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A Comparative Analysis of the Protections of Workers' Demands in the People's Republic of China and the United States in the Global Economy -- The Costs and Benefits of Collective Bargaining

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A COMPARATIVE ANALYSIS OF THE PROTECTIONS OF WORKERS'
DEMANDS IN THE PEOPLE'S REPUBLIC OF CHINA AND THE
UNITED STATES IN THE GLOBAL ECONOMY – THE COSTS AND
BENEFITS OF COLLECTIVE BARGAINING

Xiaohan Sun

Submitted to the faculty of Indiana University Maurer School of Law

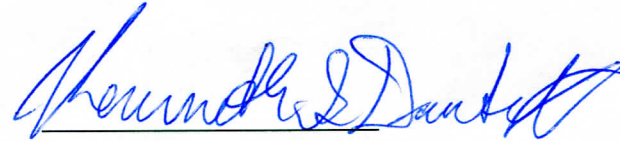
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for the degree

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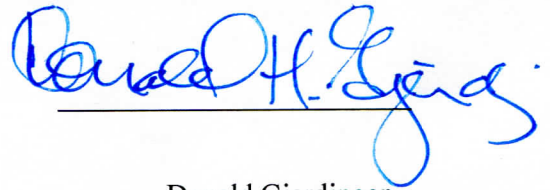
July 2015

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Xiaohan Sun

July 18, 2015

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into three categories: asking for compensation due to factory closure, relocation, and transfer; asking for increased wages and unpaid wages; and asking for benefits from SOEs reform.⁵ The results of these demands are different: one-third of these demands did not have reported outcomes while 80 percent of the other demands had been resolved.⁶ Although the workers' protests could entirely or partially satisfy workers' demands in the end, some workers, especially the strike leaders, are routinely fired, and sometimes detained by police and charged with the crime of "disturbing the public order."⁷ Realizing workers' demands cannot be ensured without greater protection in both law and policy. Moreover, the employer has begun to utilize strategies to lower business costs: cutting down on positions but increasing tasks per employee; decreasing tasks for workers inducing them to resign their positions; relocating the plant to low-cost areas; and using labor dispatch workers not in provisional, auxiliary or substitutive positions.⁸ These strategies prevent employees from obtaining fair compensation, benefits, and payment.

In order to satisfy workers' demands and create stronger policy for the PRC, drawing from the U.S.'s collective bargaining system, labor law, and case law precedents, I will make a comparative analysis of the protections for workers in labor laws and alternative dispute resolutions (arbitrations) in China and the United States.

⁵ *Id.* at 4-5.

⁶ *Id.* at 22.

⁷ Aaron Halegua, *China's New Collective Bargaining Rule Is Too Weak To Ease Labour Conflicts*, S. CHINA MORNING POST (Feb. 25, 2015 5:45PM), <http://www.scmp.com/comment/insight-opinion/article/1723213/chinas-new-collective-bargaining-rule-too-weak-ease-labour>

⁸ *Zhongguo Gongren Yundong Guancha Baogao (2011-2012)*, *supra* note 3, at 12; Zhonghua Renmin Gongheguo Laodong Hetong Fa (中华人民共和国劳动合同法) [Labor Contract Law of the People's Republic of China (2012 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2012, effective Dec. 28, 2012) (Lawinfochina) (China), Art. 66. Art.66: "Labor dispatch is a supplementary form and shall exclusively apply to provisional, auxiliary or substitutive positions. 'Provisional position' as prescribed in the preceding paragraph means a position that exists for less than six months; 'auxiliary position' means a non-major business position providing services to main business positions; and 'substitutive position' means a position that may be held by any other employee on a substitutive basis during a certain period of time when the employee of the employer who originally holds the position is unable to work because such employee is undergoing full-time training, on vacation or for any other reason".

Comparative analyses of labor laws and industrial relations can be a useful for labor law reforms in China for a variety of reasons.⁹ First, learning about other countries can help identify successful labor laws in those countries, and the manner in which the laws and institutions developed.¹⁰ Second, comparative studies are worthwhile in discovering commonalities among the surveyed countries to figure out any general structures between different societies and cultures, realizing that the national industrialization systems are becoming more uniform and varied in different ways under globalization.¹¹ Third, comparative studies are useful to provide a particular country with recommendations for labor law reform in order to improve the performance of the industrial relations system.¹² As for China, learning how the system in the United States operates could motivate and provide ideas to China in reviewing their current system with respect to efficiency and equity.

In Part II of my thesis, I review the labor market in China and the United States and emphasize the significance of collective bargaining. As for China, collective bargaining (negotiation) between the union representing employees and the employer is necessary because in most cases employers are not willing to negotiate with their employees and strikes are costly and problematic for officials obsessed with maintaining harmonization and social stability.¹³ From an economic perspective, I then analyze the challenges of an imperfect labor market by discussing unequal bargaining power, unemployment, and the externalities and social costs of labor. With respect to the costs and benefits in the existing imperfect labor market, union attendance and regulations are important to maintain fair conditions of employment.

⁹ Kenneth G. Dau-Schmidt, *Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan under the Bargaining Model*, 8 TUL. J. INT'L & COMP. L. 117, 118 (2000).

¹⁰ *Id.* at 119.

¹¹ *Id.* at 118.

¹² *Id.* at 118-19.

¹³ Halebua, *supra* note 7.

In order to satisfy workers' demands, discussing the protections in labor laws and alternative dispute resolutions in both countries is especially significant for China in reviewing its own protections.

In the following chapters, I conduct a comparative analysis of the labor laws and arbitration regulations in China and the United States by discussing the definition of employees, workers' organizing rights, remedies for employees, and the challenges of China's arbitration system. In Part III, I make a comparative analysis of labor laws in China and the United States by means of discussing the definition of employees, the basic right of employees to participate in union's activities, and remedies for improper behavior of employers. In Part IV, after a brief review of the arbitration laws in both countries, I discuss the current challenges in China referring to the U.S. arbitration models.

II. A REVIEW OF THE LABOR MARKET – THE COSTS AND BENEFITS OF COLLECTIVE BARGAINING

A. THE LABOR MARKET AND THE WORKERS' DEMANDS OF THE PEOPLE'S REPUBLIC OF CHINA AND THE UNITED STATES

The initial labor system was set up by the PRC in the 1950s was adopted from the Soviet Model and based on a centrally planned economy, including labor and the administration of wages.¹⁴ At that time, the PRC employed a “price-scissors” policy based on the Soviet Model in order to accumulate capital and ensure profits for enterprises. Under this policy, the government maintained low agricultural prices and low rural and urban wages while maintaining high prices for manufactured goods

¹⁴ JOHN B. KNIGHT & LINA SONG, *TOWARDS A LABOR MARKET IN CHINA* 13 (Oxford: Oxford Univ. Press 2005).

permitting for the centrally planned re-investment of profits into state-owned enterprises (SOEs).¹⁵ In this way, not only did rural peasants effectively pay for industrialization at the expense of their own interests, but urban workers' rights were also undermined by the policy.¹⁶ Under these conditions, the Chinese labor market system was an administrated labor system rather than a labor market.¹⁷

In 1978, Deng Xiaoping proposed a remarkable process of economic reform in China. Under the direction of reformers, China changed from a “Central Planned Economy” to a “Market Economy”. During the process of economic reform, the labor market shifted away from an administrated labor system. The transition focused first on increasing economic activity in specific areas with the expectation that the prosperity in one area would assist and spread to other sectors – prosperity to some, then to most, then to all.¹⁸ The labor reforms began at this time by means of abandoning the system of labor allocation, requiring or permitting real wages to rise, and introducing “performance-related wage incentives/distribution wages according to performance (*an lao fen pei*).”¹⁹

At the same time, the workforce transferred from rural to urban areas. In the mid-1980s this migration was of particular importance due to the rapid growth of the urban economy and the slow growth of the urban-born workforce under the one-child policy.²⁰ In the 1990s, the growth of the urban labor force was faster, 3.6 per cent per annum, than the growth of the rural labor force, 0.2 percent, resulting in continued

¹⁵ *Id.* at 18.

¹⁶ Jiandao Cha De Jingji Xue: Guanyu Zhongguo De Shizheng Yanjiu (剪刀差的经济学：关于中国的实证研) [Economics of the Price Scissors: Empirical Studies] Zhongguo Jingji Jiaoyu Keyan Wang (中国经济教育科研网) [CHINA ECON. RES. INTERNET] (Apr. 7, 2008), <http://economics.cenet.org.cn/show-2204-33649-1.html>.

¹⁷ KNIGHT & SONG, *supra* note 14, at 17.

¹⁸ Xiaoping Deng proposed this concept in 1985.

¹⁹ KNIGHT & SONG, *supra* note 14, at 21.

²⁰ *Id.* at 22.

rural-to-urban migration and the reclassification of some areas as urban.²¹ Because of this rural-to-urban migration, the state-owned sector absorbed 58 percent of new urban employees in 1988; however, by 1997 the figure was down to 32 percent.²²

The rural/urban labor redistribution was also required by China's rapid economic growth. The rapid growth of the Chinese GDP, about 10 percent per annum between 2003 and 2012,²³ exceeded the labor force growth rate of about 2.7 percent per annum over these same years.²⁴ According to Figure 1(1) below, Shenzhen has the largest private sector and also the highest proportion of migrant workers in total employment.²⁵ Since the reforms started, China's rapid growth has been driven by internal labor mobility. This is confirmed by empirical studies showing that workforce mobility and reallocation increased GDP by about 16 to 22 percent.²⁶ By the end of 2009, China had a total of 229.8 million rural migrant workers. Among them, 145.3 million rural migrant workers worked outside of their hometowns for over six months.²⁷ In the late 1990s, in order to pose a lesser threat to society and maintain political stability, the PRC government decided that unemployment should be transferred to the rural areas.²⁸ The government restricted the recruitment and re-employment of rural migrants, and unemployed urban-*hukou* residents were given priority by urban job centers responding to the widespread layoffs of urban

²¹ *Id.* at 33.

²² *Id.* at 24.

²³ "GDP Growth (annual%) 2005:11.31%; 2006: 12.70%; 2007: 14.20%; 2008: 9.60%; 2009: 9.21%; 2010: 10.45%; 2011: 9.30%; 2012: 7.8%." For more information, see *Zhongguo Tongji Nianjian (中国统计年鉴) [NEW STATISTICAL YEARBOOKS]*, CHINA, CHINA STAT. PRESS, APP. II 2-4 (2013), available at <http://www.stats.gov.cn/tjsj/ndsj/2013/indexch.htm>.

²⁴ KNIGHT & SONG, *supra* note 14, at 31.

²⁵ *Id.* at 90-1.

²⁶ Dewen Wang, *Rural-Urban Migration and Policy Responses in China: Challenges and Options*, (ILO Asian Reg'l Programme on Governance of Lab. Migration, Working Paper No.15, 2008), available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_160569.pdf.

²⁷ *Labour Migration*, INT'L LABOUR ORG., <http://www.ilo.org/beijing/areas-of-work/labour-migration/lang--en/index.htm> (last visited July 3, 2015).

²⁸ KNIGHT & SONG, *supra* note 14, at 22.

employees.²⁹ Economic reform also transformed State-owned enterprises (SOEs)³⁰ from classical SOEs to privatized SOEs.³¹ Due to the low profits and inefficiency of State-owned Enterprises, a number of SOEs closed, creating a large number of lay off employees (*xiagang*).³²

Figure 1(1) Basic data on the four cities³³

Official statistics number of employees (Population 1994 million)	Beijing	Shenzhen	Suzhou	Wuhan
Total	2,825	557	1,230	996
Migrant	561	193	213	193
Non-migrant	2,264	363	1,016	803
Migrants as a percentage of total city employment				
All	19.9	34.6	17.3	19.3
Production or supporting worker	22.7	44.7	26.4	26.9
Skilled worker	25.5	30.3	6.7	15.2
Managerial and technician staff	2.0	1.3	0.6	0.7

The layoffs in the state sector, starting in the mid-1990s, intensified in 1997 and continued to worsen.³⁴ Some SOEs survived, and many of the smaller SOEs

²⁹ *Id.*

³⁰ An SOE is a legal entity that undertakes commercial activities on behalf of an owner government.

³¹ China has over 150,000 SOEs at the national and local level, ranging from well-known behemoths like China Petro, China Mobile, and China Shipping to smaller provincial-level firms that often branch out into odd market areas such as hotels and shopping malls. Many of these companies have serious internal problems, including mismanagement, inefficiency, and inaccurate accounting methods. For more information, see Shannon Tiezzi, *Xi's New Year's Resolution: Reform China's State-Owned Enterprises*, THE DIPLOMAT, Jan. 14, 2015, <http://thediplomat.com/2015/01/xis-new-years-resolution-reform-chinas-state-owned-enterprises/>

³² Laid-off workers still retain their relationship with their state-owned enterprises (SOEs) and receive a minimum subsidy for two years. The government, however, does not count them in the unemployment statistics for those two years, nor do they count the hundreds of millions of unemployed rural Chinese.

³³ KNIGHT & SONG, *supra* note 14, at 90-91.

declared bankruptcy during this time. Displaced workers who had joined the state sector before 1985³⁵ were *xia gang* employees, but still retained their relationship with the SOE. The SOEs established “Re-employment centers” (RECs) providing those *xia gang* employees with retraining, job searching and unemployment benefits.³⁶ The SOEs were allowed to implement a unilateral buy-out offer, regarding how much compensation *xia gang* workers received based on the length of time they have served.

Xia gang employees, in most circumstances, only obtain one-time economic compensation according to their length of service, and then become officially unemployed.³⁷ If their employers contributed to an unemployment insurance fund on their behalf, the workers were authorized as unemployed and to receive unemployment benefits.³⁸ Since Re-employment Centers were phased out by 2005, however, *xia gang* workers have been empowered to register as unemployed to obtain unemployment benefits.³⁹ All unemployed workers have incentives to find new jobs elsewhere including the non-state sector or self-employment, although those who have more skills or are young likely have an easier time finding a new job and gaining

³⁴ KNIGHT & SONG, *supra* note 14, at 29.

³⁵ Zhonggong Zhongyang Guanyu Jingji Tizhi Gaige De Jueding (中共中央关于经济体制改革的决定) [The Central Committee of CPC's Decision on Economic System Reform] (promulgated by the P.R.C. the Third Plenary Session of the Twelfth Central Committee, Oct. 20, 1984, effective 1985).

³⁶ Ray Brooks & Ran Tao, *China's Labor Market Performance and Challenges* 16 (Washington, D.C.: IMF, Asia and Pacific Dept., Working Paper WP/03/210, 2003).

³⁷ Gongren Jiti Xingdong Shiyi Nian (工人集体行动十一年：基于 553 个个案的分析) [Empirical Studies on Collective Actions for Eleven Years], CHINA LAB. BULL., 5 (Dec. 21, 2011), http://www.clb.org.hk/schi/sites/default/files/2000-2010_Chinese_workers_movement_research_report_1.pdf

³⁸ KNIGHT & LINA SONG, *supra* note 14, at 29.

