NEW DEVELOPMENTS IN CHINA'S LABOR DISPUTE RESOLUTION SYSTEM: BETTER PROTECTION FOR WORKERS' RIGHTS?

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I. INTRODUCTION

The main legal sources of China's Labor Dispute Resolution System (LDR system) are the 1995 Labor Law and the 1993 PRC Regulations for the Handling of Enterprise Labor Disputes (HELDR).[1] Nevertheless, since the LDR system was established, China's labor relationship has been constantly undergoing deep changes as its economy has become increasingly market-oriented.[2] Consequently, labor disputes are more complicated than a decade ago. Numerous administrative regulations and judicial interpretations have been issued at the national level to tackle the new problems that the Labor Law and HELDR did not expect when they were promulgated.[3]

The latest development in this ongoing process is the issue of Interpretation II of the Supreme People's Court on Several Issues concerning the Applicable Law for the Trial of Labor Disputes Cases (Interpretation II) on August 14, 2006, which entered into force on

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1. *See* Zhonghua Renmin Gongheguo Laodongfa [Labor Law] (promulgated by Standing Committee of National People's Congress, Jul. 5, 1994, effective Jan. 1, 1995); Zhonghua Renmin Gongheguo Qiye Laodong Zhengyi Chuli Tiaoli [Regulations for the Handling of Enterprise Labor Disputes] (promulgated by the State Council, Jul. 6, 1993, effective Aug. 1, 1993).

2. For more detail about China's labor reforms since the 1980s, see Hilary K. Josephs, *From a Command Economy to Market Socialism: The Contract Employment System*, LABOR LAW IN CHINA ch. 2 (2d ed. 2003).

3. Apart from regulations and interpretations issued by the Ministry of Labor and the judicial interpretations of Supreme People's Court, governments and the courts at the provincial level and some local authorities also issue their regulations and interpretations on the implementation of labor law and the labor dispute resolution.

October 1, 2006.[4] In addition, a Labor Dispute Mediation and Arbitration Law has been on the 2007 legislative agenda of the Standing Committee of the National People's Congress and a preliminary draft was issued very recently.[5] A draft of the Employment Promotion Law has been submitted to comments by the public in 2007.[6] The first draft of the Labor Contract Law was issued for public comments in 2006 and incited extensive academic and public debates.[7] After substantial modifications and four drafts, the fourth draft of the Labor Contract Law was finally adopted by the Standing Committee of the National People's Congress on June 29, 2007 and will enter into force on January 1, 2008.[8]

These new steps for solving the existing problems in labor law practices may have been long expected. Voluminous literature commenting on China's LDR system evidences dissatisfaction from workers, employers, labor law enforcement personnel, and lawyers.[9]

China has ratified the International Covenant on Economic, Social and Cultural Rights and twenty-five ILO conventions.[10] It is thus an international obligation for China to protect and promote

4. *See* Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhenyi Anjian Shiyong Falu Ruogan Wenti di Jieshi [Interpretation II of the Supreme People's Court on Several Issues concerning the Applicable Law for the Trial of Labor disputes Cases], *(Fashi*, 2006, No. 6), *available at* http://www.chinacourt.org/flwk/show1.php?file_id=112724 (last visited June 14, 2007).

5. *See* Quanguo Renda Changweihui 2007nian Lifa Jihua [Legislation agenda of the Standing Committee of the NPC], *available at* http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=365233 &pdmc=110104 (last visited June 12, 2007). The text of the draft is available at http://www.sz12333.com/Article_Show.asp?ArticleID=7778 (last visited June 12, 2007).

6. *See* Jiuye Cujinfa (Cao An) [Employment Promotion Law (draft)] (issued by the NPC, Mar. 25, 2007), *available at* http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id= 362938&pdmc=110106 (last visited June 10, 2007).

7. *See* Laodong Hetongfa (Cao An) [Labor Contract Law (first draft)] (issued by the NPC, Mar. 20, 2006), a*vailable at* http://www.npc.gov.cn/zgrdw/home/lm_index.jsp?lmid=15&dm=1503 (last visited June 10, 2007). It is worth noting that both the American Chamber of Commerce in Shanghai and the European Union Chamber of Commerce submitted their comments on the draft to the Legislative Affairs Commission of the Standing Committee of the NPC in April 2006, suggesting that the new law might have a negative influence on foreign investment in China. The full text of comments by the American Chamber is available at http://lawprofessors.typepad.com/china_law_prof_blog/files/AmChamChinaLaborLawComments.pdf (last visited June 10, 2007).

8. The Labor Contract Law was adopted by the 28th Session of the Standing Committee of the NPC, *available at* http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=368169 &pdmc=1503 (last visited July 10, 2007).

9. *See*, *e.g.*, Wang Wenzhen, *Laodong Zhengyi Tizhi Gaige* [Wang Wenzhen, *Reform of the Labor Dispute Resolution System*], ZHONGGUO LAODONG [CHINA LABOR] 6–10 (June 2006).

10. Among twenty-five ratified ILO conventions, three conventions are denounced by China. The latest convention ratified by China is the Convention No. 155 of 1981 on occupational safety and health, which was ratified on Jan. 25, 2007, a*vailable at* http://www.ilo.org/ilolex/english/newcountryframeE.htm (last visited June 11, 2007).

workers' rights contained in these international treaties and to provide effective remedies to violations of these rights.

This article intends, first, to give a general introduction to China's LDR system and its procedures; second, to point out major problems in the LDR system before Interpretation II was issued; and, third, to examine to what extent Interpretation II can solve these problems and its implications for protection of workers' rights.

II. CHINA'S LABOR DISPUTE RESOLUTION SYSTEM

In general, China adopts a system of "one arbitration, two trials" (*yi cai er shen*) as formal labor dispute resolution.[11] When a labor-related dispute occurs, parties involved may go through three steps to seek a resolution: mediation, arbitration, and litigation.[12] The corresponding institutions handling labor disputes are respectively: the enterprise mediation committee, the labor dispute arbitration commission, and the people's court. While mediation is completely voluntary, arbitration is mandatory, as a necessary step preceding litigation.

A. Mediation

In China's LDR system, mediation is not only a voluntary independent procedure as a process preceding arbitration and litigation, but also a procedure applying as a matter of principle to the whole process of labor dispute resolution.[13] In other words, apart from mediation conducted by the labor-dispute mediation committee within the enterprise (so-called "Enterprise Mediation Committee," hereafter EMC), the Labor Arbitration Commission (LAC) and the courts shall mediate first before making a decision or a judgment when a dispute is brought to them.[14] The following is focused on mediation conducted by the EMC as an independent procedure preceding arbitration and litigation.

Mediation conducted by the EMC is completely voluntary. It means that mediation must be based on the agreement of all parties

11. Apart from formal labor-dispute settlement process, there are informal dispute resolution methods such as conciliation and labor inspection. For more detail on informal process, see HO V. HARPER, LABOR DISPUTE RESOLUTION IN CHINA: IMPLICATIONS FOR LABOR RIGHTS AND LEGAL REFORM 46–56 (2003).

12. *See* 1995 Labor Law, at art. 77.

13. *Id.*

14. *See* HELDR, at art. 27, and Laodong Zhengyi Zhongcai Weiyuanhui Banan Guize [Working Rules of Labor Dispute Arbitration Commission], at art. 26 [hereafter Working Rules of the LAC], (promulgated by the Ministry of Labor, October 18, 1993).

and can be ended at any time at the will of any party involved.[15] One party's seeking for arbitration automatically terminates the on-going mediation. The agreement reached by mediation is not binding for any party concerned and parties could still file a claim for arbitration.[16]

As regards the nature of mediation, theoretically speaking, it should be neither judicial nor administrative, but a type of self-regulation of workers and employers. This private nature can be seen from the organization of the EMC. The committee is composed of representatives of three parties: workers, the employer, and the trade union in the enterprise concerned.[17] In order to guarantee impartiality, the chairperson of the EMC should be the trade union representative,[18] who does not have a direct interest in the disputes. In terms of daily functioning, the EMC receives the guidance from the trade union at a superior level, as well as from the local labor arbitration commission.[19] The secretariat of the EMC is taken up by the trade union of the enterprise.[20]

As a form of self-regulation of workers and employers, mediation has played an important role in regulating industrial relations and still does in the public sector. Nevertheless, statistics indicate that during the past decades, the number of disputes mediated by EMCs has significantly decreased.[21] A number of factors may contribute to this phenomenon. First, privatization and restructuring of public enterprises largely reduced the number of EMCs. Few private enterprises have the EMC today.[22] Second, the enterprise may be discouraged from establishing the EMC because it must bear the costs of activities of the EMC.[23] Third, partly due to the notorious weakness of trade unions in China, the tripartite structure of the EMC may be currently less effective in solving increased conflicts of interests between employers and workers.

