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Labour Disputes Settlement System in China: Past and Perspective

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PREFACE

The evolution of the market-oriented economy and the increase in cross-border transactions have brought an urgent need for research and comparisons of judicial systems and the role of law in the development of Asian countries. The Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO) has conducted a three-year project titled “Economic Cooperation and Legal Systems.”

In the first year (FY 2000), we established two domestic research committees: Committee on “Law and Development in Economic and Social Development” and Committee on “Judicial Systems in Asia.” The former has focused on the role of law in social and economic development and sought to establish a legal theoretical framework therefore. Studies conducted by member researchers have focused on the relationship between the law and marketization, development assistance, trade and investment liberalization, the environment, labor, and consumer issues. The latter committee has conducted research on judicial systems and the ongoing reform process of these systems in Asian countries, with the aim of further analyzing their dispute resolution processes.

In the second year (FY 2001), we established two research committees: the Committee on “Law and Political Development in Asia” and the Committee on “Dispute Resolution Process in Asia”. The former committee focused on legal and institutional reforms following democratic movements in several Asian countries. The democratic movements in the 1980’s resulted in the reforms of political and administrative system to ensure the transparency and accountability of the political and administrative process, human rights protection, and the participation of people to those processes. The latter committee conducted a comparative study on availability of the court system and out-of-court systems (namely Alternative Dispute Resolutions), with the purpose of determining underlying problems in the courts. As social and economic conditions drastically change, Asian countries face challenges to establish systems for fairly and effectively resolving the variety of disputes that arise increasingly in our societies.

This year (FY 2002), based on the achievements of the previous years, we carefully reorganized our findings and held a workshop entitled “Law, Development and Socio-Economic Change in Asia” with our joint research counterparts to develop our final outcome of the project. Also, we extended the scope of our joint research and

added some new countries and topics. This publication, titled *IDE Asian Law Series*, is the outcome of latter research conducted by the respective counterparts (Please see the list of publications attached at the end of this volume). The final outcome of the project will be published separately in another series.

We believe that this work is unprecedented in its scope, and we hope that this publication will make a contribution as research material and for the further understanding of the legal issues we share.

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Introduction

Since its reforms and opening up, particularly in the last two decades, China has devoted to the governance of the country by law. In accordance with the demand of establishing a socialist market economy, China has accelerated its legal system building, formulated and promulgated a series of laws and regulations, which have provided legal guarantee for the successful advancement of reforms and modernisation drive. The legal system construction in the realm of labour and social security has also witnessed great achievements. *Labour Law of the People's Republic of China* (hereinafter referred to as *Labour Law*) promulgated in July 1994 is the landmark in China's labour legislation, symbolising that China has entered a new stage of labour law system building. *Labour Law* is an important law, which comprehensively regulates labour relations and safeguards the legitimate rights and interests of both the labourers and employing units. By adopting common practices in the international labour legislation, it has set up unified basic labour standards with a series of detailed stipulations for safeguarding the legitimate rights and interests of both the labourers and employing units. The provisions fully demonstrate the fundamental principles of equal status and fair competition among subjects of market economy. The enactment and enforcement of *Labour Law* in 1994 have filled the blank in the labour legislation.

I. Labour Policy Development and Labour Law System Building

1. Social Security Legislation

China's social security system consists of social insurance, social relief, social welfare and special care.

Social insurance refers to the system, under which the state raises social insurance fund and offers financial aid to labourers in the case of permanent or temporary loss of work ability and incomes as result of such unavoidable circumstance as old age, illness, work-related injury, unemployment, child-bearing and death in order to secure their livelihood. Under the planned economy, social insurance system was divided into three parts in accordance with different target groups. First part covered employees in urban enterprises. Enterprises were obliged to make contributions to the social insurance funds, which was managed by local labour administrative departments. Social security for civil servants and employees in institutions and social organisations was financed by allocations from government budgets and administered by local personnel department. As for rural residents, old age insurance and medical insurance schemes were established chiefly in economically developed areas. The schemes were mainly financed by individual's contributions with some financial support from communities, and administered by local civil affairs departments. In 1998 the Chinese government assigned unified administration of social insurance affairs to the newly-established administrative departments of labour and social security.

Social relief system is financed by allocations from government budgets and seeks to assist urban residents who live below poverty line by granting them financial aids. Social welfare system pursues to provide assistance and cares for helpless elderly widows and widowers, orphans and the disabled through establishing old-age homes, children's welfare homes and social welfare enterprises for employing disabled people and other forms. The system is supported by allocations from government budgets and voluntary contributions. Special care system aims at compensating or commending disabled veterans, family members of conscripts, and etc. Presently, civil affairs departments are in charge of social welfare, social relief and special care affairs.

Social insurance is an important component of the social security system. Soon after the founding of the People's Republic of China on October 1, 1949, the State Council enacted *Labour Insurance Regulations of the People's Republic of China* in 1951, which initiated the social insurance system in the new China, including old-age pension, employment injury benefits, sickness benefits, maternal benefits and survivor's benefit, and practiced pooling of insurance fund. However, during the "Cultural Revolution" between 1966 and 1976, China's social insurance management organisations were disbanded and pooling of social insurance fund was cancelled. As a result, the social insurance turned out to be employer's liability insurance. Since 1980s, with the introduction of reforms and opening up policy as well as the establishment of socialist market economy mechanism, China has resumed the pooling of social insurance funds and started reforms in various social insurance schemes such as old-age insurance, unemployment insurance, medical insurance, employment injury insurance and maternity insurance.

In the process of establishing new social security system, China places great attention to the building of the social insurance legal system.

1.1 Old-age Insurance

The Chinese government has enacted a series of regulatory documents, such as *Provisional Measures of the State Council on Retirement and Resignation* and *Decision of the State Council on Establishing a Unified Enterprise Workers' Basic Pension System*. In accordance with these documents, the old-age insurance system combining social pooling with individual account has been set up. Tripartite financing mechanism was introduced, under which government, enterprises and individuals share contributions to the old-age insurance scheme. A worker's individual contributions and part of enterprise's contributions go into his(her) individual account for accumulation and the rest goes into social pooling fund. In January 1999, the State Council promulgated *Provisional Regulations on Collection of Social Insurance Contributions*, which stipulated to pool pension insurance fund at provincial level and expand coverage of pension insurance from state-owned enterprises and collective enterprises to foreign funded enterprises, urban private enterprises and urban self-employed entrepreneurs. Beside the compulsory insurance, enterprises are encouraged to establish supplementary

insurance for their employees. At same time, pension-oriented private saving is also encouraged. Currently, China is drafting *Regulations on Basic Pension Insurance*. By the end of 2001, 142 million people were covered by the basic pension insurance. The average monthly pension of retirees from enterprises was increased from 129 yuan in 1990 to 579 yuan in 2001.

1.2 Unemployment Insurance

In 1993 the Chinese government enacted administrative regulations such as *Regulations on Insurance against Waiting for Employment for State-owned Enterprise Workers*, *Regulations on Re-employment of Redundant Workers from State-owned Enterprises*. According to the regulations, unemployment insurance system covered state-owned enterprises and institutes with commercialised management. However, the schemes at local level were expanded to cover employees of urban collective enterprises, shareholding enterprises, cooperative enterprises, private enterprises, foreign funded enterprises (Chinese employees only), and employees working on contract basis for government departments and institutions as well as social organisations. *Regulations on Unemployment Insurance*, promulgated by the State Council in January 1999, further expanded its coverage to all types of urban enterprises and institutions, and stipulated that both enterprises and individuals should make insurance contributions. Rural residents, working on contract basis for urban enterprises and institutions, do not pay unemployment insurance contributions, according to the Regulations. By the end of 2001, unemployment insurance covers a total of 104 million workers.

Besides, minimum living standard security system has been set up, which aims at securing livelihood for urban residents with their family income below a certain level. The enactment of *Regulations on Minimum Living Standard Security for Urban Residents* in 1999, symbolises the official establishment of livelihood security system for urban residents. Presently, the system has been established in all cities and county towns throughout the country. A total of 19.36 million people have benefited from the system.

1.3 Medical Insurance

In the field of medical insurance, the Chinese government issued a series of regulatory documents, including *Directions on Pilot Reform of Medical Insurance System*, *Directions on Expanding Pilot Reform of Medical Insurance System*, and *Circular on Trying Out Social Pooling of Medical Costs for Serious Diseases* in order to experiment with social pooling of medical costs for enterprise employees and retirees, combination of social pooling and individual accounts for basic medical insurance. In December 1998, by enacting *Decision on Establishing Basic Medical Insurance System for Urban Employees*, the State Council launched nation-wide medical insurance reform with an aim to institute a basic medical insurance system for all urban employing units and their employees. General guidelines for the reform were: low level, wide coverage, cost sharing, combination of costs pooling and individual accounts, multi-tier security and simultaneity of three reforms. While the fundamental principles are set up at the national level, decisions for concrete matters are decentralised to local levels. According to *Provisional Regulations on Collection of Social Insurance Contributions*, basic medical insurance not only covers urban enterprises and institutions, but also government departments and social organisations. Currently, the basic medical insurance system boasts its wide coverage. By August 2002, the system covered 83 million people.

1.4 Employment Injury Insurance

In August 1996, the Ministry of Labour issued *Interim Methods on Employment Injury Insurance for Enterprise Workers*, stipulating to replace full enterprise liability with social pooling. In accordance with the regulations, employment injury insurance fund has been set up to provide financial compensations for the workers injured while performing employment duties and render socialised management services. Individual workers do not pay insurance contributions. Currently, the scheme covers 43 million workers from all types of enterprises across China.

At present, the Chinese government is drafting *Regulations on Employment injury Insurance*, which will cover all urban enterprises and institutions with commercialised management. The provisions of the regulations will be used by other institutions and government departments as reference.

1.5 Maternity Insurance

In 1994, the Ministry of Labour enacted *Interim Methods on Maternity Insurance for Enterprise Workers*. In the same year, the State Council issued *Chinese Women's Development Programme for 1995-2000*, setting up the objective of the social pooling of maternity costs for urban female workers. Enterprises, covered by the current scheme, pay a certain proportion (not more than 1%) of the total payroll to the maternity insurance fund for the purpose of social pooling, and individuals do not make contributions. The maternity benefit includes maternity allowance and maternity medical costs. At present, the scheme involves 35 million workers.

In order to settle the disputes relating to social insurance, the Ministry of Labour and Social Security issued *Methods on Settlement of Social Insurance-related Administrative Disputes* in May 2001. The *Methods* include 34 articles and stipulate the scope of application, rights and obligations of the parties to a dispute, responsibilities of dispute –handling organisations, and procedures for settling such administrative disputes.

2. Labour Legislation

2.1 Formulation of the Legal System on Labour Dispute Settlement

Labour dispute settlement system was initiated in 1950, which was symbolised by the *Rule on Organisational Structure and Working Procedures of Municipal Labour Dispute Arbitration Committee*, enacted by the Ministry of Labour in June 1950, and *Regulations on Labour Dispute Settlement Procedure* issued by the Ministry of Labour with approval of the State Administrative Council in November 1950. Since 1957, however, due to the planned economy and the unitary public ownership the system was suspended for 30 years until July 31, 1987, when the State Council resumed it by promulgating *Provisional Regulations on the Settlement of Labour Disputes in State-run Enterprises*. To meet the requirements of establishing socialist market economy, the State Council enacted *Regulations on Settlement of Labour Disputes in Enterprises* which covers all enterprises in the territory of China. The adoption of *Labour Law* on July 5, 1994, which stipulates the organisations and procedures to settle labour disputes

in its ChapterX, has symbolised the establishment of labour dispute settlement system in the basic law. Presently, the labour disputes resolution system is based on *Labour Law* as basic law, and supporting regulations and rules, such as *Regulations on Settlement of Labour Disputes in Enterprises*, *Rule on Organisational Structure and Working Procedure of Enterprise Labour Dispute Mediation Committee*, *Rule on Organisational Structure and Working Procedure of Labour Dispute Arbitration Committee* and *Rules on Recruitment of Labour Dispute Arbitrators*.

