

## Validity Of China's Overseas Employment Service Contracts: From The Perspective Of The Game Between Intermediary Evasion And Labor Rights

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### Abstract

Based on Chinese legislation and judicial judgments, this paper takes China's overseas employment service contract disputes as an example, and analyzes how overseas employment agencies evade responsibility through laws and court trials, and how workers' demands for protection and compensation of their rights and interests are hindered. The game between overseas employment agencies and labor rights is shown through case analysis, but the results seem to be unsatisfactory. Legislative bodies and judicial judges expressed helplessness when exercising their discretionary powers, because the lack of a certain legislative basis has led to the continuous erosion of labor rights and reduced labor expectations and satisfaction with this unfair treatment. In order to find some evidence and new viewpoints, we put forward targeted suggestions based on the premise of protecting the rights and interests of overseas workers, and provide reference for policy makers and researchers.

**Keywords:** overseas employment; enterprise evasion behavior; labor rights and interests; contract validity; public order and good customs

### 1.Introduction

In today's economic globalization, countries around the world attach great importance to the benefits brought by human resources and job placement, and have also set up public and private employment service projects that provide jobs for the unemployed (Sol, 2010). While private employment agencies play an important role in the project, they are more flexible (International Labor Organization, 1997).<sup>[1]</sup> In particular, it is manifested in promoting the flow of labor between countries. Overseas employment is undoubtedly a relationship between supply and demand for exporting countries and importing countries, which is in line with the needs of their respective interests. An intermediary is an intermediary that connects overseas employment and is "a person or company

committed to providing services to meet employment supply and demand".<sup>1</sup> Its importance cannot be ignored (Eichhorst et al., 2013; Wisetsri et al., 2022). Including dispatch and intermediary overseas employment agencies.<sup>2</sup> At present, the issue of dispatch-type overseas employment agencies is a global hot issue, and has received widespread attention from academia and government organizations. They have formulated many legal regulations to supervise agencies and protect the rights and interests of temporary dispatch workers. Compared with Yan, the problem of intermediary overseas employment agency, which is easily overlooked by people, is rarely concerned. This paper studies the groups that rely on intermediary overseas employment agencies to transfer labor to

foreign jobs and obtain labor remuneration from foreign employers, as well as the phenomenon and problems of contract disputes between these groups and intermediaries. In fact, the issue of the rights and interests of overseas employees is a worldwide problem, but it does not receive attention, and there is no way to prevent them from being harmed and abused. Although international treaties have provisions and obligations to protect them, there are always ways to evade legal behaviors. They are exposed to risk zones, and overseas employment agencies are no exception (Forman, 1994). As overseas employment agencies have low market access and crime costs in China, the agencies try to ignore or detract from the rights and interests of workers in their business activities, and maximize benefits. Due to the scattered, chaotic, weak stability, and hidden characteristics of such intermediaries, after infringing on the rights and interests of laborers, they can be exempted from their responsibilities. When the government punishes such intermediaries, it happens that the victims cannot be compensated due to the lack of traces. Such intermediaries operate through illegal methods such as arbitrary charges, false advertisements, and fraud, and even conduct such vile acts as human trafficking, organ trafficking, forced labor, and illegal smuggling. Although the Chinese government has issued relevant laws and policies to regulate it, due to the lag of China's economic development and laws and policies, and the lack of targeted and effective legislation, the rights and interests of such intermediaries and labor groups cannot be effectively supervised and protected.