15. *See* 1995 Labor Law, *supra* note 12, at art. 79.

16. *Id*.

17. See HELDR, *supra* note 14, at art. 7; *see also* Qiye Laodong Zhengyi Tiaojie Weiyuanhui Zuzhi ji Gongzuo Guize [Organization and Working Rules of Enterprise Labor Dispute Mediation Committee] [hereafter EMC Rules] (promulgated by the Ministry of Labor, Nov. 5, 1993), at art. 8.

18. *See* HELDR, *supra* note 14, at art. 8; *see also* EMC Rules, *supra* note 17, at art. 9.

19. *See* EMC Rules, *supra* note 17, at art. 2.

20. *See* HELDR, *supra* note 14, at art. 8; *see also* EMC Rules, *supra* note 17, at art. 9.

21. *See* HARPER, *supra* note 11, at 60 (referring to CHINA'S LABOR STATISTICAL YEARBOOK (various years)).

22. *Id.*

23. *See* EMC Rules, *supra* note 17, at art. 13.

B. Arbitration

Unlike mediation, which is a voluntary procedure that labor dispute parties can omit, the labor-dispute arbitration procedure must be exhausted before parties can file a claim before a court.

Labor dispute arbitration commissions at various levels are established by the local government at the corresponding level.[24] LACs at different levels are independent from each other and do not have a subordinate relationship with each other. Commissions adopt a tripartite organization structure, in the sense that they are composed of representatives of the local labor administration, the trade union at the same level, and the employers.[25] The chairperson should be the responsible person of the local labor administration.[26] The labor dispute resolution department within the local labor administration serves as the secretariat of the LAC.[27]

Arbitration of individual disputes is conducted by *ad hoc* arbitration panels, which are normally composed of three arbitrators. "Simplified procedures," appointing one arbitrator to the case, may be used where the dispute is not complicated.[28] Where a collective dispute involves more than thirty workers, the panel should have more than three arbitrators.[29] LACs recruit both full-time and part-time arbitrators. Full-time arbitrators are normally from the local labor administration. Part-time arbitrators should be selected from professionals in a labor-related area, such as trade union officials, labor law professors, and experienced lawyers.[30]

Parties can be assisted by one or two lawyers or other agents who present the case and participate in the hearings.[31] Parties can also settle the case by themselves, at any time of the procedure.[32] Third parties who have an interest in the dispute can also participate in the arbitration procedure.[33]

It is worth noticing that the administrative nature of the LAC does not mean that its adjudication on labor disputes results in an

24. *See* HELDR, *supra* note 14, at art. 12 (quoting that "Counties, municipalities, districts of municipalities should establish a labor dispute arbitration commission").
25. *See id.* at art. 13.
26. *Id.*
27. *Id.*
28. *See* HELDR, *supra* note 14, at art. 16; *see also* Laodong Zhenyi Zhongcai Weiyuanhui Zuzhi Guize [Rules of Organization of the Labor Dispute Arbitration Commission] [hereafter Organization Rules of the LAC] (promulgated by the Ministry of Labor, Nov. 5, 1993), at art. 20.
29. *See* Working Rules of the LAC, *supra* note 14, at arts. 36–37.
30. *See* Organization Rules of the LAC, *supra* note 28, at art. 15.
31. *See* HELDR, *supra* note 14, at art. 19.
32. *See id.* at art. 21
33. *See id.* at art. 22.

administrative decision. Clearly, the LAC is an administrative organization because of its subordinate relationship with the local administration. However, arbitration *per se* possesses quasi-judicial characteristics and thus cannot be considered as administrative action.[34] For this reason, the Administrative Litigation Law does not apply to labor dispute arbitration. If a party to a labor dispute is not satisfied with the decision of the LAC panel, it could appeal to a court, but it cannot sue the LAC for its decision on the dispute.[35] In other words, the court is to examine the merits of the dispute instead of the arbitration decision, and the parties to the litigation are still the employer and the worker, not the LAC.

Compared to other types of arbitration in China, labor dispute arbitration has a number of distinctive characteristics.

First, unlike other arbitration such as trade dispute arbitration which should be based on a mutual agreement between the parties, labor dispute arbitration is compulsory in the sense that once one of the parties files an application before a LAC, the procedure starts without the consent of the other party. Moreover, parties do not have the right to choose the arbitrators.

Second, labor dispute arbitration cannot lead to a final decision in the whole dispute settlement process. If any party is unsatisfied with the arbitration decision, it could bring the case to a people's court. However, at the phase of arbitration itself, the decision is final, which means that the parties involved cannot appeal to the LAC at the higher level or require a second arbitration. Nevertheless, if the arbitration panel finds an error in its decision, it can arbitrate again, on its own initiative.[36]

Third, before the formal arbitration starts, the arbitration panel has the obligation to conduct mediation for the parties. Unlike the mediation agreement reached by the EMC, an agreement reached by arbitral mediation is binding and enforceable in the courts. Where one of the parties involved neither appeals to the court within fifteen days nor implements the arbitration decision within the time limit, the

34. *See* Shen Tongxian, *Laodongfa de Lilun he Shijian* [Shen Tongxian, *Theory and Practice of Labor Law*], ZHONGGUO RENSHI CHUBANSHE [CHINA PERSONNEL PRESS] 391 (2003). *See also* HARPER, *supra* note 11, at 186.

35. *See* Guanyu Laodong Zhengyi Zhongcai Weiyuanhui Budang Xingzheng Beigao de Tongzhi [Notice that labor arbitration commissions cannot be defendants in administrative litigation] (promulgated by the Ministry of Labor, Aug. 31, 1998).

36. *See* Zuigao Renmin Fayuan Guanyu Laodong Zhengyi Zhongcai Weiyuanhui de Fuyi Zhongcai Juedingshu Kefou Zuowei Zhixing Yiju Wenti de Pifu [Reply of the Supreme People's Court on the question of whether a labor arbitration commission review of arbitral awards can form the basis of enforcement action] (promulgated by the SPC, July 21, 1998).

other party may apply to the court for enforcement.[37] It is worth noting that while an arbitration decision can be appealed to the court within fifteen days, the arbitral mediation agreement cannot be appealed against.[38] Recent statistics illustrate that a large percentage of disputes are settled by mediation conducted by arbitrators.[39] Nonetheless, according to some arbitrators, it becomes more difficult to reach an agreement through mediation.[40] One reason may be that privatized enterprises are more concerned about their economic interests and reluctant to make compromises.

C. Litigation

Litigation is the final step of the whole LDR procedure. Labor dispute litigations are currently considered civil lawsuits, which fall under the application of the Civil Procedure Law. Therefore, labor dispute cases are heard by a civil tribunal of the people's court, which adopts a "two trials" system. After the first trial, an unsatisfied party can appeal to the court at the higher level. There is also a voluntary in-court mediation conducted by the presiding judge or the panel.[41] Settlement through mediation or conciliation is possible throughout the legal procedure.[42] Like the mediation agreement reached in arbitration, a binding in-court mediation agreement also forecloses an appeal.[43]

Although labor disputes are heard by civil courts, differences exist between labor dispute lawsuits and other civil lawsuits. First, arbitration must be exhausted prior to the judicial procedure. Second, in general civil lawsuits, the burden of proof normally rests on the applicant; in labor dispute cases, when the dispute concerns the termination of employment, reduction of payment, or determination of length of service, the burden of proof rests on the employer.[44]

37. *See* HELDR, *supra* note 14, at arts. 30–31.