In the last 15 years, Enterprise Labour Dispute Mediation Committees and local Labour Dispute Arbitration Committees have protected legitimate rights and interests of both employees and employing units by fairly and timely handling disputes in conformity of law. By the end of June 2002, Enterprise Labour Dispute Mediation Committees have succeeded in mediating 1.32 million disputes. Local Labour Dispute Arbitration Committees across China have accepted 815 thousand cases, which involved 2.493 million workers. During the period from 1997 to 2001, People's Courts at all levels have accepted and handled 360 thousand cases. The system has played a significant role in accelerating legal construction in the field of labour and social security, protecting rights and interests of both employees and employing units, as well as facilitating harmonious labour relations and social stability.

However, there are some shortcomings in the labour dispute settlement system. Firstly, some enacted regulations are at low level in terms of effect. Secondly, the procedure for handling labour disputes is so complicated that it tends to be a long haul to get the final settlement. Thirdly, labour contract law, the law substantial for the labour dispute settlement, has not been enacted. At present, in order to keep abreast of the provision of article 8 of *Legislation Law* that arbitration system should be stipulated by laws, the Ministry of Labour and Social Security is making great efforts to develop labour dispute resolution system suitable for Chinese reality and market-oriented economy, so that the Labour Dispute Settlement Law will be included in the legislation list of the People's Congress at an early date.

2.2 Achievements in Individual Labour Contract and Collective Labour Contract Legislation

China started to introduce labour contract system in mid-1980s and expanded it in a large scale in the 1990s. As a result, the labour contract system is now widely implemented in all urban enterprises. Currently, state-owned enterprises, collective enterprises and foreign funded enterprises boast highest proportions of employees (95%), with whom labour contracts have been concluded. The figure is 60% for private enterprise and individual businesses. Besides, around 30 million employees have signed labour contracts with rural and village enterprises. To secure the authenticity and validity of the concluded labour contracts, the Ministry of Labour has initiated contract verification system and standardised it by issuing *Methods on Labour Contract Verification* in October 1992, which stipulates the purposes, subjects and procedure of verification. In recent years, the Ministry of Labour and Social Security has speeded up labour contract legislation. Currently, the Legal Affairs Office under the State Council is modifying the draft of *Labour Contract Law*. Local administrative regulations on labour contracts, issued in 2001 in some provinces and municipalities such as Shandong and Shanghai, have provided useful practical experience for the enactment of *Labour Contract Law*.

On December 1994, the Ministry of Labour promulgated *Regulations on Collective Labour Contracts*, which stipulated the conclusion and verification of collective labour contracts as well as settlement of disputes. *Provisional Measures for Wage Collective Bargaining*, adopted by the Ministry of Labour and Social Security on November 2000, stipulates that wage collective bargaining is an import component of collective labour contract system. According to the *Provisional Measures*, wage collective bargaining should be conducted between trade union or employees' representatives and enterprise in line with principles of "equal negotiation between parties" and "reasonable increase of employees' wage in accordance with enterprise's development". Wage bargaining should be resulted in collective wage agreement, involving wage distribution, forms of distribution and wage level.

2.3 Labour and Social Security Inspection Is the Guarantee for Effective Law Enforcement

In the process of establishing and improving the labour and social security insurance system through legislation, the Chinese government has attached great importance to the law enforcement and legal institutional building. At present, in accordance with China's regionalism, labour inspection agencies have been established in all the labour and social security departments at county and above levels. In performing labour inspection, the labour and social security departments stick to the principles of "Laws must be observed", "Laws must be enforced strictly", and "Violators of laws must be brought to justice". Inspections have been strengthened of compliance with laws and regulations concerning social insurance, wage payment, social security for laid-off workers and labour market operations. As a result, unlawful practices have been timely disclosed, handled and corrected. Labour inspection has played an significant role in regulating labour market operations, harmonising relations between enterprises and employees, safeguarding legitimate rights and interests of both the employees and employing units as well as promoting social stability.

3. Problems in the Present Labour and Social Security Legal System and Ideas for Future Improvements

It should be noted that the current labour and social security legal system still fall short of demands of establishing socialist market economy. In the transitional period the system needs constant improvements and strict enforcement. Low level of effect and weak enforcement are the typical features of some regulations in the field of labour relations and social insurance. Social insurance legislation particularly lags behind, and current regulations have narrow scope of regulation and lack standardisation. Meanwhile, much is still to be done to strengthen labour and social security administrative departments and improve their abilities to administer labour and social security affairs in accordance with law.

Chinese government has decided to establish the framework for legal system suitable for market economy within five years. To complete this task, Chinese

government must speed up the legislation process in the field of labour and social security. The general ideas are follows:

In the field of labour legislation, it is essential to formulate supporting laws and regulations on the basis of *Labour Law 1994*, including Employment Promotion Law, Labour Contract Law, Collective Contract Law, Law on Settlement of Labour Disputes, Regulations on Labour Market Management.

In the aspect of social insurance legislation, attention should be paid to enact Social Insurance Law as fundamental law, and based on it to enact supporting regulations, such as Regulations on Basic Pension Insurance, Regulations on Medical Insurance, Regulations on Employment Injury Insurance and Regulations on Maternity Insurance.

II. Evolution of Labour Disputes Settlement System

China's labour dispute settlement system has experienced three stages in its development: establishment, interruption and restoration.

1. Establishment of Labour Disputes Settlement System

In the early days after the founding of the People's Republic of China, misgivings about the Communist Party and People's government were prevalent among capitalists of private enterprises. They consequently either took passive attitude to enterprise operations, or withdrawn capital, deliberately closed business, or randomly dismissed workers. Some capitalists went further to draw over workers, corrupt Communist Party's cadres and make troubles. This aroused dissatisfaction and objection from workers. Meanwhile, some workers took unduly radical actions against capitalists by proposing unrealistic wage and welfare requests. All of these led to strained labour relations and frequent labour disputes. In order to put in practice the principles "Developing production, flourishing economy, giving attention to both public and private economies, and mutual benefits for both workers and capitalists" set up by the *Common Guiding Principles of China People's Political Consultative Conference*,

handle disputes in timely and reasonable manner and bring labour relations into the right trajectory, All-China Federation of Trade Unions issued *Measures for Conclusion of Collective Labour Contract in Private Industrial and Commercial Enterprises* in November 1949. Shortly in April 1950, the Ministry of Labour promulgated *Directions on Setting up Employee-employer Consultation Meeting in Private Enterprises*. According to incomplete statistics, by the end of June 1953 the employee-employer consultation meeting system was established in more than 1200 private enterprises, with 166,000 collective contracts signed. It was illustrated by practical results that employee-employer consultation meeting and collective contract system were appropriate ways to prevent and settle labour disputes.

In early days after the founding of People's Republic of China, People's government attached great importance to the building of legal system for labour dispute settlement. Labour administrative departments were appointed unitary organs to resolve labour disputes. At national level, Department of Labour Dispute Settlement was set up in the Ministry of Labour to take charge of handling major disputes, which had nation-wide impacts, supervising and providing guidance to labour dispute handling organs at local levels. At provincial and municipal level (including municipalities directly under the central government, large administrative regions, economically developed cities directly under provincial government), divisions of labour dispute settlement were created in Labour Bureaus, which were responsible for mediating labour disputes in public and private enterprises. On June 15, 1950 the Ministry of Labour enacted *Rule on Organisational Structure and Working Procedure of Municipal Labour Dispute Arbitration Committee*. According to it, Labour Dispute Arbitration Committee (hereinafter referred to arbitration committee) was composed of director or deputy director of Labour Bureau, and representatives from city Industrial and Commercial Association. If necessary, representatives from other organisations, whose interests might be affected, could be invited to the arbitration committee. Depending on the situation, experts could be invited to attend the proceedings for the purpose of consultation. The post of chair to the arbitration committee should be taken up by director or deputy director of Labour Bureau. Division of Labour Dispute Settlement and any party to the dispute had right to refer the dispute to arbitration committee for arbitration. Further on November 11, 1950, with approval of the State Administrative

Council, the Ministry of Labour promulgated *Regulations on Labour Dispute Settlement Procedure*, which appointed labour administrative departments at all levels as unitary organs to handle labour disputes in state enterprises, public enterprises, public-private jointly operated enterprises and enterprises, affiliated to cooperatives. The *Regulations* contributed to preventing contradictory rulings by different organisations handling disputes, effectively carrying out labour policies and enforcing relevant regulations. By the end of June 1953, labour administrative departments at all levels across China had handled a total of 100,000 disputes, most of which were solved in a reasonable manner. According to *Regulations on Labour Dispute Settlement Procedure*, the labour dispute resolution process consisted of four stages: negotiation within enterprise, mediation, arbitration and litigation. Consultation within enterprise should be resulted in an agreement to be verified and recorded by local labour administrative department. If a dispute which took place in state enterprises, public enterprises, public-private jointly operated enterprises or enterprises, affiliated to cooperatives, failed to be settled through negotiation, it would be passed on to higher-level trade union and corresponding higher-level enterprises administration departments for further negotiation. If it was a private enterprise where the dispute took place, the industrial trade union and guild should provide assistance to the disputing parties so that they could reach agreement. If the dispute could not be resolved internally, the next step was mediation by labour administrative departments. If the mediation failed, the dispute would be referred to arbitration committee for arbitration. If a party refused to accept the arbitration award, it should inform the labour administrative department and bring a lawsuit in People's Court within 15 days from receiving the arbitration award. Otherwise, the arbitration award would come into force legally. In this way, such settlement process not only secured equal negotiation of the parties to a dispute, but also provided the parties with effective means to protect their rights and interests through arbitration and litigation.

2. Interruption of Labour Disputes Settlement System

By 1956, capitalist elements had been transformed into socialist economies. As a consequence, major conflict in China's society turned out from conflict between working class and bourgeois to be conflict between relative slow economic and cultural

development and increasing demand, as it was pointed out by *Resolution on Political Reports of Eight National Communist Party Conference* that “Socialist revolution has been basically completed and major task of the State turns out from liberation of labour force to protection and development of labour force. In this regard, we must further strengthen legal institution of people’s democracy and consolidate the order of socialism construction. The State must gradually and systematically build a perfect legal system in line with reality.¹” In the respect of legislation for labour dispute settlement, the State should have utilised the accumulated experience to amend *Regulations on Labour Dispute Settlement Procedure* in order to keep it abreast of new social development. However, due to the misconceptions, the principles set up by the *Resolution on Political Reports of Eight Communist Party Conference* was not carried out in practice. On the contrary, mediation divisions and arbitration committees were disbanded, and People’s Courts ceased to handle labour disputes. Since then, all labour disputes, which failed to be settled within enterprises, had to be submitted to labour administrative departments in the forms of complaints. In May 1957, General Office of the Central Committee of China Communist Party and Secretariat of the State Council jointly formulated the draft of *Regulations on Competence of Nineteen Central-level Departments in Handling Complaints*, which appointed the Ministry of Labour in charge of dealing with work-related complaints. Later, in accordance with the principles of the draft, Grievance and Complaints Offices were set up in local labour administrative departments. Since then, labour disputes had been dealt with as complaints.