In order to demonstrate the above point of view, this paper uses the data materials in Chinese judicial judgment documents, and takes the contract disputes between overseas employment agencies and laborers as an

example to discuss the impact of contract validity on the evasion behavior of intermediaries and labor rights and interests. Because of the triangular relationship or the multi-angle relationship, labor misunderstandings are often caused, and even after finding the party responsible for the dispute, it cannot be resolved by going to the court. Because of the lack of such legal protection, the overseas employment relationship becomes tense and fragile. Their disputes are also at the crux of what the legislature and courts are dealing with. At the contract level, the overseas employment service contracts signed by overseas employment agencies and laborers form an intermediary relationship. And fulfill the rights and obligations to be performed and undertaken by each other in accordance with the contract. But often intermediaries like to avoid liability by exploiting loopholes in the law and judicial decisions, such as the issue of contract validity. The helplessness and difficulty of the legislature and the courts in dealing with such issues of contract validity. Regarding the validity and invalidity of the contract, the respective courts have different opinions, which undoubtedly shows the discretionary power of the court, which makes its discretionary power unfair and puts labor rights protection in a helpless situation. It is precisely because of the uncertain nature of the law that it may also lead to an increase in the number of cases (Brown, 2008). We want legislatures and courts to determine the legal status of multinational workers. First, it must aim to safeguard the rights and interests of transnational workers and treat these marginalized relationships fairly, rather than relying on temporary solutions (Wynn & Leighton, 2006). Next, we will clarify and address contract validity issues of this nature, creating a new perspective for proposing countermeasures.

## 2.literature review

A contract is an obligation attached to a person by law in written form (Solan, 2007). Is "is a promise or series of promises, breach of which the law grants relief, or performance of which, to the extent that the law recognizes as an obligation"(Wynn & Leighton, 2006). Any entity relationship is accompanied by the existence of a contract, and the contract and the contractual relationship coexist. Like the logic of employment in employment and employment contracts,<sup>3</sup> It can also be considered that overseas employment agencies coexist with intermediary contracts and intermediary relationships, and they are based on rights and obligations, which is almost the commonality between contracts and contractual relationships. According to Article 961 of Chapter 26 of the Civil Code of the People's Republic of China, an "intermediary contract" is defined as "a contract in which the intermediary reports to the client the opportunity to conclude a contract or provides intermediary services for the conclusion of the contract, and the client pays remuneration"(Solan, 2007). Signing an overseas employment service intermediary contract establishes an intermediary relationship and specifies the rights and obligations that both parties enjoy and undertake. Because the attributes of overseas employment involve many spaces and dimensions. For example, before going abroad, during going abroad, and after going abroad. In these processes, we have experienced a series of policies, laws, culture, ethics, and public interest relations between the exporting country and the importing country. The rights and obligations signed by the intermediary and the laborer always revolve around the above three stages, and one of the stages cannot be unilaterally separated, which is regarded as a

failure to fulfill commitments or obligations. That is to say, even if their intermediary relationship does not exist, the intermediary contract may exist for a long period of time and is affected by the content stipulated in the contract, so that the intermediary and the laborer reach an agreement and end the intermediary relationship. For a period of time thereafter, their rights and obligations continued to be affected by the intermediary contract. So whether the overseas employment service agency contract can continue to be complied with, we believe that the result is obviously affected by the validity of the contract. Whether the contract is valid or invalid, the consequences of the contract determine the outcome of the court's decision. Although there are detailed provisions in the Contract Law, there are still many spaces and opportunities for the study of contract validity (Pollock, 1881). For example, the surrogate mother hopes to obtain certain benefits through the agreement, but the law holds an ambiguous attitude towards the moral issues caused by the validity of the agreement, and will involve public policies and uncertain disputes that will harm the interests of society and family members. conflicting controversy(Carbone, 1988). For the non-assignment clause in the land contract, for the seller, the land contract cannot be transferred without consent, otherwise, it should be understood that the act is invalid. For the court, however, there are disputes over whether the provision is valid (Goddard, 1932). Next, there are prostitution agreements (Mastrodi & Precoma, 2020), contract for intermittent employment (Davies, 2007), suicide (McMyler & Pryjmachuk, 2008), Disputes about the validity of contracts that affect the principle of fairness(Pollock, 1881); Or it is possible to affect the whole or individual clauses of the contract in the form of restricted mandatory rules ranging from personal ultra vires, flawed agreements,

