the additional publicity and veracity a legal ruling can provide to fuel public political, economic, and social pressure campaigns. Legal submissions utilizing the frameworks available at the ILO, UN Global Compact, U.S. free trade agreement-based labor rights, international corporate codes of conduct, and other international arrangements provide an international framework within which labor organizations and multinational corporations strategize and navigate.

Although few of these international instruments afford relief to victimized workers and trade unions, or deterrent sanctions against employers or even nation-states, they do play an important role in mobilizing political pressure to change policy in noncompliant nation-states and induce corporate compliance with core international labor rights, even in the absence of strong national- or local-level enforcement. U.S. domestic statutes such as the Alien Tort Claims Act provide a stronger deterrent effect against both companies and governments by affording potentially massive tort remedial awards for the worst violations of workers' rights.

Management lawyers analyze choice of law, choice of forum, election or combination of procedures and remedies, comparative labor costs, industrial relations systems, and labor and employment law regimes as they advise regarding site selection decisions, capital redeployment decisions, and trade union development of countervailing transnational affiliations, mobilization, and economic and political pressure campaigns.

With an ever-shrinking globe, and an ever-intensifying international integration of markets and work, one must anticipate that these trends will continue and intensify in the coming years.

Acknowledgments

The content of this book derives from working experiences in Asia and countless visits over the past decades to East Asia, including China, Japan, South Korea, Hong Kong, and Taiwan, and meetings, consulting, teaching, providing seminars and training, and working on joint projects on law and labor and employment-related projects with legal practitioners, academics, business personnel, and government officials. The format and organization of the book evolved from my law school course on Asian International and Comparative Labor and Employment Law, which I have taught at the University of Hawaii Law School and in Asian law schools for the past two decades and which appears to have been successful in introducing the legal environment of East Asia and educating law students during that time.

During this period of continually discovering and discussing with countless numbers of legal practitioners, academics, students, business personnel, and government officials the development and importance of international labor and employment law, I have come to understand that this area of the law is very significant as a discrete and concrete subject area that involves citizens, workers, businesses, unions, and governments. The economics and politics of labor and employment laws and labor relations can be volatile and affect economic development, social stability, labor unrest, and the success or failure of business operations, as well as the welfare and safety of the employees performing the work under varying workplace environments. I am grateful for the permissions granted by the authors for some of the materials used in this book, as they and their expertise have expressed it in the voice of firsthand knowledge and perspective.

The time for specialized emphasis and knowledge of the approaches and requirements of labor and employment laws and practices in this region of the world is now. The tide of trade and business investment, and even adventure for many, has moved from trans-Atlantic to trans-Pacific. This book seeks to address the legal background of the region, provide an introduction to the reader of the many sophisticated regional and global developments presently occurring in East Asia, and place

them in an international and comparative context; yet leave the many factors and variables raised, but not fully analyzed, for subsequent discussions and decisions by lawyers, students, business and human resource personnel, and those interested in the combined localization and globalization of the workplace environments now taking place in East Asia. The law in each country changes rapidly, and the EA country materials are not necessarily intended to be specific and current but rather to provide sufficient basis to understand the legal parameters and spur on further inquiry.

I also want to acknowledge the support of the University of Hawaii Law School and the significant technical assistance provided to me on this project by my research assistants at the Law School, Aeri Yum and Sara Lee. Aeri Yum, already a health specialist, transformed into a wonderfully capable foreign legal researcher, using her meticulous medical skills to collect and analyze the many laws and articles of possible relevance to my teaching a course on Asian labor law as well as for use in this book. She also successfully organized and obtained the required copyright permissions. Sara Lee, a second-year law student, more recently has assisted greatly in adding to Aeri's work and putting this book in proper form and formatting. Lastly, I wish to acknowledge my wife, Mangmang, who has assisted and supported me over the years in the many projects in Asia relevant to this book. Her keen mind, legal background, inherent understanding of "Chinese and Asian characteristics," and her time and support are always an asset to me as I move forward.

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I

Perspective

Globalism and Its Impacts

“Globalization” is a phenomenon that has moved domestic and foreign businesses, as well as developed and developing countries, ever closer. It is sometimes described as economic integration. Often the business motivation is to take advantage of cheaper labor and lax law enforcement, but there are many reasons why U.S. and European Union (EU) businesses trade and invest in and with Asia, including market expansion. While some of the practices by hosting countries may appear unfair and exploitive and fuel the “race to the bottom,” this trade and investment also bring jobs and technology to those countries and lower-priced products for consumers in the European Union and the United States.¹ Cross-border and foreign business revolve around corporate activity performed by labor (and sometimes involving labor unions) and serviced by lawyers. With increases in foreign direct investment (FDI) in East Asia, the use of outsourcing, global production systems, and offshore production has also grown. With this growth, new challenges abound for lawyers and human resource managers to comply with the myriad laws that arise in domestic, foreign, and international forums.

