The Regulatory Challenges of 'Uberization' in China: Classifying Ride-Hailing Drivers

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There has been nascent litigation around the world on the employment classification of workers in the 'sharing economy', 'gig economy' or 'on demand economy'. New business models and forms of work organization arising from rapid advancements in digital technologies (or 'disruptive innovation' as some have described the phenomenon) have sparked considerable debate on a wide array of regulatory issues, including the role of labour law protections for the emergent 'digital workforce'. This debate is currently taking place in the People's Republic of China. This article analyses how Chinese courts and lawmakers have addressed issues that are directly or indirectly relevant to determining the status of drivers in the ride-hailing sector. Despite the presence of criteria for identifying a 'labour relationship' under Chinese labour law, the courts have not adopted a uniform approach across different types of claims involving these drivers. A new government regulation on the ride-hailing sector, which took effect in November 2016, has not resolved this issue as it permits ride-hailing platform companies to enter into labour contracts and other forms of agreements with drivers based on the particularities of their work arrangements. In considering these recent cases and regulatory developments, the article concludes that a purposive approach to the existing criteria in Chinese labour law for ascertaining the status of workers in the sharing economy is useful for addressing the basic question of whether they should be protected, rather than creating 'new' categories of employment classification.

1 INTRODUCTION

The digitalization of the Chinese economy resulting from swift advances in information and communication technology (ICT) has commanded substantial policy attention of late. The phenomenon is taking place as the country shifts from an export-reliant, manufacturing-based economy to a service-led economy driven by domestic consumption. On the back of an ever-expanding pool of over 670 million Internet users in China,[1] the government recently launched an 'Internet Plus' strategy to encourage 'hundreds of thousands of people's passion for innovation to build the new engine for economic development'.[2] This push for the public 'to start their own

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1 McKinsey Global Institute, *China's Digital Transformation: The Internet's Impact on Productivity and Growth* (July 2014), http://www.mckinsey.com/industries/high-tech/our-insights/chinas-digital-transformation (accessed 27 Apr. 2017).

2 State Council, *China Unveils Internet Plus Action Plan to Fuel Growth* (4 July 2015) http://english.gov.cn/policies/latest_releases/2015/07/04/content_281475140165588.htm (accessed 27 Apr. 2017).

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business'[3] can be further understood in light of the broader macro-economic goal of creating millions of new jobs.[4] The Chinese Premier has stated that 'mass entrepreneurship and innovation means more employment. Though growth is moderating, more jobs are being created because new market entities keep emerging'.[5]

In this context, the so-called 'sharing economy' in China has quickly expanded in recent years. According to a report issued by the State Information Centre in 2016, the 'sharing economy'[6] encompasses the 'use of the Internet and other ICT tools to share decentralized and under-utilized resources on a mass scale for meeting the needs of diverse economic activities'.[7] The report estimated the value of China's sharing economy in 2015 at around RMB 1.956 trillion (around USD 300 billion), with 500 million users. The number of 'providers' was around 50 million or 5.5% of the total workforce. The sharing economy is expected to grow at an average rate of 40% every year between 2015 and 2020 and to exceed 10% of total GDP by 2020.[8] One of the largest sharing economy companies in China (and globally) is the ride-hailing and ride-sharing platform operator Didi Chuxing, which acquired Uber's Chinese operations in August 2016.[9]

The organization of work in the sharing economy has some 'novel' aspects, such as the ways in which digital technologies are being used to near-instantaneously connect an indefinite number of workers/service providers and customers and allow for a wide array of economic activities to be parcelled out as discrete tasks and performed by 'crowdworkers'.[10] Competition among these workers can be intense, especially for 'virtual work' undertaken by a global pool of workers in developing and developed countries.[11]

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3 State Council (People's Republic of China), *Guiding Opinion on the Development of Innovation and Promotion of Mass Entrepreneurship* [2015] No.9, issued on 11 Mar. 2015.

4 G. Chen, *State Council Calls for Angel Investors to Help Grow Start-Ups and Jobs in China*, S. China Morn. Post (12 May 2015), http://www.scmp.com/news/china/article/1735905/state-council-calls-angel-investors-help-grow-start-ups-and-jobs-china?comment-sort=all (accessed 27 Apr. 2017).

5 Chinese Premier Li Keqiang's Speech, *World Economic Forum's Annual Meeting of the New Champions 2015 in Dalian* (11 Sept. 2015), https://www.weforum.org/agenda/2015/09/chinese-premier-li-keqiangs-speech-at-amnc15/ (accessed 27 Apr. 2017).

6 Other names such as 'gig economy', 'on-demand economy', and 'crowdwork' have been used to describe this phenomenon. This article will refer to the 'sharing economy' (*xinshang jingji*), which appears to be the most prevalent term in China.

7 State Information Centre, *Report on the Development of the Chinese Sharing Economy* 1 (Feb. 2016) http://www.sic.gov.cn/archiver/SIC/UpFile/Files/Htmleditor/201602/20160229121154612.pdf (accessed 27 Apr. 2017).

8 *Ibid*.

9 P. Mozur & M. Isaac, *Uber to Sell to Rival Didi Chuxing and Create New Business in China*, N.Y. Times (1 Aug. 2016), http://www.nytimes.com/2016/08/02/business/dealbook/china-uber-didi-chuxing.html?_r=0 (accessed 27 Apr. 2017).

10 M. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 Comp. Lab. L. & Pol'y J. 577 (2016); A. Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 Berkeley J. Emp. & Lab. L. 143 (2011).

11 V. De Stefano, *Introduction: Crowdsourcing, the Gig-Economy, and the Law*, 37 Comp. Lab. L. & Pol'y J. 461, 463 (2016).

Some commentators have described this phenomenon as the 'Uberization' of work.[12] Others have argued that these non-standard or alternative work arrangements, such as 'gig work', 'crowdwork', and 'work-on-demand via app', should be examined in conjunction with wider labour market trends towards casualization, 'demutualization of risk', and precaritarization.[13]

Perhaps the most contentious debate so far over the labour practices in the sharing economy has been the employment (mis)classification of Uber drivers (or 'partners', as they are referred to by the company). Uber and similar companies such as Lyft and Didi Chuxing own a mobile platform application ('app') that matches registered drivers (and most commonly, these drivers' privately owned vehicles) with customers in the provision of near real-time, location-based rides. Uber sets the fare and takes a percentage of the cashless transaction via the mobile app. Drivers receive performance ratings from customers after each ride. Uber monitors the customer ratings and can 'deactivate' the accounts of drivers whose average ratings fall below a certain level. The classification of these drivers (by Uber) as contractors rather than employees has meant that the drivers are excluded from labour and social security protections, including minimum wage, health and safety, unemployment benefits, and the right to organize among other labour rights. This has provoked criticisms on how platform-based business models such as Uber's can extract profits in a certain sector by circumventing the usual regulatory costs of doing business.[14]

Various lawsuits over the classification of Uber drivers and other workers in the sharing economy have been filed in numerous jurisdictions, including China. Although it has the largest ride-hailing market in the world (with over 10 million private drivers and 400 million registered app users to date),[15] not much is known outside of China about the emerging regulatory landscape pertaining to this sector and the sharing economy in general. In this connection, this article aims to fill in an important knowledge gap in the current comparative labour law inquiry into 'digital work'. It is hoped that the insights from this article will contribute to

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[12] A. Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from A Set of 'On-Demand/Gig Economy' Platforms,* 37 Comp. Lab. L. & Pol'y J. 653, 670 (2016).

[13] G. Davidov, *The Status of Uber Drivers: A Purposive Approach*, Spanish Lab. L. & Emp. Rel. J. (2017 forthcoming); V. De Stefano, *The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowdwork, and Labor Protection in the 'Gig Economy',* 37 Comp. Lab. L. & Pol'y J. 471; Cherry, *supra* n. 10.

[14] E. Morozov, *Cheap Cab Ride? You Must Have Missed Uber's True Cost*, Opinion, Guardian (31 Jan. 2016), https://www.theguardian.com/commentisfree/2016/jan/31/cheap-cab-ride-uber-true-cost-google-wealth-taxation; Jack Newsham, *Uber, Lyft Save Big by Avoiding Regulations*, Bos. Globe (25 Dec. 2014), https://www.bostonglobe.com/business/2014/12/25/uber-lyft-save-big-avoiding-regulations/pQAMk1KMOavlyZhWi4XIaJ/story.html (accessed 27 Apr. 2017).