violations of law or morals, to exports of public law (Drobnig, 1992). The issue of contract validity is widespread in every corner of social and economic development and change. In China, scholars are also studying intractable disputes over the validity of contracts, such as labor contracts (Gan et al., 2016), Equity transfer contract (Hu et al., 2018), company guarantee (Shi et al., 2013), private lending (Minzner, 2013), house sale contract (Kyriakopoulos, 2021). And other issues. The validity of overseas employment service contracts is also a controversial issue that China's legislature and courts need to face. Next, we use a clear case to analyze the problems existing in the validity of overseas employment service contracts, so as to put forward the views of this paper.

### **3. Overseas employment service contract case**

We searched for "overseas employment agencies" from 2007 to 2022 in Chinese judicial judgment documents 294 In the civil case, the court level involved includes the basic people's court, the intermediate people's court and the high people's court, and the trial includes 18 regions including Hebei Province, Jilin Province, Henan Province, Shandong Province, etc. The types of cases involved involve contract validity, liability compensation, business scope, commitment, duty of reasonable care, etc. According to statistics, the issue of contract validity accounts for 95% of all civil cases, of which invalid contracts account for more than 70% of contract validity cases, and most of the invalid contracts involve the unlicensed operation of overseas employment agencies. Therefore, combined with the focus of this article, we selected the following two representative cases for discussion and analysis.

#### **Xu Wei case**

In January 2019, the overseas employment agency and company (defendant) signed an agreement with Xu Wei (plaintiff). He handled employment in Germany for the plaintiff, promising that the plaintiff would receive high wages from the employer, and signed a labor contract with the plaintiff on behalf of the employer. The plaintiff paid the defendant RMB 100,000 for intermediary service fees. After going abroad, the plaintiff found that the defendant's promise did not match the actual salary and treatment, and the gap was very large. After negotiating with the defendant to no avail, the plaintiff found that the defendant did not have the qualification for overseas employment and operation approved by the Chinese government. In order to protect its own legitimate rights and interests, the plaintiff sued the defendant and asked the defendant to return RMB 10 and compensate for the loss of transportation and lost work expenses. In the end, the court ruled that China implements an administrative licensing system, and no unit or individual may engage in overseas employment agency activities without approval and registration. Since the defendant operated without a license, it seriously violated the relevant mandatory provisions of the Employment Promotion Law of the People's Republic of China and the Regulations on the Administration of Overseas Employment Intermediaries. According to the Contract Law, the overseas employment service contract between the plaintiff and the defendant is invalid. The invalid contract is not legally binding from the beginning, so the intermediary fee charged by the defendant should be refunded to the plaintiff. However, considering that the plaintiff did not carefully examine whether the defendant has the qualifications of an overseas employment agency before forming the legal relationship of

the intermediary service contract with the defendant, and blindly obeyed the defendant's arrangement to work abroad, the plaintiff also had certain faults, and the plaintiff's own transportation costs and lost work costs Losses should be borne by yourself.

### **Lu Shaolin case**

In September 2017, the overseas employment agency (defendant) charged the plaintiff 70,000 yuan for intermediary services in the name of introducing Lu Shaolin (plaintiff) to work in Germany. Defendant issued a receipt. However, because the defendant did not handle employment matters for the plaintiff in Germany as promised, the plaintiff filed a lawsuit, requiring the defendant to return RMB 70,000 to the plaintiff plus interest and litigation costs during the occupation period. In the end, the court ruled that although the plaintiff and the defendant did not sign a written contract, they had formed a service contract intermediary relationship, and according to relevant state regulations, the defendant needed to hold an administrative license for overseas employment intermediaries to engage in business activities. However, taking into account the mandatory provisions of the administrative nature such as the business scope, they should generally be regarded as administrative mandatory provisions rather than effective mandatory provisions, so the employment service contract between the plaintiff and the defendant is valid. Although the defendant has stricter contractual prudence obligations and protection of the legitimate rights and interests of laborers, the plaintiff should also fulfill the obligation to prudently review the qualifications. According to China's "Contract Law", according to the facts of the case, the performance of the contract and the size of the responsibility, the defendant is judged to only return The plaintiff is RMB 35,000.00, and the defendant and the

plaintiff shall bear the case acceptance fee in proportion.

