

Non-Litigation Settlement Mechanism of Labor Disputes in China--- Examine and Review

MECANISME DES REGLEMENT NON CONTENTIEUX DES DIFFERENCES DE TRAVAIL EN CHINE

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Abstract

Labor disputes settlement in China follows a non-litigation mode which contains consultation, mediation and arbitration. This article gives explanations on basic theory of labor disputes settlement mechanism and analyzes problems existed in the current non-litigation settlement mechanism of labor disputes in order to help with the perfecting of the mechanism.

Key words: Labor disputes settlement; Non-litigation settlement mechanism of labor disputes; Problems

Résumé

Le règlement des différences de travail en Chine suit un mode non-contentieux, qui contient de consultation, de médiation et d'arbitrage. Cet article donne des explications sur la théorie de base du travail de règlement des différends mécanisme et analyses des problèmes existaient dans le mécanisme de règlement non contentieux des différends du travail en cours afin d'aider à la mise au point du mécanisme.

Mots clés: Règlement des différences de travail; Mécanisme de règlement non contentieux des différence du travail, Les problèmes

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Facing to the increasing amount of labor disputes, old ways of dispute settlement can hardly handle. Under the circumstance that labors' rights are difficult to be spoken out and pursued, labors have to try irrational ways to resolve disputes which will definitely cause more sever social problems. Once there are disputes, they must be handled timely, effectively and fairly. Therefore, dispute settlement has become basic mission of social control in certain system. To discuss settlement of labor disputes under the legal background, the main part is to build up a whole mechanism that adapts to various types of labor disputes in order to play unique role in settling labor disputes.

1. DEFINITIONS OF LABOR DISPUTES SETTLEMENT MECHANISM

Dispute or the so called conflict, controversy and argument is "a confrontation between two or more parties when there is conflict of benefit among them." "Labor disputes" is one of various disputes. The using of the definition of labor dispute in China can be traced to the Labor Disputes Settlement Act in 1920s and until now it is used as well. Law of the People's Republic of China on Mediation and Arbitration of Labor Disputes 2007 continues to use the definition of labor disputes. In this situation, labor disputes are disputes about rights and obligations between employee and employers.

Dispute settlement means resolving disputes and conflict through certain procedure or methods and recovering balance and order in society. Dispute settlement has become a famous and well known word in modern academic world. FAN Yu has said: dispute

settlement is “an activity of eliminating conflict, fixing damage and recovering orders and it is conducted by disputed parties after the dispute according to particular rules and methods”. The author thinks that professor FAN Yu’s definition on dispute can express comprehensively and precisely features of dispute which are subjects, rules, methods and objectives

Dispute settlement is a social activity and “it must be acted according to certain rules, therefore, it is necessary to study on dispute settlement mechanism”. Mechanism always thought as “process and methods of mutual effecting between elements or parts of a working system”. Dispute settlement mechanism includes a whole set of dispute resolving methods and rules or system that can effectively eliminate and resolve various kinds of disputes in a particular society. A complete dispute settlement mechanism must include disputed parties, content of the dispute, dispute solver, rules applied and other basic elements. Dispute settlement mechanism in modern society is a litigation centered mechanism and diverse and organic non-litigation dispute settlement.

Labor disputes settlement mechanism is a more practical research topic. Generalized labor disputes settlement mechanism includes all methods in labor dispute resolving, such as litigation and non-litigation methods (reconciliation, consultation, mediation and arbitration). In a narrower sense, labor disputes settlement mechanism only refers to labor disputes mediation and arbitration. In this paper, the labor dispute settlement mechanism refers to reconciliation, consultation, mediation and arbitration. Among the four dispute settlement methods, consultation, mediation and arbitration are studied as a focus in order to response to the design of labor disputes settlement mechanism of the Law of the People’s Republic of China on Mediation and Arbitration of Labor Disputes 2007.

2. OVERVIEW OF LABOR DISPUTES SETTLEMENT MECHANISM IN OTHER COUNTRIES

Labor disputes are problems that all countries have to face to in their industrialization process. After nearly a century’s discover, every country has accumulated teeming experiences and built up effective labor disputes settlement mechanisms.

Completion of Labor disputes procedure and effective operation in the United Kingdom is a typical example in western countries. Labor disputes settlement mechanism in U.K. includes employers internal consultation mechanism, employers external mediation and arbitration, and trail procedure of special labor court, labor court of appeal and common court.

Outside of the common civil dispute resolution procedure, the Germany has set up special dispute

settlement mechanism according to the features of labor disputes. One is that the labor court as a special labor disputes settlement judicial organ is independent. In the Germany, most labor disputes are settled through litigation procedure. Therefore, the labor court has been set up. The trail is made up of professional judge and unprofessional citizens and applies simpler and easier procedures than in the common civil procedures. The other is that there is labor disputes arbitration committee inside of the labor court. Arbitrators are appointed and under control of the labor court. Compared to previous legal procedures, the arbitration committee is more independent and mainly in charge of collective labor disputes. The last is that individual labor disputes must be mediated.