[15] H. Huifeng, *China's Ride-Hailing Market Hits a Speed Bump After Subsidies Cut, Regulations Imposed*, S. China Morn. Post (28 Dec. 2016), http://www.scmp.com/business/companies/article/2057602/chinas-ride-hailing-market-hits-speed-bump-after-subsidies-cut (accessed 27 Apr. 2017).

further analyses of how diverse legal regimes are addressing labour regulatory challenges arising from 'Uberization'.

The article proceeds as follows. Part 2 briefly contextualizes the concept of a 'labour relationship' under Chinese labour law and the development of criteria for determining such a relationship. Part 3 reviews the various approaches taken by Chinese local courts in different types of cases that either directly or indirectly examine the relationship between ride-hailing companies and drivers. These cases were decided in the absence of specific laws and regulations with respect to the ride-hailing sector, which has been operating in a legal 'grey area' in China until recently. Part 4 looks at the new *Interim Measures for the Administration of Online Taxi Booking Business Operations and Services* ('*Interim Measures*'), which came into effect in November 2016. This regulation officially permits ride-hailing companies like Uber to operate with a license provided that they meet certain requirements. Although the Interim Measures clarify numerous obligations of ride-hailing companies, the provisions nevertheless leave room for these companies to sign 'various labour contracts *or* other agreements' with the drivers.[16] Part 5 concludes with a proposal on how Chinese courts could adopt a purposive approach to ascertaining the employment status of ride-hailing drivers based on existing criteria in Chinese labour law and the new Interim Measures.

2 THE 'LABOUR RELATIONSHIP' IN THE CHINESE CONTEXT

Since the 1980s, China's dramatic economic and social reforms fundamentally transformed the relationship between the state, labour, and capital.[17] This transformation saw the dismantling of the former state-organized labour administration system based on the so-called 'three old irons' of lifetime employment and 'cradle-to-grave' welfare, fixed wages, and controlled appointments. A key feature of labour market reforms in the 1990s was the creation of a labour contract system. In January 1995, the Labour Law entered into force and formally established labour contracts as the primary institution for governing labour relationships in China. It required all 'employing units' ('*danwei*') to sign employment contracts with full-time employees.[18]

In its rapid industrialization, China became the 'factory of the world' at an unprecedented pace and scale, on the back of a seemingly abundant labour pool of rural migrant workers who moved to the cities for work. A salient feature of this

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[16] No. 60 [2016] of the Ministry of Transport, the Ministry of Industry and Information Technology, the Ministry of Public Security, the Ministry of Commerce, the State Administration for Industry and Commerce, the General Administration of Quality Supervision, Inspection & Quarantine, and the Cyberspace Administration of China, Art. 8.

[17] S. Kuruvilla, M. Gallagher & C. Kwan Lee, *From Iron Rice-Bowl to Informalization: Markets, State and Workers in a Changing China* (Cornell University Press 2010); E. Friedman & C. Kwan Lee, *Remaking the World of Chinese Labour: A 30-Year Retrospective,* 48 Brit. J. Indus. Rel. 507 (2010).

[18] Labor Law of the People's Republic of China (effective 1 Jan. 1995, amended 27 Aug. 2009), Arts 16 and 19.

rural-to-urban migration has been the *hukou* system of household registration. Without a local urban *hukou*, rural migrant workers and their accompany family members could not reside permanently in the receiving cities, nor access various social welfare benefits that their urban counterparts enjoyed.[19] As discussed later, this structural disadvantage is reflected in the labour regulatory challenges emerging from China's ride-hailing sector, in which many drivers do not have a local *hukou* in the cities where they work and live.

Rural migrant workers were commonly engaged without written labour contracts, which made it difficult to prove the existence of a labour relationship for claiming substantive rights under labour and social security laws. A government survey of rural migrant workers in forty cities in 2006 showed that over half of the workers surveyed had signed an employment contract with their employer. Around half of the survey respondents indicated that they did not receive overtime payments; 57% could not obtain workplace injury compensation; 80% were not entitled to paid leave; over 90% did not have access to housing allowances; and 80% of female migrant workers were not entitled to maternity leave.[20]

Major deficiencies in the legal and institutional framework for regulating market-based labour relations became increasingly apparent in the 2000s. The escalation of labour disputes revealed significant discontent and frustration among workers over widespread violation of legal rights as well as the ineffectiveness of formal institutions such as trade unions to resolve worker grievances. In response to the potential socially destabilizing effects of mass labour unrest, a wave of labour law reforms in 2007 represented an endeavour by policymakers to 'reverse the deregulation agenda' in the 1990s and to 're-regulate' the labour market with the overarching goal of 'building harmonious labour relations'.[21] These reforms included the introduction of the Labour Contract Law (LCL),[22] along with the Labour Dispute Mediation and Arbitration Law[23] and the Employment Promotion Law.[24]

A key objective of the LCL was to improve compliance with labour laws through mandating the use of written labour contracts. For example, if the employer fails to sign an employment contract within one month of the commencement of

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[19] M. Zou, *The Evolution of Collective Labour Law with 'Chinese Characteristics': Crossing the River by Feeling the Stones?,* BCLR 55 (2013).

[20] National Bureau of Statistics of China (NBS) *Cheng shi nong min gong sheng huo zhi liang diao cha bao gao* [*Life Quality Survey of Rural Migrant Workers in Cities*] 19 Oct. 2006.

[21] C.-H. Lee, W. Brown & X. Wen, *What Sort of Collective Bargaining is Emerging in China?*, 54 Brit. J. Indus. Rel. 214 (2014).

[22] *Labour Contract Law of the People's Republic of China* (issued 29 June 2007, effective 1 Jan. 2008; amended 28 Dec. 2012).

[23] *Labour Dispute Mediation and Arbitration Law of the People's Republic of China* (issued 29 Dec. 2007, effective 1 May 2008).

[24] *Employment Promotion Law of the People's Republic of China* (issued 30 Aug. 2007, effective 1 Aug. 2008; amended 24 Apr. 2015).

work, the employer must pay double the wages for each month the contract remains unsigned, up to a year.[25] If the employer fails to sign an employment contract within a year, the employer and employee shall be deemed to have entered into an open-ended employment contract.[26] Targeted enforcement efforts by the state and trade unions resulted in an increase of signed employment contracts after the enactment of the LCL, especially among rural migrant workers.[27] The LCL also sought to curb the use of fixed-term contracts by considering the worker to be on an open-ended employment contract after two contract renewals or after ten years of service with the same employer.[28] For the first time in national labour legislation, the LCL sought to regulate the increasing proliferation of labour dispatch arrangements.[29]

The LCL and Labour Law apply to 'labour relationships' formed between workers and an 'employing unit'.[30] An important requirement is that the 'employing unit' must be an enterprise, an individually owned economic organization, or a private non-enterprise association. The two laws also cover state organs, public institutions, or social groups that enter into a labour relationship with a worker.[31] However, natural persons and households do not fall within the definition of an 'employing unit'.[32] Such relationships (between individual/household 'hirer' of labour and the worker) are deemed to be contracts for labour services and regulated by the General Principles of Civil Law and Contract Law.[33] As such, the scope of Chinese labour laws excludes certain groups of workers, such as domestic workers who are directly engaged by individuals and households.[34]

Other categories of workers who fall outside the scope of a 'labour relationship' include peasants and farmers engaged in agricultural work on their contracted land,[35]

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25 LCL, Art. 82.

26 LCL, Art. 14.

27 M. E Gallagher, J. Giles, A. Park & M. Wang, *China's 2008 Labor Contract Law: Implementation and Implications for China's Workers*, World Bank Policy Research Working Paper 6542 (2013).

28 LCL, Art. 14.

29 M. Zou, *Regulating the Fissured Workplace: the Notion of the Employer in Chinese Employment Law,* 95 BCLR 183 (2017).

30 LL, Art. 2; LCL Art. 2; State Council Regulations on the Implementation of the LCL 2008, Art. 3.

31 LCL, Art. 2.

32 Ministry of Labour and Social Security (PRC), Opinion on Several Issues Concerning the Implementation of the PRC Labour Law (1995) No. 309, issued on 4 Aug. 1995, Art. 4.