### **Controversial focus**

Summarizing the focus of the disputes in the above two cases, it mainly focuses on three aspects: legal relationship, contract validity and compensation scope. However, in the case, it is shown that different courts have different judgments on the nature of the same case.

From the perspective of legal relationship disputes, in the Xu Wei case and the Lv Shaolin case, the triangular relationship formed by overseas employment is the relationship between overseas employment agencies, laborers, and foreign employers. Judging from China's definition and nature of overseas employment, overseas employment Different legal relationships arise between the triangular relationships in employment. The overseas employment agency signs an overseas employment service contract with a foreign employer and laborer, which is an intermediary relationship, while the foreign employer and a laborer sign a labor contract, which is a labor relationship. In determining these complex relationships, courts need to consider elements such as legal norms and legal facts. Chinese courts hold that regardless of whether overseas employment agencies and laborers sign a contract, as long as legal facts are formed, their relationship can be determined to be an intermediary relationship. But in practice, it is easy to confuse the legal relationship in the triangular relationship, which is the basic factor for judging the case.

From the point of view of contract validity disputes, in the whole civil case, it is the most controversial, the most core, and the most critical, and it is also the most difficult content for the court to adjudicate. Similar to the contract validity disputes in the above two cases, it is emphasized that two The obvious features are, first, what affects the issue of

contract validity; second, what is the decisive basis for affecting the issue of contract validity. No matter how the court decides whether the validity of the contract is valid or invalid in such cases, it reflects the court's discretion in deciding such cases, but from the actual understanding of legal norms and the understanding of the legislative spirit, the court arbitrarily expanded its Discretionary function.

From the point of view of the dispute over the scope of compensation, it is difficult for the parties of the case to request the intermediary to return all the intermediary fees and compensation for related losses. According to statistics, in such civil cases, more than 80% of the intermediaries' demands to return all the intermediary fees and compensate for their losses cannot be realized. According to the provisions of China's "Contract Law", if a contract is found to be invalid, it is shared according to the proportion of responsibilities between the two parties. Some courts will let the laborer bear the proportion of the returned brokerage fee 10%<sup>4</sup>、20%<sup>5</sup>或 50%<sup>6</sup>; Since both parties are at fault in the court's ruling, the workers' claim for compensation for the loss of transportation expenses, lost work costs, etc. that they are forced to incur cannot be supported by the court. Generally speaking, the rights of overseas employment agencies and laborers have been at odds all the time. Although the court ruling will favor the laborers with a reasonable side and agree to the agency's return of the agency fees, the compensation for labor losses has never been won, only lost.

### Case Analysis

In such civil cases, we pay attention to the issue of contract validity as the most critical

part. Through the discussion and analysis of the case contract validity, we can provide new viewpoints and discover new problems. China's legislature's determination of contract validity shows the value of China's participation in public law's intervention in private law. The legislature and academia have different views on the determination of the validity of the contract. Among them, there are dichotomous violations of laws, administrative regulations and mandatory provisions, and the contract is invalid. Or adopt mandatory provisions including "effective mandatory provisions and administrative mandatory provisions",<sup>7</sup> If the mandatory provisions of validity are violated, the contract is invalid; some scholars believe that a civil legal act shall be adopted (Liu, 2022), fundamental rights (Brizioli, 2021)、public order and good customs (Lin, 2022)、public policy (Eisenberg-Guyot et al., 2022)、The principle of measuring interests (Huang, 2022) Such as the judgment criteria, such as violation of the above judgment criteria, the contract is invalid. Throughout the countries, there are similarities and differences in the judging standards for the determination of contract validity, but the world contract validity system is generally divided into the common law system and the civil law system. In the Anglo-American legal system, they all point to illegal agreements, including both the illegality of common law and the illegality of statutory law. British law regards illegal agreements and violations of public order and good customs as invalid contracts (Florio de León, 2021). U.S. law adopts a contract that violates public policy as void, that is, a contract that violates public policy is void. In fact, the validity of contracts in the United States has experienced the first "Restatement of Contract Law" in 1933 (Patterson, 1933). With the Second Restatement of Contract Law in

