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 Settlment 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 tripatism coordination or directly act as intermediator. 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. Inline 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 f 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 biding 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 biding 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 represantation. 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.