33 According to the Supreme Peoples' Court Notice on Issuing the Revised Provisions on Causes of Action in Civil Cases (2011) No. 42, 'Labour Contract Disputes' (Part 4, Ch. 10, cl 122) is a distinct category from 'Contract for Labour Services Disputes' (Part 6, Ch. 17, cl 169).

34 ILO, *Situational Analysis of Domestic Work in China* (1 Sept. 2009) http://apmigration.ilo.org/resources/resource-content/situational-analysis-of-domestic-work-in-china/at_download/file1 (accessed 27 Apr. 2017). Some domestic workers are engaged by enterprises (such as labour dispatch agencies), in which case, the LCL and Labour Law would apply to these labour relationships. (accessed 27 Apr. 2017).

35 Ministry of Human Resource and Social Security (PRC), Opinion on Several Issues Concerning the Implementation of the PRC Labour Law (1995) No. 309, issued on 4 Aug. 1995, Art. 4.

student 'interns' undertaking vocational training and apprenticeships,[36] and state civil servants and military personnel.[37] Those who engage in work after they have reached the statutory retirement age and receive basic pension benefits as prescribed by law are also not deemed to be in a 'labour relationship'.[38]

Given the prevalent problem of employers failing to sign employment contracts with their workers, the Ministry of Human Resource and Social Security, in 2005, set out some basic criteria for determining whether or not a de facto labour relationship has been formed.[39] According to the Ministry's multi-factor criteria, a labour relationship is deemed established where there is no written employment contract if the following conditions exist: (1) the employing unit and employee meet the legal qualification prescribed by laws and regulations (for example, the employing unit is an enterprise instead of an individual and the employee must be at least eighteen years old); (2) various workplace rules made by the employer in accordance with the law are being applied to the employee, and the employee is under the control of the employer and performs paid labour assigned by the employer; and (3) the labour provided by the employee is part of the employer's business.[40]

The courts have applied the Ministry's criteria to labour disputes that require proof of an existing labour relationship. Such disputes could entail situations where there is no written contract of any kind or where a commercial contract may have disguised an actual labour relationship. In all such cases, the burden of proof is on the claimant. The Ministry's criteria set out a list of the types of evidence to prove a de facto labour relationship, which include: written evidence and records of wage payments, records of social insurance payments, employee ID certificates, recruitment records and registration/application forms, working time or attendance records, and witness testimony of other employees.[41] It has been observed that the courts in practice have adopted a 'flexible' approach to the Ministry's criteria and place significant weight on the kinds of evidence required for proving such a

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[36] Interpretation of the Supreme People's Court on Several Issues Concerning Application of Laws in the Trial of Labour Disputes (II) (2006) Art. 7.

[37] Civil servants are governed by a separate regime: Civil Servant Law of the People's Republic of China (adopted by the Standing Committee of the National People's Congress on 27 Apr. 2005, came into force 1 Jan. 2006). The Chinese military (People's Liberation Army) has its own system of personnel rules and regulations. Social insurance rights of military personnel are covered by the Military Personnel Insurance Law of the PRC (issued by the Standing Committee of the National People's Congress on 27 Apr. 2012, entered into force on 1 July 2012).

[38] LCL, Art. 44; Regulations for the Implementation of Labor Contract Law, Art. 21; Interpretation of the Supreme People's Court on the Application of Laws for Adjudicating Labour Disputes (III) (2010) Art. 7.

[39] Matters Relevant to the Establishment of an Employment Relationship Circular (2400/05.05.25) (issued by the Ministry of Labour and Social Security on 25 May 2005).

[40] *Ibid.*, Art. 1.

[41] *Ibid.*, Art. 2.

relationship.[42] The article now examines whether and how local courts have applied such criteria in cases involving the classification of ride-hailing drivers.

3 CASES BEFORE CHINESE COURTS

The judicial structure in China consists of the Supreme People's Court (SPC), local courts at various levels (Higher People's Courts, Intermediate People's Courts, and Basic People's Courts), military courts, and specialized courts such as railway and maritime courts. The SPC issues judicial interpretations on specific issues arising from the application of law in the adjudicative work of the courts.[43] These judicial interpretations have full legal force and should be cited in court judgments where relevant.[44] On the other hand, 'case law' from court decisions is not a direct source of law making within the Chinese legal system. Specific judgments do not have the same binding or authoritative effect, as would be the case in common law systems. The SPC has developed a limited system of 'guiding cases' since 2010 that is aimed at provide more authoritative guidance for local people's courts. At the time of writing, none of the SPC's guiding cases issued so far have addressed employment classification issues.[45] However, as a prominent Chinese law scholar has observed, a study of individual cases and judicial opinions can be useful for understanding how Chinese courts apply the 'published norms' of the law found in the statutes and regulations promulgated by legislative and administrative institutions.[46]

The cases analysed in this article provide a 'snapshot' of the rising number of claims brought before local courts in China that directly or indirectly address the nature of the relationship between ride-hailing companies and drivers. I have selected twelve published cases that are fairly typical of the relevant claims involving these companies and drivers. The cases were decided between 2013–2016 by local people's courts in Beijing (7), Shanghai (3), Guangzhou (1), and Hangzhou (1). These localities are among China's most populous cities where consumers of ride-hailing services tend to be concentrated. The selected cases include: labour law claims (4), claims relating to liability for third party injuries in traffic accidents (5), insurance and repairs claims (2), and a claim involving compensation for

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42 C. Ding, *Development of Employer's Vicarious Liability: A Chinese Perspective*, 5 J. Eur. Tort L. 67 (2014).

43 Provisions of the Supreme People's Court on the Judicial Interpretation Work, No.12 [2007] of the Supreme People's Court (issued 9 Mar. 2007), Arts 2, 6.

44 *Ibid.*, Arts 5, 27, 28.

45 Stanford Law School China Guiding Cases Project, *Guiding Cases in Perspective*, https://cgc.law.stanford.edu (accessed 27 Apr. 2017)

46 N. Calcina Howson, *Corporate Law in the Shanghai People's Courts, 1992–2008: Judicial Autonomy in a Contemporary Authoritarian State,* 5 E. Asia L. Rev. 303 (2010).

'income lost' as a ride-hailing driver (1). These decisions have not been appealed further at the time of writing.

3.1 Labour law cases

An analysis of labour law cases that directly address the question of employment classification reveals the courts' reluctance to recognize an employment relationship between the ride-hailing drivers and companies based on the Ministry of Human Resource and Social Security's criteria. In three separate cases against the same defendant (a local Chinese company registered as a technology company that operated an app for ride-hailing services) brought before local courts in Beijing,[47] the plaintiffs were claiming social insurance entitlements, wage arrears, and severance pay for unlawful termination among other things. There was a 'Cooperation Agreement' between the plaintiff drivers and the defendant. Excerpts of the agreement were cited in the courts' judgments:

(1) Agreement content: Party A (the company) will provide information regarding online ride-hailing customer orders to Party B (the driver). Party B shall be responsible for providing the driving services to the customer and for charging the customer in accordance with the fees that Party A has publicly advertised. Party A shall deduct the corresponding costs from Party B as 'information fee'.
(2) (omitted)
(3) Agreement service procedure:
    (a) Party A receives bookings from customers and then notifies Party B the content of the booking, or allows customers to directly contact Party B.
    (b) Party B performs the service task in accordance with this Agreement.
(4) (omitted)
(5) Income distribution and payment method:
    (a) Party A provides the information regarding the service requested by the customer and charges Party B an 'information fee'

[47] *Sun Yongling v. Beijing Yixin Yixing Automotive Technology Development Services Ltd Labour Dispute*, Beijing First Intermediate People's Court, Civil Judgment (2015) Yi Zhong Min Zhong Zi di No 176*; Wang Zheshuan v. Beijing Yixin Yixing Automotive Technology Development Services Ltd Labour Dispute,* Beijing Shijingshan District People's Court Civil judgment (2014) Shimin Chu Zi No. 367; *Zhuang Yansheng and Beijing Yixin Yixing Automobile Technology Development Service Co., Ltd Labour Dispute Appeal*, Beijing First Intermediate People's Court, Civil Judgment (2014) Yi Zhong Min zhong Zi di No. 6355.

equivalent to 20% of the transaction. Party B keeps the remainder of the deducted amount after taxation.