1981(Farnsworth, 1981), Marks an expansion from illegal transactions to violations of public policy. In the civil law system, represented by France, Germany, and Japan, the French Civil Code, which came into effect in 1804, was formulated earlier than other countries. Section 6 stipulates: "A person may not violate relevant public order and The Law of Good Customs", <sup>8</sup> That is, laws that violate public order and good customs are invalid. Article 134 of the German Civil Code, which came into effect in 1900 and was subsequently amended, stipulates: "A legal act that violates the prohibition of the law shall be invalid unless otherwise provided by the law". <sup>9</sup> Violation of the prohibitive provisions of the law leads to the invalidity of the behavior. This provision in Germany has a certain impact on the legislation of various countries. Japan inherited and learned from the French and German civil codes, which came into effect in 1898. After revisions and deliberation, Article 90 of the new Japanese Civil Code, which was finally implemented in 2020, stipulates: Legal action, void."<sup>10</sup> It can be seen that the civil law system 1 regards acts that violate public order and good customs as invalid.

Generally speaking, regardless of the civil law system or the common law system, there are standards established by the law to judge the invalidity of a contract based on illegality, violation of public policy or public order and good customs. Such standards are pre-set by the state, leaving room for flexibility. Combined with the theme of this study, we strongly agree that the determination of contract validity in the "Chinese Civil Code" violates public order and good customs and is invalid. Since the intermediary has not obtained the approval of China's administrative license, it cannot engage in overseas

employment and business activities, and violates departmental regulations. According to China's invalid contract, it is determined that "a contract that violates the mandatory provisions of laws and administrative regulations is invalid". Mandatory provisions are divided into effective mandatory provisions and Administrative mandatory provisions are valid in violation of administrative mandatory provisions, but contracts that violate public order and good customs shall be deemed invalid. We believe that disputes over the validity of contracts arising from the qualifications of overseas employment agencies, whether they are invalidated by the courts in accordance with administrative regulations, or due to their particularity and complexity, involving personal rights, social order and national interests, should be included in violation of public order and good customs. category, the contract deemed to violate public order and good morals is invalid. On the issue of contract validity of judgments in such cases, court judgments should be inclined to contract invalidity, and will be summarized into individual guiding cases for reference, establish a case law field, accumulate and summarize specific trade-off rules through cases, and then run through them. system.<sup>11</sup>

However, no matter whether the validity of the contract is judged to be valid or invalid, it cannot change the continuous game between overseas employment agencies and laborers over disputes over contract validity in the future. Similar judgments by the legislature and the court will also allow overseas employment agencies to infringe and evade behavior after infringement, and continue to expand the pain and difficulty of overseas labor rights protection. International trade unions say 'labor is not a commodity'.<sup>12</sup> Countries and international trade union

organizations have regulations to protect the rights and interests of workers, and the state has formulated labor laws to protect labor rights and interests. There is a compensation system for violations of labor rights and interests, also belong to laborers, but because of the changes in transnational space and dimensions, the state distinguishes the protection of domestic laborers, and ignores or shies away from the protection of state-exported laborers under the pretext of not being able to manage transnational affairs. It is necessary to protect overseas employment workers of the same nature, formulate legal regulations on overseas employment agencies, and at the same time supervise overseas employment agencies, set up special provisions to protect workers and clarify legal responsibilities. In this way, it can not only prevent intermediaries from evading legal responsibilities, but also allow intermediaries to be severely punished for their illegal business operations, so that labor rights and interests can be protected, and their losses can be compensated, so that court judgments tend to be fair.