During the 30 years between 1956 and 1986, Complaints and Grievance Offices had resolved a great amount of labour disputes. However, as it was showed by facts, complaints and grievance system exhibited a lot of disadvantages in handling labour disputes. Firstly, since Complaints and Grievance Offices were not established by provisions of law, their decisions did not have legal binding force. Many suggestions and recommendations proposed labour and personnel departments, through feasible and reasonable, have not been taken into consideration. As a result, the dispute handling process itself tended to be a long haul and labour disputes might not be solved timely. Secondly, without a legally-prescribed dispute handling procedure, enterprise

¹ The resolution was adopted at the Eighth National Conference of China Communist Party on September 27, 1956. *Reference to China Communist Party*, compiled by Central Communist Party School, page 531, People’s Publishing House, 1980

administration departments used to be partial to enterprises in dealing with disputes. It was the worst situation when enterprise acted as a referee to handle disputes between itself and employees. In either case, workers were unlikely to have their rights really protected. Furthermore, violation of workers rights often arose from such arrangement and sometimes conflicts between enterprises and workers flared up. Thirdly, since People's Courts did not accept labour disputes, workers had nowhere to turn to for a settlement. To pursue a resolution, some workers committed suicide, while some others perpetrated crimes. All of these did harm to people's life and property as well as the social order. Fourthly, a few of personnel, who dealt with labour disputes with officialdom, negligence and low efficiency, prevented disputes from timely resolution. Sometimes, in order to get their dispute settled, parties to a dispute had no choice but continuously appealing to higher-level Complaints and Grievance Offices, even frequently visiting the central-level office, which consequently was loaded with heavy workload.

3. Restoration of Labour Disputes Settlement System

It was not until the Third Session of the Eleventh Central Committee of Communist Party in 1978 that the labour dispute handling system started restoration and further development with the deepening of reforms and advancement of legal system construction. On July 26, 1980, the State Council promulgated *Regulations on Labour Management in Sino-Foreign Joint Venture Enterprises*. According to the regulations, labour disputes in enterprises with foreign investment should be handled first through negotiation within enterprise. If the negotiation was unsuccessful, any party to the dispute could request for arbitration by provincial-level labour administrative department in the province (including autonomous region and municipality directly under the central government), where the enterprise was located. The arbitration decision can be appealed by any party to the local People's Court. On July 12, 1986, the State Council issued *Circular on Reforming Four Components of Labour System*, urging to strengthen labour and personnel departments and create labour dispute arbitration committees. Although *Provisional Regulations on Labour Contracts in State-run*

Enterprises stipulated three stages of handling labour disputes: negotiation, arbitration and litigation, there was no arbitration committee to handle the disputes.

Along with the deepening of economic and labour system reforms, great changes took place in the pattern of labour relations and interests concerns of the parties. The increasing number of labour disputes made it imperative to speed up legislation in this field. The *Provisional Regulations on Settlement of Labour Disputes in State-run Enterprise*, promulgated by the State Council on July 31, 1987, reinstated the labour dispute settlement system, which had been interrupted for 30 years. Considering difficulty in spreading the system due to the lack of personnel and experience as well as incompleteness of the legal system, the State Council decided that at early stage of restoration, the labour dispute settlement system should only cover state-owned enterprises, where majority of employees worked and where the labour contracts were first introduced. The system would be applied to disputes arising from implementation of labour contracts, dismissal and resignation of employees. Labour disputes in government organs, institutions and social organisations were handled with reference to *Provisional Regulations*. Application of *Provisional Regulations* to other disputes would be determined by provincial government (including autonomous region and municipality directly under the central government). According to the *Provisional Regulations*, when dispute arose from implementation of labour contract, parties had choice of applying to either Enterprise Labour Dispute Mediation Committee or Labour Dispute Arbitration Committee. As for the disputes regarding cancellation of labour contracts, parties should directly appeal to Labour Dispute Arbitration Committee for arbitration. If a party disagrees with the arbitration decision, he can file a lawsuit in People's Court within 15 days from receiving the arbitration award. In case one party failed to implement award upon expiration of the time limit, the other party may petition with the people's court for enforcement of the award. By the end of 1992, a total of 1,000,000 labour disputes was handled, of which 710,000 was solved by Enterprises Labour Dispute Mediation Committees and 290,000 was brought to Arbitration Committees. Among the 290,000 disputes, referred to Arbitration Committees, 240,000 was settled through mediation without filing case, while the rest 50,114 disputes came into arbitration proceedings. Among the 50,114 cases heard by Arbitration Committees, 45,043 disputes was settled by arbitration mediation, accounting for 89%, while the rest

5,071 disputes was settled by arbitration ruling, accounting for 11%. 1115 arbitration rulings (22%) were appealed to People's Courts. Among them, 912 rulings were upheld by Courts.

The promulgation of *Provisional Regulations* brought the labour dispute settlement into legal trajectory, which greatly contributed to the protection of legitimate rights and interests of state-run enterprises and workers, maintaining production order and social order, as well as socialist construction. However, along with the establishment of socialist market economy and deepening of labour system reform, labour relations became so diversified and complicated that *Provisional Regulations* was not adequate to cope with the changing situation due to its narrow scope of application to disputes, small coverage of enterprises and lack of clarified arbitration procedure. To deal with the increasing number of labour disputes, there was urgent need to modify *Provisional Regulations* and make detailed stipulations. In this situation, *Regulations on Settlement of Labour Disputes in Enterprises* was adopted by the State Council at the 5th Executive Meeting on June 11, 1993 and came into effect from August 1, 1993, revoking the *Provisional Regulations* 1987. The scope of coverage of the new regulations has been broadened to cover a wider range of disputes in all enterprises operating within China's borders, arising from: 1) termination and early termination of labour contracts; 2) failure to comply with state regulations on wage, social insurance, occupational safety, training and welfare benefits; 3) performance of labour contracts and etc. In handling a labour dispute, the arbitration committee shall form an arbitration tribunal. When a dispute takes place, the parties directly involved should try to settle it by discussion and negotiation. If a party refuses to negotiate directly with another party or the negotiation fails, the dispute can be referred to Enterprise Labour Dispute Mediation Committee for mediation. *Regulations* allows direct appeal to local Arbitration Committee. The decision of Arbitration Committee can be appealed to local People's Court. The *Regulations* plays an important role in perfecting labour dispute settlement system, promoting labour legal system construction, protecting enterprises' and workers' rights, maintaining production order and harmonising labour relations, thus contributes to the smooth reforms.

4. Profile of Labour Dispute Settlement System

According to the statistics across China including 30 provinces (autonomous regions and municipalities directly under the central government) and Xinjiang construction corps, Labour Dispute Arbitration Committees at all levels in 2001 accepted 154,621 disputes, involving 467,150 workers. By the end of the year, 150,279 disputes, including 8,793 left from last year, had been settled, accounting for 92%. Besides, Labour Dispute Arbitration Committees also mediated 63,969 disputes without filing case.

4.1 Features of the Labour Disputes

- Substantial increase in the number of disputes

In 2001 the number of disputes, accepted by Arbitration Committees, saw 14.4% increase against 2000 (The figure was 135,206 disputes in 2000) and 27.6-time increase against 1987, when the labour dispute settlement system first reinstated, 4.7-time increase against 1995, when *Labour Law* came into force. In the respect of workers involved, there was 10.5% increase against 2000 (The figure was 422,617 workers in 2000). Disputes were concentrated in eastern coastal regions and economically developed areas. The number of disputes kept rising in state-owned enterprises, while that in share-holding enterprises, companies with limited liability, individual businesses was on rapid increase.

- Rapid rise in the number of collective disputes

In 2001 there was 9,847 collective disputes, a 19.4% increase as compared with 2000. The number of workers involved climbed 10.5% to reach 286,680, an average of 30 workers in each dispute. 66.9% of all the collective disputes (67.7% workers involved) took place in state-owned enterprises, collective enterprises, share-holding enterprises, companies with limited liability and jointly-operated enterprises.

- Increasing difficulty in mediating disputes, and rise in the number of disputes settled by arbitration rulings

Among disputes settled by Arbitration Committees at all levels in 2001, 72,250 was resolved by arbitration rulings (48.1%), a 6.7% increase against 2000; 42,933 was resolved by arbitration mediation (28.6%), a 3.4% decrease against 2000.

- High proportion of disputes appealed by workers and high proportion of disputes won by workers

Among the disputes accepted by Arbitration Committees in 2001, 146,781 (94.4%) was raised by workers, a 6.1% increase against 2000. In breakdown by types of enterprises, the figure was 97% in individual businesses, 95.7% in private enterprises, 95.3% in foreign, Taiwan, Makao, Hongkong-funded enterprises. As for the results, 47.7% disputes was won by workers and 21% by enterprises. The rest was partly won by both parties. The highest proportion (52.7%) of disputes, won by workers, was seen in private enterprises, which was followed by 52.5% in individual businesses and 48.1% in foreign, Taiwan, Makao, Hongkong-funded enterprises.

4.2 Problems in the Labour Dispute Settlement System

4.2.1 Labour Dispute Settlement Process

The current labour dispute settlement process in China is one-track process, consisting of three stages: mediation by Enterprise Labour Dispute Mediation Committee, mandatory arbitration by local Labour Dispute Arbitration committee, and litigation by People's Courts of first instance and second instance. Such process displays some disadvantages: Firstly, it is time-consuming, as it takes around one year to complete the whole process from mediation to judgement by court of final instance. During the long period of waiting for final decision, the relations between parties to a dispute are in strained state, which in turn adversely affects enterprise operations. Secondly, it involves a lot of time and expenditures for parties to a dispute, and a lot of workload and costs for organisations dealing with disputes. Thirdly, such process shows low efficiency. In this regards, there is urgent need to simplify the process.

Since the Labour Dispute Arbitration Committee is set up in labour and social security department and the post of committee director is taken up by representative from the department, arbitration committee is closely tied to government, and therefore show the feature of "administrative arbitration". Furthermore, mandatory arbitration is

against internationally-accepted principle of voluntary arbitration. Therefore, the arbitration system should be brought in line with current international practice and its overall trend of development. Labour dispute arbitration should be conducted on voluntary basis, and arbitration bodies should be civil organisations. It is also necessary for arbitration bodies to make independent arbitration decisions, free of intervention by any administrative department, social organisation and individual.

In this regard, it is suggested that one-track system should be transformed into double-track system, involving free choice of arbitration or litigation. When employing units and employees conclude labour contracts or a labour dispute takes place, the parties should, based on the principle of "autonomy of will", make decision in writing, indicating which form of settlement they have selected. If the parties have reached consensus about arbitration, they should include it in labour contract as arbitration clause or sign a separate arbitration agreement. In the case of absence of arbitration clause or arbitration agreement, Arbitration Committees should refuse to accept the dispute. All the disputes, which are not covered by arbitration clauses or arbitration agreements, should be brought to People's Courts. If the parties have agreed about arbitration settlement, the arbitration award will be final decision and parties must comply with it. In this case, either party will be not able to appeal to People's Court or any other organisations for modification of the decision. If a party does not implement the arbitration award, the other party can petition with the people's court for enforcement of the award. For the disputes, which are settled through People's Courts, final judgements will be made at courts of second instance.

Double-track system enjoys many advantages, such as less time-consuming and higher efficiency, lightened financial burden on parties and lower administrative costs for handling disputes. Since it is convenient for both parties to a dispute and organisations dealing with disputes, such a system will be the direction of future reform.