In all cases, significant labor and employment issues will be raised because human resources are the fuel of this economic activity. In understanding the impacts of globalism on international and comparative labor and employment issues in Asia, some perspective on the global economic and production systems affecting employment is provided because these systems often are the underpinnings of the evolving changes in workplace regulation. Globalization can be described as the “hub” of a wheel, with

¹ JIM DATOR ET AL., FAIRNESS, GLOBALIZATION, AND PUBLIC INSTITUTIONS: EAST ASIA AND BEYOND (2006). See also LABOUR LAW IN AN ERA OF GLOBALIZATION (Joanne Conaghan et al. eds., 2004). This collection of “[e]ssays consider[s] the consequences of such developments as accelerating international economic integration and wage competition, a decline in the capacity of the nation-state to steer economic progress, the proliferation of contingent employment relationships, and the significantly increased participation of women in paid work.” Book Notes, 29 LAW & SOC. INQUIRY 299, 304 (2004).

its emanating spokes transmitting impacts on labor, labor unions, human resource management policies, law, and law practice, in ways described next.

A. ECONOMIC INTEGRATION: BUSINESS FLOWS AND EXPANDING LEGAL ISSUES

1. *Cross-Border Business*

a. Economic Integration

Economic integration within communities, regions, nations, and internationally has occurred in some form for thousands of years, but never at today's pace. The reality is that, whereas global merchandise exports in 1913 were eight percent of the world's gross domestic product (GDP), today they are more than twenty percent;² capital exports, historically coming from industrialized countries, today also come from emerging market nations.³ An interesting phenomenon has occurred in recent decades wherein many corporations are geographically fragmented, with portions of their business operations diversified; and further, some forty percent of U.S. merchandise trade is being done *intrafirm*, which combines with increasing numbers of firms being involved in *global supply chains*.⁴

Author Thomas L. Friedman has made the case that the "world is flat."⁵ Not all accept that globalization has flattened the world outside the business community,⁶ but, within the business realm, Federal Reserve Chairman Ben Bernanke explains this aspect of globalization as "global economic integration,"⁷ which is at the epicenter of the hub of globalization.

Global Economic Integration: What's New and What's Not?⁸

Ben S. Bernanke, Chairman, Federal Reserve

When geographers study the earth and its features, distance is one of the basic measures they use to describe the patterns they observe. Distance is an elastic concept, however. The physical distance along a great circle from Wausau, Wisconsin, to Wuhan, China, is fixed at 7,020 miles. But to an economist, the distance from Wausau to Wuhan can

² Chairman Ben S. Bernanke, Speech at the Federal Reserve Bank of Kansas City's Thirtieth Annual Economic Symposium: Global Economic Integration: What's New and What's Not? (August 25, 2006), available at <http://www.federalreserve.gov/newsevents/speech/bernanke20060825a.htm> (last visited Oct. 3, 2010).

³ *Id.*

⁴ *Id.*

⁵ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2005).

⁶ JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* (2006).

⁷ Bernanke, *supra* note 2.

⁸ *Id.*

also be expressed in other metrics, such as the cost of shipping goods between the two cities, the time it takes for a message to travel those 7,020 miles, and the cost of sending and receiving the message. Economically relevant distances between Wausau and Wuhan may also depend on what trade economists refer to as the “width of the border,” which reflects the extra costs of economic exchange imposed by factors such as tariff and nontariff barriers, as well as costs arising from differences in language, culture, legal traditions, and political systems.

One of the defining characteristics of the world in which we now live is that, by most economically relevant measures, distances are shrinking rapidly. The shrinking globe has been a major source of the powerful wave of worldwide economic integration and increased economic interdependence that we are currently experiencing. The causes and implications of declining economic distances and increased economic integration are, of course, the subject of this conference. The pace of global economic change in recent decades has been breathtaking indeed, and the full implications of these developments for all aspects of our lives will not be known for many years. History may provide some guidance, however. The process of global economic integration has been going on for thousands of years, and the sources and consequences of this integration have often borne at least a qualitative resemblance to those associated with the current episode. In my remarks today I will briefly review some past episodes of global economic integration, identify some common themes, and then put forward some ways in which I see the current episode as similar to and different from the past. In doing so, I hope to provide some background and context for the important discussions that we will be having over the next few days.

A Short History of Global Economic Integration

As I just noted, the economic integration of widely separated regions is hardly a new phenomenon. Two thousand years ago, the Romans unified their far-flung empire through an extensive transportation network and a common language, legal system, and currency. One historian recently observed that “a citizen of the empire traveling from Britain to the Euphrates in the mid-second century CE would have found in virtually every town along the journey foods, goods, landscapes, buildings, institutions, laws, entertainment, and sacred elements not dissimilar to those in his own community.” . . . This unification promoted trade and economic development.

A millennium and a half later, at the end of the fifteenth century, the voyages of Columbus, Vasco da Gama, and other explorers initiated a period of trade over even vaster distances.

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Global economic integration took another major leap forward during the period between the end of the Napoleonic Wars in 1815 and the beginning of World War I. International trade again expanded significantly as did cross-border flows of financial capital and labor. Once again, new technologies played an important role in facilitating integration: Transport costs plunged as steam power replaced the sail and railroads replaced the wagon or the barge, and an ambitious public works project, the opening of the Suez Canal, significantly reduced travel times between Europe and Asia. Communication costs likewise fell as the telegraph came into common use.