(b) Customers who book the service of Party B via the official platform are deemed to be using the information provided by Party A to Party B. Therefore Party A has the right to charge the corresponding information fee.

(c) Party A has right to adjust the information fee in accordance with market changes and competition. The adjustment of the information fee due to other special circumstances shall require Party A to give notice to Party B.

In seeking to prove the existence of an employment relationship, the plaintiffs in all three cases presented as evidence: bank statements with monthly payments from the company, a driver ID card/badge with the company's name, the company's provision of a work uniform and a mobile phone to the drivers, and an induction letter upon joining the company. The plaintiffs asserted that they joined the defendant company via a formal process of recruitment, interview, and training, and that they had accepted the company's rules in performing the ride-hailing services and the attendant disciplinary measures that could lead to their dismissal.

The defendant denied having an employment relationship with the three drivers, insisting that it only provided an information platform that connected the drivers with the customers and charged the drivers a service fee for each customer booking that was facilitated by the company's app. The defendant further argued that it did not control the working time of the drivers, who could turn on its app and take any orders if and when they wanted to, and that the provision of the drivers' IDs and uniforms was aimed at helping drivers 'improve' their image and promote their services to customers.

In all three cases, the plaintiffs were unsuccessful. The courts applied the Ministry's criteria for identifying a de facto employment relationship and found there was no such relationship. Some key considerations were: the plaintiffs had the 'final say' on taking an order; they could control when and where they worked or rested; the company's primary business was providing an online platform that provided drivers with information on customer orders, for which it charged the drivers a 20% service fee; there was no payment of regular wages from the company to the drivers; there was no fixed physical 'workplace'; and the drivers' ID badge and uniform with the company's name were not sufficient to prove the existence of a labour relationship.

The employment status of ride-hailing drivers was also implicitly mentioned in a labour law case in Hangzhou.[48] The case concerned an unfair dismissal claim

[48] *Zhejiang Start Car Accessories Co. Ltd, v. Wang Tiwei Regarding a Labour Dispute: First Instance Civil Judgment*, Zhejiang Province Hangzhou City People's Court of Jianggan District (2015) Hang Jiang Min Chu No. 1929.

brought by the plaintiff against his former employer, a car accessories company (not a ride-hailing company). The defendant argued that the reason for the plaintiff's termination was that he had seriously violated its internal rules by providing ride-hailing services 'on the side' while he was working for the defendant. The court ruled in favour of the defendant and stated that the plaintiff's engaging in his own 'personal business' while being employed by the defendant constituted a serious breach of company rules. In other words, the justification for the plaintiff's dismissal was based on his 'Uberpreneurship' (running a business) as a ride-hailing driver, rather than recognizing this activity as an employment relationship with another employer (the ride-hailing company).

It can be seen that local courts have been disinclined to recognize an 'employment relationship' between ride-hailing companies and drivers in substantive labour law claims. In applying the Ministry's multi-factored criteria, the courts focused on the ability of these drivers to determine their own flexible working schedules and to choose which orders they want to take up. The courts also took at face value the absence of fixed monthly wage statements as an indicator of the lack of a de facto employment relationship. I would argue that such an approach does not represent a full consideration of the Ministry's criteria, overlooking other hallmarks of control. For example, the courts in these cases did not delve deeper in looking at the drivers' submission to the company's rules regarding their service provision. Nor did the courts place much weight on the company's disciplinary procedures or the prerogatives of the company to recruit and select the drivers and to terminate the 'Cooperation Agreements' with the drivers.

3.2 Liability for traffic accidents

In comparison with labour law cases, Chinese courts have been more willing to impose vicarious liability on ride-hailing companies in cases where drivers have caused injury to third parties when providing rides booked via the company's platform. In this category of claims, the applicable legal rules concerning vicarious liability come from the SPC's Interpretations on the Application of Law for the Trial of Cases on Personal Injury Compensation ('SPC Interpretation on Personal Injury')[49] and the Tort Liability Law.[50]

The SPC Interpretation on Personal Injury stipulates that an 'employer' shall be liable to pay compensation where an 'employee' causes an injury to others

[49] Interpretation of the Supreme People's Court on Several Issues Applicable to Trials involving the Personal Injury Compensation Law 2003.

[50] *Tort Liability Law of the People's Republic of China*, issued by the Standing Committee of the National People's Congress on 26 Dec. 2009, entered into force on 1 July 2010.

when 'carrying out an employment activity'. If the employee caused the injury intentionally or due to gross negligence, he shall be jointly and severally liable along with the employer.[51] The term 'carrying out an employment activity' is further defined as: 'carrying out a production or business activity or any other labour service activity within the scope of authorization or instructions of the employer'. Even if the employee's actions exceeded this scope, it would still be regarded as 'carrying out an employment activity' if it is the 'apparent performance of duties' or 'inherently connected with the performance of duties'.[52]

It should be noted that the Chinese terms for 'employer' (*guzhu*), 'employee' (*guyuan*), and 'employment relationship' (*guyuan guanxi*) used in the vicarious liability provisions of the SPC Interpretation on Personal Injury are different from the terms 'employment relationship' (*laodong guanxi*), 'employing unit' (*yongren danwei*), and 'labourers' (*laodong zhe*) found in the Labour Law and LCL. The particular semantics used in Chinese labour law largely reflect ideological factors relating to Marxist-Leninist labour relations theory.[53]

In addition, the Tort Liability Law 2009 stipulates three types of relationships that entail an employer's vicarious liability. The first type concerns a labour relationship where the employing unit (*yongren danwei*) is liable for the tort committed by its employee while performing the work task.[54] The second type applies to labour dispatch arrangements involving intermediated labour relationships. Here, the end-user is liable for the tort committed by the dispatched worker. The dispatch agency that supplies the worker to the end-user only has 'supplementary liability' if the end-user fails to fulfil its primary liability.[55] The third type of vicarious liability refers to a 'labour service relationship' (*laowu guanxi*) formed between individuals whereby the party receiving the labour service assumes liability for the actions of the party providing the labour service.[56] For example, this third type would apply to individuals and households that engage domestic helpers, who are excluded from the scope of labour law as mentioned earlier.

The question of vicarious liability arising from this category of claims has required the courts to examine the nature of the relationship between the ride-hailing companies and drivers. In one case,[57] the ride-hailing company argued that

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51 SPC Interpretation on Personal Injury, Art. 9.
52 *Ibid*.
53 S. Cooney, S. Biddulph & Y. Zhu, *Law and Fair Work in China* 55 (Routledge 2014).
54 *Tort Law of the People's Republic of China*, issued by the Standing Committee of the National People's Congress on 26 Dec. 2009, entered into force on 1 July 2010, Art. 34 (1).
55 *Ibid*., Art. 34 (2).
56 *Ibid*., Art. 35.
57 *Zhang Jun v. Dong Group of Companies in a Dispute Concerning Liability for a Motor Vehicle Traffic Accident*, People's Courts of Changning District of Shanghai Municipality, Civil Judgment (2015) Zhang Min Yi (Min) Chu Zi No. 455.

there was only a 'cooperation agreement' with the driver since it only charged the driver a service fee for the provision of information via its platform. The court rejected this argument and held that as the 'employer', the company was liable for the driver's tort arising from the traffic accident. It further pointed to the fact that the company set the standard fees for the driver's services and that the driver in this case did not receive any additional income beyond the fees that he earned from the rides assigned by the company's platform.

In a notable case,[58] the first instance court of Shanghai Pudong New Area analysed various factors that pointed to the presence of an 'employment relationship' (*guyuan guanxi*) between the driver and ride-hailing company. The court applied the above-mentioned rules on vicarious liability and described an 'employment relationship' as:

> [A] legal relationship in which a party provides the other party with specific labour services in a fixed period or irregular labour services over a sporadic period, work under the direction of the other party, and obtains remuneration for the labour provided. The essential characteristic is that one party accepts the other party's management and provides labour services to obtain remuneration.

The main factors considered by the court included: the driver's actions arose from his acceptance of the company's instructions to complete a particular task; the driver had to be assessed by the company before he could become a driver; the driver must comply with the company's regulations; and the driver must wear the company's uniform with an ID card bearing the company's logo. The court concluded that the driver was subject to the company's management during 'working hours' and the driver had no right to negotiate the company's set tariff with the customer, which meant that his remuneration was solely derived from the work he provided for the company. Although the company claimed that the relationship was a 'cooperation agreement', the court decided that it was actually an 'employment relationship' and the driver was carrying out an employment activity when he caused injury to the plaintiff. Accordingly, the company should bear vicarious liability for the driver's actions. The company brought an appeal to the Shanghai First Intermediate People's Court, which was dismissed.