38. *See id.* at art. 28.

39. For instance, 32% of the disputes arbitrated are resolved by mediation and 41% by an arbitral decision. *See* HARPER, *supra* note 11, at 69–70, referring to LABOR STATISTICAL YEARBOOK 429, tbl. 8–12 (2001).

40. Interviews with arbitrators at the Changzhou Labor Dispute Arbitration Commission, December 2004.

41. *See* Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law] (promulgated by the National People's Congress, April 9, 1991, effective April 9, 1991, at art. 85.

42. *See id.* at art. 128.

43. *See id.* at art. 91.

44. *See* Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Shiyong Falu Ruogan Wenti di Jieshi [Interpretation of the Supreme Court on Certain Questions concerning the Application of Law in Examining the Labor-dispute Cases] [hereafter Interpretation I] (issued by the SPC, April 16, 2001), at art. 13.

III. DEFICIENCIES IN CHINA'S LDR SYSTEM

A. Problems in the Scope of Application of the LDR System

1. Personal Jurisdiction

The 1995 Labor Law is the most important legal basis of China's LDR system. The scope of application of the LDR system is therefore the same as that of the Labor Law. Article 2 of the 1995 Labor Law reads:

> This Law applies to all enterprises and individual economic entities (hereafter referred to as employing units) within the boundary of the People's Republic of China, and to laborers who form a labor relationship therewith.
>
> State organs, institutional organizations and social groups as well as laborers who form a labor contract relationship therewith shall follow this Law.

This provision has two implications. First, a worker, before entering an employment, is not protected by the 1995 Labor Law. As a consequence, if a worker has suffered from unfair treatment such as discrimination at the recruitment stage, he cannot seek remedies through the LDR system.[45] Second, there should be a *labor relationship*, instead of other types of relationship, in order for the LDR system to be applied. The Labor Law does not clarify what constitutes a labor relationship. According to jurisprudence and implementing regulations, the following categories of workers are excluded from China's LDR system: public servants, permanent staff in institutional organizations (*shi ye dan wei*) and social groups who are treated as public servants, farmers, military personnel, and those in an informal employment situation, such as the self-employed and domestic workers.[46]

Self-employed workers may be one of the largest groups excluded from China's LDR system. Chinese law distinguishes the labor relationship (*laodong guanxi*) from the recruitment relationship

45. For more about employment discrimination in China, see Ronald C. Brown, *China's Employment Discrimination Laws during Economic Transition*, 19 COLUM. J. ASIAN L. 361–423 (2006).

46. *See* Laodongbu Guanyu "Laodongfa" Ruogan Tiawen de Shuoming [Explanations of the Ministry of Labor on Certain Provisions of the Labor Law] (promulgated by the Ministry of Labor, Sept. 5, 1994), at art. 2; *see also* Laodongbu Guanyu Guanche Zhixin "Zhonghua Renmin Gongheguo Laodongfa" Ruogan Wenti de Yijian [Opinions of the Ministry of Labor on Several Questions Concerning the Execution of the "Labor Law of People's Republic of China"] (promulgated by the Ministry of Labor, August 11, 1995), at art. 4.

(*guyong guanxi*) and the service relationship (*laowu guanxi*).[47] A laborer on a *guyong* or *laowu* contract is considered an independent contractor in the context of civil law and thus cannot invoke the LDR system to solve a dispute. Such distinction implies not only the existence of different procedures for seeking remedies, but also the existence of differences with respect to substance of reparation. While the dispute on a labor contract must undergo labor arbitration prior to litigation, the dispute on a *guyong* or *laowu* contract can be directly brought to the court as a civil lawsuit. As regards compensation standards, taking work injury as an example, the worker on a labor contract is entitled to compensation both from the work injury insurance and the employer, job arrangement, pension, medical allowances, and so on,[48] but the worker on a *guyong* or *laowu* contract normally obtains only a lump sum civil compensation for physical damages.[49] As regards the termination of employment, the worker in a *guyong* or *laowu* relationship does not enjoy any substantive or procedural protection against arbitrary dismissal and is not entitled to a severance allowance.

Therefore, it is very important to determine whether a *labor* relationship exists between the worker and the employer. In practice, however, it is often very difficult to distinguish a *labor* relationship from a *guyong* or *laowu* relationship, especially when it concerns small enterprises or individual economic entities. The courts seem to rely on formal conditions of the employer rather than on the substance of the relationship between the worker and the employer. According to the Ministry of Labor, "individual economic organization" refers to an individual economic entity (*geti gongshanghu*) that employs less than seven workers.[50] In reality, an individual business entity could be a family or single natural person. The case law shows that only those individual economic organizations that have registered are considered a lawful subject to form a labor relationship. If an individual economic entity or a natural person has not registered and obtained a license, the workers working for such entity or person will be considered self-employed or an independent contractor and thus

47. The Chinese law does not use the term "self-employment," but the worker in an employment relation can indeed be regarded as self-employed.

48. *See* Gongshang Baoxian Tiaoli [Work Injury Insurance Regulations] (promulgated by the State Council, April 27, 2003, effective January 1, 2004), at ch. 5 on "Work Injury Insurance Benefits."

49. *See id.* at art. 63.

50. *See* Opinions of the Ministry of Labor on Several Questions Concerning the Execution of "Labor Law of People's Republic of China," *supra* note 46, at art. 1.

excluded from labor law.[51] In the case *Chen Weili v. Lai Guofa*, the court held that the case involved a civil dispute on a *guyong* relationship rather than a labor relationship because the employer does not hold a license for individual economic organization. This formalist approach is also reflected in the 1994 Work Injury Insurance Regulations. In this reasoning, employers may be discouraged from acquiring a license in order to escape from all the obligations arising from a labor relationship such as paying contribution to the social security scheme and providing a severance allowance for dismissal.

A written contract could be helpful to determine the existence of a labor relationship, but it is not always clear whether a written contract is a labor contract or a civil contract. Moreover, while China's labor law requires the employer to sign a written labor contract with the worker, many employers—especially small ones—ignore this obligation.[52]

A labor relationship without a written labor contract is currently recognized and protected by the Chinese labor law as a "*de facto* labor relationship" (*shishi laodong guanxi*), instead of long-term employment as in many industrialized countries.[53] As regards what constitutes a *de facto* labor relationship, the Ministry of Labor has interpreted it as one in which "the laborer has in fact become the member of an enterprise or an individual economic organization, and has provided for remunerative labor."[54] This interpretation does not provide much guidance for practice. At the provincial level, the Senior People's Court of Jiangsu Province has offered more detailed standards: there is a *de facto* labor relationship where the laborer (1) provides the employer with labor; (2) is subject to the employer's management, instruction, and supervision; and, (3) where the employer pays the remuneration to the laborer.[55] These three

51. *See* Chen Weili v. Lai Guofa [Gazette of the Supreme Court of the People's Republic of China], 2001, Vol. 1, at 32–33.

52. According to the recent survey conducted by the Standing Committee of National People's Congress, less than 20% of mid-small private enterprises have concluded labor contracts with workers. *See Laodong Hetong Lifa Zhuanti: Ruhe Tiaozheng Laodong Guanxi* [*Labor Contract Legislation Theme: How to Adjust Labor Relationship*], *in* CHINA LABOR 16–18 (Jan. 2006).

53. *See* Opinions of the Ministry of Labor on Several Questions Concerning the Execution of "Labor Law of People's Republic of China," *supra* note 46, at art. 2; *see also* Interpretation I, *supra* note 44, at art. 1(2).

54. *See* Opinions of the Ministry of Labor on Several Questions Concerning the Execution of "Labor Law of People's Republic of China," *supra* note 46, at art. 2.