#### **4. Government Intervention**

With the internationalization of labor force today, China realizes that the welfare and problems encountered by overseas labor service export cannot be ignored. Administrative regulations, rules and policies such as the "Employment Promotion Law of the People's Republic of China", "Regulations on the Administration of Overseas Employment Intermediaries", and "Regulations on the Administration of Foreign Labor Service Cooperation" have been formulated to supervise and regulate the behavior of overseas employment agencies. However, due to the development of China's economy, the previous administrative regulations, rules and regulations have been

quite lagging behind, and cannot meet the current stage, especially under the dividends of the "Belt and Road" policy, the continuous development of overseas employment business, the modern Internet and Conflict brought about by the old economic system. It can also be seen from the judicial judgment cases that the legislation, labor relief, and enterprise support for the supervision of overseas employment agencies are blank and imperfect.

#### **5. Conclusion**

This paper, through the research on the validity of the intermediary service contract between overseas employment agencies and laborers, introduces the court's customary methods in judging such cases, and analyzes the basis and focus of the judgment on valid contracts and invalid contracts, static and dynamic introduction and discussion The interests of intermediaries and laborers, and how the intermediaries use the law to evade behavior without punishment, make it difficult for overseas laborers to defend their rights. However, a large number of facts have proved that most of the foreign laborers have failed miserably. Finally, they will criticize the government for not paying enough attention and taking effective action on their protection. It is also due to the lack of attention from the state and the government that the government has failed to legislate in the supervision of such overseas employment agencies and the management of foreign employers, so as to grant such rights to overseas workers. At present, there are no clear regulations on the protection of disputes over the validity of service contracts for overseas workers. Courts also understand the significance of such intermediary legislation, but they have no basis to prove that it is not something that can be decided by court decisions. Because, they know they have no authority. Such an outcome allows such intermediaries to have the ability



to evade legal responsibility - they are showing off, which is why the infringement cases of such intermediaries are repeatedly banned, growing like weeds, common and messy. These involve the social and economic policy interest orientation of the country and the government. In order to develop economic and social stability and support overseas employment, the state and the government have made every effort to promote a flexible overseas labor market and reduce the control of intermediaries. It is precisely because of their utilitarian policy concepts that the social and economic rights of workers are damaged (Chavez & Piper, 2015). This makes the laborers without legal protection in the transnational marginal areas, showing their vulnerability, exploitativeness in the tripartite relationship, and unfair social treatment, which breeds the collective dissatisfaction of overseas laborers, and they have a psychological contract violation. Afterwards, it will have adverse effects on personal development, economic development and social problems. This involves not only the personal rights and interests of overseas workers, but also the level of national interests and conflicts of interest between countries. In any case, the state and the government should come forward with legislation to solve and alleviate such conflicts, improve the efficiency and fairness of judicial adjudication, and reduce the cost of judicial adjudication. Especially in the supervision of overseas labor, legislation will be made in a timely manner, so that court judgments can be based on, and the structure of administrative supervision bodies will be reformed. The agency conducts overall management and calls on other business departments to implement changes in regulatory action. Improve the administrative licensing system, reserve fund system, contract filing and review system, intermediary and labor training system, charging standards and

labor compensation mechanism. In terms of assistance and relief, it is necessary to strengthen the protection and relief of consulates for overseas workers, establish legal aid departments and arbitration institutions, effectively handle and protect disputes over overseas workers, and reduce the cost of individual rights protection. Finally, behind the illegal operation of enterprises and legal evasion of responsibility are related to the immature enterprise management system and the external legal environment and policy support environment for managing enterprises. It is necessary for the state to consider the importance of enterprise growth to the protection of the rights and interests of overseas workers, formulate relevant laws and policies, and give attention and support to enterprises at various stages of growth.

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