³⁹ Guanyu Qieshi Zuohao Guoyou Qiye Xiangang Zhigong Jiben Shenghuo Baozhang Zhidu Binggui Youguan Gongzuo De Tongzhi De Yaoqiu (关于切实做好国有企业下岗职工基本生活保障制度向失业保险制度并轨有关工作的通知的要求) (promulgated by the MINISTRY OF HUM. RESOURCES & SOC. SEC. CHINA (MOHRSS) Feb. 24, 2005, effective Feb. 24, 2005).

a better salary. Protests by displaced workers over their benefits and compensation increased over the course of the increased layoff period.⁴⁰

The surviving SOEs increased productivity at the expense of layoff workers' rights and benefits. At the same time, workers realized that they have a right to demand improved working conditions. By the end of 2009, China had a total of 229.8 million rural migrant workers. Among them, 145.3 million rural migrant workers worked outside their hometowns for a period over six months.⁴¹ Due to lack of available collective bargaining mechanisms, intensive strikes happened in the summer of 2010. Among the striking workers, the majority were migrant workers born in the 1980s or 1990s.⁴²

In 2001, China's WTO participation drove it to reform its labor market with a new perspective. As part of the new reforms, depending on the quality of their lands, some rural workers were able to cultivate higher value-added crops, which made other workers living on marginal land more subject to poverty and/or urban migration.⁴³ In particular, rural workers in mid-western provinces lost their job because of a skewed massive surplus of agricultural workers and less need for rural labor. Farmers, therefore, came to leave their lands, going to urban areas, especially coastal areas, to find a job.⁴⁴

As a result of the rural-to-urban migration, job loss reached 14.5 million – 13 million workers in rural areas and 1.5 million in urban areas (for the most part in the

⁴⁰ CHINA LAB. BULL., *supra* note 37, at 4.

⁴¹ Labor Migration, ILO COUNTRY OFFICE FOR CHINA, <http://www.ilo.org/beijing/areas-of-work/labour-migration/lang--en/index.htm>.

⁴² Migrant workers in China refer to the workers who migrate within a country and are working far away from their hometown.

⁴³ Brooks & Tao, *supra* note 36, at 19.

⁴⁴ Shulian Zhou & Houkai Wei (周叔莲 魏后凯), *Jiaru WTO Dui Zhongguo Quyue Jingji Fazhan De Yingxiang* (加入 WTO 对中国区域经济发展的影响) [*Joining in the WTO: Impacts on Chinese Economics*], THE MODERN ECONOMIC RESEARCH (现代经济讨论) 3, 4 (2002).

automobile and machinery industries).⁴⁵ In the medium-term of WTO accession, by means of restructuring, benefits in higher job growth are estimated at about 0.5-0.75 percent annually.⁴⁶ A sizable portion of China's increase in world market share has resulted in job growth where resources of labor-intensive industries shifted from less competitive capital-intensive industries.⁴⁷ In the long-term, China's increase in world market share induced a massive relocation of foreign manufacturing to coastal China, drawing a large number of jobs to China in the global labor market.

Due to the low wages in China and lack of a practical means to collective bargaining, strikes in China are on the rise.⁴⁸ China's strikes are unique in that most strikes are economic strikes occurring at the onset of disputes with little negotiation occurring between labor and management. This is different than in the United States where strikes usually occur as a last resort after collective bargaining fails. However, there is also a challenge for developed countries like the United States to confront under the global labor market. Workers in those developed countries have limited redress in global market, weakening their bargaining power.⁴⁹ For instance, in the United States, manufacturing workers have begun to lose their jobs to low-cost foreign countries. American unions cannot use their bargaining power to organize employees outside of the United States, even if they worked in a U.S.-owned enterprise in a developing country, since the NLRA only regulates domestic business.⁵⁰ Thus, on the one hand, the low-cost workforce and price advantage of low-end products in developing countries, such as China and Viet Nam, create rapid

⁴⁵ Brooks & Tao, *supra* note 36, at 19.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Strike Map, CHINA LAB. BULL., <http://maps.clb.org.hk/strikes/en> (last visited July 6, 2015).

⁴⁹ Katherine S. Newman, *Great Recession and the Pressure on Workplace Rights*, 88 CHI.- KENT L. REV. 529, 530-31 (2013).

⁵⁰ Charles B. Craver, *The Relevance of the NLRA and Labor Organizations in the Post-Industrial Global Economy*, 57 LAB. L.J. 133, 136-37 (2006).

developments in those country's exports trade, which gives rise to negative impacts on the labor market of developed countries. On the other hand, in China, the ability to collective bargaining is also needed to balance interests and alleviate strife. With regard to establishing a detailed mechanism of collective bargaining and unionism, it is worthwhile to illustrate a typical picture of the labor market in the United States since 1900. Unionism, as one of a number of significant factors, has made impressive impacts on the labor market and the global economy. The conventional wisdom is that unionism declines when the economy declines. The obvious exception to this general rule was the Great Depression of the 1930's when employers reneged on implicit promises of job security and benefits creating a greater need for collective bargaining and regulation.⁵¹ Generally, union membership in the United States displayed a \cap -shaped pattern including the rise of membership of the non-agricultural labor force during 1913-1955 and the fall of this rate from 1955 through the 21st century.⁵² Notably, union membership experienced the most rapid expansion in U.S. history from 1935 to the mid-1950s when the union destiny rate increased from 13.2 per cent to 34.7 percent.⁵³ The percent of the nonagricultural labor force in organized unions surpassed the absolute number of workers in labor organizations.⁵⁴

The NLRA was amended in 1947 (under the Taft-Hartley Act) and 1959 (under the Landrum-Griffin Act), in order to limit and regulate the power of labor unions to implement unfair labor practices and to carry out secondary activity.⁵⁵ The union leaders took action to reverse the status quo, merging the AFL and CIO into the

⁵¹ LABOR LAW IN THE CONTEMPORARY WORKPLACE 107 (Kenneth G. Dau-Schmidt et al. eds., 2d ed. 2009).

⁵² Emin M. Dinlersoz & Jeremy Greenwood, The Rise and Fall of Unions in the U.S. 4-7 (NAT'L BUREAU OF ECON. RES., Working Paper No. 18079, 2012).

⁵³ Craver, *supra* note 50, at 133; PHILIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY, N.Y.: HARPER & ROW 471-72 (1st ed. 1964).

⁵⁴ "The absolute number of individuals in labor organizations grew from 17,000,000 in 1955 to 22,000,000 in 1980. The percent of nonagricultural labor force participants in unions declined from 35 to 23." For more information, *see* Craver, *supra* note 50, at 133, 147.

⁵⁵ Craver, *supra* note 50, at 133.

AFL-CIO because they believed it would be much stronger and effective as a solidarity organization.⁵⁶

By the late 1980s and early 1990s, the American economy had changed radically. Low-cost relocation and cost-saving technological developments weakened most of the traditional industrial unions like the Auto Workers, the Steel Workers, and the Electrical Workers.⁵⁷ A relatively new industrial union – Change to Win – formed in 2005, when a number of union officials⁵⁸ who were not satisfied with AFL-CIO and felt the leaders had not done enough to halt the decline of the labor movement, withdrew from their original traditional union.⁵⁹ During these times, unions were devoted to increasing wages, lowering profits, and raising employees’ voices, possibly having a positive effect on firms’ productivity.⁶⁰ Unions also tend to decrease profitability, which is why firms tend to not like unions. However, increasing or decreasing the costs to maintain profitability will have different consequences for social welfare.⁶¹ Generally, unions’ greatest contribution to a society is raising workers’ share of income and workers’ voice in the firm and government. Unions can stimulate the economy by raising workers’ wages because they can afford to buy more goods. As the positive aspect of unions can offset the negative aspects regarding social goods and the economy, the ongoing decline of unionization is not good for unions, their members, or society overall because unions do much social good.⁶² As analyzed above, collective bargaining and unionism are necessary under the worldwide labor market in both the United States and China.

⁵⁶ Jennifer Schramm, *The Future of Unions*, SOC’Y HUM. RESOURCE MGMT. 2 (2005), <https://www.shrm.org/Research/FutureWorkplaceTrends/Documents/Visions1005.pdf>.

⁵⁷ Craver, *supra* note 50, at 137-38 &147.

⁵⁸ Union officials in the SEIU, UFCW, UNITE-HERE, the Laborers, and the Teamsters.

⁵⁹ Craver, *supra* note 50, at 149; *See* Daily Labor Report (B.N.A.) No. 115 (June 16, 2005) at AA-1.

⁶⁰ RICHARD B. FREEMAN & JAMESL. MEDOFF, *WHAT DO UNIONS DO?* 189-90 (Basic Books, Inc., N.Y., 1984).

⁶¹ *Id.* at 185, 188-89.

⁶² *Id.* at 250.

B. CHALLENGES IN THE IMPERFECT LABOR MARKETS

The economy plays an important role in the changing labor market in terms of both mobility and flexibility. It is important to analyze the labor market together with both microeconomics and macroeconomics. Simply using the model of neoclassical economic theory cannot comprehensively analyze imperfect labor markets because the model assumes that labor markets work perfectly in complete competition. *Institutional Law and Economics* (IL&E) theory, however, is much more convincing, assuming that markets have gaps. The set of fundamental IL&E assumptions, such as purpose of an economy, institutions, power, and modes of coordination, has an orientation to labor and employment issues.⁶³ Thus, this chapter applies IL&E theory to analyze labor markets in China and America. Alternatively, I apply macroeconomic theory to analyze labor markets under global conditions. There are three main challenges in labor markets: unequal bargaining power, unemployment, and externalities and social costs of labor, indicating that costs and benefits of employee organizations and regulations between labor and management are needed in the process of collective bargaining.⁶⁴

1. Unequal Bargaining Power

Imperfect labor markets and unequal resources and rights indicate that workers suffer inequality of bargaining power.⁶⁵ In a perfect labor market, competition forces firms to provide an optimal agreement including such terms and conditions so as to keep or recruit their workforce, while employees can quit and find

⁶³ Bruce E. Kaufman, *Labor Law and Employment Regulation: Neoclassical and Institutional Perspectives* 25-27 (Andrew Young SCH. POL'Y STUD. Research Paper No. 08-27, 2008), available at SSRN <http://ssrn.com/abstract=1260837> or <http://dx.doi.org/10.2139/ssrn.1260837>.

⁶⁴ See generally, *LABOR AND EMPLOYMENT LAW AND ECONOMICS* (Kenneth G. Dau-Schmidt et al. eds., 2d ed. 2009).

⁶⁵ Kaufman, *supra* note 63, at 30.

jobs somewhere else.⁶⁶ However the real labor market is not always perfect. Within an imperfect labor market, either employees or employers have the advantage.⁶⁷ Most often, the employer has a skewed power over workers. Compared to the power given to management, workers feel pressured to bargain with employers.

For example, in an imperfect labor market, a firm sets wages rather than the impersonal forces of demand and supply. In particular, since the economic reforms in China, enterprises have become increasingly flexible in setting wages by means of negotiation with a trade union, and enterprises have obtained more power to drive wages down. Since Chinese economic reform, China has changed its labor market from an administrated labor system to a mediated market system. A large number of rural migrants have moved to urban areas, making the supply curve in those areas shift to the right.

Figure 1(2) demonstrates this problem. In the figure, wage (W_1) is lower than the competitive wage (W_2) at the point of employment (L_1) (meaning that a firm only employs workers when doing so will increase profits up to the point L_1 where $MRP=MCL$ and not beyond). This results in a rise of exploitation of labor.⁶⁸ The firm, therefore, may cut down wages or pay a competitive wage (W_2) at the expense of reducing workers' other terms and conditions of employment.⁶⁹

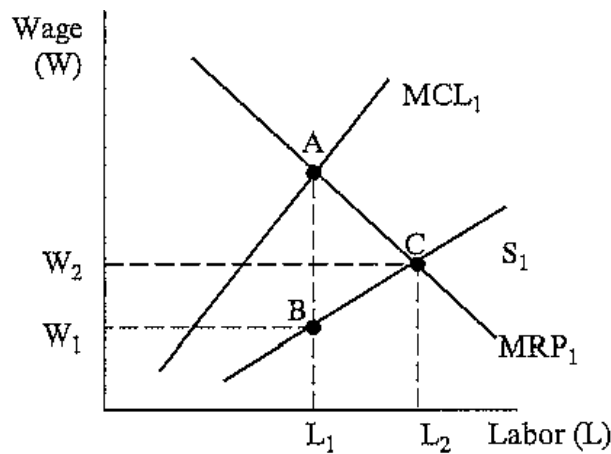
⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 32.

⁶⁹ *Id.*

Figure 1(2)⁷⁰



(1) Imperfect labor market

Further, regardless of whether labor markets are perfect or not, labor may also face unequal bargaining power because the distribution of resources and rights favor employers.⁷¹ Employers control ownership and property rights, creating unequal bargaining power within the market, particularly under the employment-at-will doctrine (shifting the supply curve to the right).⁷² Moreover, both employers and consumers have self-interests in low wages, which improve their welfare at the expense of labor.⁷³ Because the employment relationship has always been unequal and exploited, and firms have the market power to set wages, employee organizations focus on raising wages and lowering prices, which means more income equality and a greater employee voice in the economy and society.

Owing to the unequal power between labor and management, “good faith” exchanges of relevant information during bargaining should be required. Imperfect information or strategic behavior is another aspect of an imperfect labor market, and

⁷⁰ Kaufman, *supra* note 63, at 32.

⁷¹ *Id.* at 33.

⁷² *Id.* at 35.

⁷³ *Id.*

is one of the causes of strikes.⁷⁴ The outcome of a strike can be improved when the parties act for their collective interests, and cooperate; however, if both parties only follow their individual interests and are inflexible, a strike will waste a portion of the cooperative surplus.⁷⁵

The United States government, therefore, may seek to promote cooperation and discourage costly strategic behavior or strikes by means of prohibiting such behavior and enforcing it with suitable fines, or creating laws governing collective bargaining to avoid costly strategic behavior.⁷⁶ For example, the government disallows secondary boycotts to limit unions' bargaining power to impose costs on employers.⁷⁷

Contrary to the U.S., China's strikes are distinct, and doubled in 2014 with a continuing shrinkage of the labor force. In this situation, workers may have a stronger bargaining position, but the government's political power still needs to be reconsidered so as not to rely solely on officials' desire for economic growth and stability. Instead, the government, as a third party in the process of strikes, should promote cooperation and discourage costly strikes. The existence of unequal bargaining power signals that unions in the process of collective bargaining and regulations could be very useful to govern imperfect markets with unequal resources.

2. Unemployment

During the post-war period, unemployment was generally low in the United States. The full employment is located at the production possibility frontier, demonstrating that the resources are being used efficiently in the production of goods

⁷⁴ LABOR AND EMPLOYMENT LAW AND ECONOMICS, *supra* note 64, at 118-19.

⁷⁵ *Id.* at 119-21.

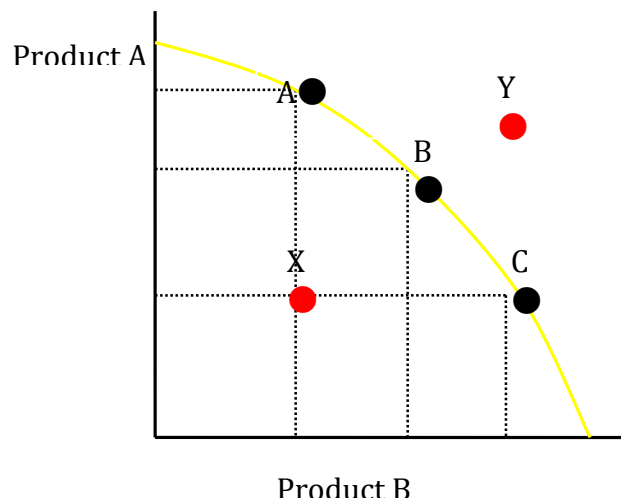
⁷⁶ *Id.* at 120-22.