4.2.2 Time limit for arbitration

According to *Labour Law*, the party that requests for arbitration shall file a written application to Labour Dispute Arbitration Committee within 60 days starting from the

date of the occurrence of a labour dispute². The arbitration committee shall accept a petition when a party fails to observe the time limit due to force majeure or other justifiable reasons. If a party petitions to Arbitration Committee beyond the 60-day time limit without justifiable reasons, the Committee shall refuse to accept the dispute and inform the party in a writing ruling, note or decision, stating the reason for refusal. In this case, the party can appeal the decision to People's Court. If the court determines that the time limit expires without justifiable reasons, the court shall reject the appeal.

Date of the occurrence of a labour dispute, according to the *Explanations on Some Questions in Implementing Labour Law* issued by the Ministry of Labour on August 4, 1995, is defined as date when a party knows or should know that his rights have been infringed upon. In fact, the date of occurrence of dispute between parties does not always coincide with the date of infringement on a party's right. Therefore, the date of occurrence of dispute should be defined as date when a party requests another party for restitution of his right. Here we will not discuss the definition of "date of occurrence of labour dispute" in depth. The problem we want raise is the time limit, which is shortened by *Labour Law* from 6 months to 60 days (6-month time limit was set up by *Regulations on Settlement of Labour Disputes in Enterprise*). It is understandable that the change was made out of good intention to speed up the resolution of disputes. However, the 60-day time limit for arbitration is too short as compared with 2-year time limit for litigation. As arbitration is the mandatory stage of labour dispute settlement process, it is a common occurrence that parties to a dispute lose right of judicial action just because of expiration of time limit. Also, as there is no detailed explanation on "justifiable reasons for expiration of the time limit", it becomes a subject of subjective conclusion of court or arbitration personnel. This sometimes leads to different decisions over the same dispute. It is also worth mentioning that sometimes parties can not get their rights protected, if they have spent too long time on negotiation and mediation so as to the time limit for arbitration expired. Therefore, detailed explanation on "justifiable reasons for expiration of the time limit" and legal institution of "interruption of time limit" should be formulated to supply the existing gap in order to better protect parties' rights and interests.

² According to the *Regulations of Settlement of Labour Disputes in Enterprises*, a party to a labour dispute should petition for arbitration to the arbitration committee in writing within 6 months from the date when he knows or should know that his rights have been infringed upon.

4.2.3 “Access control” for dispute handling personnel

Arbitration is a sub-judicial or judicial activity, which concerns labour law, trade unions law, civil and commercial law, economic law, administrative law, criminal law, procedure law as well as theory of law and etc. To carry out such activity, arbitrators and judges must have knowledge of theory of law and be familiar with relevant laws, regulations and government policies. Otherwise, they would not be competent to handle disputes.

Labour administrative departments, people’s courts and trade unions attach great importance to the training of arbitrators (both full-time and part-time), judges and legal workers in trade unions. No one can take up such positions before passing special examinations. In the case of arbitrators, labour administrative departments hold examinations and grant accreditations to successful passers. Names of the accredited arbitrators are publicised within labour administrative departments. Such accreditation system plays significant role in ensuring settlement of disputes in conformity of legal provisions, protecting parties’ legitimate rights and interests, harmonising labour relations and promoting economic and social development. However, since only a small number of arbitrators have legal education background, they are not well-qualified to handle labour disputes. In this regard, access control system should be introduced to select labour dispute arbitrators in order to enhance the quality of arbitrators and quality of dispute handling. It is suggested that unified national qualification examination should be held to select arbitrators, except for the ones with long years of work experience in the profession.

In 1997 legal aid system was introduced in China with an aim to ensure fair legal protection, perfect social security system and improve human rights protection system. Legal aid refers to the legal system, in which lawyers, notaries and grass-root level legal workers provide persons living in poverty or parties of special cases with free-of-charge legal service or on fee-reduction basis under the guidance and coordination of state legal aid organisations. Beneficiaries of such system usually are persons who are insolvent or partly insolvent to pay fees for legal services duo to poverty (The standard for poverty is determined by local government department). Legal aid system applies to the following cases: 1)claim for damages resulted from performing public duties; 2)claim for

survivor's benefits, pension, social insurance benefits and wage; 3) other cases if necessary. Legal aids are granted in the forms of: 1) offering legal advice; 2) drafting legal documents; 3) acting as legal counsel in civil or administrative proceedings; 4) non-litigation affairs; 5) issuing notarial deeds; 6) other forms. With focus on handling labour disputes, trade unions provide its members living in poverty, its workers and grass-root level trade unions with legal aids in forms of offering legal advice, drafting legal documents, acting as legal counsels in arbitration and litigation proceedings in order to safeguard their legitimate rights and interests.

Application for legal aids should be made to the local legal aid organisation in the jurisdiction of people's court handling the case. The organisation will determine whether to offer legal aids

Lawyers, notaries and grass-root level legal workers are requested to provide free-of-charge legal aids in certain amount as stipulated by provincial department of justice, and they also have to render paid services assigned by legal aids organisations. If they refuse to perform the duty or perform it in such a negligent manner that brings about great loss to aids recipients, legal aids organisations may suggest that relevant departments impose punishment on them or refuse to renew their licenses.

III. Organisations to Handle Labour Disputes

1. Enterprise Labour Dispute Mediation Committee

An enterprise may set up a labour dispute mediation committee to be responsible for mediating labour disputes within the enterprise. The mediation committee is usually composed of representative(s) of employee(s), representative(s) of the enterprise, representative(s) of the enterprise trade union. The employees' representative(s) is nominated by the congress of employees' representatives or employees' congress. The enterprise representative(s) is appointed by the enterprise director or manager. The enterprise trade union representative(s) is appointed by the enterprise trade union committee. The number of members to the mediation committee should be determined through negotiations between employees' congress and the enterprise director or

manager, at the proposal of the former. The number of enterprise representative(s) should not exceed one third of the total. The post of chairman of the mediation committee should be taken up by a representative of the enterprise trade union. The mediation committee sets up its secretariat at the enterprise trade union committee. In an enterprise without trade union, the establishment and composition of the mediation committee should be determined through negotiations between the employees' representatives and the enterprise representatives.

Labour Dispute Mediation Committee is different from People's Conciliation Committee, which aims at mediating minor civil cases and petty criminal cases under the guidance of grass-root level People's Court. The differences between the two Committees are as follows:

- They have different scope of coverage. When the Labour Dispute Mediation Committee works with parties acting as employee and employer, People's Conciliation Committee deals with parties, which can be employer and employee, employees of the same enterprise, or employees from different enterprises.
- They handle different disputes or cases. Labour Dispute Mediation Committee mediates labour disputes, which takes place in the enterprise, and People's Conciliation Committee mediates minor civil cases and petty criminal cases.
- The committees work under guidance of different organisations. Labour Dispute Mediation Committee functions under the guidance of trade unions associations at all level, while grass-root level People's Court and People's government provide guidance to People's Conciliation Committees.

Labour Dispute Mediation Committee is responsible for:

- Mediating labour disputes within the enterprise, arising from resignation and demission of employees; performance of labour contracts; implementation of laws and regulations on working time, wage, social insurance, welfare, training and occupational safety. The committee also

deals with other disputes, if it is stipulated by legal provisions. Usually, the committee does not handle disputes over dismissal of employees by enterprise.

- Supervising and prompting parties to a dispute to perform the mediation agreement. Since parties are not legally bound by the agreement, what the committee can do at this stage is to monitor and prompt parties to implement the agreement.
- Carrying out publicity of labour laws and regulations, as well as other activities to prevent labour disputes. Abiding by the principle of “highlighting prevention, combining prevention and mediation”, the committee aims to prevent and minimise the occurrence of labour disputes through publicity campaigns, and settle disputes at grass-root level.

2. Labour Dispute Arbitration Committee

Labour Dispute Arbitration Committee is arbitral organ to handle labour disputes, established in accordance with legal provisions. Counties, cities and city districts should set up labour dispute arbitration committees. When necessary, provincial government (including autonomous region and municipality directly under the central government) may set up Labour Dispute Arbitration Committee and determine its jurisdiction. The arbitration committee is usually composed of representative(s) of labour administrative department at the same level, representative(s) of enterprises, representative(s) of trade union. The members to the arbitration committee must be in odd numbers. The committee consists of 1 chairman, 1-2 vice-chairmen and members. Members are selected by the three above-mentioned organisations respectively. The post of chairman is to be taken up by an official in charge of the labour administrative department. The vice-chairman (chairmen) is elected by members of the committee through negotiation.

The secretariat of the arbitration committee shall be located at the labour dispute settlement division of the labour administrative department, and be responsible for dealing with its day-to-day routine.

The arbitration committee shall follow the principle of decision by a majority vote. The system of arbitrators and arbitration tribunals shall be adopted by the

arbitration committee in the settlement of labour disputes. The arbitration committee may engage personnel from the labour administrative department or from other relevant government departments, trade union officials, experts, scholars and lawyers as full-time or part-time arbitrators. Part-time and full-time arbitrators shall enjoy equal rights in discharging their duties of arbitration. In handling a labour dispute, the arbitration committee shall form an arbitration tribunal, which shall be composed of three arbitrators. A simple labour dispute may be handled by a single arbitrator appointed by the arbitration committee. For collective labour dispute involving more than 30 employees, special arbitration tribunal should be formed with more than three odd number of members. The arbitration tribunal may submit major or complicated labour dispute cases to the arbitration committee for deliberation and decision. The arbitration tribunal must implement the decisions of the arbitration committee.

Labour Dispute Arbitration Committee is responsible for:

- Handling labour disputes within its jurisdiction, arising from resignation and demission of employees; dismissal and discharge of employees by enterprise; implementation of laws and regulations on working time, wage, social insurance, welfare, training and occupational safety; performance of individual labour contracts and collective labour contracts. The committee also deals with other disputes, if it is stipulated by legal provisions.
- Recruitment and administration of part-time and full-time arbitrators. The arbitration committee may engage personnel from the labour administrative department or from other relevant government departments, trade union officials, experts, scholars, and lawyers as full-time or part-time arbitrators. The committee administers arbitrators in accordance with *Directions on Recruitment and Management of Labour Dispute Arbitrators*, issued by the Ministry of Labour.
- Providing guidance to and supervising secretariat of the arbitration committee and arbitration tribunals in handling disputes. The secretariat is responsible for dealing with day-to-day routine of the committee; administering arbitrators and form arbitration tribunals with authority of the

committee; maintaining documents, archives and stamps of the committee; providing consultation on relevant laws and regulations; guiding and supervising arbitration tribunals in carrying out arbitrations, including acceptance of disputes, formation of tribunals, and withdrawal of arbitrators, mediation and arbitration of disputes.

3. People's Court

People's Court, exercising juridical power on behalf of the state, is also responsible for hearing labour disputes and making judgments.

If a party to a labour dispute refuses to accept arbitration decision, it can appeal the decision to People's Court. The disputes should be 1)disputes surrounding implementation of individual labour contracts and collective labour contracts; 2) disputes between employees and employing units, which have not concluded written labour contracts but formed de facto labour relations; 3)claims of retirees for pension, medical costs, employment injury benefits and other social insurance benefits to employing units, which have not participated in the social insurance pooling scheme. People's Court will accept the dispute, if the dissenting party appeals the arbitration decision with a set time limit. People's Court will not accept disputes without prior arbitration by arbitration committee. A dispute should be appealed to the People's Court in the place, where the employing unit is located or where the labour contract is implemented. Final judgment over a dispute will be made at People's Court of second instance. Parties to a dispute are not allowed to make repetitive appeal to court, grounding on the same fact or same reason.