Subsequent commentary on this case, written by the first instance judge and colleagues (and published in the court's official journal), suggests that the court sought to develop the notion of an 'employment relationship' in the context of the rules on vicarious liability.[59] One of the main issues discussed in this commentary

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[58] *Tao Xinguo v. Beijing Yixin Yixing Automotive Technology Development Services Ltd in a Dispute Concerning Liability for a Motor Vehicle Traffic Accident*, People's Courts of the Pudong New Area of Shanghai Municipality (2014) Pu Min Yi (Min) Chu Zi No. 37776; Shanghai First Intermediate People's Courts (2015) Hu Yi Zhong Min Yi (Min) Chu Zi No. 1373.

[59] Tan Wei Feng, Dai Jiao & Cao Shuyu, *Paid Designated Driving Service and Determination of Subject of Liabilities for Compensation*, 2 Renmin sifa (anli) 4 (2016).

was the nature of the relationship between the ride-hailing companies and the drivers. The authors noted the limited clarity in Chinese civil law in dealing with the concept of an 'employment relationship'. In their view, control was a key feature of an 'employment relationship' in terms of whether the 'employee' had accepted the supervision and management by the 'employer' and would be subject to the latter's command. The authors attempted to distinguish an 'employment relationship' from a 'labour relationship' based on the extent of the worker's personal dependence, the degree of management and supervision exercised by the employer, and the employer's obligation to pay for the worker's social insurance. They argued that such factors would be strongly present in a 'labour relationship' compared to an 'employment relationship'. Based on the case, the authors concluded that the ride-hailing company had an 'employment relationship' with the driver, rather than a 'labour relationship'.

Local courts in Beijing have considered similar factors in deciding this category of claims. In one case,[60] the Beijing Intermediate People's Court found that the company was liable for the driver's tort because the customer's order, which the driver had received via the company's platform, was deemed a company assignment. The court in this case, however, did not directly tackle the question of whether a labour or employment relationship existed between the driver and the company. In a similar case, the local Beijing district court also did not specifically classify the nature of the relationship. It nonetheless ruled that the company should be held liable for the fault of the driver in causing the traffic accident because the driver was working on a ride assigned by the company and the company received 20% of the driver's tariff.[61] In another case, the court held that the company and driver were jointly liable for the damages suffered by the third party.[62] It pointed out the company's responsibility for managing and monitoring the operations of the driver and his vehicle. Furthermore, the court was of the view that the company should bear some liability as it received economic benefits through the 'promotional effects' of the driver's services.

The above cases reveal significant conceptual challenges in the judicial application of a complex and evolving area of law concerning employer's vicarious liability in China. Nevertheless, it can be seen that the local courts in Beijing and Shanghai have been inclined to impose some form of liability on ride-hailing

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60 *Beijing Yixin Yixing Automotive Technology Development Services Ltd and Zhao Baochun and others in an Appeal Concerning a Traffic Accident Dispute*, Beijing No. 2 Intermediate People's Court (2014) Er Zhong Min Zhong Zi No. 07157.

61 *Li and Xing Chunze and Others in a Dispute over Liability for Traffic Accident,* First instance civil judgment, People's Court of Haidian District, Beijing. (2013) Hai Min Chu Zi No. 25451.

62 *Xu Xiaoyin Appealed Beijing Yixin Yixing Automobile Technology Development Service Co., Ltd. and Other Motor Vehicle Traffic Accident Liability Disputes*, Beijing No.3 Intermediate People's Court, Civil judgment (2015) San Zhong Min Zhong Zi No. 04810.

companies for drivers' actions in traffic accidents. An analysis of these cases highlights the centrality of the 'control test' to the principle of vicarious liability in China (and elsewhere). Control is also the essential indicator of a 'labour relationship' in Chinese labour law, as reflected by the Ministry's criteria. Indeed the courts seem to be examining the same features of control in the relationship between the companies and drivers in claims involving vicarious liability and labour law claims. The different approaches and outcomes may come down to the pragmatic consideration of the company's superior position (vis-à-vis the driver) to compensate the third party for the injury caused by the driver. Furthermore, the application of the rules on vicarious liability by some local courts points to another category of 'employment relationship' that is distinct from a 'labour relationship' – further complicating the task of determining the status of ride-hailing drivers.

3.3 Other types of claims

Classification issues of ride-hailing drivers have also indirectly emerged in an assortment of other civil claims. Some cases involved insurance claims for vehicle repairs in situations where the driver provided 'chauffeur' services to the customer by driving the customer's car and the driver was assigned to the customer via the company's platform. In one such case, the court referred to the 'cooperation agreement' between company and driver.[63] An annex to the agreement included an 'Accident Handling Procedure Agreement' in which the driver must personally contribute a certain amount towards the cost of repairs for damage to the customer's vehicle where the driver was at fault. The court characterized the claim as a 'service contract' dispute between the driver and customer, in which the ride-hailing company was deemed a third party. The court applied contract law in deciding that the driver should make a contribution pursuant to the annex agreement and deducted this amount from the compensation covered by the customer's insurance company.

In a similar case, the customer also owned the vehicle that was damaged by the driver during a ride assigned by the defendant company's platform.[64] The court looked at the agreement between the driver and defendant, which contained a provision requiring the company to pay for any uninsured damages to the

[63] *Li Yongzhong v. Beijing Yixin Yixing Automotive Technology Development Services Ltd Service Contract Dispute,* Guangzhou City, Guangdong Province, Haizhu District People's Court Case (2014) Sui Haifa Min Er Chu Zi No. 1082.

[64] *Liu Yexun v. Beijing Yixin Yixing Automotive Technology Development Services Ltd Contract Dispute,* First Instance Civil Judgment, People's Court of Shijingshan District, Beijing (2014) Shi Min Chu Zi di No. 17.

customer's vehicle. The court did not mention the issue of whether or not a labour relationship existed, but ruled that the company had responsibility for driver's carelessness during the assigned ride and that their agreement imposed liability on the company.

This issue has also surfaced in cases involving the assessment of compensatory damages sought by plaintiffs who were ride-hailing drivers. In one case, the plaintiff claimed the loss of income as a driver for damages resulting from a tort action against a local government property management company.[65] The plaintiff was injured in an accident arising from the defendant's road repair works that did not have any warning signs in place. The defendant argued that the plaintiff did not have a labour relationship with the ride-hailing company and that his unstable 'income' as a driver should not be counted in the compensation awarded for his injury. The court did not overtly confirm the existence of a labour relationship but, instead, used its discretion to include the income of the plaintiff as a ride-hailing driver in the damage awarded in this case.

The variety of lawsuits examined above shed some light on how local courts in China have directly or indirectly addressed employment classification issues affecting ride-hailing drivers and companies across different types of claims. Overall, there appears to be no coherent or consistent judicial approach, in spite of the multi-factor criteria for identifying a labour relationship that the Ministry of Human Resource and Social Security formulated over a decade ago. The existence of potential 'hybrid' categories such as the (doctrinally unclear) notion of an 'employment relationship' in Chinese personal injury compensation law has added more confusion and uncertainty to the exercise of ascertaining these drivers' status. The next part examines whether a new administrative regulation on the ride-hailing sector in China provides some clarification on this question.

4 RECENT REGULATORY DEVELOPMENTS

In July 2016, the Interim Measures were promulgated along with a national policy document on broader reforms to the taxi industry, including both 'traditional' taxi operators and online ride-hailing and ride-sharing businesses.[66] The espoused policy goals of the broader reforms refer to the need for: 'perfecting the distribution of benefits', 'facilitating a business model of rational risk sharing', 'building harmonious labour relations', and 'encouraging, supporting and guiding businesses,

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[65] *Lang Jia Ning v. Beijing Municipal Road and Bridge Management Group Ltd Regarding a Dispute over Liability and Damages Arising from Ground and Underground Construction Work*, First Instance Civil Judgment, People's Court of Chaoyang District, Beijing (2014) Chao Min Chu Zi No. 41514.