55. *See* Jiangsusheng Gaoji Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Ruogan Wenti de Yijian [Opinion of the Jiangsu Province Senior People's Court on Certain Questions concerning Trying Labor Dispute Cases] (issued by the Jiangsu Province Senior People's Court , Feb. 3, 2004), at art. 19.

cumulative criteria are similar to those adopted by the European Court of Justice: performance of services, subordination, and remuneration.[56] These criteria of the Jiangsu Senior People's Court may be very useful but they do not have a nationwide effect. In practice, many workers without a written contract still lack sufficient protection.[57] It is worth noting that in the first draft of the Labor Contract Law, the three cumulative criteria are adopted to define a labor relationship and a *de facto* labor relationship is regarded as a long-term labor relationship unless the worker expresses otherwise. Moreover, if the employer and the worker have a different understanding on whether there is a labor relationship, the employer assumes the burden of proof.[58] However, the first draft has been criticized (especially by employers) for over-protecting workers.[59] In the adopted Labor Contract Law, compromise can be seen in Article 14, which provides that after one year of *de facto* labor relationship, the worker will be considered as being under a labor contract of indefinite term (*wuguding qixian hetong*) if no written contract is signed.

Public servants may bring their disputes before a personnel arbitration commission (*renshi zhongcai weiyuanhui*) that can hear disputes on recruitment, position change, and implementation of the "recruitment contract" (*pin ren he tong*) between public agents and their employer.[60]

As regards personnel working in institutional organizations and social groups, the situation is more complicated. These organizations are different from each other in terms of their functions and financial resources. Permanent staff in some institutional organizations and social groups is treated as public agent, such as staff in news agencies, trade unions, women's unions, and political parties. As regards those institutional organizations that are financially supported by the government but managed like an enterprise such as some publishing houses and magazines, their staff, whether permanent or not, is

56. *See* ROGER BLANPAIN, EUROPEAN LABOR LAW 290 (9th ed. 2003).

57. *See*, *e.g.*, Xu Yan, *Shishi Laodong Guanxi Jiben Wenti Tanxi* [Xu Yan, *Analysis of Basic Questions on de facto Labor Relationship*], 3 DANGDAI FAXUE [3 CONTEMPORARY LEGAL SCIENCE] 38–41 (2003).

58. See the first draft of the Labor Contract Law, *supra* note 7, at arts. 3 & 9.

59. *See*, *e.g.*, Wei Haozheng, *"Laodong Hetongfa Caoan" Jiuda Zhiyi (Shang)* [Wei Haozheng, *Nine Doubts on the Draft Labor Contract Law*], *in* 13 RENLI ZIYUAN [HUMAN RESOURCES] 54–55 (2006). It is reported some foreign enterprises threatened to withdraw their investment from China after the first draft was issued.

60. *See* Renshi Zhengyi Chuli Zanxing Guiding [Provisional Regulations on the Settlement of Personnel Disputes] (issued by the Ministry of Personnel, Aug. 8, 1997), at art. 2.

covered by labor law.[61] But for the rest of the staff in institutional organizations, their status is not that clear. For instance, the teaching staff in public schools, and the medical staff in public hospitals is covered neither by public service law nor by labor law.[62]

In fact, for a long while, there was no law or any competent body to deal with disputes between the above mentioned public staff and their employers.[63] Until 1997, when personnel arbitration commissions were established, the personnel were indeed deprived of the right to seek remedies when their rights were allegedly infringed by their employer. This phenomenon was largely due to the fact that the pre-reform employment system divided laborers into two categories: "workers" and "cadres." While "workers" were managed by the labor administration, "cadres" were managed by the personnel administration. The reform of the labor contract system was mainly targeted at "workers" and left "cadres" to a large extent out.

In order to fill this lacuna, the Ministry of Personnel promulgated the Provisional Regulations on the Settlement of Personnel Disputes in 1997 and accordingly created personnel arbitration commissions at various levels. In 2003, the Supreme People's Court issued an Interpretation that allows the courts to accept a dispute that has been examined by a personnel arbitration commission.[64]

However, the establishment of a personnel arbitration commission is problematic from the perspective of legislative procedures. According to the 2000 Law on Legislation, any arbitration or litigation system shall be established by the "Law" (*fa lü*) promulgated by the National People's Congress or its Standing Committee.[65] In the absence of a "*fa lü*," the State Council can be authorized by the NPC or its Standing Committee to elaborate administrative regulations (*xingzheng fagui*) on the issue.[66] But the Provisional Regulations on the Settlement of Personnel Disputes are merely a department regulation (*bumen guizhang*) promulgated by the Ministry of Personnel, which means that the Regulations have much lower legal effect than a "Law" or administrative regulations

61. *See* Opinions of the Ministry of Labor on Several Questions Concerning the Execution of "Labor Law of People's Republic of China," *supra* note 46, at art. 3.

62. *See* SHEN, *supra* note 34, at 21–22.

63. *Id.*

64. *See* Zuigao Renmin Fayuan Guanyu Renmin Fayuan Shenli Shiye Danwei Renshi Zhengyi Anjian Ruogan Wenti de Tongzhi [Stipulations of the Supreme Court on Certain Questions Concerning the Examination of Human Resources Dispute Cases by the People's Court] (promulgated by the SPC, Aug. 27, 2003, effective Sept. 5, 2003).

65. *See* Zhonghua Renmin Gongheguo Lifafa [Law on Legislation] (promulgated by the Standing Committee of the NPC, March 15, 2000, effective July 1, 2000), at art. 8(9).

66. *See id.* at art. 9.

within the Chinese legislation hierarchies. Therefore, the personnel arbitration commission lacks a solid legislative basis for its existence.[67] It is worth noting that China's first Law on Public Agents, which entered into force in 2006, has a whole chapter on appeal for rights violations but does not mention the personnel arbitration system.[68]

In addition, the Provisional Regulations on the Settlement of Personnel Disputes do not indicate which law or substantive standards should be referred to in arbitration. As a result, the decision made by a personnel arbitration commission is technically not enforceable. The 2003 Interpretation of the Supreme People's Court (SPC) is problematic for the same reason. In Chinese law, an interpretation by the SPC theoretically does not have the effect of legislation and may not exceed the scope of the existing law.[69] As such, the SPC has exceeded its competence in the 2003 Interpretation though its main purpose is to resolve some technical difficulties in connecting personnel arbitration and litigation.

There is a positive sign that the present legislative deficiency may be repaired by the new Labor Dispute Mediation and Arbitration Law. The very first draft of this law intends to integrate labor disputes and personnel disputes in a single dispute resolution system.[70] Nevertheless, at this stage of the legislative process, it is still too early to make further comments in this respect.

2. Subject Matter Jurisdiction

China's LDR system handles a wide range of labor disputes in terms of subject matter. The HELDR lists disputes over the following subjects: (1) disciplinary dismissals, worker's resignation or leave; (2) implementation of State regulations on wages, insurance, training, and labor protection; (3) implementation of the labor contract; and, (4) other labor disputes that should apply the HELDR according to laws or regulations.[71] Interpretation I of the SPC has further clarified that labor disputes shall include disputes in a *de facto* labor relationship

67. For a detailed explanation of China's legislation and hierarchy of laws, see CHEN ALBERT HUNG-YEE, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA ch. 6 77–103 (1992).

68. *See* Zhonghua Renmin Gongheguo Gongwuyan Fa [Public Servant Law] (promulgated by the Standing Committee of the NPC, April 27, 2005, effective January 1, 2006), at ch. 15.

69. In practice, the Supreme People's Court often acts legislatively, especially when it joins ministries in issuing legal documents. *See* CHEN, *supra* note 67, at 100.

70. *See* Labor Dispute Mediation and Arbitration Law, *supra* note 5, at art. 45. It is worth noting that according to Article 1 of the draft, public agents who are covered by the present personnel dispute resolution system are excluded from the new system.

71. *See* HELDR, *supra* note 14, at art. 2.

and disputes raised by retired workers who seek a pension, medical fees, work-injury compensation, or any other social security compensation from their former employer if the latter did not participate in the social security scheme.[72] The latter case is specifically targeted at the State-owned enterprise pensioners in the context of China's reform of the social security system.[73]

Certain disputes related to a labor relationship are not considered as labor disputes and thus excluded from the LDR system.

First, disputes on social security compensation between the worker and public social security institutions, or disputes between the worker and the labor administration on determination whether an injury constitutes "work-injury" (*gong shang*), are not settled by the LDR system. Instead, the worker should file a claim for administrative litigation.