When a party petitions with People's Court for enforcement of the arbitration note or award, which has come into effect, People's Court shall refuse to enforce the arbitration note or award, if it is found: 1) the dispute does not fall into the jurisdiction of labour dispute arbitration or the labour dispute arbitration committee does not have authority to deal with the dispute; 2) there is wrong application of laws and regulations; 3) the arbitrator engaged in malpractice and broke the law in making decision; 4) the arbitration decision is against public interests. Within 30 days after receiving the court's

order of refusal to enforce an arbitration note or award, the party to a dispute may bring a lawsuit over the dispute in court.

4. Tripartism Mechanism in Collective Labour Dispute Settlement

Tripartism mechanism in collective labour dispute settlement refers to the mutual consultation and negotiation between labour administrative department, trade union and representatives from enterprises with an aim to settle collective labour dispute.

Directions on Establishment and Improvement of Labour Relations Tripartism Coordination Mechanism, jointly issued by the Ministry of Labour and Social Security, All-China Federation of Trade Unions and China Enterprises Confederation on August 13, 2000, points out that labour relations tripartism coordination mechanism is an effective way to regulate labour relations and promote harmonious labour relations, hence important for creating stable environment for reforms and opening up.

Currently, the labour relations tripartism coordination mechanism has been established in more than 20 provinces (autonomous regions and municipalities directly under the central government). Tripartism collective labour dispute settlement mechanism is an important component of the labour relations tripartism coordination mechanism, as it investigates major collective labour disputes and “mass incidents”, proposes suggestions on prevention and reconciliation of such disputes, offers guidance in dealing with disputes arising from conclusion and performance of collective contracts. The tripartism mechanism shifts its focus along with the changing situation, highlighting priorities and sticking to issues of workers’ common concern, which may have impacts on labour relations. In the provinces, where the coordination mechanism has been set up at provincial level, it should be replicated to cities and counties so as to form a multi-level tripartism coordination system.

IV. Procedures to Handle Labour Disputes

1. Labour Dispute Mediation Procedure

The procedure involves several steps. Firstly, a party to a dispute submits petition to the committee for mediation. Next, after acceptance of the petition, the committee shall investigate the dispute and convene mediation meeting. If the mediation is successful and the parties reach agreement, the result shall be documented in a mediation note.

The start of the mediation procedure depends on the application of a party to a labour dispute. Article 14 of *Rule of Organisational Structure and Working Procedure of Enterprise Labour Dispute Mediation Committee* stipulates, that within 3 days since he know or should know about the infringement upon his rights, the party should petition in writing or orally to the Enterprise Labour Dispute Mediation Committee and fill out application form. However, it is not stipulated in the *Rule* whether the procedure shall be started upon receipt of petition of one party or both parties. But, majority of people think it is enough to start the procedure, if one party applies to the committee. Along with the social-economic development in China, organised mediation is becoming increasingly popular, while unorganised mediation is decreasing. Link of application for arbitration with the start of the procedure is not only socially accepted, but also recognised by other party to the dispute. However, it is still necessary to have confirmation from another party on the application for mediation. Once a party has raised a dispute to the committee for mediation and another party confirmed the application, the committee shall decide whether to accept the dispute. If the answer is in the affirmative, the committee shall start the mediation procedure. Such arrangement not only reflects wills of the two parties, but also enhance the efficiency of application by one party.

Another important step of the procedure is investigation of the application and acceptance of the case. In the same way as People's Court dealing with bills of indictment, the committee shall investigate the dispute in terms of jurisdiction, time limit and other factors. At present, Labour Dispute Mediation Committee looks after the same disputes as Labour Dispute Arbitration Committee, including disputes arising out of:

- Dismissal, discharge or lay-off of workers by enterprises;
- Resignation and demission by workers;
- Implementation of relevant laws and regulations on wages, insurance, welfare, training and work safety;
- Execution of labour contracts;
- Other disputes, if it is stipulated by other laws and regulations.

Besides, as Enterprise Labour Dispute Mediation Committee handles dispute which arises between the same enterprise and employees, the committee also have to check: 1) whether the dispute has occurred between employees and the enterprise, where the committee is set up; 2) whether the application for mediation is made within the set time limit. The procedure will be started if all the conditions are met.

The core of the procedure is investigation of the dispute and organising negotiation. Before convening the negotiation meeting, the committee shall investigate the facts and reasons, over which the parties are arguing, including time and venue of occurrence of the dispute, process of disputing, key issue in the dispute and reasons. Fact finding involves: 1) listen to the statement and explanations by the parties, ask questions as to know the real intention and request of the parties; 2) talk to insiders and other persons, who may know the dispute, to obtain first-hand information; 3) If necessary, go for field investigation to gain first-hand evidence; 4) request for expertise by relevant authorities, if the dispute relates to employment injury or other technical matters. Based on the findings, the committee chairman shall invite the parties to a negotiation meeting, in which other relevant organisations and individuals may also get involved. Generally, negotiation meetings are chaired by 1-3 mediators: those for simple disputes³ are usually chaired by 1 mediator and those for complicated disputes are chaired by 2-3 mediators. The meeting usually is announced open by the speech of a mediator on the purposes and content of the meeting, relevant laws and regulations, social morals. The mediator also calls for the parties to be brave to admit wrongdoing and take the consequences, and to make efforts to reach agreement. After the speech by the mediator, the parties shall present facts and state their positions on the dispute. Next

³ Whether it is a simple or complicated dispute is determined by the committee.

step, mediator(s), shall direct the parties to conduct debate in an abstentions and reasonable manner in order to clarify the situation.

There are two possible results of the negotiation: reaching agreement and failure to do so. If the disputing parties have reached consensus, the committee shall formulate a mediation note, indicating names and positions of the disputing parties, disputed matter(s), result of negotiation. The note shall be signed by the committee chair and the parties respectively, and produced in three copies to be kept by the parties and committee respectively. The agreement does not possess legal binding force and they parties should perform the agreement on voluntary basis.

Cultural traditions exert influence on the choice of the form of dispute settlement. In China, concepts of “Compromise is most precious ” and “Zhong Yong” (It can be translated in English as “Golden mean”). have long history and date back thousands years. For around two thousands years since Han dynasty, which rejected the various schools of thinkers and made Confucianism the single accepted and honored school, Confucianism was the dominating and orthodox cultural concepts. Confucius value orientation has been carrying great weight with Chinese in disputing and settling disputes. “Zhong” means middle, no bias. “Yong” means normal. So, for Chinese, unbiased mediation is a rational choice to settle disputes. For this reason, internal settlement within enterprise without going to public arena has been first choice of many disputing parties. Enterprise Labour Dispute Mediation Committees have played an important role in resolution of disputes. In addition, internal mediation within enterprise can reduce the social costs of the disputes and free the enterprises from troubles, resulted from inharmonious labour relations, so that enterprises can focus their full efforts on developing their business.

However, there are some drawbacks in the current mediation system. Firstly, the mediation procedure still shows traits of planned economy. Since it was reestablished in mid-1980s, the system was designed with earmarks of the time and in accordance with other social institutions of the days. Labour dispute mediation in enterprise was considered to be equal to the grass-root level People’s Conciliation system. Moreover, along with the speeding-up of urban economic reforms during the mid-1980s, enterprise reform, centred on expansion of autonomy and revitalisation of enterprises, became the priority of priorities. As a part of the enterprise reform, labour management, wage and

social insurance systems were changed. The labour mediation system was established to cope with disputes arising in the process of the reform. Consequently, the labour mediation system has characteristics of the transitional period. Secondly, the mediation procedure is an exclusive circle. Although many enterprises have labour dispute mediation committee, but there are little relations between those committees. If a dispute involves a third party or another enterprise, the committee will have nothing to do with them. Thirdly, the system is not suitable to regulate labour relations in market economy. Such committees are established in enterprises, which are only part of employing units in market economy. For employing units other than enterprises, there is no mediation committee to handle labour disputes. For this reason, mediation as a form of labour dispute settlement covers only enterprises. Fourthly, the system puts excessive emphasis on procedure itself. Strictly imitating arbitration and litigation, the mediation procedure is unduly rigid and lacks flexibility. Fifthly, the mediation note does not have legal binding force and therefore not legally enforceable, which makes no substantial difference between reaching agreement and failure in reaching agreement. This tends to preclude the arbitration agreement from being a final resolution to the dispute.

2. Labour Dispute Arbitration Procedure

The labour dispute arbitration procedure system includes jurisdiction, time limit, submission and acceptance of an arbitration petition, hearing of a dispute and etc.

2.1 Jurisdiction and time limit

Jurisdiction refers to the division of responsibilities in handling labour disputes among Labour Dispute Arbitration Committees at all levels and in different territories. At present, territory is the primary factor in determining jurisdiction, while level jurisdiction is also taken into consideration. Simple disputes are under the jurisdiction of the district (county)- level arbitration committee, where the disputing employee's wage record is maintained. Major and complicated disputes are handled at provincial-level

(municipality-level) arbitration committees⁴. As for time limit, *Regulations of Settlement of Labour Disputes in Enterprises* stipulates that a party to a labour dispute should appeal to the arbitration committee for arbitration in writing within 6 months from the date when he knows or should know that his rights have been infringed upon. The arbitration committee shall accept a petition when a party fails to observe the time limit due to force majeure or other justifiable reasons. However, the period has been shortened by *Labour Law 1994* from 6 months to 60 days. According to the principle of “The latter law precedence over the early law and the effect of law is superior to that of regulations”, the provision on time limit in *Labour Law* is applied in arbitration practice.

2.2 Submission and acceptance of an arbitration petition

The arbitration procedure shall start, once a party has found an infringement upon his right and lodged a petition for restitution. Upon receiving the petition, the arbitration committee shall investigate it in terms of completeness of documents, territory and level jurisdiction, time limit and whether the petition is made by a disputing party. If the answers are all in the affirmative, the committee shall fill out a form and submit it to the official in charge of the secretariat, requesting for approval to file the case. The official in charge shall make decision within 7 days after receiving the form. Within 7 days after making the decision, the committee shall notify the party of the decision in a written note. If the decision is affirmative, the committee shall also send a copy of the petition to the respondent and request him to file a bill of defence with related evidence within 15 days.

2.3 Hearing of a dispute

In handling labour disputes, the arbitration tribunal shall firstly mediate and try to bring the disputing parties involved together to reach an agreement on their own. In case an agreement is reached through mediation, the arbitration tribunal shall produce a mediation note. If no agreement is reached through mediation or if one party retracts before the note is delivered, the arbitration tribunal shall proceed promptly with a ruling.

⁴ Currently there is no unified national standard on level jurisdiction. In practice, it is different in provinces, municipalities directly under the central government and autonomous regions.

According to *Rule on Organisational Structure and Working Procedure in Labour Dispute Arbitration Committee*, the hearing process consists of several steps: 1) ascertain the presence of the parties; 2) announce disciplines during the hearing; 3) explain the dispute, rights and responsibilities of the parties; 4) announce the members of the tribunal; 5) ask the parties whether to apply for withdrawal; 6) investigate the dispute and ask the parties to make statement regarding to the dispute; 7) mediate; 8) adjourn the hearing for collegial discussion; 8) continue the hearing, announce the ruling or suspend ruling. Arbitration tribunal shall conclude all labour disputes within 60 days from the date of its setting up. If a case is so complicated that requires an extension of its mandate, the tribunal shall request the arbitration committee for approval, and the extension shall not exceed 30 days. After making ruling, the tribunal shall fill out a “Case Conclusion Form” and submit it to the committee chairman for approval. The mediation note shall take effect upon receipt by the parties. Arbitration award shall come into effect after 15 days of receiving the award, if the parties do not appeal it to People’s Court.