⁷⁷ *Id.* at 117.

and an output is accessible with the given inputs. Unemployment can consist of frictional unemployment, or demand deficient unemployment. Frictional unemployment occurs at full employment when there are always some people between jobs. Demand deficient unemployment occurs when firms layoff workers as a result of decreasing demand for a particular good. In order to keep the economy closer to full employment, from the IL&E perspective, employment regulation has a positive role in stabilizing the economy.⁷⁸

With the rise of the global economy and new technological information, another type of unemployment, involuntary unemployment proposed by Keynes in 1936, exists in most developing countries. Involuntary unemployment refers to a worker having the will to accept the prevailing wage yet is unemployed, meaning that unemployment shifts further inside the production possibility frontier at point X in Figure 2(1).

Figure 2(1)



⁷⁸ Kaufman, *supra* note 63, at 40.

In a primary labor market, which has higher wages, capital and knowledge-intensive sectors resist wage cuts.⁷⁹ If the higher wages continue or are set above the market wages, in a semi-chronic condition, there will be an increasing excess of labor supply in the primary labor market.⁸⁰ Therefore, some workers in the primary labor market will be unemployed because of the excess supply of labor. Under this situation, if wages go down below the market wages in order to balance the supply and demand curve, there will be chronic unemployment and a shortage of jobs at high wages firms, likely resulting in a portion of the job seekers shifting to the low-wage secondary labor market.⁸¹ The supply of secondary labor market workers, thus, will increase to the rightward of the supply curve and further lower wages.

Involuntary unemployment has happened in China where wages have been increasing since the last century. The wage increase made the supply curve shift to the right; in particular, there is a serious imbalance in the labor market with labor shortages or unemployment in some sectors and over-supply of labor in others. On the one hand, in order to cut the labor costs of enterprises, for example, the majority of workers currently in SOEs are not directly employed by the enterprises but rather by an employment agency named *Paiqian* firms (a firm that employs workers but not use their labor force) created by that enterprise in order to cut costs.⁸² Those workers who have signed a dispatched contract are transferred to secondary labor markets and obtain lower wages. Although the Chinese Labor Contract Law proposes, “equal pay

⁷⁹ *Id.* at 37.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Employment in China*, CHINA LAB. BULL., (June 22, 2013), <http://www.clb.org.hk/en/content/employment-china>.

for equal work”⁸³, it is hard to require enterprises to implement this general rule because the definition of equal work is so vague.

Bidding down the wage rate to gain employment, in general, is not an efficient way to facilitate the supply and demand situation or alleviate worsened unemployment, even in a perfect competitive economy.⁸⁴ In other words, bidding down wages cannot solve the supply and demand problem. Moreover, as wages go down, the price of production will soon decrease and the real wage may actually increase rather than decrease—which is what happened during the Great Depression.⁸⁵ Although the real wages increase, the purchase power of individuals is deficient given the excess supply of production. On the other hand, wages reduction can actually lead to a destabilizing downward helix in wages and prices, leading to a capitalist catastrophe.⁸⁶ A fall in wages below the original equilibrium level, like what happened in the Great Recession, results in a destabilizing downward spiral of wages because the aggregate supply has a more elastic negative slope than the aggregate demand curve.⁸⁷ As for the aggregate demand curve, the decline of wages decreases household income and expenditure leads to leftward labor demand curves (D1 to D3 in Figure 2(2)), even if there is a positively sloped supply curve.⁸⁸ Wage reduction, therefore, has a negative impact on preventing a deflationary spiral and does not move towards the production possibility frontier.⁸⁹

⁸³ Zhonghua Renmin Gongheguo Laodong Hetong Fa (中华人民共和国劳动合同法) [Labor Contract Law of the People’s Republic of China (2012 Amendment)], *supra* note 8, art.46.

⁸⁴ Kaufman, *supra* note 63, at 38.

⁸⁵ *Id.*

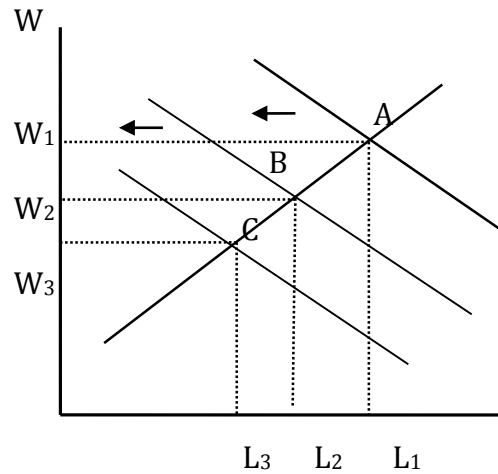
⁸⁶ *Id.*

⁸⁷ *Id.* at 40.

⁸⁸ *Id.*

⁸⁹ *Id.*

Figure 2 (2)⁹⁰



(2) Unemployment and destructive Competition

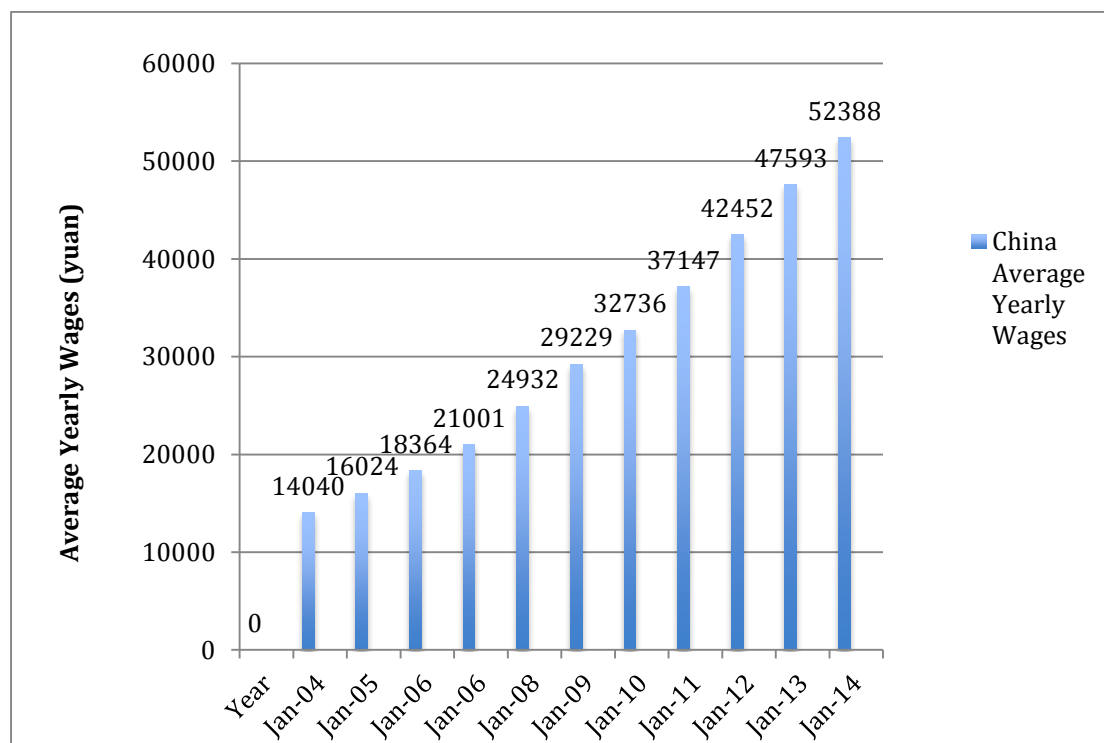
On the other hand, in China, firms actually increase wages for formal workers in order to recruit enough workers. The conventional understanding was that if money wages increase it would induce national consumption ability. However, what actually happened is that the high national saving rate resulted in poor consumption ability. This remarkably high national saving rate has supported China's high-investment, export-led growth model. Once China's export-led growth model is challenged by labor-cost increases, from a macroeconomic perspective, enterprises might lose their share in the global market. The response of the industries in the south and east coastal provinces has been either to devote to wage increases and working condition improvements, or to relocate to lower labor cost areas.⁹¹ Wages in the remaining

⁹⁰ Kaufman, *supra* note 63, at 40.

⁹¹ "Thousands of businesses in low-cost, labor-intensive industries, such as garments, shoes and toys have already closed or relocated to Southeast Asia and the Chinese hinterland", *see* CHINA LAB. BULL., *supra* note 82.

industries have increased by about 73 percent from 2004 to 2014 in Figure 3,⁹² which should feed more domestic consumption and production.

Figure 3: Source from MOHRSS, China⁹³



However, workers in these industries still have insufficient wages to improve their consumption ability because their wages only cover basic subsistence. Under such conditions, wage negotiation with the help of an employee organization would probably raise wages and domestic consumption and give workers a larger say in the economy and public policy. Therefore, wage negotiation between labor and management with the help of an employee union organization in China is very important and may help to balance interests in an efficient way.

Labor mobility is another important factor to solve the unemployment problem and balance the supply and demand curve. There is a specific condition in China that warrants discussion. Unemployment does not include *xiagang* workers,

⁹² *China Average Yearly Wages 2004-2014*, TRADING ECONOMICS, <http://www.tradingeconomics.com/china/wages>, (last visited July 3, 2015).

⁹³ *Id.*

which means there is a special unemployment phenomenon named underemployment. According to the International Labor Organization, China's unemployment statistics do not include a proportion of layoff workers (*xiagang*) because these workers still maintain an employment relationship with their employer even though they do not work anymore.⁹⁴ Some of these workers might work in other informal sectors as part-time workers, and are regarded as underemployed workers. This is to say that unemployment rates are actually higher than the official data purports, excluding workers who suffer from underemployment. The unemployment rate, thus, does not comprehensively indicate underemployment conditions in China. Moreover, underemployment has been a significant problem for over a decade without much improvement, and requires a solution.

In order to resolve unemployment in urban areas, *Hukou* policy was set up in the mid-1950s to control labor mobility and flexibility. Unless the labor force in a particular province could not be found locally, employers were not allowed to recruit workers from another province at that time. There was a change in the *Hukou* system in 1997, allowing migrants to obtain “urban *hukou*” status if they had a stable income or owned a house in small towns and cities. A further reform occurred in 2001 – a person having a stable job or a residence could gain a *hukou* in more than 20,000 small towns and cities, while keeping their rights to use land in the countryside.⁹⁵ In the end, the *Hukou* system actually had a negative impact on labor mobility. For example, in 2004 some labor-intensive industries located in eastern and southern China could not recruit employees because of the limitation of *Hukou*, resulting in an “insufficient supply of the labor.” Thus, labor mobility is important in China to improve the current unemployment problem.

⁹⁴ Brooks & Tao, *supra* note 36, at 11.

⁹⁵ *Id.* at 20.

From a macroeconomic perspective, a further step should be considered – a macroeconomic stabilization measure. In the U.S., the New Deal labor program including the Social Security Act (SSA), National Labor Relations Act (NLRA), and Fair Labor Standards Act (FLSA) has existed since 1935.⁹⁶ Most of the New Deal labor laws were enacted to protect employment conditions from the mass unemployment of the 1930s. Employee unions play an important role in the process of these laws. However, problems can arise if there is no regulation on employee unions; the union may shift to “monopoly creating”⁹⁷ and create greater negative impacts such as lower productivity, inflation, and competitiveness.⁹⁸ With respect to union power, regulations are useful to minimize or maximize the power of unions to produce more equitable results.⁹⁹ For example, when union power was too weak in the 1930s, the Wagner Act was enacted to promote union power; when union power was too strong, however, the Taft-Hartley Amendments were passed to restrain union power. In sum, the analysis of unemployment shows that efficient regulations can protect the labor force from unemployment situations. Compared with the laws in the United States, the Employment Promotion Law of the People’s Republic of China¹⁰⁰ relies on the government to promote employment, which lacks rules on attendance of an employee union, not to mention regulating unions. Other labor laws in China, such as the Labor Contract Law and Trade Union Law, involve employee unions in, but there are still problems with the process of collective negotiation, which will be analyzed in the next chapter.

⁹⁶ Kaufman, *supra* note 63, at 40.

⁹⁷ Regarding labor as a group to serve at their firms, *see* Kaufman, *supra* note 63, at 41.

⁹⁸ Kaufman, *supra* note 63, at 41.

⁹⁹ *Id.* at 114.

¹⁰⁰ Zhonghua Renmin Gonghe Guo Jiuye Cujin Fa (中华人民共和国就业促进法) [Employment Promotion Law of the People’s Republic of China (revised)] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Jan. 1, 2008) (Lawinfochina) (China).

3. Externalities and the Social Costs of Labor

Although externalities affect both sides of in the labor market, they have a considerably negative effect on workers; notably, employers can often shift private production costs onto workers, their families, and other third parties as a form of social cost.¹⁰¹ Since social cost¹⁰² includes fundamental human and social rights in the workplace, the fact that these rights have no market value and are therefore do not enter into enterprise resource planning and human resources practices, employment regulation cost shift in order to prevent or redress injured parties.¹⁰³ A shift of social labor cost is promoted by a large supply of labor in the market. For example, in the United States, large-scale immigration has transferred into the nation. As a result, in order to balance the supply and demand curve of the labor market, wages may have to fall to such an extent that it will not cover the minimum subsistence cost of labor.¹⁰⁴ In China, large numbers of rural migrants transferred to urban areas, causing firms to displace formal employees by means of recruiting a cheaper labor force from rural areas. Given that the labor market is not full employment, it is easy for firms, and then consumers, to shift the burden of labor costs to others, such as workers who are underpaid by firms with labor market power.¹⁰⁵ Workers, therefore, should be granted legal or human rights with the help of a union to address the social wage vanishing externality/social cost problem.¹⁰⁶ Regulation of the employment labor market also facilitates greater economic efficiency and maintains the economy on the production possibility frontier.¹⁰⁷ In particular, without any employment regulation, greater

¹⁰¹ Kaufman, *supra* note 63, at 46.

¹⁰² Social cost is also considered to be the private cost plus externalities.

¹⁰³ Kaufman, *supra* note 63, at 46.

¹⁰⁴ *Id.* at 48.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 41.

insecurity makes workers less productive.¹⁰⁸ Thus, externalities and social costs of labor indicate that regulations are an efficient way to satisfy workers' demands and promote productivity.

In conclusion, from these three challenges, it is clear that regulations on collective bargaining are important in an imperfect labor market. During the process of collective bargaining, unions are necessary to balance bargaining power and improve employment conditions by means of raising wages and lowering prices with an ambiguous impact on total productivity. Regarding the costs and benefits of employee organizations, unions raise wages and lower prices at the expense of lower profits, giving employers an incentive to flee to non-union workplaces. As for China, employee organizations would probably raise wages and domestic consumption and provide workers with a larger voice in the economy and public policy. To some degree, it might give some employers motive to move inland or other low-cost labor countries, like Viet Nam. From my perspective, the benefits of employee organizations outweigh their costs in the process of collective bargaining.