The most significant feature of the American labor disputes settlement mechanism is the labor disputes arbitration is getting more popular while labor disputes arbitration is no longer limited in dealing collective labor disputes and many individual labor disputes can voluntarily reach an agreement to apply arbitration. Furthermore, National Labor Relations Board has played particular role in resolving labor disputes. The National Labor Relations Board can bring a lawsuit of labor disputes as a public organ and is in charge of examining the qualification of the representative from the labor union in collective bargaining and bring lawsuit against improper industrial conducts.

There is no special court dealing with labor disputes. However, administrative organs play important part in providing consulting, directing and especially mediating in resolving labor disputes.

3. REVIEW OF CHINA’S CURRENT LABOR DISPUTES SETTLEMENT MECHANISM

Paragraph 1, Article 77 of the Labor Act stipulates: “Where a labor dispute between the employing unit and laborers takes place, the parties concerned may apply for mediation or arbitration or take legal proceedings according to law, or may seek for a settlement through consultation.” Article 79 stipulates: “Where a labor dispute takes place, the parties involved may apply to the labor dispute mediation committee of their unit for mediation; if the mediation falls and one of the parties requests for arbitration, that party may apply to the labor dispute arbitration committee for arbitration. If one of the parties is not satisfied with the adjudication of arbitration, the party may bring the case to a people’s court.” Article 4 of the Law of the People’s Republic of China on Mediation and Arbitration of Labor Disputes states: “Where a labor dispute arises, a laborer may have a consultation with the employing unit or request the labor union or a third party to have a consultation with the employing unit in order to reach a settlement agreement.” Article 5 states: “Where a

labor dispute arises, the parties are not willing to have a consultation, the consultation fails or the settlement agreement is reached but not performed, an application for mediation may be made to a mediation institute. Where the parties are not willing to mediate, the mediation fails or the mediation agreement is reached but not performed, an application for arbitration may be made to the labor dispute arbitration commission. Where there is objection to the arbitral award, litigation may be initiated to a people's court unless otherwise specified herein." All the above are core expression of China labor disputes settlement mechanism.

According to the Labor Act and the Law of the People's Republic of China on Mediation and Arbitration of Labor Disputes, labor disputes settlement mechanism in China includes reconciliation, consultation, mediation and arbitration and it has formed a non-litigation mechanism step by step of which the main methods are reconciliation, mediation and arbitration. The reconciliation is the most important part in the mechanism and arbitration is an affiliated part of great importance. The labor disputes arbitration is a pre-procedure of labor lawsuit and it aims at strengthening the position in labor disputes settlement. The idea of setting up this system is scientific but not has great influence in practice.

First, labor disputes settlement procedure exists in name only. In certain labor relations, due to the power of the employer, the situation of the labor and the employer are unequal which has made the Collective bargaining of no sense and a fair platform is hard to establish as well. However, in the collective bargaining there suppose to be a collective negotiation between the representative of labor union and the employer. Due to the labor union is set in the company and the source of funding and salary guarantee are enslaved to the company, when there are labor disputes it usually plays a role of mediator between employees and the employer. This cannot improve the situation of employees and sometimes they have to bend to the administrative organ of the company. Therefore, distance between employees and the employer which has been caused by the different economic conditions have made no matter the separate negotiation or the collective bargaining exists in name only when they are used in resolving labor disputes. Not to say the effectiveness.

Second, labor disputes arbitration performs practically no function. One of the biggest differences in the Law of the People's Republic of China on Mediation and Arbitration of Labor Disputes is adding the mediation organs in resolving labor disputes. It means besides the labor disputes mediation committee in the company, there has been primary disputes settlement organizations

set up by law and organizations which have labor disputes settlement function in towns and streets. Just for mediation, the principle of setting up the rules is making use of the neutrality of the third party to prompt employees and employer to achieve agreement. In practice, due to the labor union is set in the company and the source of funding and salary guarantee is enslaved to the company, the labor union cannot be a totally neutral third party. While organizations which have the function for settling labor disputes are not build up at a large scale, most disputes are solved by primary disputes settlement organizations. However, most mediators are not qualified and unprofessional which has led to the result that disputing parties are lack of confidence and identification of them.

Third, Labor arbitration are unable to fulfill their duties. Many people go to the arbitration committee just because the arbitration service is free of charge. People think if their request is supported by the arbitration, he or she is a beneficiary. If not, no one lose anything. The amount of labor arbitration case is increasing while the settlement organs, staffs, funds and etc. are not improved.

To highlight the position of non-litigation mechanism in resolving labor disputes is the original intention when designing the current labor disputes settlement mechanism. Facing increasing amount of labor disputes, it is necessary to unite litigation and non-litigation mechanism. Try to make full use of the non-litigation mechanism in resolving labor disputes and protect disputing parties' legal rights.

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