[66] General Office of the State Council Guidance on 'Deepening Reform and Promotion of the Healthy Development of the taxi industry' [2016] No. 58.

industry associations, drivers, and trade unions in consultation on an equal basis'.[67] The Interim Measures contain various provisions that regulate ride-hailing companies' qualifications, vehicle requirements, drivers' qualifications, and standards for business conduct.

In light of the inconsistency in judicial approaches to identifying drivers' employment status, some may reasonably expect that the Interim Measures would provide some clarification. The original draft of the Interim Measures actually included a requirement that these companies must enter into labour contracts with their drivers.[68] However, after months of heated public debate (and government lobbying by large ride-hailing companies),[69] the final version only obliges ride-hailing companies to 'sign and conclude various forms of labour contracts or agreements with drivers based on working time, service frequency, and other particularities, which specify the rights and obligations of both parties'.[70] This provision leaves room for different types of contracts to be concluded. The basic requirement is to have a written agreement in place that sets out the rights and obligations of the companies and drivers.

Other important provisions of the Interim Measures require the platform company to: maintain and protect the lawful rights and interests of drivers[71]; carry out pre-job training and day-to-day education of drivers in relation to laws, regulations, professional ethics, service and safety standards[72]; ensure the drivers and vehicles offering online services are consistent with those providing offline services, and report the relevant information of drivers to the component administrative department of taxis in the locality of service[73]; assume responsibility for the safety of service provision, and passengers' lawful rights and interests[74]; ensure drivers' vehicles have lawful operational licenses, good technical condition, reliable safety performance, and mandatory insurance[75]; reasonably set rates, implement price quotations, and provide corresponding invoices to passengers[76]; publish the company's pricing method and determine the service schedule and quality commitments[77]; and establish a system of service evaluation and handling of

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67 *Ibid.*, para. 5.
68 Interim Measures for the Administration of Online Taxi Booking Business Operations and Services (draft), issued by Ministry of Transportation on 10 Oct. 2015, Art. 18.
69 A. Kuhn, *In China, A Battle Uber Didn't Win* (3 Aug. 2016), http://www.npr.org/sections/parallels/2016/08/03/488477289/in-china-a-battle-uber-didnt-win (accessed 27 Apr. 2017).
70 Interim Measures, Art. 18.
71 *Ibid.*
72 *Ibid.*
73 *Ibid*, Arts 17 and 18.
74 *Ibid.*
75 Interim Measures, Art. 17.
76 Interim Measures, Art. 19.
77 Interim Measures, Art. 20.

passenger complaints, and record data on drivers' service information and evaluations.[78]

The Interim Measures raise several pertinent labour regulatory issues. First, they impose various obligations on platform companies that lean towards hallmarks of a de facto labour relationship under the Ministry of Human Resource and Social Security's criteria. Even though platform companies can enter into a 'labour contract' *or* 'other agreements' with drivers, other provisions of the Interim Measures impose several duties and responsibilities on the companies that amount to a high degree of control to be exercised over the driver in practice. For example, the platform company must provide 'pre-job training' and 'day-to-day education' for its drivers, which seems to be a strong indicator of control. While Uber and ride-hailing companies elsewhere have not been subject to driver training demands, this requirement under the Interim Measures would effectively subject these companies to an important aspect of regulations affecting traditional taxi services.[79] The Interim Measures also reinforce these companies' systems of surveillance over the drivers by requiring the companies to record driver data and customer evaluations. The next part of the article will discuss in further detail the implications of this new regulation for the courts' approach to the question of employment classification.

Second, the Interim Measures provide the flexibility for different types of labour contracts to be signed between ride-hailing companies and drivers, based on the 'particularities' of the work arrangements. As noted earlier, the Chinese labour market has seen the proliferation of diverse forms of employment contracts over the past two decades, including the rise of fixed-term and dispatch labour arrangements which have tended to be associated with a lower degree of employment protection. Nevertheless, it remains to be seen what types of labour contracts would eventuate in this sector, given the option for companies to sign 'other agreements' with these drivers. Furthermore, in light of the enhanced protections for non-standard workers under the LCL, companies may seek to avoid any type of labour contract, be it part-time, fixed term, or dispatch. However, based on a purposive approach that is suggested in the next section, courts could apply the Interim Measures to decide whether the 'particularities' of the work arrangements indicate the existence of some form of labour relationship.

Third, the espoused policy goal of 'encouraging, supporting and guiding businesses, industry associations, drivers, and trade unions in consultation on an equal basis' recognizes the need to improve relations between taxi drivers and ride-

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[78] Interim Measures, Art. 19.

[79] P. Leighton, *Professional Self-Employment, New Power and the Sharing Economy: Some Cautionary Tales from Uber,* 22 J. Mgmt. & Org. 859 (2016).

hailing drivers in light of numerous protests and confrontations between the two groups in recent years.[80] The China Labor Bulletin has documented numerous 'mass protests' involving thousands of taxi drivers in over a dozen major cities in 2015–2016, requesting the government to crackdown on ride-hailing services.[81] It has been further reported that Uber has previously warned its drivers in China to 'steer clear' of these taxi protests or face the risk of losing their contracts with the company.[82]

It is also possible that this policy goal hints at future prospects of unionization and/or 'collective consultation' (collective bargaining)[83] in this sector. Since the 2000s, there has been the accelerated expansion of laws, policies, and institutions to promote collective bargaining as a tool for regulating wages and working conditions in a context of growing labour disputes. A concerted push by the state and the All-China Federation of Trade Unions (ACFTU) has seen a dramatic increase in the number of such agreements. However, they has been relatively weak in terms of substantive outcomes (many collective agreements simply replicate the statutory minima) and worker participation in the process of negotiations.[84] There remain major institutional and political constraints on the development of collective bargaining and other collective worker activities in China.[85] At the time of writing, the ACFTU has not formally announced any plans to organize ride-hailing drivers or sharing economy workers. Given the projected expansion of this sector, it is conceivable that the ACFTU will look to a new source of membership growth and/or seek to intervene in labour disputes involving these workers.

Fourth, local-level implementing rules and policies requiring drivers to have residential status in the cities where they work will pose an important challenge in the implementation of the (national-level) Interim Measures. A salient feature of China's legal system is the complex, multi-layered relationship between national and local regulatory powers and practices. National level laws, regulations, and rules such as the Interim Measures are usually framed in general terms and depend

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80 D. Hewitt, *China's Uber Headache: How Ride Hailing Apps Have Enraged Taxi Operators, Delighted Consumers, And Challenged China's Government*, Int'l Bus. Times (5 Sept. 2016), http://www.ibtimes.com/chinas-uber-headache-how-ride-hailing-apps-have-enraged-taxi-operators-delighted-2365035 (accessed 27 Apr. 2017).

81 China Labor Bulletin, *Thousands of Taxi Drivers in Several Major Cities Strike over Fees, Unfair Competition* (13 Jan. 2016), http://www.clb.org.hk/en/content/thousands-taxi-drivers-several-major-cities-strike-over-fees-unfair-competition (accessed 27 Apr. 2017).

82 C. Glover, *Full Speed Ahead in China's Taxi App War* (21 June 2015), https://www.ft.com/content/0c521248-15a0-11e5-8e6a-00144feabdc0 (accessed 10 Feb. 2017).

83 The Chinese term used in the relevant laws refer to 'collective consultation', which is considered less confrontational than 'collective bargaining'.

84 Lee, Brown, & Wen, *supra* n. 21.

85 C. Estlund, *A New Deal for China's Workers* (Harvard University Press 2017).

on the rules and policies that are made and enforced by local governments. Under the Interim Measures, the local government transport authority in charge of the administration of the taxi industry has responsibility for implementation of the Measures and supervision of the ride-hailing sector.[86] Importantly, local authorities are responsible for approving and issuing the permits for ride-hailing operators and can impose other conditions on applications for these permits.[87]

In October 2016, transport authorities in several large Chinese cities such as Beijing, Shanghai, Shenzhen, Guangzhou, and Tianjin released draft local rules on the required qualifications for ride-hailing vehicles and drivers. The rules in Beijing and Shanghai came into effect in December 2016, requiring drivers to have a local *hukou* or long-term residency status.[88] It is anticipated that such restrictions will disqualify a 'vast majority' of current ride-hailing drivers whom are rural migrant workers.[89] In line with other local regulations, traditional taxi drivers in these cities must also be residents with a local *hukou*.[90] Yet, at the same time, the Employment Promotion Law 2008 (national legislation) prohibits discriminatory restrictions against rural migrant workers seeking employment in the cities[91] and directs local governments to 'improve the environment and conditions for employment of rural workers to enter into the cities'.[92]

In this arena, numerous conflicting regulatory goals and interests between national and local policymakers are evident. On the one hand, national policymakers have articulated a desire for job creation in the sharing economy as well as the relaxation of institutional restrictions inhibiting the mobility of rural migrant workers. On the other hand, local governments have sought to maintain control over access to local job opportunities, social welfare allocation, and the protection of local industries including the traditional taxi sector. These differences are playing out in the regulation of China's ride-hailing sector. It remains to be seen whether local government restrictions on ride-hailing drivers' residential status will reduce the number of drivers. Such restrictions may unintentionally create a pool of

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86 Interim Measures, Art. 4.