III. COMPARATIVE ANALYSIS OF EMPLOYMENT PROTECTIONS IN THE PEOPLE'S REPUBLIC OF CHINA AND UNITED STATES

A. OVERVIEW OF LABOR LAWS ON THE PROTECTIONS OF WORKER'S DEMANDS

There are three types of laws governing China's labor standards: statutory laws, administrative laws, and international laws, and most of them were adopted in

¹⁰⁸ *Id.* at 42.

the last two decades.¹⁰⁹ Statutory laws are enacted by the National People's Congress and its standing committee. The Labor Law of 1994 was the first comprehensive labor standards law in China. Although the law covers minimum wage, child labor, working hours, protection of women, forced labor, collective bargaining and collective contracts, over time pay, and many other areas,¹¹⁰ but a lack of supporting policies and laws prevented the implementation of the law. The Labor Law has been revised since the Labor Contract Law was passed in 2008 and went into effect in 2009. In 2013, Section 2 of Chapter 5 of the Labor Contract Law concerning worker dispatch service was revised. The Trade Union Law of 1992 addressed labor unions including collective contracts, settlement of labor disputes, and management decisions of workers. In order to encourage union participation by workers, the Reform of the Trade Union Law of 2001, added to Article 3 that prohibits and limits improper behavior that attempts to impede workers from joining or forming unions. The Law also added to Article 10 that requires enterprises to establish unions at their plants if the number of members is more than 25, otherwise, enterprises may establish unions. More importantly, the law added a chapter on legal responsibilities regulating improper conduct that violates the laws. With the enactment of this law, China has established the largest network of trades unions with memberships currently exceeding 150 million up to the middle of year 2006.¹¹¹ Unions in State sectors are all unionized with a high percentage of participation, while non-state sectors in urban areas are partially unionized.¹¹²

¹⁰⁹ Baogang Guo, *China's Labor Standards: Myths and Realities*, ACADEMIA.EDU, at 1-2 (2003), http://www.academia.edu/165449/China_s_Labor_Standards_Myths_and_Realities.

¹¹⁰ *Id.*

¹¹¹ "The number of grassroots unions has been reached 1.174 million by July 2006, and the members of these unions has been reached 150 million." *Quanguo Zhonggong Hui (中华全国总工会) [ACFTU]*, Zhongguo Wang (中国网) (2008), http://www.china.com.cn/aboutchina/zhuanti/shtt/2008-04/17/content_14970963.htm.

¹¹² Guo, *supra* note 109.

Due to the insufficiency of statutory law within particular areas, Chinese administrative agencies have enacted administrative laws to regulate a particular field. Administrative law is also an important means to amend the existing statutory law. The Provisions on Collective Contracts (1994) was issued to regulate the particular field of collective contracts, but was superseded by the Provisions on Collective Contracts (2004). The Provisions on Collective Contracts (2004) added new chapters on the contents of collective negotiation, the representatives of collective negotiation, and the changing of collective contracts.

There has been increasing international pressure on China regarding its labor standards, since China entered into WTO. The International Labor Organization (ILO), the United Nation's labor agency, has developed a set of core labor standards and a tripartite system. In 2001, China created a national tripartite system ('sanfangjizhi') to deal with serious industrial relations strife.¹¹³ However, the Chinese tripartite system is not use efficient because the government authority in this system is not neutral and independent from the labor relationship between labor and management.¹¹⁴

In the United States, the Wagner Act (1953) was issued in order to support unionization, collective bargaining, and reduce strife by giving workers political and economic power.¹¹⁵ During the New Deal, the National Labor Relation Board was set up to administer over claims of unfair labor practices and interpret unfair labor practice and representation provisions of the Wagner Act.¹¹⁶ Under the Wagner Act, unionism increased since the Great Depression of the 1920s. The Wagner Act

¹¹³ ZHENG QIAO, COLLECTIVE BARGAINING IN CHINA 10 (Zheng Qiao et al. eds., ILO 2006).

¹¹⁴ Jian Qiao & Lauren D. Appelbaum, *Research & Policy Brief: Tripartite Consultation in China*, UCLA INST. FOR RES. ON LAB. AND EMP. 2 (2011), <http://www.irle.ucla.edu/publications/documents/ResearchBrief9.pdf>.

¹¹⁵ Dau-Schmidt, *supra* note 51, at 51-52; DOUGLAS L. LESLIE, LABOR LAW IN A NUTSHELL 4 (3d ed. 1992).

¹¹⁶ LESLIE, *supra* note 115, at 5.

contained no limitations on the activities of unions.¹¹⁷ By the late 1940s, business people had become worried about the expanding membership and economic power of the labor movement. Such fear led to the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959 Amendments to the NLRA, which reduced the power of unions by, for example, forbidding certain union “bad practices” and regulating unions' internal affairs and union officials' relationships with employers.¹¹⁸ The statute shows a shift from encouraging unionization to a neutral position as well as protecting employees from coercion.¹¹⁹

B. A COMPARATIVE ANALYSIS OF THE ABILITY OF THE CHINESE LABOR LAWS AND AMERICAN LABOR LAWS TO SATISFY WORKERS' DEMANDS

1. The Definition of Employee

In China, the Provisions on Collective Contracts¹²⁰ and the Labor Contract Law of the People's Republic of China (Labor Contract Law)¹²¹ use the term “employee” to describe people who enjoy the right to organize and bargain collectively under these statutes. According to Article 20 of the Provisions on Collective Contract, employee representatives shall be elected by the corresponding trade union. In an enterprise without an employee trade union, representatives may be recommended by the employees in a democratic way and be approved with the

¹¹⁷ *Id.* at 5.

¹¹⁸ Craver, *supra* note 50, at 148 n.56; LESLIE, *supra* note 115, at 7.

¹¹⁹ LESLIE, *supra* note 115, at 6.

¹²⁰ Jiti Hetong Guiding (集体合同规定) [Provision on Collective Contracts] (promulgated by the Ministry of Labor and Social Security(dissolved), Jan. 20, 2004, effective May 1, 2004) (Lawinfochina) (China).

¹²¹ Zhonghua Renmin Gongheguo Laodong Hetong Fa (中华人民共和国劳动合同法) [Labor Contract Law of the People's Republic of China (2012 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2012, effective Dec. 28, 2012) (Lawinfochina) (China).

consent of more than 50% of the employees.¹²² This raises the question: who is the employee in the labor-management relationship?

The employee/employer relationship is described in Article 2 Part 1 of the Labor Contract Law: “this law shall apply to the establishment of employment relationship between employees and enterprises, individual economic organizations, private non-enterprises, or other organizations (hereafter referred to as employers), and to the formation, fulfillment, change, dissolution, or termination of labor contracts.”¹²³ Employees, therefore, are workers having labor relationships with employers. Under the laws, there is no clear definition of who is an “employee”. Instead of defining the “employee”, Chinese legislators use an indirect way to define it by defining certain employers. Article 2 of the Labor Contract Law defines employers as enterprises, individual economic organizations, private non-enterprises entities, or other organizations.

Another important factor in figuring out who is an employee under the law is the labor relationship referred to in the law. Labor relationships are governed by the labor contract law and are different from service relationships that are regulated by the civil laws. In addition to Article 2 of the Labor Contract Law, labor relationships appear in Article 7 of the *Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labor Dispute Cases (II)*, which states that the following relationships are not labor relationships: “4) a dispute between a family or individual and a family service provider; 5) a dispute between a private craftsman and a helper or apprentice; and 6) a dispute over a rural contractor

¹²² QIAO, *supra* note 113, at 20.

¹²³ Zhonghua Renmin Gongheguo Laodong Hetong Fa (中华人民共和国劳动合同法) [Labor Contract Law of the People’s Republic of China (2012 Amendment)], *supra* note 121, art.2.

and a person he has employed.”¹²⁴ Article 7 of the *Interpretation (III) of the Supreme People’s Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases* excludes the relationship between “an employer and an employee who has already enjoyed pension insurance treatments or received pensions pursuant to the law when he is employed by the employer”¹²⁵ from the definition of the labor relationship but the service relationship. Article 8 of the *Interpretation (III) of the Supreme People’s Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases* takes the relationships as labor relationship when “a employees of an new employer, but the employee who is on leave with pay suspension, has retired under the statutory age of retirement, is removed from post or waiting for a post or is on a long leave due to the former enterprise's operational cessation of production with the former employer”¹²⁶ instead this is a service relationship. According to the definitions of employer and labor relationships, an employee shall include employees working and having labor relationships with enterprises, individual economic organization entities, or other organizations, and shall not include a family service provider, a helper of private craftsman or apprentice, and a person employed by a rural contractor. Aside from these three exclusions, the definition of the employee is still obscure under the law.

In contrast, the definition of the employee in the United States is more explicit and detailed in the law. Section 2(3) of the NLRA states:

¹²⁴ Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Shiyong Falü Ruogan Wenti De Jieshi (II) (最高人民法院关于审理劳动争议案件适用法律若干问题的解释(二)) [Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labor Dispute Cases (II)] (promulgated by the Sup. People’s Ct., Aug. 14, 2006, effective Oct. 1, 2006), art. 7(4)-(6) (Lawinfochina) (China).

¹²⁵ Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Shiyong Falü Ruogan Wenti De Jieshi (III) (最高人民法院关于审理劳动争议案件适用法律若干问题的解释(三)) [Interpretation (III) of the Supreme People’s Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases] (promulgated by the Sup. People’s Ct., Sep. 13, 2010, effective Sep. 14, 2010), art. 7 (Lawinfochina) (China).

¹²⁶ *Id.* art. 8.

“The definition of employee shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.”¹²⁷

Although the NLRA's definition of employee includes "any employee," it also expressly lists the exceptions: independent contractors¹²⁸, supervisors¹²⁹, and employees covered by the Railway Labor Act.¹³⁰ Case law has also excluded managerial employees and confidential employees from the NLRA through *Bell Aerospace Co. Division*¹³¹ and *Hendricks County Rural Electric Membership*.¹³² And employees who were endowed with managerial status in determining the central policies of their employer are also excluded from the NLRA under *Yeshiva* (1980).¹³³ The court exempted certain charge nurses and defined them not as supervisors because of their exercise of professional, technical, or experienced judgment based on their professional employee status.¹³⁴

Comparing to the implementation of “employee” sections in the laws of the two countries, it is harder to determine the “employee” definition in labor disputes in China. The main reason is that in China is that the “employee” definition is derived

¹²⁷ National Labor Relation Act, 29 U.S.C §152 (3)(2009).

¹²⁸ “Independent contractors are not covered by the NLRA, based on the Taft-Hartley Act of 1947 overruling *Hearst Publs.*”, NLRB v. Hearst Publ'n, Inc., 322 U.S. 111, 131 (1944).

¹²⁹ 29 U.S.C. § 152(11) (2009).

¹³⁰ 45 U.S.C § 151 (2009).

¹³¹ NLRB v. Bell Aerospace Co. Division, 416 U.S. 267 (1974) (exempting managerial employees).

¹³² NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981) (exempting confidential employees).

¹³³ NLRB v. Yeshiva, 444 U.S. 672, 682 (1980).

¹³⁴ 348 N.L.R.B. 686, at 694.

from the employees of Sated-owned enterprises model,¹³⁵ which does not reflect the current labor market and impedes economic development. Despite this flaw, labor relationships are nevertheless regulated under such model, resulting in numerous labor disputes.¹³⁶ In particular, employees from rural areas were included for the first time under the Labor Contract Law of 2008.¹³⁷ However, rural employees could not obtain benefits from public services because they are not registered as citizens who obtain benefits from “City Houkou”.¹³⁸ Public services, such as the Public Employment Service and Union Services, have begun to provide services to rural workers since 2003, but social insurance benefits are still hard to obtain if workers comes from rural areas.¹³⁹ Although rural employees are real employees protected by the Labor Contract Law, a lack of supporting policies and a detailed definition encompassing their unique perspective resulted in rural employees working in poor conditions for a long time.¹⁴⁰ As shown in Figure 4, the total number of rural employees has been decreasing since 2009, but it is still higher than the total number of urban employees.¹⁴¹ It is critical for legislators to review the definition of the employees, and most notably, to review rural employees to ensure that their rights are protected and enforced. With a greater coverage of employees, unions would have a better chance to organize a larger percent of employees in a certain plant and

¹³⁵ Changzheng Zhou, *Laodong Fa Zhongde Ren (劳动法中的人) [The Relevant Definition of People in Labor Laws]*, Vol.34 No.1 MOD. L. SCI. 103, 109 (2012).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ “City Hukou is a household registration record officially identifies a person as a resident of an area and includes identifying information such as name, parents, spouse, and date of birth. Because of its entrenchment of social strata, especially as between rural and urban residency status, the hukou system is often regarded as a caste system of China.” For more information, *see* https://en.wikipedia.org/wiki/Hukou_system.

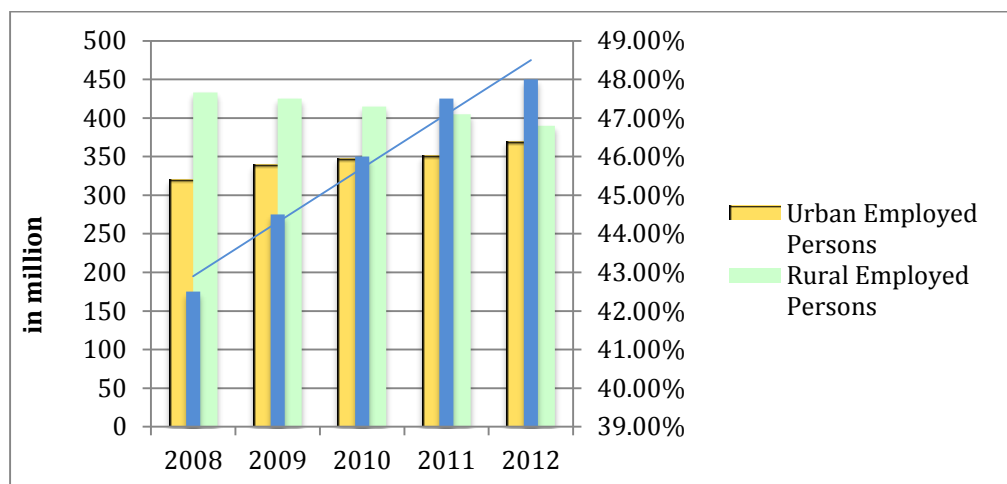
¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ KNIGHT & SONG, *supra* note 14, at 90-91.

nationally as well.¹⁴² A broad definition of employee favors greater union bargaining power on the premise of a comprehensive collective bargaining mechanism, and vice versa.

Figure 4: The urban and rural workforce in China¹⁴³



As the information technology changes have occurred in production, in the United States, production has become more decentralized, and more skilled employees have greater free choice to work.¹⁴⁴ The narrow definition of employee under the NLRA has excluded a larger share of the workforce.¹⁴⁵ In addition, with increased international trade, national borders have showed less importance in collective bargaining.¹⁴⁶ For example, Japanese workers are protected under Japanese labor law with broader coverage of the employee definition, so they can still can bargain with employers who shift production to low-wage workers overseas.¹⁴⁷ Thus, broader coverage is increasingly important in the new global economy. Boarder coverage of employees is significant for both China and the United States.