2.4 Shortcomings in the present system

Firstly, the arbitration is mandatory procedure before litigation, and disputing parties are deprived of litigious right without prior arbitration. This means that arbitration committees have replaced judicial power with arbitral power, and the litigious right with the right to apply for arbitration. As a result, the committees have replaced People’s Courts of first instance in handling labour disputes.

Secondly, arbitration award is a conditional, time-bound and effect-pending decision rather than a final resolution to a dispute. Despite arbitration can be conducted only for one time, the arbitration award is not a final resolution, as it have to wait for the parties’ response before coming into effect. If a party disagrees with the ruling, he can proceed with the settlement process and bring the dispute into litigation. Such arrangement, to a certain extent, makes the arbitration procedure nominal and void.

Thirdly, the arbitration procedure is unduly rigid and lacks flexibility, strictly imitating the litigation procedure. For example, some of the time limits are set too long. Furthermore, the arbitration procedure still has “administrative colour” in terms of its approval requirement for filing and concluding a case.

Fourthly, there is logical contradiction in some provisions. The provision on level jurisdiction is a typical example. The logical basis of such level jurisdiction arrangement is the administrative affiliation among arbitration committees. In fact such relations do not exist. Furthermore, according to this logic, there should have been arbitration committees of second instance, which shall correct the rulings made by the committees of first instance. Only in this way, there will be level jurisdiction. In practice, it is a rare phenomenon in some areas that arbitration committees of different levels argue with each other to obtain a jurisdiction over disputes.

3. Judicial System for Labour Dispute Settlement

It is worth pointing out that China's judicial system for handling labour disputes is in a transitional period. On March 22, 2011, the Judicial Commission of the Supreme People's Court at its 1165th meeting adopted *Interpretations on Some Questions on Application of Laws and Regulations in Handling Labour Disputes* (hereinafter referred to as *Interpretations*), which have made substantial amendments to the existing judicial system for settling labour dispute. In this article, both the previous and new provisions are included so that our readers can have a clear picture of the system and its revolution.

3.1 Indictment and acceptance of an indictment

Before the issuance of the *Interpretations*, according to *Civil Procedure Law, Labour Law and Regulations on Settlement of Labour Disputes in Enterprises*, a party shall have right to bring a lawsuit to court, "if:

- 1) he is a party to the labour dispute. He can also appoint agents, if he can not bring a lawsuit himself;
- 2) he refuses to accept the arbitration award. The arbitration is mandatory, without which it is not allowed to bring a lawsuit;
- 3) there is clear indication of defendant;
- 4) there are clear claim and groundings for the claim;
- 5) it is within the time limit, which is set as 15 days after receiving the arbitration award."

However, the imposed preconditions have been loosened by the *Interpretations* in 2001. Article 2 of the *Interpretations* stipulates:” If the Labour Dispute Arbitration Committee refuses to accept a case grounding on the conclusion that it is not labour dispute, the Committee shall notify the party of the decision in a written note. If the party disagrees with the Committee’s decision and brings a lawsuit in People’s Court, the Court must deal with the appeal in one of the following way in accordance with the situation: 1)accept the case, if it is labour dispute...” Article 3 of the *Interpretations* stipulates:” In case a party disagrees with Labour Dispute Arbitration Committee’s refusal to accept the dispute grounding on the expiration of 60-day time limit, set by article 82 of *Labour Law*, if the party brings a lawsuit, the Court shall accept the case.” The above-mentioned provisions have loosened conditions for bringing a lawsuit in court. Some cases, which were not accepted before, have turned out to be acceptable now.

3.2 Jurisdiction

Before the issuance of the *Interpretations* there was no unified rule on jurisdiction over labour disputes. In some places, courts accepted the disputes, over which the arbitration committees in its territory had made the arbitration award. In other places, courts determined jurisdiction with reference to provisions on arbitration jurisdiction. As for more complicated level jurisdiction, courts in most provinces and municipalities accepted cases in accordance with arbitration level jurisdiction, viz, if a party disagrees with arbitration award made by county-level arbitration committee, he would appeal to county-level People’s Court; if a party disagree with arbitration award made by city-level arbitration committee, he would appeal to city-level Intermediate People’s Court. For example, according to *Interim Interpretation of Some Questions in Handling Labour Disputes* issued by Civil Tribunal of Beijing Supreme Court, “If a party to a labour dispute bring a lawsuit over the decision by Labour Dispute Arbitration Committee, People’s Courts in Beijing shall accept the cases temporarily in conformity of the following principles: if a party disagrees with arbitration award made by Beijing Municipal Arbitration Committee, he shall appeal to the Intermediate People’s Court in the place, where the enterprise is located. If a party disagrees with arbitration award

made by county-level arbitration committee, he shall appeal to the district(county)s-level People's Court in the place, where the Arbitration Committee is located..." According to the *Interpretations*, "a labour dispute shall come under jurisdiction of the grass-root level People's Court in the place, where the disputing enterprise is located or the labour contract is implemented. In the case when the place of implementing labour contract is not clear, the grass-root level People's Court in the place, where the disputing enterprise is located, shall accept the case".

3.3 Time limit

A special time limit system is adopted in labour dispute litigation. Firstly, the starting point to calculate time limit is the date when parties receive the arbitration award. Secondly, unlike the 2-year time limit (or 1 year in specific situations) in civil procedure, time limit in the labour dispute litigation can be called "mini time limit", as it is set within mere 15 days after receiving arbitration award.

3.4 Proceeding

Currently, *Interpretations on Some Questions on Application of Laws and Regulations in Handling Labour Disputes* and *Civil Procedure Law* are applied in labour dispute litigation proceeding. The litigation procedure for labour disputes is quite similar to civil procedure, in terms of preparation before hearing, opening hearing session, courtroom investigation, court debate and making judgment. The principal difference is the acquisition and identification of evidence in courtroom investigation and court debate. Article 13 of *Interpretations* stipulates that enterprise shall be responsible to adduce proof in the cases of disputes, arising from dismissal, discharge of employees, termination of labour contracts, reduction of compensation, calculation of length of service and etc.

Labour dispute litigation procedure has direct influence on effectiveness of the labour dispute judicial system. Shortcomings in the procedure prevent the system from effective functioning. At present, there are some shortcomings in the litigation procedure and judicial system.

Firstly, the procedure is stipulated in such a fragmented manner that confuses not only parties to a dispute but also judges. When determining jurisdiction, time limit and

evidence adducing requirement, judges find it difficult to decide that they should apply *Civil Procedure Law* or *Interpretations*. Some disputing parties have no knowledge of the *Interpretations* at all. All of these have precluded effective protection of parties' rights. Many judges, particularly those in grass-root level courts, can not understand the relations between jurisdiction of grass-root level courts over labour disputes and territory jurisdiction over civil cases. The *Interpretations* have broken up the jurisdiction system in civil procedure by canceling level jurisdiction of labour disputes and assigning all labour disputes to grass-level courts. No matter how large it is the amount in controversy, how great is the public concern about the dispute, and how far-reaching is the impacts of the dispute, all the labour disputes are handled by grass-root level courts. The fragmented provisions have weakened the judicial system in handling labour disputes.

Secondly, there is a tendency of expanding administrative power and shrinking of judicial power in settling labour disputes. "Civil judicial power is part of political power, neither economic, administrative power nor religious power. It is the instrument of the state to settle civil conflicts." Jurisdiction of law courts is the judicial power of the courts in settling civil conflicts. Jurisdiction is a division of responsibilities between People's Courts and other state organs or organisations in handling and settling civil conflicts."⁵ It is law provisions that determine the jurisdiction of People's Courts and other administrative organs over various conflicts. "In principle, jurisdiction of courts is not limited. There is so-called fundamental of" final settlement by judicial power", which means that any conflict, failing to be settled by other means, can be brought to courts and settled by judicial judgment."⁶ Mandatory arbitration prior to litigation was first set up by administrative regulations of the State Council. Regulation of litigation and arbitration procedure by administrative regulatory documents have led to intervention of administrative power into the domain of arbitration power and judicial power. Particularly, the intervention of administrative power into the domain of judicial power has exhibited the expansion of administrative power and shrinkage of judicial power.

⁵ Wang Xuerong, *China Civil Litigation*, Law Publishing House, page 87-89.

⁶ Chen Guiming, *Concepts and Rules of Procedure*, China Legal System Publishing House, page 208.

Thirdly, vacuum has been created in jurisdictions over disputes, as regulations on arbitration procedure give clear definition of labour disputes to be settled through arbitration. This means that disputes, arising from factors other than those stipulated in the regulations, though employment-related, are not recognised as labour disputes, thus not protected by labour dispute litigation. Currently, “personnel dispute” is a typical example. Since 1988, when the Ministry of Labour and the Ministry of Personnel got Enterprise employees are administered by the Ministry of Labour, and employees of government organ and institutions are administered by the Ministry of Personnel. Since mid-1980s, the labour dispute arbitration organisations has reached a tacit agreement with courts that personnel disputes are excluded form the litigation proceeding. In recent years, personnel dispute arbitration system has been built up, but it still in the initial stage of development. Due to the lack of legal stipulation whether a personnel dispute can be brought to court or not, in practice some courts accept such disputes, while some not. In most cases, if arbitration committee refuses to accept the dispute, the parties can not expect protection from court. This runs counter to the fundamental principle ” final settlement by judicial power”.

Lastly, there is no distinction between right disputes and interests disputes, viz. law disputes and fact disputes. Acceptance of a dispute by People’s Court is directed liked with arbitration, which handles both right disputes and interests disputes. Link between arbitration and litigation enables some interests disputes to enter litigation proceedings, which is against conventional theories and practice of civil procedure. In another word, an interests dispute refers to dispute arising from future interests or from straggling for interests. Generally, such disputes often take place in the process of collective bargaining between trade unions and employer’s organisation, pursuing different interests. Since the subject-matter of such disputes is nor acquisition of right or infringement upon right, they can not be settled through litigation. In civil legal proceedings, courts can not make accurate, feasible and enforceable judgment to disputes without clear claim. Currently, though interests disputes are not litigable, courts have not made clear distinction between interests disputes in practice.

V. Suggestions for Reforming the Current Labour Dispute Settlement System

Functioning of a system relies on its organisations, and rational system must be based on rational organisational arrangement. Organisations, handling labour disputes, involve mediation organisations, arbitration organisations and People's Courts. Establishing rational organisational structure in conformity with socialist market economy is a practical and also theoretical issue. Reform of labour dispute handling organisation should be based on experience in countries of developed market economy, particularly in European countries and USA, and Chinese real situation. The reform must be carried out in whole system and in all the organisations, handling labour disputes, namely, mediation organisations, arbitration organisations and judicial organisations.