87 Interim Measures, Arts 6–9.

88 Shanghai Municipal Government, Shanghai Provisions on the Management of Platform Ride-Hailing Services, issued 21 Dec. 2016 (No. 48 of 2016) Art. 9; Beijing Municipal Government (various departments), Detailed Rules for the Administration of Platform Ride-Hailing Services in Beijing, issued 21 Dec. 2016 (No. 216 of 2016), Art. 8.

89 China Daily, *Ride-Hailing Rules in Beijing, Shanghai Call for Local Residents* (22 Dec. 2016), http://blog.chinadaily.com.cn/forum.php?mod=viewthread&tid=1877404 (accessed 27 Apr. 2017).

90 E. Dou, *China Ride-Hailing Rules Threaten Didi's Migrant Drivers*, Wall St. J. (22 Dec. 2016), https://www.wsj.com/articles/china-ride-hailing-rules-threaten-didis-migrant-drivers-1482391152 (accessed 27 Apr. 2017).

91 Employment Promotion Law of the People's Republic of China, adopted 30 Aug. 2007, effective 1 Jan. 2008, Art. 31.

92 *Ibid.*, Art. 20.

unregistered drivers that fall outside formal regulatory frameworks, including labour law protections.

5 'UBER-DEPENDENCE'? 'UBERPRENEURSHIP'? APPLYING A PURPOSIVE APPROACH TO THE CURRENT DEBATE IN CHINA

Although the Interim Measures attempt to lay down rules on the legal obligations of ride-sharing companies, the relevant provision still leaves the door open for diverse contractual arrangements to govern the relationship between the companies and drivers. Given the lack of a definitive resolution on the issue of employment classification, the local courts in China will continue to play an important role in identifying whether or not a labour relationship exists in any particular case. As seen in other jurisdictions, courts and tribunals have developed and applied different tests to ascertain the statuses of a range of workers in the sharing economy. This final part of the article considers how Chinese courts should approach future cases involving the determination of ride-hailing drivers' status, based on a purposive interpretation of the criteria of the Ministry of Human Resource and Social Security for identifying a labour relationship and the provisions of the Interim Measures.

As Davidov argues, a purposive approach to the employee/independent contractor distinction when it comes to ascertaining the status of Uber drivers has an important advantage: it 'avoids technical-legalistic application of tests that could be outdated, instead looking for the ultimate goals behind labour laws … to decide who should be protected'.[93] Setting in legislation a specific list of criteria for definitively deciding 'who is an employee' and 'who is a contractor' would allow employers to sidestep the law by changing the form of work organization. Hence, as Davidov maintains, it is essential to leave the courts a suitable margin of discretion and the only sensible approach to interpreting the term 'employee' is to adopt 'a meaning that will best advance the purpose of that legislation'. In his view, labour laws seek to counteract 'subordination (in the sense of democratic deficits) and dependency (in the sense of inability to spread risks) as two vulnerabilities that characterize employment relations'.[94] Based on this approach, the novelty of work arrangements does not divert attention away from the basic question of whether Uber drivers should enjoy some or all of labour law protections.

The Ministry of Human Resource and Social Security's broad criteria have, in practice, seen a considerable degree of judicial discretion in labour law cases that require the claimants to prove the existence of a labour relationship. Resembling

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[93] Davidov, *supra* n. 13.

[94] *Ibid. See also* G. Davidov, *A Purposive Approach to Labour Law* (OUP 2016).

the control/subordination tests found in other jurisdictions, the main provision in the Ministry's criteria refers to whether 'various workplace rules made by the employer in accordance with the law are being applied to the employee, and the employee is under the control of the employer and performs paid labour assigned by the employer'.[95] As discussed in Part 3.1, in labour law claims directly seeking to address this question, Chinese courts have focused on the autonomy and flexibility of drivers to set their own working schedules. Since the drivers can accept or refuse to take a ride assigned by the platform at any time and deciding 'where' and 'when' they worked and rested, the courts have tended to conclude that there is not a labour relationship between the drivers and platform companies. In these claims, the drivers tend to be characterized as 'Uberpreneurs' who use the 'information services' of the platform companies to provide ride-hailing services to customers.

However, in considering the background and purpose of the Ministry's criteria as described in Part II, the intention was to address the problem of many rural migrant workers not having a signed labour contract, which posed practical challenges to proving the existence of a labour relationship – the threshold for enforcing substantive labour law and social security protections. The Ministry's criteria subsequently provided the interpretative framework for courts to determine whether or not a de facto labour relationship existed in the absence of a written employment contract, including commercial contracts that may disguise actual employment relationships.

Drafted in relatively general terms, the Ministry's criteria do not present the control test in a highly technical manner. Rather, they present a basic question of whether there is submission of the worker to the employer's direction or command. Indeed, drivers have some degree of 'freedom' and flexibility to choose their working hours, although some have expressed scepticism over the 'illusion' of such freedom.[96] However, the ability of drivers to set their own schedules should not be the only consideration of a lack of control or subordination. It can be seen that various rules (often detailed rules) made by the platform companies are being applied to the drivers regarding the way the task is to be performed, such as requirements to wear the company's uniform and an ID badge with the company's logo. The companies' control over the drivers extends to constant monitoring and surveillance through the app as well as customer ratings of the drivers' performance in providing the ride-hailing service.

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[95] Matters Relevant to the Establishment of an Employment Relationship Circular, *supra* n. 39, Art. 1(2).

[96] M.-A. Russon, *Uber: Underpaid, Assaulted and Disillusioned UK Drivers File Lawsuit Exposing Dark Side of Company*, Int'l Bus. Times (18 Feb. 2016), http://www.ibtimes.co.uk/uber-underpaid-assaulted-disillusioned-uk-drivers-file-lawsuit-exposing-dark-side-company-1544706 (accessed 27 Apr. 2017).

The Ministry's criteria also refers to the requirement that the 'labour provided by the employee is part of the employer's business'. Ride-hailing companies have generally argued that they are not transportation carriers, but technology firms providing a 'platform' for independent, self-employed 'Uberpreneurs'. However, these drivers are an integral part of these companies' businesses, which explains the relatively high degree of control that the companies exercise over the drivers' provision of services to customers. As the UK employment tribunal put it, the proposition that 'Uber in London is a mosaic of 30,000 small businesses linked by a common "platform" is to our minds faintly ridiculous'.[97] In some cases involving claims of liability for traffic accidents, the Chinese courts have raised the point that the drivers are providing the ride-hailing services to customers 'on behalf' of the company or 'assigned' by the company.

The notion of economic dependency is partly captured in the Ministry's criteria, notably the requirement that the worker 'performs paid labour assigned by the employer'. As one court noted in a case regarding vicarious liability for a traffic accident,[98] drivers cannot negotiate the cost of rides with customers but must accept the company's standard tariffs. This was a pertinent indicator that the driver's 'remuneration' solely came from performing the task assigned by the company. The driver has no control over a key business decision that one may reasonably expect that an entrepreneur would be able to exercise.

Davidov has pointed out the fact that drivers could use their own asset (private car) to spread risks is an indicator of some economic independence.[99] Indeed, ownership of this asset enables drivers to use different platforms to provide rides to customers. However, it cannot be assumed that these drivers always have ownership of the car they drive and can thus freely choose how to utilize it. As some of the cases have shown, there are different types of services 'on offer' via the ride-hailing platforms, including services where a customer can book 'chauffeurs' to drive the customer's own car. The diversity of work arrangements within this sector suggests that a case-by-case approach to identify the status of these drivers, based on purposive interpretations of the relevant laws and regulations, is a sensible one.