¹⁴² Kenneth G. Dau-Schmidt & Benjamin C. Ellis, *Comparative Analysis of the United States and Japan*, 20 IND. INT'L & COMP. L. REV. 1, 9 (2010).

¹⁴³ *Employment in China*, CHINA LAB. BULL. (June 22, 2013),

<http://www.clb.org.hk/en/content/employment-china>.

¹⁴⁴ *Id.* at 10.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

2. Organizing and Bargaining Rights of Employees

In order to analyze the rights of employees, it is first helpful to know how to set up trade unions are set up in China. Although the official All China Federation of Trade Unions (ACFTU) is a “monolithic organization”,¹⁴⁸ there is considerable variation within ACFTU in terms of union organizing strategies. Unions are top-down organizations classified into the national ACFTU, local trade union federations (Defang Gonghui),¹⁴⁹ industry trade union federations (Chanye Gonghui),¹⁵⁰ and grassroots trade unions (Jiceng Gonghui).¹⁵¹

In the traditional official unions model, the national ACFTU sets up grassroots unions relying on organizing quotas by obtaining the approval of employers instead of mobilizing and organizing workers per se.¹⁵² Under such conditions, although this dominant pattern of union organizing has rapidly increased the ACFTU's membership, it may cause the grassroots unions to become completely dependent upon employers and become more or less irrelevant to Chinese workers.¹⁵³ The official grassroots unions designated by high-level official unions provide welfare,¹⁵⁴ and pass on workers demands to employers. Depending on whether workers have a good employer, or, these unions might rarely represent workers.¹⁵⁵ As for unions in State-owned enterprises (SOEs), the official grassroots unions are totally top-down unions under the direction of the national ACFTU, so employees in state sectors have been

¹⁴⁸ Mingwei Liu, *Union Organizing in China: Still a Monolithic Labor Movement*, 64 INDUS. & LAB. REL. REV. 30, 30 (2010-2011).

¹⁴⁹ “Local trade unions are established at the provincial (Shengji Gonghui), district, city, county, township, village and neighborhood levels, however, local trade union federations can be set up at and above the county level.” QIAO, *supra* note 113, at 13.

¹⁵⁰ *Id.* “Industrial unions are established at the national, provincial, city and township levels. Industrial trade union federations can be set up at and above the county level”.

¹⁵¹ *Id.*

¹⁵² Liu, *supra* note 148, at 37.

¹⁵³ *Id.* at 48.

¹⁵⁴ Unions provide welfare, such as arranging workers to have a trip or other entertainment activities.

¹⁵⁵ Liu, *supra* note 148, at 41-2.

thoroughly unionized with an over 90 percent labor participation rate.¹⁵⁶ The establishment of unions in non-stated-owned enterprises is more or less harder depending on the employer in the traditional model. In this chapter, I discuss the establishment of grassroots unions in non-stated-owned enterprises. Even though the Trade Union Law says that neither an employer nor any party could prohibit union organization, employers in non-state-owned enterprises might have a negative attitude towards organizing preventing high-level unions from setting up units in these companies. Quanzhou Difang Gonghui¹⁵⁷ (Quanzhou local union), however, has tried a novel way to get developing workers becoming union members to have a union committee in order to organize units at Walmart without depending on the enterprise's human resource department to set up a pre-union group (Gonghui Choubei group)¹⁵⁸ and instead of a totally top-down unions designed by the higher level official union. The President in the Quanzhou local union is like a union organizer in the process of organizing a unit. It took 10 years to establish the union at Walmart, which was finally set up in 2006.¹⁵⁹ However, after the union was set up at Walmart, and even though workers joining in the unit have increased to 500 members,¹⁶⁰ there are still large numbers of workers who are afraid to become members of the union because the lack of protections in the law allow employers to

¹⁵⁶ Xiaohui Wang (王晓慧), *Guoqi Gonghui Zhineng De Bianqian Yanjiu* (国企工会职能的变迁研究) [*The Function of the Union in State-owned Enterprises*], Vol.13 No. 6 Guangdong Gongye Daxue Xuebao (广东工业大学学报) 52, 52-3; Guo, supra note 104, at 1-2.

¹⁵⁷ Quanzhou is the largest city of Fujian Province, People's Republic of China. All enterprises in Quanzhou establish their own unions, including Foreign-owned Enterprises.

¹⁵⁸ A pre-union group is a group that helps establishing grassroots unions.

¹⁵⁹ *Wal-Mart Zhongguo Gonghui Shinian* (沃尔玛中国工会十年破茧 能否顺利成长仍待观察) [*Chinese Unions in Walmart*], Xijing Bao (新京报) [XINJING NEWS] (Aug. 15, 2006), http://news.xinhuanet.com/fortune/2006-08/15/content_4964319.htm.

¹⁶⁰ Deming Xu: *Wal-Mart Jian Gonghui Qianhou* (徐德明：沃尔玛建工会前后) [*Deming Xu: Before and After Wal-Mart set up the Union*], Xinhua Wang (新华网) [XINHUA INTERNET] (Oct. 14, 2006), http://news.xinhuanet.com/video/2006-10/14/content_5204856.htm.

continue unfair labor practice.¹⁶¹ Because of the insufficiency of the laws, it is hard to implement collective bargaining in reality, and workers' demands are hard to satisfy.

Although reforms in the Trade Union Law (2001), which forbids supervisors or managers from joining grassroots unions, resulted in greater independence, there are still some problems in the Trade Union Law making it hard to apply in practice. Article 10 of the Trade Union Law says that the trade union of an enterprise with more than 25 members shall establish a grassroots trade union committee; if there are less than 25 members, a grassroots trade union committee may be established separately, or a grassroots trade union committee may be set up jointly by members of two units or more; or an organizer may be elected to organize various activities for members.¹⁶² And Article 11 says that high-level unions could assist and direct workers to set up a union, and any firms should not prohibit workers from doing so.¹⁶³ In Article 51¹⁶⁴ and 52,¹⁶⁵ it only states that employers should not prohibit workers

¹⁶¹ *Wal-Mart Heyi Gai Guanli Yingzi Gonghui Nengzou Douyuan? (沃尔玛何以改惯例 影子工会能走多远?) [Why does Wal-Mart Agree to set up the Union in China?]*, Xinhua Wang (新华网) [XINHUA INTERNET] (Aug. 24, 2006), http://news.xinhuanet.com/employment/2006-08/24/content_5000288.htm.

¹⁶² "The trade union of an enterprise, public institution or government organ with 25 or more members shall establish a basic-level trade union committee; if the members are less than 25, a basic-level trade union committee may be established separately, or a basic-level trade union committee can be established by the members of 2 units or more, or an organizer may be elected to organize activities for the members. If the number of female employees is relatively large, a trade union committee for female employees may be established under the leadership of the equivalent level trade union; if the number of female employees is relatively small, female employee members shall be included in the trade union committee... Several enterprises of the same industry or in industries of a similar nature may establish a national or local specific industry trade union, depending on their requirements." *Zhonghua Renmin Gongheguo Gonghui Fa (中华人民共和国工会法) [The Trade Union Law]* (promulgated by the Standing Comm.Nat'l People's Cong., Oct. 27, 2001, effective Oct. 27, 2001), art.10 (Lawinfochina) (China).

¹⁶³ "The establishment of a basic-level trade union, local all-level federation of trade unions or a national or local specific industry trade union must be reported to the trade union organization at the next highest level for approval. The trade unions at the higher level may assign personnel to assist and guide the workers and staff members of enterprises to establish trade unions, no unit or individuals may obstruct the effort." *Id.* art.11.

¹⁶⁴ "Those in violation of the provisions of this Law, that make vindictive attacks by transferring the working personnel of trade unions performing their duties according to law from their posts without justified reasons shall be ordered by the administrative department of labor to make corrections; and shall make compensation if any loss is caused. Those that insult, defame or make personal injuries to the trade union working personnel performing duties according to law and thus committed crimes shall be investigated for criminal responsibilities; if the case is not serious enough to constitute a crime, the

from establishing a union, but it does not provide enough remedies if employers break the laws, such as the “reasonable reasons” stated in the law are unclear and lack of certain redress to workers who are interfered with by employers when organizing movements or protecting rights activities. Moreover, the members referred to in Article 10 are confused because before setting up the grassroots union how do the workers become members of the union? Nevertheless, in practice, there are two approaches to set up a trade union.

First, relying on the human resources department of a company, the company can set up a pre-union group (Gonghui Choubai group) to discuss with workers whether to set up a union or not. If they all agree to do so, the next step is getting members to register. The third step is to unite these members to set up a union committee and then hold a conference to conduct a democratic vote for selecting the president, vice president, and committee members. The last step is to get approval from the high-level union and authorized leaders in the union. Second, if the company’s human resources department does not initiate the establishment of a pre-union group, the president or other leaders in a high-level trade union could persuade workers to be union members without depending on the enterprise level. And then these members should or could set up the grassroots union committee if they are more than 25 members or less than 25. The next step is a democratic vote among these members in the company to select the president, vice-president, and committee members. If the members in a firm are less than 25, it is easier for a firm that might

public security departments shall give punishment according to the regulations on punishment with respect to management of public security.” *Id.* art.51.

¹⁶⁵ “In any of the following cases in which the provisions of this Law are violated, the administrative department for labor shall order that the victim be reinstated, his remuneration payable during the period of the termination of the labor contract be made up, or that a compensation two times the amount of his annual income be given: 1) the employees’ labor contracts are cancelled because of the employees’ participation in trade union activities; or 2) the labor contracts of the trade union working personnel are cancelled because of their performance of the duties provided for by this Law”, *Id.* art.52.

hold a negative attitude to neither respond to setting up the union committee nor prohibit the set up of one. The last step to organizing the grassroots union is authorizing the union leaders to the high-level union and getting an approval from the high-level union. In the grassroots union pattern, it is easier for employers to control the process of organizing grassroots union in most conditions and they play a major role in shaping the outcomes for industrial relations, therefore, more details and explanations in the laws should be given.¹⁶⁶ Since some industrial workplaces have suffered from shortages of workers, however, workers having skills in high demand might gain bargaining power and force the official grassroots union to genuinely represent the workers some day in the future.¹⁶⁷

Besides the traditional ACFTU and its grassroots unions' system, there are two types of new systems: the *Gonghui Lianhehui* (one of the Union Association Patterns)¹⁶⁸ and the *Hangye Gonghui* (one of the unions associations)¹⁶⁹. The traditional grassroots union occurs in most conditions in both SOEs and non-State-owned enterprises, while the *Gonghui Lianhehui* and the *Hangye Gonghui* mostly organize their movement in small non-State-owned enterprises, such as small POEs (Private-owned Enterprises), FIEs (Foreign-invested Enterprises), and IOBs (Individually-owned Business). Compared with the traditional trade union, in these new systems the employers only play a limited role in shaping the union organizing because they do not have any effective means of preventing or controlling unions

¹⁶⁶ Liu, *supra* note 148, at 49.

¹⁶⁷ *Id.* at 48.

¹⁶⁸ Since the late 1990s, in areas with high concentrations of small enterprises or individually owned businesses (IOBs, getihu), "regional unions have begun to organize union associations (Gonghui Lianhehui) to cover multiple workplaces, such as community unions (Shequ Gonghui), village union associations (Cun Gonghui Lianhehui), market unions (Shichang Gonghui), office building unions (Bangonglou Gonghui), and union associations of FIEs or POEs (Waiqi or Siqu Gonghui Lianhehui)." Liu, *supra* note 148, at 42.

¹⁶⁹ Regional unions that follow the regional, industry-based bargaining pattern choose to organize union associations by trade and engage in regional, industry-based negotiations of wages and other employment conditions. See Liu, *supra* note 148, at 45.

from being established.¹⁷⁰ In the *Gonghui lianhehui*, the regional unions directly set up union associations without the need of employer agreement, by means of direct leading and appointing their own staffs as union leaders, like the president. Although *Gonghui lianhehui* pattern unions are more independent from employers, they are highly dependent on regional unions and further on the state administration, which might make concessions to firms in order to give top priority to economy growth.¹⁷¹ In the *Hangye Gonghui* system, with the help of the government and high-level union, the regional trade union council decides to organize union associations by trade. In order to reverse the shortage of workers in small POEs, the *Hangye Gonghui* has been established for certain purposes to collectively negotiate wages and other issues related to working conditions, which makes this kind of union more representative.¹⁷² It is able to transform the administrative union power of the government into bargaining power under certain conditions.¹⁷³ Although this form of unions is not common, the Labor Contract Law (2008) Article 53¹⁷⁴ recognizes regional collective bargaining contracts and industry-based collective contracts, which may facilitate this kind of union.¹⁷⁵

In conclusion, the unions in China are not completely independent, which is hard to change due to complicated conditions, but Chinese legislators could try to figure out a more efficient approach to satisfy workers' demands by establishing the real trade unions. Article 2 and 3 of the Trade Union Law in China ensure the

¹⁷⁰ Liu, *supra* note 148, at 49.

¹⁷¹ *Id.* at 42-44.

¹⁷² FROM IRON RICE BOWL TO INFORMALIZATION: MARKETS, WORKERS, AND THE STATE IN A CHANGING CHINA, 171 (Sarosh Kuruvilla et al. eds., 2011).

¹⁷³ Liu, *supra* note 148, at 46.

¹⁷⁴ “Industrial or regional collective contracts may be concluded between the labor unions and the representatives of enterprises in industries such as construction, mining, catering services, etc. in the regional at or below the county level.” *Zhonghua Renmin Gongheguo Laodong Hetong Fa* (中华人民共和国劳动合同法) [Labor Contract Law of the People’s Republic of China (2012 Amendment)], *supra* note 121, art.53.

¹⁷⁵ Liu, *supra* note 148, at 49.

employees' right to join or form a union shall not be restricted and that any party shall not refrain employees from joining the union.¹⁷⁶ Article 7 of the Provisions on Collective Contracts (1995)¹⁷⁷ provides the definition of collective bargaining: the union or representatives of employees bargain with the representative of an employer to reach a collective agreement.¹⁷⁸ The definition of collective bargaining is not in the Provisions on Collective Contracts (2004). In March 2015, the administrative department of labor issued "the draft of Provisions on Collective Contracts and Labor Contract Law" adding terminology and explanations into laws, such as collective bargaining, collective contract, and representative of collective negotiation.¹⁷⁹

Compared to China, obstructions confronted by the United States during the organization of unions are dealt with differently under the National Labor Relations Act and the Railway Labor Act, which have changed this aspect of the labor and management relationship.¹⁸⁰ The National Labor Board authorized by the NLRA determines employees' choice of a collective bargaining unit.¹⁸¹ In the NLRA, Section 7 guarantees the rights of employees to join, form, and assist in organizing their own organizations, and to bargain collectively through representatives of their own organization.¹⁸² If such rights are affected by an agreement requiring

¹⁷⁶ "Trade unions are mass organizations formed by the working classes of their own free will. . . . [Workers] shall have the right to participate in and form trade union organizations pursuant to the law...no organization or individual may hinder them from doing so or restrict them." Zhonghua Renmin Gongheguo Gonghui Fa (中华人民共和国工会法) [The Trade Union Law], *supra* note 162, art.2, 3.