Second, disputes over disciplinary measures of the employer, except when they take the form of a dismissal, are excluded from the LDR system.[74] According to one of the judges of the SPC, Dr. Han Yanbin, disputes caused by employer's human resources management do not concern the implementation of the labor contract, and therefore should not be accepted by the court as labor disputes.[75] This reasoning is not convincing because employer's management decisions especially when they involve disciplinary measures may well affect the worker's contractual rights such as bonus or wage reduction. Obeying disciplines is either an expressed or implied contractual obligation of the workers. In fact, Article 19 of the 1995 Labor Law requires that a labor contract shall include labor disciplines as one of the mandatory terms. However, the Regulation on Awards and Sanctions of Enterprises, which was promulgated by the State Council in 1982, remains valid.[76] According to its Article 21, the worker who is unsatisfied with disciplinary measures shall appeal to superior administrative authorities. Although the 1993 HELDR has integrated to the LDR system disputes over disciplinary sanctions that take the

72. *See* Interpretation I, *supra* note 44, at art. 1.

73. Before the reform, workers' social security benefits are exclusively assumed by the employer. Now employers are required to participate in public social security funds. As such, disputes over social security are normally administrative litigation between workers and social security institutions. But there are still some public employers not in the public social security system. *See* Han Yanbin, *Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Falu Shiyong Ruogan Wenti di Jieshi" de Lijie yu Shinyong* [Han Yanbin, *Understanding and Applying the "Interpretation I"*] *in* 6 REMIN SIFA [PEOPLE'S JUSTICE] (2001).

74. *See* SHEN, *supra* note 34, at 189.

75. *See* HAN, *supra* note 73.

76. *See* Qiye Zhigong Jiancheng Tiaoli [Regulations on Awards and Sanctions of Enterprises] (promulgated by the State Council, April 10, 1982).

form of the termination of employment (*kai chu*, *ci tui*, *chu ming*), it does not include disputes over other disciplinary sanctions.[77] As such, workers are denied access to justice when they encounter unfair disciplinary sanctions by the employer.

Third, disputes over layoffs, internal retirement (*nei tui*), and other issues caused by the restructuring and privatization of public enterprises (*gai zhi*) are excluded from the LDR system and civil litigation.[78] According to the vice-president of the SPC

> lay-offs or unpaid wages of the whole workforce is a special phenomenon that appeared during the reform of the enterprise regime and the employment system, and is not related to the implementation of the labor contract. Therefore, these disputes are not labor disputes and should not be accepted by the court. Instead, these disputes should be handled by the competent government departments in accordance with the policies concerning the *gai zhi*.[79]

In this way, many laid off workers are deprived of their right to seek remedies. This denial of access to justice may also have contributed to mass protest nationwide of laid off workers.[80]

3. Time limit

Given the unique nature of labor disputes, China's LDR system is designed to be speedy in order to better protect workers.[81] For this purpose, the law sets a strict time limit for each procedure. As regards arbitration, the arbitration commission should normally take a decision within sixty days from the date of receiving the application. Where complicated cases are involved, the decision could be extended up to another thirty days. If a party is not satisfied with the arbitral decision, it may bring a lawsuit to a people's court within fifteen days from the date of receiving the arbitration ruling.[82] As regards litigation, since labor disputes are heard in the courts as civil lawsuits, the timetable follows the civil litigation rules.

A major problem that has appeared in practice lies in the time limit for a labor dispute party to file a claim to arbitration and to the

77. *See* HELDR, *supra* note 14, at art. 2(1).

78. In practice, it is possible that these types of disputes are accepted by arbitration but dismissed by the court. *See* HAN, *supra* note 73.

79. This statement was made by Li Guoguang, the vice-president of the Supreme Court at the national conference on the work of civil litigations. *See* HAN, *supra* note 73.

80. For more about China's economic restructuring and workers' protests, see, e.g., Feng Chen, *Privatization and Its Discontents in Chinese Factories*, *in* THE CHINA QUARTERLY 42–47 (2006).

81. *See* SHEN, *supra* note 34, at 382.

82. *See* the 1995 Labor Law, *supra* note 12, at art. 83.

court. Article 82 of the 1995 Labor Law provides "The party that requests arbitration shall file a written application to a labor dispute arbitration commission within 60 days starting from the date on which a labor dispute occurs." The interpretation of this provision has caused great controversy in practice and in literature.[83]

First of all, it is not clear what "the date on which a labor dispute occurs" exactly means. The HELDR and the Ministry of Labor borrowed the concept from civil law[84] and interpreted it as the "date on which the applicant is aware or should be aware of the violation of his rights."[85] This interpretation is problematic in terms of its validity because it has substantially changed the original meaning of Article 82 of the 1995 Labor Law and reduced the time for the applicant to seek remedies. It is also problematic to use the civil law concept for labor disputes because for a normal civil dispute, the time limit for filing a claim is one or two years, while for a labor dispute, the applicant has only sixty days to file a claim.[86]

In reality, the date on which the parties actually raise the dispute could be much later than the date on which the party concerned is aware of the violation. Such interpretation is not practical and favorable for workers, who may not be able to raise the dispute in time due to their subordinate and disadvantaged position or due to lack of access to information held by the employer. In practice, before taking hostile actions, such as seeking arbitration or litigation, workers are more likely to seek solutions through consultation or conciliation with the employer. Such informal process could last longer than sixty days depending on the complexity of the dispute and the good faith of the employer. It is reported that employers often take advantage of the sixty-day time limit and deliberately delay the consultation until the expiry of the time limit for the worker to seek a formal remedy.[87] Although the worker may argue that such consultation constitutes "legitimate reasons" for extending the sixty-

83. *See*, *e.g.*, Xing Ying, *Wanshan Laodong Zhengyi Shixiao Zhidu de Sikao* [Xing Ying, *Amelioration of the time limit of the LDR system*], *in* CHINA LABOR 29–30 (Aug. 2006).

84. *See* Zhonghua Renmin Gongheguo Minfa Tongze [General Principles of Civil Law] (promulgated by the NPC, April 12, 1986, effective Jan. 1, 1987), at art. 137.

85. *See* HELDR, *supra* note 14, at art. 23. *See also* 1994 Explanation by the Ministry of Labor on Certain Articles in Labor Law, *supra* note 46, at art. 82; and the 1995 Opinions of the Ministry of Labor on Several Questions Concerning the Execution of the "Labor Law of People's Republic of China," *supra* note 46, at art. 85.

86. *See* General Principles of Civil Law, *supra* note 84, at arts. 135–36.

87. *See* LI JIANFEI, LAODONG QUANYI JIUJI DE XINJUCUO—JIEDU "GUANYU SHENLI LAODONG ZHENGYI ANJIAN SHIYONG FALU RUOGAN WENTI DE JIESHI (ER) [LI JIANFEI, NEW MEASURES OF LABOR RIGHTS REMEDIES: UNDERSTANDING THE INTERPRETATION II (2006)], *available at* http://www.china.com.cn/law/txt/2006-09/11/content_7149046.htm (last visited Oct. 20, 2006).

day time limit, as discussed later in this paper, there is no clear interpretation of "legitimate reasons." Such an argument does not seem to be accepted nationwide in practice.

At the provincial level, some Senior People's Courts tried to address this problem through their own interpretations.[88] Among them, the Senior People's Court of Jiangsu Province took certain steps worth noting, which were later reflected in Interpretation II. According to that interpretation, where the dispute concerns unpaid wages or deduced pay, the sixty-day time limit runs from the date on which the employer *expressly* refuses the payment. Where the employer does not expressly refuse to pay, the time limit runs from the date on which the worker claims the payment to the employer. But if the employer has delayed the payment for more than two years, the case will be dismissed except if the employer does not object to the case being accepted.[89]

Second, there are debates on the question of whether the sixty-day time limit is for arbitration only or for arbitration as well as litigation. Some scholars argue that the sixty-day time limit applies to arbitration only and that the court has to apply the two-year time limit as the Civil Litigation Law provides since a labor dispute is treated as a civil lawsuit in the court. Others argue that sixty days is the time limit for both arbitration and litigation because the court has to apply labor law when hearing a labor dispute. The Supreme People's Court, by its Interpretation I, appears to support the latter position. In practice, before Interpretation I was issued in 2001, if a labor dispute was rejected by arbitration for not satisfying the admissibility criteria, it would be rejected by the court as well.[90] The applicant had thus no opportunity to have the case heard by a court even if the arbitration ruling on admissibility was wrong. Article 3 of Interpretation I solved this problem by requiring the courts to accept those disputes rejected by the arbitrators for having been filed out of time and to review the admissibility issue. The same provision provides that if the court finds that the application *does* have exceeded the sixty-day time limit for arbitration, the case will be rejected by the court.