Ride-hailing companies have also promoted the idea of driving as a 'side gig' to earn extra income,[100] which suggests that drivers have considerable degree of economic independence. However, some drivers' livelihoods may be derived solely or primarily from the provision of ride-hailing services via a particular

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97 *Aslam, Farrar and others v. Uber London Limited and Others* (2202550/2105) 28 Oct. 2016 (UK Employment Tribunals).

98 *Tao Xinguo v. Beijing Yixin Yixing Automotive Technology Development Services Ltd*, *supra* n. 58.

99 Davidov, *supra* n. 13.

100 J. Youshaei, *The Uberpreneur: How an Uber Driver Makes $252,000 A Year*, Forbes (4 Feb. 2015), http://www.forbes.com/sites/jonyoushaei/2015/02/04/the-uberpreneur-how-an-uber-driver-makes-252000-a-year/2/#61e01606ca61 (accessed 27 Apr. 2017).

platform, rather than across different platforms. In one accident liability lawsuit, the court referred to the fact that the ride-hailing company provided the only source of the driver's income.[101] In another case, the plaintiff sought 'lost income' as a ride-hailing driver to be included in the awarded damages for a personal injury claim. Indeed, a number of these cases reveal a relatively high degree of economic dependency of the drivers on one ride-hailing company. This raises another indicator of dependency as noted by Davidov, which is the inability of the worker to spread risks among numerous client-employers and within the same line of work.[102]

What would a purposive approach towards the Ministry's criteria and the new Interim Measures look like? Although the Interim Measures do not definitively resolve the issue of employment classification, numerous provisions recognize that ride-hailing companies are not merely a 'platform' that provide information services to drivers. Such provisions impose a range of obligations on companies that arguably go well beyond a conventional 'arm's-length' commercial relationship, such as the training of drivers, monitoring of drivers' provision of services (including systems of customer evaluations), and responsibility for the safety of drivers' operations, among others.

A purposive approach would consider that the main regulatory thrust of the Interim Measures is to impose a set of conditions on the operation and management of ride-hailing companies that treat these companies as transportation service providers, not as technology companies. In labour law claims, Chinese courts should therefore exercise closer scrutiny of 'Cooperation Agreements' between these companies and drivers in applying the Ministry's criteria, which would lean towards the identification of a labour relationship in the cases that were examined in Part 3.1. In other words, the Interim Measures seem to require ride-hailing companies to exercise a high level of control over the drivers in practice. This may well lead, almost inevitably, to the finding of a 'labour relationship' in many cases. However, the reference to the 'particularities' of the work arrangements in the Interim Measures could mean that in some instances, *de minimis* or one-off provision of ride-hailing services may not warrant the determination of a labour relationship. This could fend off some concerns that all types of service provision in the sharing economy would attract the label of 'labour relationships'.[103]

In other categories of claims, such as tort liability for injury to third parties caused by drivers, the Interim Measures reinforce the existing judicial approach (as discussed in Part 3.2) to imposing vicarious liability on ride-hailing companies.

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[101] *Zhang Jun v. Dong Group of Companies, supra* n. 57.
[102] Davidov, *supra* n. 13.
[103] M. A. Cherry & A. Aloisi, '*Dependent Contractors' in the Gig Economy: A Comparative Approach*, 66 Am. U. L. Rev. 635, 687 (2017).

The relevant provisions do not resolve the conceptual murkiness of the notion of an 'employment relationship' in the SPC Interpretation on Personal Injury. Nevertheless, the Interim Measures could be seen as preserving the status quo of the 'labour relationship' in Chinese law, rather than developing an intermediate or hybrid category of workers for the purpose of classifying ride-hailing drivers.

In other jurisdictions, some commentators have called for the carving out of a separate contractual category beyond the 'employee'/'contractor' distinction that would take into account the 'unique' features of sharing economy workers such as ride-hailing drivers.[104] However, others have pointed out the potentially greater arbitrage of the law arising from a third category that could result in the 'down-grading' of an employee to an intermediate status without addressing the problems of 'bogus' contracting – depending on what types of substantive labour law protections are included in such a category.[105]

Furthermore, it would not be appropriate for judicial intervention to create a new category of employment classification in China. At a national level, formal legislative powers reside with the National People's Congress and its Standing Committee. Meanwhile, the State Council and its ministries and departments have the powers to issue administrative regulations and rules (such as the Interim Measures). A similar law making structure exists at the local levels. In applying the provisions of statutes and regulations in its adjudicative work, the SPC and local people's courts can adopt a purposive approach to interpreting broadly drafted legislative and administrative texts that show a high degree of generality and vagueness. As China is still developing its legal system, Chinese courts have yet to establish a coherent and systematic body of legal principles or rules of statutory interpretation.[106] Given the prevalence of linguistic uncertainties and ambiguities in Chinese legislation, a purposive approach to statutory construction would indeed be useful for courts to resolve such problems.

Finally, platform-based businesses and proponents have argued that applying existing laws and regulations (including labour laws) to companies such as Uber would stifle innovation, entrepreneurship, and job creation in the sharing economy.[107] While the Chinese government's Internet Plus strategy and other

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[104] S. D. Harris & A. B. Krueger, *A Proposal for Modernising Labour Laws for Twenty-First-Century Work: The 'Independent Worker'*, The Hamilton Project Discussion Paper 2015-10 (Dec. 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf (accessed 27 Apr. 2017).

[105] Cherry & Aloisi, *supra* n. 103, at 677.

[106] D. Cao, *Linguistic Uncertainty and Legal Transparency: Statutory Interpretation in China and Australia*, in *Transparency, Power, and Control: Perspectives on Legal Communication* 13–30 (C. A. Hafner, L. Miller, A. Wagner & V. K Bhatia eds, Ashgate 2012).

[107] Bloomberg View, *Europe Needs New Rules for the Uber Economy* (27 Jan. 2017), http://www.bloomberg.com/view/articles/2017-01-27/europe-needs-new-rules-for-a-new-labor-market; Financial

policies around the sharing economy entail goals of job creation from innovative business models, this certainly does not equate to promoting 'new' business models that gain their competitive advantage from legal and regulatory evasion. As others have argued, the problem is 'distinguishing between authentic innovators, who could compete on a level playing field or who have a distinct and interesting business model, and those platforms that are profiteers' or 'arbitrageurs who are merely looking for legal loopholes'.[108] A purposive approach provides room for courts to take into account innovative and new business models, for example, whether a particular contractual arrangement is associated with a genuinely 'sharing' activity that would not deem the participant as an employee.

6 CONCLUSION

As policymakers around the world consider how to regulate the burgeoning sharing economy, including the appropriate protections for this workforce, the stakes involved for companies like Uber are high. It is hard to deny that these companies' business models gain a significant cost advantage from classifying their workers as independent contractors rather than 'employees'. In China, new forms of work arising from digitalization such as the provision of ride-hailing services through mobile platforms have posed certain challenges for a labour regulatory framework that has experienced dramatic transformations in recent decades. Recognizing the common features between these 'novel' work arrangements and other forms of non-standard employment allows us to re-examine the need for creating new specific categories of worker classification. Rather than applying a formalist interpretation of existing laws and criteria for the identification of labour relationships, courts should consider the goals and purposes of labour laws alongside other related regulations to adapt labour protections where and as needed for workers in the sharing economy.

In the Chinese context, there is no need to replace or change the criteria of the Ministry of Human Resource and Social Security for identifying a labour relationship in order to adapt to the particular labour practices of the ride-hailing sector or the sharing economy generally. Instead, the courts should approach issues of classification in light of the goals of the Ministry's criteria and relevant regulations such as the Interim Measures. While there is some specificity inherent in China's experience of 'Uberization' and the legal and policy responses to this phenomenon, there are also many parallels with other parts of the world – which call for further comparative analyses of how different jurisdictions address the regulatory challenges of digital work.

Times View, *Law Threatens to Hit the Brakes on Uber* (22 June 2015), http://www.ft.com/content/819aa754-1677-11e5-b07f-00144feabdc0 (accessed 27 Apr. 2017).

[108] Cherry & Aloisi, *supra* n. 103, at 686.