¹⁷⁷ Jiti Hetong Guiding (集体合同规定) [Provision on Collective Contracts] (promulgated by the Ministry of Labor and Social Security(dissolved), Dec. 15, 1994, non-effective), art.7 (Lawinfochina) (China).

¹⁷⁸ *Id.* art.7.

¹⁷⁹ *Guanyu Zhengqiu Laodong Hetong Guifan Deng Sanxiang Gongjia Biaozhun Yijian De Han* (关于征求《劳动合同规范》等3项国家标准意见的函) [The National Standard Letter on Opinions of Labor Contracts], ADMIN. DEP'T LAB. (Feb. 27, 2015), http://www.mohrss.gov.cn/SYrlzyhshbzb/zxhd/SYzhengqiuYijian/201502/t20150227_152665.htm.

¹⁸⁰ James L. Jr. Hall & H. Leonard Court, *Selecting a Union Representative: Management's Role*, 26 OKLA. L. REV. 38, 38 (1973); 29 U.S.C. § 151 (1970); Railway Labor Act, 45 U.S.C. § 151 et seq. (1970).

¹⁸¹ 29 U.S.C. § 159; 45 U.S.C. § 152; Hall & Court, *supra* note 180, at 39.

¹⁸² 29 U.S.C. § 158.

membership as a condition of employment, employees shall not have the right to refrain from such activities.¹⁸³ Section 8 (a)'s¹⁸⁴ “unfair labor practice” basically involves interference with the rights granted to employees under Section 7. Generally, employer’s unfair labor practices are “coercion on employees in the exercise of the rights in section 7; domination or interference with formation or administration of any labor organization; discrimination regard with hire or tenure of employment or any term or condition of employment to encourage or discourage membership in organization; discrimination or discharge an employee who has filed charges or given testimony under this Act; refusal bargaining collectively with exclusive representatives of employees.”¹⁸⁵ When the Board processes a charge, the board shall consider evidence of the employer’s misconduct as follows: employer cannot express or imply anything related to union organization by means of threatening,¹⁸⁶ interrogating,¹⁸⁷ promising¹⁸⁸ and spying.¹⁸⁹

Compared to these sections, the challenge of organizing in China is the top-down system of organizing unions, which resulted in the grassroots union relying on the administration of high-level union guidance or the willingness of employer’s. In addition, the lack of procedural rules prevents the protection of employees’ rights to organize unions despite the fact that Article 3 of the Trade Union Law ensures employees’ rights to join and form unions. Even though established unions have been

¹⁸³ *Id.*

¹⁸⁴ 29 U.S.C. § 158(a).

¹⁸⁵ *Id.*

¹⁸⁶ “For example, a threat could be putting out the word that the company will close or move operations to another state or country if the employees bring in a union.” Mary Gormandy White, *TIPS to Avoid Unfair Labor Practices*, LOVETOKNOW BLOG (JULY 18, 2014), <http://business.lovetoknow.com/blogs/hr-matters/tips-to-avoid-unfair-labor-practices>.

¹⁸⁷ *Id.*, “an interrogation could occur if management representatives question employees about their thoughts about unions or what might have taken place at a union organizing meeting they attended”. For more information, see Dau-Schmidt, *supra* note 51, at 472.

¹⁸⁸ *Id.*, “a promise could be spreading the word to employees that the company will provide some new type of benefit or increase compensation – but only if the employees stop trying to organize”.

¹⁸⁹ *Id.*, “spying would occur if management sent its own representatives in to union organizing activities to find out what employees thoughts or plans for unionizing might be”. For more information, see Dau-Schmidt, *supra* note 51, at 473.

increased in recent years since the policy of the government has been to support organize unions in China, unions still fail to sufficiently satisfy workers' basic subsistence demands, not mention to bargain for them. Therefore, in order to strengthen workers' organizing rights, Chinese legislators, on the one hand, should reconsider how to motivate workers' to organize real, useful unions, and on the other hand, clearly point out employer's unfair labor practices during the process of organizing in order to relieve workers' fear of joining, forming, or assisting unions.

3. Remedies for Improper Conducts of Employers

Because unfair labor practices might be conducted by employers, remedies are important for non-offending parties to require the employer to bargain with the union. In the United States, the main bargaining remedies for unfair labor practices of employers are as follows: the NLRB can set aside the election and order another one at the request of the union if the Board finds that the employer or the union has committed unfair labor practices, created confusion or fear of reprisals and thus interfered with the employees' freedom of choice.¹⁹⁰

A cease and desist order¹⁹¹ will be issued with the notice-posting order if the employer violates Section 8(a)(1) (interfering with or coercing employees), which is devoted to either redressing improper conduct or preventing its recurrence.¹⁹² Further, as violations have become more complicated and measured the usual remedies like reinstatement, back pay, and notice-posting orders were not enough to prevent or

¹⁹⁰ *Remedies for Employer Unfair Labor Practices during Union Organization Campaigns*, 77 YALE L.J. 1574, 1574 (1967-1968); Hall & Court, *supra* note 180, at 60; *Conduct Elections*, NLRB, <http://www.nlr.gov/what-we-do/conduct-elections> (last visited July 3, 2015).

¹⁹¹ 29 U.S.C. § 160(c) (1964).

¹⁹² John H. Fanning, *New and Novel Remedies for Unfair Labor Practices*, 3 GA. L. REV. 256, 260 (1968-1969); Hall & Court, *supra* note 180, at 60.

redress the occurrence of unfair labor practices.¹⁹³ The Board may require some affirmative action to remedy the union when the employer violates the NLRA through severe conducts, such as requiring the employer to give the union a chance to present its views to workers at a plant during working hours.¹⁹⁴ For instance, in *Stevens*,¹⁹⁵ the Board required the employer to mail notices to all employees concerning the misconduct;¹⁹⁶ gave the union and its representatives reasonable access to the plant for one year, beginning with the issuance date of the decision to its bulletin boards;¹⁹⁷ and required the employer to read the notifications of the intent to conduct the unfair labor practices to employees during work time meetings at their plants.¹⁹⁸ The Second Circuit in *Stevens*¹⁹⁹ approved most parts of the order, only refusing the requirements of names and address provided by the employer.

A bargaining order shall be issued if the employer committed substantial unfair labor practices as well as if the union has achieved majority support by authorization cards. In *Gissel*,²⁰⁰ the Court held that a bargaining order is the remedy for Section 8(a)(5) violations. The Supreme Court discussed the degree of unfair labor practices that would result in a bargaining order. First, a bargaining order should be imposed without inquiring into the card authorization, if the employer committed “outrageous and pervasive” unfair labor practices.²⁰¹ Second, in “less extraordinary” cases, if the employer implemented less “pervasive” unfair labor practices tending to undermine majority strength and impede the election processes, the Board would

¹⁹³ 157 N.L.R.B. 869, 878 (1966); Fanning, *supra* note 192, at 256, 261.

¹⁹⁴ Hall & Court, *supra* note 180, at 61; NLRB v. J. P. Stevens & Co., 464 F.2d 1326 (2d Cir. 1972); NLRB v. H. W. Elson Bottling Co., 379 F.2d 223 (6th Cir. 1967); Montgomery Ward & Co. v. NLRB, 339 F.2d 889 (6th Cir. 1965).

¹⁹⁵ 157 N.L.R.B. 869.

¹⁹⁶ 157 N.L.R.B. 869, 878 (1966).

¹⁹⁷ *Id.*

¹⁹⁸ 157 N.L.R.B. 869, 878-79 (1966).

¹⁹⁹ NLRB v. J. P. Stevens & Co., 464 F.2d 1326 (2d Cir. 1972).

²⁰⁰ NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

²⁰¹ 395 U.S. 575, 613 (1969).

issue a bargaining order where the union at one point had a majority, and recognizing the importance of employees' free choice.²⁰² Third, if the unfair labor practices have no negative impacts on the election process, a bargaining order will not be commanded.²⁰³ In certain refusal to bargain situations, however, a bargaining order might not be enough.²⁰⁴ The Board may order a bonus to be paid or order the employer to fulfill the agreement reached previously.²⁰⁵

Compared to the United States, the Trade Union Law in China provides insufficient compensations for non-offending workers or union members. Article 50 of the Trade Union Law says that any organization that “obstruct the employees from participating in or organizing trade unions according to law or that obstruct the trade unions at the next higher levels from assisting and giving guidance in the establishment of trade union shall be ordered by the administrative department of labor to make corrections; those refusing to make corrections shall be submitted by the administrative department of labor to the government at the level of county or above for solution; those causing serious results by the means of violence or threats and constituting crimes shall be investigated into for criminal responsibilities.”²⁰⁶

Article 51 says that organization that “make vindictive attacks by transferring the working personnel of trade unions performing their duties according to law from their posts without justified reasons shall be ordered by the administrative department of labor to make corrections; and shall make compensation if any loss is caused.

²⁰² 395 U.S. 575, 614 (1969).

²⁰³ 395 U.S. 575, 615 (1969).

²⁰⁴ Fanning, *supra* note 192, at 263.

²⁰⁵ *Id.* at 263-64.

²⁰⁶ “In violation of the provisions of Article 3, Article 11 of this Law that obstruct the employees from participating in or organizing trade unions according to law or that obstruct the trade unions at the next higher levels from assisting and giving guidance in the establishment of trade unions shall be ordered by the administrative department of labor to make corrections; those refusing to make corrections shall be submitted by the administrative department of labor to the people’s governments at the level of county or above for handling; those causing serious results by the means of violence or threats and constituting crimes shall be investigated into for criminal responsibilities.” *Zhonghua Renmin Gongheguo Gonghui Fa* (中华人民共和国工会法) [The Trade Union Law], *supra* note 162, art.50.

Those that insult, defame or make personal injuries to the trade union working personnel performing duties according to law, and have thus committed crimes, the public security departments shall give punishment according to the regulations on punishment with respect to management of public security”.²⁰⁷

Article 52 says that “the administrative department of labor, under the following circumstances, shall order to resume the employees’ work and reissue the remunerations that should be paid during the cancellation of labor contracts, or order to make double compensation of the annual income of the employees: 1) the employees’ labor contracts are cancelled because of their participation in trade union activities; or 2) the labor contracts of the trade union members are cancelled due to the performance of his duties provided by this Law”.²⁰⁸

Article 53 says that any organization that “in violation of the provisions of this law, commits any of the following acts shall be ordered to make corrections and be dealt with by the people’s governments at the level of county or above according to law: 1) hindering the trade union organizations in organizing the employees to exercise the democratic rights through the employee representative assemblies or other forms according to law; 2) illegally cancelling or consolidating the trade union organizations; 3) hindering the trade unions from participating in the investigation and handling of the job-related accidents resulting in fatality or personal injuries of the employees and other infringement upon the legal rights and interests of the employees; and 4) refusing to make equal negotiation without justified reasons”.²⁰⁹

These remedies above are partially similar to the function of a cease and desist order for illegal behavior and a compensation order in the United States. For example, transferring union members without justified reasons violates Article 51, so the

²⁰⁷ *Id.* art.51.

²⁰⁸ *Id.* art.52.

²⁰⁹ *Id.* art.54.

employer will be issued a corrective order by the administrative department of labor and shall also make compensation if any loss is caused. And Article 52 emphatically states that the administrative department of labor shall issue an order of correction to resume working, as well as reissue the remunerations that should be paid during the cancellation of labor contracts, if the employer discharges workers because of their joining and organizing union.

The Trade Union Law seemingly guarantees workers' rights to join and organize the trade union, but in reality some workers are not willing to join or organize a union. There are three possible reasons why some workers are not willing to join and organize unions: workers have better wages and good working conditions; workers do not think the unions can help; workers are threatened by the employer. According to the surveys at Walmart in Beijing, Shenzhen, and Kunming, a large number of temporary workers have wages lower than about 3 yuan per hour. The workers are not satisfied with their wages, which are below the minimum wage set by law.²¹⁰ Despite these conditions, some workers do not want join and organize a union because they do not believe in the union and are afraid of threats from their employer. Analyzing the deficiencies of the Trade Union Law regarding remedies for misconducts of the employer could provide a better understanding on how to satisfy workers' demands.

Article 50, 51, and 52, separately provide remedies for improper behavior of the employer. These remedies are issued as corrective orders by the administrative department of labor. If the employer refuses to make a correction, the administrative department of labor will submit it to the government at the level of county or above

²¹⁰ *Gaiyou Shuilai Zujian Gonghui?* (该由谁来组建工会?) [*Who will Take Charge to set up the Union?*], Vol. 53 *Zhongguo Laogong Tongxun Dianzi Bao* (中国劳工通讯电子报第 53 期) [CHINA LAB. BULL. NEWSL.] (Aug. 8, 2006), <http://www.clb.org.hk/schi/content/中国劳工通讯电子报第 53 期-0>.

county. This rule greatly depends on the administrative department of labor, which can often ignore the administrative pressure and overlook the improper behavior of employers. In contrast, under the same conditions in the United States, besides the cease and desist order for illegal conducts, the Board may give unions access to the plant to present their views. Moreover, Article 52 makes it illegal for employers to discharge employees who join “union activities”. However, some small enterprises still do not set up their grassroots union. Workers in these companies have no choice but to self-organize while they are in bad working conditions. Self-organized workers bargain collectively with employers without the union, and therefore, these workers are easily fired because of the lacking protections of Article 52.²¹¹ Section 7 of the NLRA, on the other hand, guarantees employees’ rights to self-organization. If China’s government cannot include self-organization in the laws to satisfy workers’ demands, at least it should reconsider the remedies for those self-organized workers.

Article 53 (4) also has problems that need to be reconsidered. First, how to define justified reasons and which institution should determine justified reasons. According to the Act, the government has the authorization to set the justified reasons, rather than the administrative department of labor or the court. In reality, the government’s goals are stability, economic prosperity, and harmonization; therefore, in order to pursue these goals, the government might be inclined to provide concessions at the expense of workers’ demands. Second, the “correction” in this subsection means not to refuse an equal negotiation. It is like a bargaining order under the condition that the employer does not have justified reasons. Seemingly, it has increased unions’ bargaining power. Under most conditions, workers submit their

²¹¹ For more information, see *Zhuanjia Lüshi Jiányi Xiugai Gonghui Fa* (专家律师建议修改《工会法》条款) [Scholars and Lawyers Give Advice on Revising the Trade Union Law], Caixin Wang (财新网) [CAIXIN INTERNAT], (May. 23, 2014), <http://china.caixin.com/2014-05-23/100681482.html>.

demands to the government through the special process “*shangfang*” (letters and visits).²¹² The government issues a corrective order to lead a negotiation between labor and management. Once the employer has still refused to bargain or negotiation has failed, the workers have to resubmit their demands to high-level government or find an alternative way to pursue their demands, such as arbitration.²¹³ During this process, although the union can be the subject of law according to Article 2 of “Regulation on Complaint Letters and Visits”,²¹⁴ the union is not actually in the process of “*shangfang*”. Its function is relieving conflicts as the third party during the process, but not to be the representative of the workers. Thus, clearly guaranteeing the union as a subject of law during the “*shangfang*” process is necessary to achieve an equal negotiation. Nonetheless, employers always have negative attitudes and lose their motivation, unless there is an immediate economic reason for negotiation. Therefore, workers have no choice but to strike. For example, in December 2014, *Guangzhou Fanyulide Shoes Co.*’s workers held a strike under the direction of the union, and the next day the employer made a negotiation with them.²¹⁵ Although many of these workers strikes have resulted in higher wages or other benefits, these strikes with "Chinese characteristics" also increase the real costs of employers and

²¹² Xinfang Tiaoli (信访条例) [Regulation on Complaint Letters and Visits], (promulgated by the ST. COUNCIL, Jan. 10, 2005, effective May 1, 2005) (Lawinfochina) (China), art. 2. “The term “complaint letters and visits” as mentioned in the present Regulation refers to the activities that a citizen, legal person or any other organization who, by way of letter, e-mail, telephone or visit, etc., reports facts, submits proposals or opinions, or files a complaint to the people’s governments at various levels or working departments of the people’s governments at or above the county level, which shall be dealt with by the relevant administrative organs according to law”.