88. *See*, *e.g.*, Guangdongsheng Gaoji Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Ruogan Wenti de Zhidao Yijian [Guiding Opinions of the Guangdong Province Senior People's Court on Certain Questions concerning Trying Labor-dispute Cases] (promulgated by the Guangdong Province Senior People's Court, Sept. 15, 2002), at art. 11.

89. *See* Opinions of the Jiangsu Province Senior People's Court on Certain Questions concerning Trying Labor Dispute Cases, *supra* note 55, at art. 16.

90. *See* HAN, *supra* note 73.

Third, the HELDR and Interpretation I allow the sixty-day time limit to be extended for *force majeure* or other legitimate reasons.[91] But there is no further explanation on what constitute "other legitimate reasons." Certain courts at the provincial level gave their own interpretation. For instance, the Senior People's Court of Jiangsu Province has interpreted "other legitimate reasons" including the following: (1) The laborer has suffered from serious illness that has prevented him from making a complaint; (2) the laborer has consulted the employer on the issue; (3) the laborer has requested mediation by the trade union, by the enterprise mediation committee, or by the administrative authorities concerned; and, (4) other reasonable situations recognized by the court. The burden of proof rests on the party who invokes above reasons.[92] The Senior People's Court of Guangdong Province has slightly different interpretation. According to that court, "other legitimate reasons" refer to: (1) unexpected situations such as the laborer having been hospitalized for medical treatment; (2) the laborer and the employer having consulted each other on the disputed issued or having reached an agreement on the issue; or, (3) other reasonable situations recognized by the court.[93] In Shanghai, the term "legitimate reasons" has been given a broad interpretation. Any reasons not related to the subjective fault of the applicant could be considered as legitimate.[94] The case law illustrates that local courts have exercised discretion to a certain extent by taking into consideration the circumstances of the dispute when deciding what constitute legitimate reasons.[95]

B. Problems in the Structure of the LDR System

Apart from deficiencies in the jurisdiction, the "one arbitration, two trials" structure of China's LDR system has been subject to lots of criticism. First, the lengthy process of the "one arbitration, two trials" of the LDR system increases the costs for labor dispute parties and

91. *See* HELDR, *supra* note 14, at art. 23; *see also* Interpretation I, *supra* note 44, at art. 3.

92. *See* Opinions of the Jiangsu Province Senior People's Court on Certain Questions concerning Labor Dispute Cases, *supra* note 55, at art. 17.

93. *See* Guiding Opinions of the Guangdong Province Senior People's Court on Certain Questions concerning Labor Dispute Cases, *supra* note 88, at art. 10.

94. *See* Shanghaishi Gaoji Renmin Fayuan, Shanghaishi Laodongju Guanyu Shenli Laodong Zhengyi Anjian Ruogan Wenti Yijian [Opinions of the Shanghai Municipal Senior People's Court and Shanghai Labor Department on Certain Questions concerning Labor-dispute Cases] (promulgated by the Shanghai Municipal Senior People's Court, Oct. 6, 1996), ¶ 2.

95. *See*, *e.g.*, Chen Jinshun v. Xiamen Yiren Corporation, *Laodong Hetong Jifen* [*Labor Contract Disputes*], ZHONGGUO FAZHI CHUBANSHE [CHINA LEGAL PRESS] 413–20 (Zhu Mingshan ed., 2003).

places workers in a disadvantaged position. Without choice between arbitration and litigation, labor dispute parties must in fact undergo "three trials," which altogether take around one year, and in some cases, may take up to three years.[96] This fact is at odds with the principle of speediness of the LDR system and renders futile other legislative efforts following this principle such as the time limit for filing the claim and that for adjudicating the dispute. In order to avoid such time-consuming and costly process, workers are often more willing than employers to settle the dispute through arbitral mediation. In certain cases, workers may accept much lower compensation than they are entitled to.[97]

Second, both arbitration and litigation have their own strengths and deficiencies in terms of their functions and organization. Judges are often specialized in civil lawsuits and unfamiliar with labor law.[98] In contrast, arbitrators are mostly experienced professionals in industrial relations and labor law. However, the arbitration commission is an administrative organ directly subordinated to the local government, and its staff are public servants. This fact renders the independence of arbitration questionable. Relatively speaking, the courts are more independent than the labor arbitration commission; although in China, even the courts cannot be completely exempted from the influence of the government especially when sensitive cases are concerned.[99]

C. Problems in the Implementation

China has made great efforts to improve the implementation of labor law and the LDR system. For instance, in response to the rapidly increasing number of labor disputes, China established a great number of enterprise mediation committees and labor arbitration commissions at various levels and ran the dissemination campaign to increase the public awareness of the labor law.[100] Nevertheless,

96. *See* Li Jianfei, *2003 Nian Laodong Faxue he Shenhui Baozhang Faxue Xueshu Yanjiu Huigu* [Li Jianfei, *Review of the Research in Labor Law and Social Security Law in 2003*], 5 ECON. L. & LAB. L. 81–82 (Zhu Mingshan ed., 2003)]; *see also* Ruan Xiu, *You Gean Kan Woguo Laodong Zhengyi Tizhi* [Ruan Xiu, *Study of the Labor Dispute Settlement System of Our Country from Individual Cases*, 12 ECONOMIC LAW & LABOR LAW 49-52 (2000).

97. The information is based on interviews and a survey of cases at the Changzhou Labor Arbitration Commission.

98. *See* HARPER, *supra* note 11, at 201.

99. In China, the independence of the courts is questionable for other reasons, in particular in terms of the nomination and terms of judges, and the existence of a Committee of Judicial Work of the Chinese Communist Party within each court. For more discussion on this topic, see HARPER, *supra* note 11, at 204–08.

100. *See id.* at 217–18.

problems are still significant in the following aspects of the implementation.

First, there is a shortage of qualified personnel. Many arbitrators and judges, especially those at the grassroots level, do not receive an adequate training in labor law.[101] Labor lawyers are also in shortage. Compared to lucrative commercial cases, labor disputes are much less attractive for lawyers.

Second, financial costs for workers to take legal action insufficient legal aid discourage many workers from resorting to the LDR system. Although reducing or waiving fees for arbitration or litigation is legally possible,[102] it is not extensively awarded in practice.[103] Public or private legal aid services exist in China, but their application may be limited to certain categories of workers such as local residents,[104] or may focus on certain types of disputes such as work injury claims.[105]

Third, the effectiveness of the LDR system is not only affected by technical deficiencies in the system *per se* but also by the deficiencies in the substantive labor law. China's labor law is poorly drafted and has diversified sources, which results in conflicting legislation and the inconsistent application of labor law. Apart from the "laws," administrative regulations, and department regulations at the national level, local people's congress and governments issue their own regulations and legal documents addressing labor issues. In addition, the SPC and local courts give judicial interpretations to unclear labor rules. Lack of an effective legislation review mechanism makes it difficult to change this situation.[106] Government policies addressing issues such as restructuring and layoffs of public enterprises render the implementation of labor law even more chaotic.

Fourth, after receiving a favorable judgment through the LDR process, workers are often unable to obtain the compensation due by the employer. In fact, the difficulty of enforcement is not limited to labor disputes, but is a pervasive phenomenon deeply rooted in

101. *Id.* at 200–02.

102. *See*, *e.g.*, the 1993 Working Rules of the Labor Dispute Arbitration Commission, at art. 61.

103. *See* HARPER, *supra* note 11, at 157.

104. For instance, cities such as Guangzhou and Wuhan only provide legal aid to those with local resident permits. *See* HARPER, *supra* note 11, at 156.