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The structure of trade during the post-Napoleonic period followed a “core-periphery” pattern. Capital-rich Western European countries, particularly Britain, were the center, or core, of the trading system and the international monetary system. Countries in which natural resources and land were relatively abundant formed the periphery. Manufactured goods, financial capital, and labor tended to flow from the core to the periphery, with natural resources and agricultural products flowing from the periphery to the core. The composition of the core and the periphery remained fairly stable, with one important exception being the United States, which, over the course of the nineteenth century, made the transition from the periphery to the core. The share of manufactured goods in U.S. exports rose from less than 30 percent in 1840 to 60 percent in 1913, and the United States became a net exporter of financial capital beginning in the late 1890s.

For the most part, government policies during this era fostered openness to trade, capital mobility, and migration. . . . A growing appreciation for the principle of comparative advantage, as forcefully articulated by Adam Smith and David Ricardo, may have made governments more receptive to the view that international trade is not a zero-sum game but can be beneficial to all participants.

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Unfortunately, the international economic integration achieved during the nineteenth century was largely unraveled in the twentieth by two world wars and the Great Depression. After World War II, the major powers undertook the difficult tasks of rebuilding both the physical infrastructure and the international trade and monetary systems. The industrial core – now including an emergent Japan as well as the United States and Western Europe – ultimately succeeded in restoring a substantial degree of economic integration, though decades passed before trade as a share of global output reached pre-World War I levels.

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Postwar economic re-integration was supported by several factors, both technological and political. Technological advances further reduced the costs of transportation and communication, as the air freight fleet was converted from propeller to jet and intermodal shipping techniques (including containerization) became common. Telephone communication expanded, and digital electronic computing came into use. Taken together, these advances allowed an ever-broadening set of products to be traded internationally. In the policy sphere, tariff barriers – which had been dramatically increased during the Great Depression – were lowered, with many of these reductions negotiated within the multilateral framework provided by the General Agreement on Tariffs and Trade. Globalization was, to some extent, also supported by geopolitical considerations, as economic integration among the Western market economies became viewed as part of the strategy for waging the Cold War. However, although trade expanded significantly in the early post-World War II period, many countries – recalling the exchange-rate and financial crises of the 1930s – adopted regulations aimed at limiting the mobility of financial capital across national borders.

Several conclusions emerge from this brief historical review. Perhaps the clearest conclusion is that new technologies that reduce the costs of transportation and communication have been a major factor supporting global economic integration.

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A second conclusion from history is that national policy choices may be critical determinants of the extent of international economic integration. Britain’s embrace

of free trade and free capital flows helped to catalyze international integration in the nineteenth century.

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A third observation is that social dislocation, and consequently often social resistance, may result when economies become more open. An important source of dislocation is that – as the principle of comparative advantage suggests – the expansion of trade opportunities tends to change the mix of goods that each country produces and the relative returns to capital and labor. The resulting shifts in the structure of production impose costs on workers and business owners in some industries and thus create a constituency that opposes the process of economic integration. More broadly, increased economic interdependence may also engender opposition by stimulating social or cultural change, or by being perceived as benefiting some groups much more than others.

The Current Episode of Global Economic Integration

How does the current wave of global economic integration compare with previous episodes? In a number of ways, the remarkable economic changes that we observe today are being driven by the same basic forces and are having similar effects as in the past. Perhaps most important, technological advances continue to play an important role in facilitating global integration. For example, dramatic improvements in supply-chain management, made possible by advances in communication and computer technologies, have significantly reduced the costs of coordinating production among globally distributed suppliers.

Another common feature of the contemporary economic landscape and the experience of the past is the continued broadening of the range of products that are viewed as tradable. In part, this broadening simply reflects the wider range of goods available today – high-tech consumer goods, for example – as well as ongoing declines in transportation costs. Particularly striking, however, is the extent to which information and communication technologies now facilitate active international trade in a wide range of services, from call center operations to sophisticated financial, legal, medical, and engineering services.

The critical role of government policy in supporting, or at least permitting, global economic integration, is a third similarity between the past and the present. Progress in trade liberalization has continued in recent decades – though not always at a steady pace, as the recent Doha Round negotiations demonstrate. Moreover, the institutional framework supporting global trade, most importantly the World Trade Organization, has expanded and strengthened over time. Regional frameworks and agreements, such as the North American Free Trade Agreement and the European Union’s “single market,” have also promoted trade. Government restrictions on international capital flows have generally declined, and the “soft infrastructure” supporting those flows – for example, legal frameworks and accounting rules – has improved, in part through international cooperation.

In yet another parallel with the past, however, social and political opposition to rapid economic integration has also emerged. As in the past, much of this opposition is driven by the distributional impact of changes in the pattern of production, but other concerns have been expressed as well – for example, about the effects of global economic integration on the environment or on the poorest countries.