²¹³ *Guangzhou Fanyu Xinsheng Shiwu Zhipin Youxian Gongsi Gongren Zhi Guangzhoushi Renda Jianchayuan Gonganju Qingyuanshu* (广州番禺新生饰物制品有限公司工人致广州市人大、检察院和公安局请愿书), Laogong Huzhu Wang (劳工互助网) [LAB. INTERNET], (Nov. 8, 2014), <https://www.laogonghuzhu.org/3170.html>.

²¹⁴ Xinfang Tiaoli (信访条例) [Regulation on Complaint Letters and Visits], *supra* note 207, art. 2.

²¹⁵ *Guangzhou Fanyulide Xiechang Gongren Yu Changfa Jinxing Jiti Tanpan Chenggong Zhengqu Duoxiang Quanli* (广州番禺利得鞋厂工人与厂方进行集体谈判成功争取多项权利) [Collective Negotiation between Workers and Employer in Guangzhou Fanyulide Shoes Factory], Zhongguo Laogong Tongxun (中国劳工通讯) CHINA LAB. BULL. (Dec. 9, 2014), <http://www.clb.org.hk/schi/content/广州番禺利得鞋厂工人与厂方进行集体谈判-成功争取多项权利>.

some strike leaders are fired and sometimes in jailed.²¹⁶ Therefore, reconsideration of these problems in Article 53 (4) of the Trade Union Law is very important.

In the last part of Article 50 and 51, although the employer is responsible for his egregious improper conducts related to criminal workers' personal injuries and serious results, there is no remedy for workers when it is impossible to hold a free and fair election. Compared to these Articles, in the United States, if the employer committed egregious unfair labor practices, the remedy is to issue a bargaining order without a need for the authorization cards by the Board. Issuing a bargaining order under such conditions is another important issue that should be reconsidered and added into the Trade Union Law.

IV. OTHER EMPLOYMENT PROTECTIONS – ALTERNATIVE DISPUTE RESOLUTION

A. A REVIEW ON THE LAWS OF ARBITRATIONS IN THE PEOPLE'S REPUBLIC OF CHINA AND THE UNITED STATES

In order to satisfy workers' demands in an efficient way, alternative dispute resolutions, notably arbitration, should become another approach to relieve labor strife. In China, arbitrations are not clearly divided into labor and employment arbitration. Collective labor disputes and individual labor disputes follow the same process of arbitration process controlled by law. The following laws are the main rules regulating arbitration and its process.

²¹⁶ Halegua, *supra* note 7.

First, regarding the process before and during the arbitration, Article 5 of the Labor Dispute Mediation and Arbitration Law of the People's Republic of China (2007)²¹⁷ states:

“If a party does not desire a consultation where a labor dispute arises, the parties fail to settle the dispute through consultation, or a party does not execute a reached settlement agreement, any party may apply to a mediation organization for mediation; if a party does not desire a mediation, the parties fail to settle the dispute through mediation, or a party does not execute a reached mediation agreement, any party may apply to a labor dispute arbitration commission for arbitration; and a party disagreeing to an arbitral award may bring an action in the people's court except as otherwise provided for by this Law.”²¹⁸

This article indicates that, under the law, arbitration is a compulsory arbitration step before the parties can litigate. The workers and employers cannot skip the mandatory arbitration process to litigate in court.

In addition, Article 41 and 42 address the process of arbitration. Article 41 states that even after one of the two parties apply for arbitration of a labor dispute, the two parties may reach a settlement on their own. The application for arbitration can be dropped while a settlement agreement is reached.²¹⁹ Article 42 of this law reads:

“Before rendering an award, an arbitral tribunal shall conduct mediation. If an agreement is reached through mediation, an arbitral tribunal shall make a mediation record... a mediation record shall take effect after being signed by both parties. An arbitral tribunal shall timely render an arbitration award where mediation fails or one party

²¹⁷ Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa (中华人民共和国劳动争议调解仲裁法) [Labor Dispute Mediation and Arbitration Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008) (Lawinfochina)(China).

²¹⁸ *Id.* art.5. “Where a labor dispute arises, if a party does not desire a consultation, the parties fail to settle the dispute through consultation, or a party does not execute a reached settlement agreement, any party may apply to a medication organization for mediation; if a party does not desire a medication, the parties fail to settle the dispute through medication, or a party does not execute a reached medication agreement, any party may apply to a labor dispute arbitration commission for arbitration; and a party disagreeing to an arbitral award may bring an action in the people's court except as otherwise provided for by this Law”.

²¹⁹ *Id.* art.41. “After a party applies for arbitration of a labor dispute, the two parties may reach a settlement on their own. Where a settlement agreement is reached, the application for arbitration may be dropped”.

goes back on the agreement reached before a mediation record is served.”²²⁰

Regarding the mediation record, Article 11 of the Interpretation (III) of the Supreme People’s Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases states that: “Where a mediation record made by the labor and personnel dispute arbitration committee has taken effect, and one party goes back on the agreement reached and attempts to litigate, the people's court shall not accept such a case; or if it has accepted the case, shall make a ruling to dismiss it.”²²¹

During the process of arbitration, evidence rules in Article 6 of the Labor Dispute Mediation and Arbitration Law indicate: “A party shall be responsible for adducing evidence to back up its claims. The employer shall provide the evidence related to the disputed matter where the evidence is controlled by an employer; the employer who fails to provide the evidence shall bear the adverse consequences.”²²²

Regarding collective labor disputes, Article 7 reads: “Where a labor dispute involves more than ten employees and the employees have a common claim, they may choose one worker to represent them in the mediation, arbitration, or

²²⁰ *Id.* art.42. “Before rendering an award, an arbitral tribunal shall conduct mediation first. Where an agreement is reached through mediation, an arbitral tribunal shall make a mediation record. A mediation record shall expressly state the arbitral claims and results of agreement by the parties. A mediation record shall be signed by the arbitrators, on which the seal of the labor dispute arbitration commission shall be affixed, and served on both parties. A mediation record shall take effect after being signed by both parties. Where mediation fails or one party regrets before a mediation record is served, an arbitral tribunal shall timely render an award”.

²²¹ *Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Shiyong Falü Ruogan Wenti De Jieshi* (III) (最高人民法院关于审理劳动争议案件适用法律若干问题的解释(三)) [Interpretation (III) of the Supreme People’s Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases], *supra* note 125, art.11. “Where a mediation record made by the labor and personnel dispute arbitration committee has taken effect, and one party regrets and brings an action, the people's court shall not accept such a case; or if it has accepted the case, shall make a ruling to dismiss the action”.

²²² *Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa* (中华人民共和国劳动争议调解仲裁法) [Labor Dispute Mediation and Arbitration Law of the People's Republic of China], *supra* note 217, art.6. “Where a labor dispute arises, a party shall be responsible for adducing evidence to back up its claims... where the evidence related to the disputed matter is controlled by an employer, the employer shall provide it; and the employer who fails to provide the evidence shall bear the adverse consequences”.

litigation.”²²³ Under this article, the trade unions are not representatives of employees involved in the mediation, labor or employment arbitration and employment arbitration, or litigation. A tri-party labor mechanism is responsible for resolving labor disputes, and is made up of employee representatives from the All China Federation of Trade Unions (ACFTU), government representatives from the Ministry of Labor and Social Security, and employer representatives from the China Enterprise Confederation (CEC/CED).²²⁴ Although the tri-party labor model, adopted in the Article 8,²²⁵ mimics the tripartite system of the ILO, the unions and employees’ organizations are affiliated with the Party and the government, which might result in little debate or conflict during the discussions. However, the mandate of the three-party mechanism does not include employment and social security in the negotiation, and both the trade union and employer business organizations are limited to making suggestions without the rights of codetermination in labor standards, procedures, and norms.²²⁶

In order to guarantee the justice and equity of the arbitration, the judicial review system of arbitration awards as well as the authoritativeness of arbitration awards deserve special attention. Article 47 addresses the final binding arbitration of labor disputes. Article 47 states:

“An arbitral award on any of the following labor disputes shall be final and take effect at the date of rendering of the award except as otherwise provided for by this Law: 1) a dispute over the recovery of labor remunerations, medical expenses for a work-related injury,

²²³ *Id.* art.7. “Where a labor dispute involves more than ten employees and the employees have a same claim, they may recommend their representatives to participate in the mediation, arbitration, or litigation”.

²²⁴ Qiao & Appelbaum, *supra* note 114, at 4.

²²⁵ Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa (中华人民共和国劳动争议调解仲裁法) [Labor Dispute Mediation and Arbitration Law of the People's Republic of China], *supra* note 217, art.8. “In conjunction with the trade unions and enterprise representatives, the labor administrative authority of the people's government at or above the county level shall establish a tri-party labor mechanism for coordinating the labor relations, and jointly study and address major issues related to labor dispute”.

²²⁶ Qiao & Appelbaum, *supra* note 114, at 6-7.

economic indemnity, or compensation, in an amount not exceeding the 12-month local monthly minimum wage level; and 2) a dispute over the working hours, breaks and vacations, social insurance, etc., arising from the execution of state labor standards.”²²⁷

Interpreting subparagraph 1 of Article 47 of the Labor Dispute Mediation and Arbitration Law, Article 13 of Interpretation (III) of the Supreme People’s Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases states that “if the arbitration involves several arbitral awards listed in Article 47 (1) with the determined amount of each of them not exceeding 12 months' local minimum monthly wage, it shall be held as a final binding award.”²²⁸ However, Article 48 of the Labor Dispute Mediation and Arbitration Law states: “An employee who disagrees to an arbitral award as provided for in Article 47 of this Law may bring an action in the people's court within 15 days after receiving an arbitral award.”²²⁹ That is to say, the final arbitration does not apply with respect to employees, but applies to the employers.

As for the employer, if he or she proves the arbitration award prescribed in Article 47 falls under one of the categories in Article 49, the employer “may apply for revocation of the arbitral award to the intermediate people's court at the place of

²²⁷ Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa (中华人民共和国劳动争议调解仲裁法) [Labor Dispute Mediation and Arbitration Law of the People's Republic of China], *supra* note 217, art.47. “An arbitral award on any of the following labor disputes shall be final, and an arbitral award shall take effect at the date of rendering of the award: 1) a dispute over the recovery of labor remunerations, medical expenses for a work-related injury, economic indemnity, or compensation, in an amount not exceeding the 12-month local monthly minimum wage level; and 2) a dispute over the working hours, breaks and vacations, social insurance, etc., arising from the execution of state labor standards”.

²²⁸ Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Shiyong Falü Ruogan Wenti De Jieshi (III) (最高人民法院关于审理劳动争议案件适用法律若干问题的解释(三)) [Interpretation (III) of the Supreme People’s Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases], *supra* note 125, art.13. “Where an employee requests labor remunerations, medical expenses for a work-related injury or economic indemnity or compensation according to subparagraph (1) of article 47 of the Mediation and Arbitration Law, and the arbitral award involves several of them with the determined amount of each of them not exceeding 12 months' local minimum monthly wage, it shall be dealt with as a final award”.

²²⁹ Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa (中华人民共和国劳动争议调解仲裁法) [Labor Dispute Mediation and Arbitration Law of the People's Republic of China], *supra* note 217, art.48. “An employee, who disagrees to an arbitral award as provided for in Article 47 of this Law, may bring an action in the people's court within 15 days after receiving an arbitral award”.

residence of the labor dispute arbitration commission within 30 days after receiving the arbitral award.” The categories include: “1) an arbitral award is wrong in the application of a law or administrative regulation; 2) the labor dispute arbitration commission has no jurisdiction; 3) the legal procedure is violated; 4) the evidence used to render the arbitral award is forged; 5) the other party has concealed evidence that is enough to affect the rendering of a fair award; and 6) an arbitrator in arbitrating the case asks for or accepts bribes, practices favoritism for personal gain or renders an award by perverting law.”²³⁰

In addition, Article 18 of the Interpretation (III) of the Supreme People’s Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases states:

“An employee applies to the people’s court for enforcing a final award of the labor and personnel dispute arbitration committee, while his employer applies for revocation of the final award to the intermediate people’s court at the place where the labor and personnel dispute arbitration committee is located, the court shall make a ruling to suspend the enforcement. If the employer withdraws its application for revocation of the final award or its application is dismissed, the court shall make a ruling to resume enforcement. If the arbitral award is revoked, the court shall make a ruling to terminate enforcement. If the employer makes a non-enforcement defense in the enforcement procedure on the same grounds after its application to the court for revocation of the arbitral award is dismissed, the people’s court shall not support such a defense.”²³¹

²³⁰ *Id.* art.49.

²³¹ Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Shiyong Falü Ruogan Wenti De Jieshi (III) (最高人民法院关于审理劳动争议案件适用法律若干问题的解释(三)) [Interpretation (III) of the Supreme People’s Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases], *supra* note 125, art.18. “Where an employee applies to the people’s court for enforcing a final award of the labor and personnel dispute arbitration committee, and his employer applies for revocation of the final award to the intermediate people’s court at the place where the labor and personnel dispute arbitration committee is located, the people’s court shall make a ruling to suspend the enforcement...if the employer withdraws its application for revocation of the final award or its application is dismissed, the people’s court shall make a ruling to resume enforcement. If the arbitral award is revoked, the people’s court shall make a ruling to terminate enforcement...if, after its application to the people’s court for revocation of the arbitral award is dismissed, the employer makes a non-enforcement defense in the enforcement procedure on the same grounds, the people’s court shall not support such a defense”.

If an employer applies for revocation of an arbitral award to the intermediate people's court under Article 49 of the Mediation and Arbitration Law, according to Article 16 of the Interpretation (III) of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases, "the ruling of the intermediate people's court on dismissing the application or revoking the arbitral award shall be final."²³² Moreover, the judicial review system of arbitral awards is regulated by the Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labor Dispute Cases. For example, Article 21, it states:

"If any party against the arbitral awards having the evidence which proves that the labor dispute arbitration award or mediation paper is under any of the following circumstances, and which is found to be true upon examination and verification, the people's court can decide not to implement the said award or mediation paper according to Article 217 of the Civil Litigation Law: 1) the matters do not fall into the labor dispute arbitration scope, or the labor dispute arbitration commission has no authority to decide the matters; 2) there is an error in the application of law; 3) the arbitrator commits an act of malpractice for personal benefits and perverts the law in the arbitration of the case; or 4) the people's court determines that the implementation of the labor dispute arbitration award would contradict social and public interests. The people's court shall, in the written ruling of not implementing the award, notify the parties involved of their right to bring a lawsuit within 30 days as of the day after the writing ruling has been received."²³³

²³² *Id.* art.16. "Where an employer applies for revocation of an arbitral award to the intermediate people's court according to Article 49 of the Mediation and Arbitration Law, the ruling of the intermediate people's court on dismissing the application or revoking the arbitral award shall be final".