1. Suggestions for Reforming Mediation System

Enterprise Labour Dispute Mediation Committees should be turned from internal organisations into social organisations. As the labour dispute mediation system was restored in mid-1980s along with labour system reform, which started from state-run enterprises, the system consequently targeted at state-run enterprises. The name of *Provisional Regulations on Labour Dispute Settlement in State-run Enterprises* is a perfect illustration of the situation. In 1990s, when the *Provisional Regulations* was replaced by *Regulations on Settlement of Labour Disputes in Enterprises*, the system extended its coverage to all enterprises, but not all employing units as stipulated by *Labour Law*. It is a well-known fact that enterprise trade unions play an important role in mediation of labour disputes within enterprise. Enterprise trade union is integrated with the secretariat for Labour Dispute Mediation Committee, and its power consequently has been strengthened. Trade union often exceeds its duties and replace tripartism coordination or directly act as intermediary. According to article 8 of *Rule on Organisational Structure and Working Procedure of Municipal Labour Dispute Arbitration Committee*," the mediation committee is composed of representative(s) of employee(s), representative(s) of the enterprise and representative(s) of the enterprise trade union..." and "The number of enterprise representative(s) shall not exceed one

third of the total.” However, as the members of trade union are also the enterprise’s employees, they can not be free of the enterprise’s influence in expressing their opinions. In spite of the relative independence of trade union, it still relies on enterprise to finance their administrative and other costs. In this regard, trade union can not hold a neutralised position in mediating disputes. In enterprise of any type of ownership, such committee can not perform its function in an proper manner, at least not more than “blurring the line between right and wrong”. Generally, a mediation body within enterprise is likely to be controlled by enterprise. Therefore, it is international convention to set up mediation bodies in administrative or sub-administrative organs so that they can independently exercise public power to mediate disputes, and parties to a dispute are given free choice of mediation or other form of settlement on voluntary basis.

Mediation bodies in administrative or sub-administrative organs will be not held by enterprise “by elbow” and thus able to discharge their duties of mediating disputes in a proper manner. In addition, in market economy mediation bodies should not constrain themselves within mediating disputes in enterprises, they should also handle disputes in other organisations. In line with tripartism principle, the parties to labour relations should participate in the mediation through their representatives. Administrative organs should also involve in the process. So, mediation bodies must be established on independent basis. It is most desirable to set up mediation bodies with small secretariat and large team of arbitrators.

For the French model for labour dispute settlement, individual mediation committees focus on settling individual labour disputes, while collective labour disputes are resolved through arbitration. Individual mediation committees involve division of mediation and division of ruling. Since Chinese labour dispute mediation committees are originated from individual labour disputes in enterprises and organised in line with tripartism principle, it is more practicable to make them independent from enterprise and relatively independent from administrative organs. Of course, such mediation committees should be put under guidance of administrative organs.

It is also necessary to carry out reform on the mediation procedure. Amendments have to be made in the present mediation procedure in order to remedy the shortcomings and improve the procedure.

Firstly, it is of great significance to enhance the flexibility of labour dispute mediation procedure. Rather than being as rigid procedure as arbitration and litigation procedure, the mediation procedure should be flexible and reflects wills of the parties. Excessively detailed stipulations on the procedure will hinder taking full advantages of mediation and effective protection of parties' rights. Currently, the time limit for applying for arbitration is 60 days after the occurrence of a dispute, and the time limit may be expired, since the mediation procedure lacks flexibility and may take long time. What is more, parties, particularly employees, may lose time, as they are not familiar with labour dispute settlement procedures. Therefore, the mediation procedure should be flexible, without being confined by formalities. The procedure can be simplified, as soon as it contributes to the reaching of agreement based on true wills of the parties.

Secondly, the reform should grant the binding force to mediation agreements. Lack of binding force has not only weakened the mediation system, also brought about the prevalent point of view that the mediation is a nominal and void process. On September 5, 2002, the Suppertime People's Court made interpretation on the effect of People's mediation agreements, and according to the interpretation, a agreement shall possess legal binding force, if it is made by legal procedure and consensus of the parties, in confirmation of laws and regulations, not at loss of other's interests. The interpretation can be used for reference in the case of labour dispute mediation. In our opinion, it is inevitable trend to grant mediation agreements conditional legal binding force. As regulations issued by the State Council, *Regulations on Settlement of Labour Disputes in Enterprises* specify the mediation procedure in details and make it a legal procedure. Therefore, conditional legal binding force will avoid void mediation agreements, and save time of workloads of parties and mediation committees. Of course, there should be some pre-conditions for the agreements to come into legal effect, such as legal procedure, reflection of true wills of the parties and conformity with state and public interests. If all the conditions are met, neither arbitration nor litigation should be accepted.

Thirdly, there is need to revoke some components of the mediation procedure, which are not in line with the nature and spirits of mediation. According to article 19 of *Rule on Organisational Structure and Working Procedure of Enterprise Labour Dispute Mediation Committee*, "Any party has right to request, in writing or orally, for

withdrawal of any member of arbitration committee, if: 1) if he is one of the parties, or a close relative of a party to the dispute; or 2) if he has a personal stake in the labour dispute; or 3) if he has some other relations with a party to the labour dispute that might affect the impartial handling of the case. The arbitration committee shall make a prompt decision on a request of withdrawal, and notify the parties orally or in writing. Decision of withdrawal of committee members shall be made by chair of the arbitration committee, and withdrawal of chair shall be decided collectively by the members of the committee.“ Such stipulation may cause misunderstanding that the mediation committee exercises public power and is organisation of public remedy. This is against the nature of mediation, as labour dispute mediation is defined as non-official mediation, the mediation committee, even after reform, will not turn into organisation of public power, and the mediation procedure will not turn into public remedy. Non-official nature of the mediation determines that the committee can not impose its will on the parties. For this reason, there is no need to set up withdrawal system at all. There is logic mistake in the stipulation on mediation procedure, since it is the parties that reach agreement on their own wills, and committee only provides assistance, not imposing its decision on the parties. Therefore, it is necessary to remove such components, which go against nature and spirits of mediation.

2. Suggestions for Reforming Arbitration System

The functioning of labour dispute arbitration system is based on rational arbitration organisations. An arbitration organisation in line with demands of market economy involves three factors: tripartism principle, independence from labour administrative department and perfect arbitrator system.

Firstly, it is essential to form arbitration organisations based on “real representation” of the three parties. Created under planned economy, China’s arbitration committees have not reflected real interests of the three parties. Currently, there is crisis in recognising identities of the representatives. Labour administrative departments, on behalf of administrative authorities, engage in harmonising labour relations and ensure economic construction and social stability. There is no problem on its representation. In the case of trade union representative(s), they are experiencing identity crisis. Trade

union representatives in the arbitration committee come from local trade union association, neither enterprise trade union representatives nor representatives elected by Employees' Congress. This, to a certain degree, affects their representation of employees' interests. Since the restoration of arbitration system in 1980s, which then targeted at state-run enterprises, enterprises had been represented by SETC, namely State Economic and Trade Commission (State Economic Commission formerly), and its local departments. However, after China's transition from planned economy to market economy, the coverage of labour dispute settlement system was widened to all enterprises. Accordingly, it became improper for SETC and its local departments to represent enterprises, especially foreign funded and private enterprises. At present, China Enterprise Confederation and its local branches China Enterprise Associations have replaced SETC and its local departments to represent enterprises in settling labour disputes. In fact, according to the tripartism principle, representation of enterprise administration departments in arbitration committee should be considered as employers' or enterprises' representation, not representation of the government. When autonomy of enterprises has still not been set up and team of real entrepreneurs has not been formed, interests of enterprises are expressed by various administrative departments, especially enterprise administrative departments.⁷

In this regard, it is a necessary and urgent task to form real tripartism mechanism, which will represent interests of the three parties and correspond with demands of market economy. In our opinion, in order to be able to effectively participate in arbitration, employees' representatives should be selected from enterprise trade union or industrial trade union, and also meet statutory qualification requirements. Enterprise representatives should be selected through negotiations between China Enterprise Confederation or Associations, Industrial and Commercial Associations, Associations for Foreign Funded Enterprises and other non-official organisations. Enterprise representatives should also meet statutory qualification requirements.

Secondly, labour dispute arbitration committee should be independent from labour administrative department. Secretariat of the committee has been the same as labour dispute division of local labour administrative department, only under different

⁷ Wang Zhenqi, Legislation Recommendations on Labour Dispute Settlement System, China Labour, No.2 2001

“cap”. Lack of distinctions between the two organisations has given rise to the intervention of administrative power in arbitration. What is more, some enterprises and employees identify labour administrative department with arbitration committee, and appeal to labour departments for a settlement. All of these have distorted the real “face” of arbitration.

However, many problems will ensue from detaching arbitration committee from labour administrative department. This is particularly in the case of funding. China is a developing country with vast population, and many tasks can not be performed due to shortage of funds. Attachment of arbitration committee with labour administrative department, to a degree, can be attributable to the financial consideration. Independent arbitration committee has its own personnel, office, equipment, funds to cover operation costs, and etc. All of these should not be covered by government budget. However, arbitration fee is collected in a purely nominal amount, and therefore the committee’s revenue is far from being adequate to support its operations. In order to change the situation, it is necessary to detach the arbitration committee from labour administrative department and grant it independence. Only in this way, arbitration committee will be free from influence of labour administrative department.

Thirdly, the arbitrator accreditation system should be reformed. “A few of current arbitrators have legal educational background, and there is quick turnover among arbitrators, which affect the stability of arbitrator team.”⁸

There is urgent need to enhance the professional capacity of arbitrators. In this regard, accreditation system should be strengthened, and the selection of arbitrators should be integrated into unified national judicial examination system. Only successful passer of the examination should be allowed to join the profession.

Reform on labour dispute arbitration system not only involves arbitration organisations, but also arbitration procedure. Procedure reform should disconnect arbitration with litigation, prevent the arbitration procedure from emulating judicial procedure, and eliminate other irrational elements in the arbitration procedure. Substantive fairness should be based on the procedure fairness, viz. rational and

⁸ Fan Zhanjiang, *Survey of Labour Dispute Settlement System*, China Labour Publishing House, December 1994, page 139

scientifically designed procedure. Otherwise, irrational procedure would lead its performer to unfair conclusion.

Firstly, the relations between arbitration and litigation should be changed. Currently, parties to a labour dispute have to go through “one arbitration and two litigations” in seeking a settlement with legal binding force. “One arbitration and two litigations” refers to arbitration, litigation by court of first instance and litigation by court of second instance. The parties have to go through the long process, primarily because arbitration decision does not have “natural” legal binding force. Time limit and wills of the parties are the factors, which affect the effect of arbitration decision. An arbitration decision will not obtain legal binding force until the time limit expires and if any party does not appeal it to court within 15 days. Within 15 days, any party has right, on its own wills, to bring the dispute into litigation proceeding.

Reform of the relations between arbitration and litigation calls for disconnecting arbitration and litigation. Arbitration award should come into force right upon delivery and no litigation proceeding will be followed. “Autonomy of wills” should also apply to procedure selection, viz. parties should have free choice of arbitration or litigation. Arbitration system should be parallel to the litigation system.

Secondly, it is necessary to restrain arbitration procedure from emulating litigation procedure and make it more flexible. The current *Regulations*, stipulating duties of arbitration committee chair and arbitrators in excessive details, has drawn attention of the arbitration tribunal to formalities rather than resolution of the dispute. Currently, the arbitration procedure is not alterable through agreement of the parties. There is also no simplified procedure to deal with simple disputes. It is not a simplified procedure, when one arbitrator handles the dispute, because the arbitrator has to abide by all the stipulated formalities, without being able to shorten the procedure. Therefore, the reform should be aimed at enhancing the flexibility of the arbitration procedure, lessening “judging” but intensifying “harmonising”.