105. *See*, *e.g.*, Guanyu Minshi Falu Yuanzhu Ruogan Wenti de Tongzhi [Notice regarding questions on legal aid for civil disputes] (promulgated by the SPC and the Ministry of Justice, April 12, 1999).

106. *See* Li Zhaojie, *The role of domestic courts in the adjudication of international human rights: a survey of the practice and problems in China*, *in* ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (B. Conforti & F. Francioni eds., 1997).

China's judicial system as a whole.[107] As regards labor disputes, the problems with enforcement are mainly related to the following factors. First, when bankrupt enterprises are involved, workers may not be able to obtain all the due compensation, even though they are entitled to be compensated before any other creditors.[108] Second, the courts that are responsible for enforcing the judgment often lack resources to enforce their judgments. Especially at the grassroots level, many courts have financial difficulties in daily functioning.[109] Third, the courts do not enjoy independence as the law requires and they are often influenced by the local government. The latter often has strong interests in protecting local enterprises and thus obstructs the enforcement. Fourth, local protectionism also results in great difficulties in enforcing the judgments of other jurisdictions.[110] Fifth, penalties for refusing to enforce a court order are rather exceptional. According to the law, such penalties may take the forms of fine, detention, or imprisonment up to three years.[111] In practice, few employers have been punished for technical reasons.[112]

IV. INTERPRETATION II OF THE SUPREME PEOPLE'S COURT AND ITS IMPLICATIONS

Five years after Interpretation I was issued, China's Supreme People's Court on August 14, 2006 issued Interpretation II, which contains 18 articles.

A significant point of Interpretation II is that its first three provisions and Article 14 concern unpaid wages and wage arrears, as a response to this notorious phenomenon around China and particularly in the construction sector during the past decade.[113] The rest of the provisions are devoted to clarifying the subject matter jurisdiction,

107. *See*, *e.g.*, Chang Fulin, *Qianxi Falu Guiding de Quaxianxing he "Zhixingnan"* [Chang Fulin, *Analysis of deficiencies in law and enforcement difficulties*], FALU SHIYONG 4 [APPLICATION OF THE LAW] 34–36 (2000).

108. *See* Civil Procedure Law, *supra* note 41, at art. 204. *See also* Zhongguo Renmin Gongheguo Qiye Pochanfa [Enterprise Bankruptcy Law] (promulgated by the Standing Committee of the NPC, Aug. 27, 2006, effective June 1, 2007), at art. 113.

109. *See* Jianghua, Qiantan Zhixingnan de Biaoxian, Yuanyin he Duice [Jiang Hua, *Forms, causes and measures to combat enforcement difficulties*], LIAONING XINGZHENG XUEYUAN XUEBAO, 2 J. LIAONING ADMIN. COLLEGE 12–13 (2000).

110. *See* HARPER, *supra* note 11, at 176.

111. *See* Zhonghua Renmin Gongheguo Xingfa [Penal Law] (promulgated by the NPC, July 1, 1979, revised March 14, 1997, effective Oct. 11, 1997), at arts. 313–14.

112. *See* Fulin, *supra* note 107.

113. *See*, *e.g.*, Zuigaofa Jiu Chutai Laodongfa Sifa Jieshi (Er) Da Jizhe Wen [Press Conference of the Supreme People's Court on the Issue of Interpretation II], Aug. 31, 2006, *available at* http://www.china.com.cn/law/txt/2006-08/31/content_7121546.htm (last visited Oct. 20. 2006); *see also* HARPER, *supra* note 11, at 93.

and to deal with personal jurisdictions, time limit, preservation of property, and enforcement.

Article 1 partly clarifies the controversial concept of "the date on which a labor dispute occurs" as discussed earlier in this article. This provision contains three paragraphs respectively addressing three specific situations. First, as regards wage disputes during the employment, the sixty-day time limit starts to run at the date on which the written notice of refusal of payment by the employer is served on the worker concerned; if the employer cannot provide such evidence, the time limit starts to run at the date on which the worker claims the right. Second, as regards disputes over the termination of employment, the time limit runs from the date on which the worker claims the right if the employer cannot prove when the worker concerned received the written notice of termination. Third, concerning disputes over wages, dismissal compensation, employment benefits, and other matters *after* the termination of employment, the time limit starts to run at the date on which the payment should be made as promised by the employer if the worker can prove such promise; otherwise, the "date on which a labor dispute occurs" is the date when the employment terminates. According to the SPC, since misunderstanding on the concept "the date on which a labor dispute occurs" is mainly concerned with disputes over wages, termination of contract, and dismissal compensation, Interpretation II specifically targets at these cases.[114] In fact, statistics show that disputes over wages and benefits indeed constitute the majority of labor disputes brought to arbitration and litigation.[115] As such, the majority of labor dispute plaintiffs would benefit from the clarification made by Interpretation II. For the rest of labor disputes, however, the question remains whether the time limit runs from the date on which the worker is ware of the violation or from the date on which he claims his rights.

The deficiencies in Article 1 are somewhat compensated by Articles 12 and 13, which add the rule of interruption (*zhong zhi*) and the rule of suspension (*zhong duan*), as applied in general civil lawsuits.[116] Before Interpretation II, even if the worker submitted a claim to his employer or to the labor inspection had within sixty days, the time would continue to run. Article 12 now provides "Whereas

114. *See* Press Conference of the Supreme People's Court on the Issue of Interpretation II, *supra* note 113.

115. *See* HARPER, *supra* note 11, at 93–94 (referring to the LABOR STATISTICAL YEARBOOK (2001)).

116. *See* General Principles of Civil Law, *supra* note 83, at arts. 139–40.

the plaintiff cannot file the claim within the time limit for arbitration due to *force majeure* or other objective reasons, the court shall regard the time as interrupted, and the time shall continue to run after the reasons concerned have disappeared." This rule is similar to the extension of the time limit permitted by the HELDR and Interpretation I as discussed earlier in our study. Although Interpretation II does not define what constitute "objective reasons" either, the rule of *zhong zhi* is, compared to the rule of extension, a more mature rule widely practiced in civil law and thus leaves less discretion to arbitrators and judges. Article 13 provides that if a party can prove that it has claimed the right from the defendant or has sought remedies from the authorities, or that the defendant has promised to implement the obligation, the time limit for arbitration shall be recounted from the date when the defendant expressly refuses to implement the obligation or when the authorities issue the decision or dismiss the claim. These two provisions have a significant meaning in protecting the workers' right to seek effective remedies.

Article 2 specifically targets wage arrears *during* the employment. According to this provision, the court shall not accept the argument of the employer that the sixty day time limit has run out, except if the employer can prove that the worker concerned has received the written notice of the refusal to pay by the employer. This provision indeed extends indefinitely the time limit for workers to file a claim on wage arrears. The reason behind this provision is that wage arrears are often inevitable in reality and it would be unreasonable to expect the worker to bring such claim to arbitration every time that a delay in payment occurs.[117]

Article 3 allows the worker to directly file a civil lawsuit before the court, without undergoing arbitration as the 1995 Labor Law requires, if the person has written proof of unpaid wages from the employer and if the claim does not involve any other disputes concerning the labor relationship. In other words, such a dispute is regarded as a labor compensation dispute and is handled as a general civil lawsuit. The objective of this interpretation is to avoid lengthy procedures, due to the application of the principle of "one arbitration, two trials."[118] For a civil dispute, the parties have one or two years to file a claim. Certainly, workers may still choose arbitration for such disputes. In practice, workers may benefit from the possibility offered

117. *See* Press Conference of the Supreme People's Court on the Issue of Interpretation II, *supra* note 113.

118. *Id.*

by Interpretation II. Nevertheless, scholars have raised suspicion about its applicability especially for rural migrant workers because their employers are very unlikely to provide any written proof of unpaid wages.[119] Apparently, such interpretation is at odds with the requirement of the 1995 Labor Law that a labor dispute must be arbitrated first. Nevertheless, unpaid wages can be considered as affecting workers' property rights and are therefore protected by civil law.[120] It is not clear whether the Supreme People's Court has adopted such reasoning.

In Articles 4 to 8, Interpretation II clarifies the kinds of disputes to which the LDR system applies.