Secondly, voluntary arbitration and compulsory arbitration should be combined. Voluntary arbitration refers to the free choice of arbitration by parties to a dispute on their own wills. Since the establishment of arbitration system, voluntary arbitration has become a trend, particularly in the field of civil and commercial arbitration. So is the situation with labour dispute arbitration. Voluntary arbitration has been included in an

international convention and accepted by most countries in the world. Voluntary arbitration reflects the right of parties for self-determination of procedure, originated from right to dispose of substantive rights. Instead of making arbitration a compulsory procedure, the parties should be given right to decide whether to resort to arbitration. This is particularly in the case of disputes over rights, covered by “autonomy of wills”. Aim of the reform is to introduce voluntary arbitration. However, voluntary arbitration does not rule out compulsory arbitration. To disputes in certain fields, which affect state and public interests, such as collective disputes in enterprises of water supply, electricity supply and heating supply, compulsory arbitration should be applied.

Lastly, irrational elements in the arbitration procedure should be removed. For instance, level jurisdiction is currently applied to labour disputes. Precondition of such arrangement is existence of arbitration committees of at least two instances, and affiliation of lower-level committees to higher-level committees. However, in practice, arbitration is conducted only for one time, and the level of an arbitration committee is determined by the level of the administrative department, to which it is attached. So there is neither administrative affiliation nor supervision between arbitration committees at all levels. Up to now, it has never happened that higher-level arbitration committee cancelled decisions made by lower-level arbitration committee. Therefore, level jurisdiction does not have practical use. The future reform should revoke level jurisdiction and grant parties right to determine jurisdiction over their dispute, viz. through arbitration agreement. Meanwhile, evidence system and evidence preservation system also should be established.

3. Suggestions for Reforming Judicial System and Litigation Procedure

The labour dispute judicial system and litigation procedure should be reformed to remove their shortcomings.

Firstly, the judicial system should be changed. Practice of handling labour disputes in countries with developed market economy shows that the judicial system of labour disputes settlement, particularly rights disputes, should not be equalised to that of civil disputes. Gradual separation of labour law from civil law has also illustrated that there are great differences between substantive legal relations regulated by labour law

and social relations regulated by civil law. The differences in substantive legal relations determine the differences in rights restitution procedures. Accordingly, western developed countries have instituted different judicial systems of labour disputes and civil disputes. Despite the disparity in judicial systems in those countries, for example, the Industrial Tribunal system in the UK and Labour Court system in Germany, there is one thing in common that trial system for labour disputes varies from that for civil disputes. Since the restoration of labour dispute settlement system in China in mid-1980s, the system has been facing dilemma between reality of emulating the civil dispute judicial system and need for flexible performance. In practice, there is almost no difference in litigation procedures for labour disputes and civil disputes. In spite of the fact that the mandatory arbitration prior to litigation has brought to light the incompleteness of the judicial system, People's Courts in practice tolerate such distorted system, more or less under interest motivation.

The reform should be started with judicial system. Experience in foreign countries, especially western industrialised countries, can be used for reference. In eastern Asian countries, labour disputes are handled by the same procedure as in civil dispute judicial procedure. This can be explained by the lagging regulation of industrial relations and weak trade unions in those countries. On contrary, western industrialised countries have different judicial systems for labour disputes and civil disputes. For instance, labour disputes are dealt with by Industrial Tribunals in the UK, Individual Labour Conflict Committees in France, and Labour Courts in Germany. The differences in judicial systems for labour disputes and civil disputes are determined by the nature of labour disputes, as industrial relations are not only property relations but also subjection relations between the parties.

Based on the above-mentioned reasons, it is necessary to adjust the judicial system for labour disputes. In mid-1990s, relevant organs attempted to establish labour courts in China. In fact, such attempt was made due to lack of knowledge on China's legal system and Chinese reality. It is dangerous to disrupt the integrity of China's judicial system. We should not create specialised court system, merely because of the specialties of the social relations, over which disputes take place. The rational way is to take into consideration the Chinese reality and the necessity of maintaining integrity of China's judicial system. The specialties of labour disputes should also be taken into

account when building judicial system for labour disputes. It is a trend to establish judicial tribunals within People's Courts to deal with labour dispute. In fact, the Supreme People's Court has recognised the specialties in the labour disputes settlement procedure in *Interpretations on Some Questions on Application of Laws and Regulations in Handling Labour Disputes*, issued on March 22, 2001. Accordingly, the judicial system for labour disputes should reflect the specialties.

Secondly, the litigation procedure should be adjusted. On March 22, 2001, the Supreme People's Court issued legally binding interpretations on many questions concerning labour dispute settlement. Before this, the litigation procedure for labour disputes was almost the same as that for civil disputes, apart from different requirements for filing a lawsuit and acceptance of a case as well as time limit due to mandatory arbitration prior to litigation.

Interpretations amended the stipulations on requirements for filing a lawsuit over a labour dispute and the time limit, weakened the rigid provision of mandatory arbitration, and thus opened the door to litigious protection for parties, particularly employees, which are in disadvantaged position. Now in certain circumstances People's Court accepts appeal by parties to a dispute without requiring prior arbitration. Besides, through there is no specific legal provision, in certain circumstances any party to a dispute can bring lawsuit in People's Court after expiration of the 60-day time limit for arbitration.

Moreover, the *Interpretations* have made major amendments to the jurisdiction system, evidence system and evidence preservation system, and play an important role in promoting independence and specialisation of litigation procedure.

Reform of litigation procedure for laboru disputes should include:

- With reference to the practice of western industrialised countries, to institute labour dispute litigation procedure, different from that for civil disputes, and in line with the specialty of substantive laws, over which labour dispute take place.

- To set up flexible and simple litigation procedure, shorten the time to be spent on litigation and simplify the procedure. Minor labour disputes settlement system should be established to promote prompt and cost-saving settlement.
- To establish and perfect trade union-based legal aid system, in order to provide public assistance to employee, which may in disadvantaged position in disputing with enterprises or their counsels.

VI. Conclusions

Entering the new millennium, human beings are confronted with both opportunities and challenges. China' accession into WTO and application of internationally accepted trade rules have made it necessary to adjust other rules. Against this background, integration of China' legal system with international conventions is an urgent task.

In 1980s, despite China was at the climax of conducting economic reform, its social-economic life was still dominated by planned economy. Accordingly, the labour dispute settlement system, restored then, shows traits of planned economy. This can be seen from the name of *Provisional Regulations on Labour Dispute Settlement in State-run Enterprises*, which was issued by the State Council to match *Provisional Regulations on Labour Contract System in State-run Enterprises*, and other administrative regulations. Against this background, the labour dispute settlement system was oriented toward revitalisation of state-run enterprise and shows obvious transitional characteristics.

Historical background determines a system. In line with the above-mentioned setting, labour dispute settlement system, both mediation and arbitration, had narrow coverage of state-run enterprises since its restoration. The special features of labour relations in state-run enterprises have limited the universality of the system. Consequently, a vacuum was left in handling labour disputes in non-state enterprises until August 1993. However, the settlement procedures, designed in accordance with labour relations in state-run enterprises, may not always be suitable to other enterprises.

Regulations on Settlement of Labour Disputes in Enterprises, issued in July 1993, widened the coverage of the system from state-run enterprises to enterprises of all forms of ownership. It was a great step forward. In the following year, promulgation of *Labour Law* legally confirmed the system.

Looking back at the system over the ten years from 1993 to 2003, obvious shortcomings in the system can be observed. Most of them has been analysed in this article. The shortcomings can be summed up as follows:

- The labour dispute settlement system, restored under planned economy, can not keep abreast of the market-oriented reforms. Such system has restricted the adjustment of labour relations. For example, as *Regulations on Settlement of Labour Disputes in Enterprises* are aimed at enterprises, what should apply to other organisations remains up in the air.
- The labour dispute settlement procedure can not meet the requirements of regulating labour relations in market economy. For instance, the current arbitration and litigation procedure lag far behind the demands of life.
- Rigid labour dispute mediation and arbitration procedures, emulating litigation procedure, have prevented the system from effective functioning.
- Legislation lags behind. Since the enactment of Labour Law in 1994, there has been a slow progress in labour dispute settlement legislation. In recent years, a number of interpretations on labour dispute litigation procedure have been issued under the weight of calls for China's judicial system reform. On the contrary, legislation of mediation and arbitration remains the same as 10 years ago, in spite of the drastic changes in economy and other legal system. It is urgent to modify the current laws and regulations in the field of labour dispute settlement.

In view of the situation, the labour dispute settlement system reform should involve:

- Reforming the labour dispute mediation organisations in line with the demands of market economy. With reference to the reform of People's Conciliation System, it is necessary to make timely amendments to the labour dispute mediation system, and grant mediation results conditional legal binding force to prevent mediation from a nominal and void procedure. It is also of importance to strengthen the flexibility of mediation procedure and prevent it from turning into arbitration and litigation.
- Building labour dispute arbitration system in accordance with the demands market economy, involving tripartism principle, free choice of arbitration or litigation. Reforming arbitration organisations and strengthening arbitrator accreditation system.
- Simplifying litigation procedure in accordance with substantive legal relation, establishing minor labour dispute litigation procedure, as well as legal aid system, with reference of experience in developed countries.

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A Case Study of Labour Dispute Settlement

In May 2000, a factory recruited new employees to work on a main production line, and concluded 5-year labour contracts with them. In June 2000, in order to adapt to market changes, the factory decided to replace the production line with a new one. Those employees would have to be assessed in accordance with requirements of the new production line before taking up new posts. As a result of the assessment, 36 employees were proved not up to the post. Therefore, the factory decided to revoke the labour contracts with them. In response to the decision, 6 persons out of the 36 requested for changing posts, and the rest 30 requested for carrying through the labour contracts. The factory insisted on its decision. The 36 employees applied to the district Labour Dispute Arbitration Committee for arbitration. The committee decided:

- 1) The decision made by the factory was announced wrong.

Renewal of production line and the consequent necessity of re-assessment of employees is “great change of basis for the conclusion of the contract”, and should be dealt with in accordance with legal stipulations. According to article 26 of *Labour Law*, when the objective conditions taken as the basis for the conclusion of the contract have greatly changed so that the original labour contract can no longer be carried out, and no agreement on modification of the labour contract can be reached through consultation by the parties involved, the employing unit may revoke the labour contract but a written notification shall be given to the labourer 30 days in advance. The factory acted against the stipulation, because it revoked labour contracts without prior consultation with the employees.

- 2) The factory should satisfy the request made by the 6 employees for changing posts.

According to *Labour Law*, in the case when labour contract can no longer be carried out due to the above-mentioned reason, parties should consult to modify labour contract. So the factory should change posts for the 6 employees.

- 3) The factory had right to revoke labour contracts with the rest employees.

The *Labour Law* stipulates that in the above-mentioned circumstance, the employing unit may revoke the labour contract, if the parties can not reach agreement on modification of the labour contract. In this case, employees should be notified in writing 30 days in advance and given financial compensations.

4) Arbitration procedure

Since the dispute concerned more than 3 persons, which had common claim, it was classified as collective labour dispute. In this case, the employees involved may appoint representative(s) to participate in the arbitration process. For the appeal of the 6 employees for changing posts, the arbitration committee formed a simple arbitration tribunal, composed of 3 arbitrators. A special arbitration tribunal with an odd number (above 3) of arbitrators was created to deal with the dispute, raised by the 30 employees for carrying through labour contracts. Special arbitration procedure was applied by the special tribunal.

List of Current Laws, Regulations and Interpretations

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3. *Interpretations on Some Questions in Applying of Regulations on Settlement of Labour Disputes in Enterpris*, issued by the Ministry of Labour on September 23, 1993.
4. *Rule on Organisational Structure and Working Procedure of Enterprise Labour Dispute Mediation Committee*, issued by the Ministry of Labour on November 5, 1993.
5. *Rule on Organisational Structure of Labour Dispute Arbitration Committee*, issued by the Ministry of Labour on November 5, 1993.
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