According to Article 5, disputes over dismissal compensation, transfer of personal files and social security rights, return of deposit after the termination of a labor relationship shall be heard by the court after arbitration. It is worth noting that transfer of personal files was not a clear obligation of the employer. In practice, many employers deliberately delay or detain the personal files of workers and thus seriously affect their opportunities to start a new employment. Disputes over this matter were often considered as administrative issues and dismissed by arbitration and litigation.[121] In this respect, Interpretation II plays a positive role in safeguarding the workers' right to free choice of employment.

Article 7 clearly rules out six types of disputes from the LDR system: (1) disputes over social security payments by a social security fund; (2) disputes between a family (or an individual) and a domestic worker; (3) disputes over a public housing transfer as a result of the housing reform; (4) disputes over the determination of occupational diseases and disability degree by the relevant institutions; (5) disputes between an individual artisan and a helper or an apprentice; and, (6) disputes between rural contractors and their employees. In fact, the majority of these provisions have their predecessors scattered in voluminous legal documents issued by the Ministry of Labor.[122] However, these documents are not easily accessible for the public, and

119. *See*, *e.g.*, Li, *supra* note 87.

120. *See* General Principles of Civil Law, *supra* note 84, at art. 75.

121. *See* LI, *supra* note 96.

122. *See*, *e.g.*, Laodongbu Bangongting Guanyu Shifou Shouli Qiye yu Zhigong Yin Zhufang Chushou Deng Wenti Fasheng Zhengyi de Fuhan [Response of the Secretariat of the Ministry of Labor to the questions concerning the admissibility of disputes between enterprises and staff over sales of housing] (promulgated by the Ministry of Labor, July 29, 1994); *see also* Laodong he Shehui Baozhangbu Bangongting Guanyu Chuli Gongshang Zhengyi Wenti de Fuhan [Response of the Secretariat of the Ministry of Labor to the questions concerning disputes over work injury], (promulgated by the Ministry of Labor, Feb. 15, 1996).

the courts may refer to them, but are not obliged to follow them.[123] Practices in these disputes are not always consistent. Interpretation II now provides clearer indications to the parties and the courts.

Article 10 concerns the jurisdiction *ratione personae* in the case of disputes over labor assignment contracts. According to this article, the assigning employer is the defendant in such disputes. If the dispute concerns the receiving employer, both the assigning and the receiving employer will be defendants. This triangular relationship often exists between a worker, a foreign company, which does not have the right to recruit Chinese employees, and the Chinese company providing service to the foreign company.[124] Before Interpretation II, there were no clear rules in this respect. In the case of *Chen Weihua v. Shanghai Foreign Service Corporation*, Shanghai Huangpu District People's Court supported Chen's claims over a dismissal compensation that was clearly indicated in the contract between the assigning employer and the receiving employer, but the court did not support her claim on overtime payment, due to a lack of evidence. According to Article 13 of Interpretation I, the employer assumes the burden of proof in disputes over compensation. In the instant case, the defendant is the assigning employer who does not have information on overtime pay and cannot thus assume the burden of proof on this matter. But the receiving employer, who has the relevant information, is not the party of the lawsuit and thus has no obligation to provide evidence. The current provision provides better protection to workers in labor assignment. It is expected that the Labor Contract Law will provide more substantive protection to the rights of workers in labor assignment because the respective responsibilities of the sending and receiving employers are much more clarified by the new law.[125]

Article 14 allows the court to exempt or reduce guarantees provided by workers who apply for preservation of property if they have financial difficulties or if there is evidence that the employer may flee with unpaid wages.[126] This provision intends to reduce the financial burden of workers to seek remedies. Nevertheless, it may not have much practical meaning because the rule of preservation of property does not apply to arbitration that must be exhausted before litigation. Consequently, it may have been too late when workers are allowed to apply for preservation of property to the court.

123. *See* HAN, *supra* note 73.

124. *See* Chen Weihua v. Shanghai Foreign Service Corporation, *supra* note 95, at 229–35.

125. *See* Labor Contract Law, *supra* note 7, at arts. 57–67.

126. According to Article 93 of the Civil Procedure Law, the party who applies for preservation of property must provide a deposit to the court as guarantees.

Article 16 provides that in the case of a conflict between the internal rules of the employer and the terms of a collective contract or an individual labor contract, the contract will prevail over the internal rules if the worker requests so. This provision is to solve the problem left by Interpretation I. Article 19 of Interpretation I allows the court to use the internal rules of the employer as the basis for labor disputes if the internal rules satisfy three cumulative conditions: establishment by democratic procedures; compliance with laws, administrative regulations, and policies; and publication to workers. Interpretation I sets qualifications to the validity of internal rules but does not clarify the relationship between internal rules and contracts. The new Labor Contract Law makes little progress compared to Interpretation I in this respect.[127] Interpretation II answers the controversial question whether the internal rules are part of the labor contract.[128] It can protect workers from being imposed upon unfair internal rules of the employer, as often occurs in practice.

V. CONCLUSION

China's LDR system has inherent deficiencies, especially in terms of its limited scope of application and its structural weakness. Legislative deficiencies in substantive labor law and lack of rule of law also contribute to the rather poor implementation of the LDR system.

The new Interpretation II plays a positive role in solving certain technical problems such as the time limit to file a claim and in addressing some urgent issues such as that of wage arrears. It extends the jurisdiction of the LSD system in subject matters. It can also provide better protection to certain fundamental rights of workers such as the right to wages, compensation for work injuries, and the right to seek remedies *per se*.

Nevertheless, the most disadvantaged workers such as rural migrant workers and laid off workers may not be able to benefit much from the new Interpretation either because they are excluded from the jurisdiction of the LDR system or because they do not have the technical resources to utilize the LDR system to protect their rights.

Moreover, Interpretation II can do little to change the disadvantaged position of workers in the labor dispute resolution process caused by the lengthy procedure. It cannot do much either to

127. *See* Labor Contract Law, *supra* note 7, at art. 4.
128. *See*, *e.g.*, SHEN, *supra* note 34, at 172–73.

ease difficulties in the enforcement of judgments although it has made certain efforts in this respect.

After all, one cannot expect that a judicial interpretation would solve all the problems in China's LDR system. In fact, Interpretation II does not have such ambition. According to the SPC, content overlapping with the Labor Contract Law has been deleted from Interpretation II.[129]

Scholars have made various suggestions to improve the LDR system such as changing the existing "arbitration first, litigation afterwards" structure into an "arbitration or litigation" structure, creating specific labor dispute tribunals within or outside the civil courts, or establishing separate procedures for collective and individual labor disputes.[130]

A positive sign is that China's legislative work is now more sophisticated and involves more public participation. It is thus expectable that the future Labor Dispute Mediation and Arbitration Law would draw lessons from practices in the past decade.[131] But the effective protection of workers' rights requires not only technical improvements in the LDR system and substantive labor standards, but also respect for the rule of law and commitment to fundamental rights in general.

129. *See* Press Conference of the Supreme People's Court on the Issue of Interpretation II, *supra* note 113.

130. *See*, *e.g.*, Jiang Ying, *Woguo Laodong Lifa yu Laodongzhen Quanyi Baozhang* [Jiang Ying, *Labor legislation and protection of laborers' rights and interests*], 9 ECO. L. & LAB. L. 15–18 (2003). *See also* Zheng Shangyuan, *Lun Zhengyi Susong Chengxu shi Wanshan—Jianping Zuigao Renmin Fayuan Fashi (2001) Sihao* [Zheng Shangyuan, *Amelioration of the Labor Dispute Litigation Procedures*], 11 ECON. L. & LAB. L. 67–73 (2003). *See also* Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China*, 30 FORDHAM INT'L L.J. 401 (2007).

131. The preliminary draft of the Labor Dispute Mediation and Arbitration Law is rather disappointing because it does little more than a codification of the existing regulations and many problems indicated in this article remain unsolved. Nevertheless, it is foreseeable that the draft will receive a lot of criticism as occurred to the Labor Contract Law. It is therefore still realistic to expect that the final text would be able to address the existing problems of the LDR system to a greater extent.