²³³ "Where either party involved applies to the people's court for implementing the award or mediation paper that was rendered by the labor dispute arbitration commission and has taken legal effect, if the party against whom an application is filed produces the evidence which proves that the labor dispute arbitration award or mediation paper is under any of the following circumstances, and which is found to be true upon examination and verification, the people's court can decide not to implement the said award or mediation paper according to Article 217 of the Civil Litigation Law: 1) the matters decided exceed the labor dispute arbitration scope, or the labor dispute arbitration commission has no authority to decide the said matters; 2) there is an error in the application of law; 3) the arbitrator commits an act of malpractice for personal benefits and perverts the law in the arbitration of the case; or 4) the people's court determines that the implementation of the labor dispute arbitration award would contradict social and public interests. The people's court shall, in the written ruling of not implementing the award, notify the parties involved of their right to lodge a lawsuit with the people's court for the labor dispute within 30 days as of the day after the writing ruling has been received." Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Shiyong Falü Ruogan Wenti De Jieshi (最高人民法院关于审理劳动争议案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court on

Besides Article 48 of the Labor Dispute Mediation and Arbitration Law, which illustrates the employees' right to file a lawsuit in court, of further help in figuring out the under what conditions the labor dispute arbitration award could be litigated in court is Article 17 of the Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labor Dispute Cases,²³⁴ which states "if either party involved is not satisfied with part of the award and lodges a lawsuit with the people's court after the labor dispute arbitration commission renders an arbitration award, the labor dispute arbitration award will take no legal effect."²³⁵

Regarding partial litigation of arbitration awards, Article 18 states "after the labor dispute arbitration commission renders an arbitration award to a labor dispute involving several workers, if some workers are not satisfied with the arbitration award and lodge a lawsuit with the people's court, the labor dispute arbitration award will take no legal effect on the workers that have brought the lawsuit; and take legal effect on the workers that have not brought the lawsuit; if these workers apply for implementation, the people's court shall accept their application."²³⁶ If an arbitral award provided by the labor and personnel dispute arbitration committee contains both matters on which a final award is issued and matters with no final determinations, Article 14 of the Interpretation (III) of the Supreme People's Court of Several Issues

Several Issues about the Application of Laws for the Trial of Labor Dispute Cases] (promulgated by the Sup. People's Ct., Dec.16, 2008, effective Dec.31, 2008), art.21 (Lawinfochina) (China).

²³⁴ Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Shiyong Falü Ruogan Wenti De Jieshi (最高人民法院关于审理劳动争议案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labor Dispute Cases], *Id.*, art.17.

²³⁵ *Id.* art.17. "After the labor dispute arbitration commission renders an arbitration award, if either party involved is not satisfied with part of the award and lodges a lawsuit with the people's court, the labor dispute arbitration award will take no legal effect".

²³⁶ *Id.* art.18. "After the labor dispute arbitration commission renders an arbitration award to a labor dispute involving several workers, if some workers are not satisfied with the arbitration award and lodge a lawsuit with the people's court, the labor dispute arbitration award will take no legal effect on the workers that have lodged the lawsuit; and take legal effect on the workers that have not lodged the lawsuit; if these workers apply for implementation, the people's court shall accept their application".

on the Application of Law in the Trial of Labor Dispute Cases states “a party may bring an action in the people's court against such arbitral awards.”²³⁷

If an employee brings an action in the basic people's court according to Article 48 of the Labor Dispute Mediation and Arbitration Law at the same time that his employer applies for revocation of an arbitral award to the intermediate people's court at the place where the labor and personnel dispute arbitration committee is located according to Article 49 of the Mediation and Arbitration Law, according to Article 15, “the intermediate people's court shall not accept such an application; or if it has accepted it, shall make a ruling to dismiss the application.”²³⁸ If the people's court dismisses the lawsuit or the employee withdraws the lawsuit, however, “the employer may, within thirty days after receiving the court ruling, apply to the intermediate people's court at the place where the labor and personnel dispute arbitration committee is located for revocation of the arbitral award.”²³⁹

The party involved in a labor dispute can directly brings a lawsuit under Article 12 of the Interpretation (III) of the Supreme People’s Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases, if the arbitration committee fails to make a decision on acceptance of a case or render an arbitral award within the prescribed time limit. However, there are additional limitations; the party

²³⁷ Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Shiyong Falü Ruogan Wenti De Jieshi (III) (最高人民法院关于审理劳动争议案件适用法律若干问题的解释(三)) [Interpretation (III) of the Supreme People’s Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases], *supra* note 125, art.14. “Where an arbitral award rendered by the labor and personnel dispute arbitration committee contains both matters on which final determinations are made and matters on which no final determinations are made, and a party concerned brings an action in the people's court against such an arbitral award, it shall be dealt with as an interlocutory award”.

²³⁸ *Id.* art. 15(1). “Where an employee brings an action in the basic people's court according to Article 48 of the Mediation and Arbitration Law, and his employer applies for revocation of an arbitral award to the intermediate people's court at the place where the labor and personnel dispute arbitration committee is located according to Article 49 of the Mediation and Arbitration Law, the intermediate people's court shall not accept such an application; or if it has accepted it, shall make a ruling to dismiss the application”.

²³⁹ *Id.* art. 15(2). “If the people's court dismisses the action or the employee withdraws the action, the employer may, within thirty days after receiving the court ruling, apply to the intermediate people's court at the place where the labor and personnel dispute arbitration committee is located for revocation of the arbitral award”.

involved cannot directly bring a lawsuit to the court when “any of the following situations apply to the pending arbitration: 1) the case is transferred to another arbitration committee having jurisdiction; 2) the service is being made or there is any delay in service of process; 3) the committee is waiting for the result of another lawsuit or a disability appraisal conclusion; 4) the party concerned is waiting for a hearing by the labor and personnel dispute arbitration committee; 5) the authentication procedure is started or another department is authorized to investigate and take evidence; or 6) there is any other legitimate cause.”²⁴⁰

Unlike the arbitration in China, arbitrations in the United States are classified into labor arbitrations and employment arbitrations. A labor arbitration is the arbitration of a dispute between an employer and the union representatives of employees. There are two types of labor disputes in the arbitrations: grievance disputes and interest disputes. Grievance disputes occur in the application of the meaning or terms already contained in collective bargaining agreements, while interest dispute arbitrations provide a method for resolving disputes about the terms to be included in a new collective bargaining agreement. Because public sector employees have no right to strike, the interest arbitration is most frequently used to reach a new agreement. If there is already a collective bargaining agreement, it may include a grievance arbitration clause for the settlement of grievances relating to a

²⁴⁰ *Id.* art. 12. “Where the labor and personnel dispute arbitration committee fails to make a decision on acceptance of a case or render an arbitral award within the prescribed time limit, and the party concerned directly brings an action, the people's court shall accept such a case, except that there is any of the following causes of the pending arbitration: 1) the case is transferred to another arbitration committee having jurisdiction; 2) the service is being made or there is any delay in service of process; 3) the committee is waiting for the result of another lawsuit or a disability appraisal conclusion; 4) the party concerned is waiting for a hearing by the labor and personnel dispute arbitration committee; 5) the authentication procedure is started or another department is authorized to investigate and take evidence; or 6) there is any other legitimate cause. Where a party concerned brings an action on the ground that the labor and personnel dispute arbitration committee fails to render an arbitral award within the prescribed time limit, the party shall submit the acceptance notice issued by the labor and personnel dispute arbitration committee or any other certificate or proof on the committee's acceptance of the party's arbitration application”.

violation of the agreement in front of a neutral third party. In the United States, because grievance dispute arbitrations make up the majority of labor arbitrations as opposed to interest dispute arbitrations, unless otherwise stated, the discussion of labor arbitration in this chapter concerns grievance arbitrations.

The following precedents guaranteed the authoritativeness of grievance arbitration and the court's function with respect to the arbitral awards. First, in *Lincoln Mills*,²⁴¹ the court held that even if under section 301(a)²⁴² of the Labor Management Relations Act of 1947 states that parties involved in the breach of an agreement may bring suit in any district court of the United States having jurisdiction over the parties, congressional policy favors the enforcement of agreements through grievance arbitration.²⁴³ Courts' judicial review function in ensuring the awards from grievance dispute arbitrations was discussed in the following cases. *American Manufacturing*²⁴⁴ emphasized that the function of the court is very limited when the parties have agreed to submit to the arbitrator related interpretations of all questions in the contract.²⁴⁵ The courts have no authority to weigh the merits of a grievance when the parties agree to submit all grievances to arbitration.²⁴⁶ Therefore, when the interpretation and application of an existing collective bargaining agreement is at issue, arbitration should be ordered, otherwise, the judiciary usurps a function that has been assigned to the arbitration tribunal.²⁴⁷ *Steelworkers' Trilogy*²⁴⁸ held that the court has no final say on the merits of the awards arbitrated under the collective bargaining

²⁴¹ *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

²⁴² 29 USC § 185(a): "venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties".

²⁴³ *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 458-59 (1957).

²⁴⁴ *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).

²⁴⁵ *Id.* at 567-68.

²⁴⁶ *Id.* at 568.

²⁴⁷ *Id.* at 569.

²⁴⁸ *Steelworkers of America v. Enterprise Wheel & Car. Corp.*, 363 U.S. 593 (1960).

agreements.²⁴⁹ The courts have no business overruling the arbitral award, which is legitimate so long as it draws its essence from the collective bargaining agreement.²⁵⁰ The court, on the other hand, has no choice but to refuse enforcement of the award if the arbitrator's words demonstrate a failure to meet this obligation.²⁵¹ According to Court in *Warrior and Gulf*,²⁵² Congress, under section 185(a) of the Labor Management Relations Act (LMRA),²⁵³ entrusted to the courts' duty of determining whether a reluctant party has breached his promise to arbitrate. The judicial inquiry conducted by the court under section 185(a) of the LMRA must be strictly limited to the question of whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award.²⁵⁴ The Court also held that the question of arbitrability is for the courts to decide when there are differences regarding the interpretation and application of a collective bargaining contract's provision for arbitration.²⁵⁵

The arbitration hearing may be an informal conference instead of a judicial trial. *Harvey Aluminum Inc.*²⁵⁶ indicates that because the rules of evidence applied in court proceedings do not apply in arbitration hearings, all relevant evidence may be freely admitted so long as the hearing is fairly conducted. That is to say, the parties may offer evidence as they desire and such additional evidence will be provided, while the arbitrator may deem necessary to aid in the understanding and determination of the dispute.²⁵⁷ An unfair arbitration hearing will be considered in violation of 9 U.S.C.S. § 10(c), if the arbitrator refuses to hear and consider pertinent

²⁴⁹ *Id.* at 596.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 597.

²⁵² *United Steelworkers of America v. Warrior and Gulf Co.*, 363 U.S. 574, 582 (1960).

²⁵³ 29 U.S.C. § 185(a).

²⁵⁴ *United Steelworkers of America v. Warrior and Gulf Co.*, 363 U.S. 574, 582 (1960).

²⁵⁵ *Id.* at 583.

²⁵⁶ *Harvey Aluminum Inc. v. United Steelworkers of America*, 263 F. Supp. 488 (C.D. Cal. 1967).

²⁵⁷ *Id.* at 490.

and material evidence.²⁵⁸ Moreover, obvious errors in the facts or interpretation of the law is not a cause for reversing the arbitral award if there has not been a refusal to hear pertinent and material evidence and the hearing has been fair.²⁵⁹

The Supreme Court in *Gardner-Denver*²⁶⁰ held that the arbitration's resolution of the contractual rights under the collective bargaining agreement, which did not expressly cover statutory claims and limited the arbitrator's authority to resolve contractual rights under the agreement, did not preclude a party's rights under Title VII to bring a claim into court.²⁶¹ Also, according to *Misco, Inc.*,²⁶² as to the enforcement of an arbitral award under a collective bargaining agreement, a court may not enforce it if it would be contrary to public policy.²⁶³ The public policy should be explicitly well defined and significant, and is to be ascertained by the laws and legal precedents, and not from general considerations of supposed public interests.²⁶⁴ Public policy based only on general considerations of supposed public interests, thus, cannot make a court set aside an arbitration award.²⁶⁵

Moving beyond labor arbitrations, due to the decline of unionization, fewer employees are covered by the strong grievance procedures under collective bargaining agreements. To remedy the reduced access to justice in the workplace,²⁶⁶ a new model of arbitration known as employment arbitration emerged. In this model, it is much easier for employers to be repeat players in multiple arbitration cases, which results in a lower win-rate for employees and lower damage awards compared to

²⁵⁸ *Id.* at 493.

²⁵⁹ *Id.* at 493-95.

²⁶⁰ *Alexander v. Grandner-Denver Co.*, 415 U.S. 36 (1974).

²⁶¹ *Id.* at 53-4.

²⁶² *United Paperworkers International Union, v. Misco, Inc.*, 484 U.S. 29 (1987).

²⁶³ *Id.* at 42-3.

²⁶⁴ *Id.* at 43.

²⁶⁵ *Id.* at 44.

²⁶⁶ *Alexander J. S. Colvin, Mandatory Arbitration and Inequality of Justice in Employment*, 35 *BERKELEY J. EMP. & LAB. L.* 71, 71-2 (2014).

outcomes obtained from labor arbitration or litigation.²⁶⁷ Especially in the case where an employee is self-represented, the win-rate is lower than if the employee is represented by the counsel, not to mention the damage award from such a case.²⁶⁸ To some degree, compared to employment arbitration initiated by an individual employee, labor arbitration should be the main arbitration method to ensure win-rates and outcomes. Thus, Chinese legislators would benefit from reconsidering how to set up and develop a collective labor arbitration system in the first place to relieve increasing labor conflicts.

B. COMPARATIVE ANALYSIS AND POSSIBLE RESOLUTION OF THE CHALLENGES FACING CURRENT LABOR ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA USING THE UNITED STATES ARBITRATION MODELS

With the increase in labor disputes in China a number of challenges have arisen. Unions do not play an important role, but instead act as assistants in the arbitration process. Workers act mostly as individual persons taking part in arbitrations even if they have collective labor disputes with the employer. There are major problems with China's arbitration process.

First, individual workers and representatives of workers bring a labor dispute to the arbitration committee instead of a union representing employees. In particular, with respect to collective labor disputes, even if the Labor Contract Law authorizes the trade union's legal status in the performance of arbitration, there is insufficient supportive regulations or policies enacted in favor of the trade unions' representation of workers. According to Article 56 of the Labor Contract Law and Article 49 of the Provisions on Collective Contracts, if a dispute occurring during the performance of a

²⁶⁷ Alexander J. S. Colvin, *Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 11-4 (2011).

²⁶⁸ *Id.* at 16-7.

collective contract is not resolved after negotiations, the labor union may apply for arbitration or lodge a lawsuit in pursuance of the law.²⁶⁹ Regarding disputes arising in the course of a collective negotiation, either party shall not apply for arbitration, but rather may file a written application to the administrative department of labor and social security for mediation.

Generally, collective labor disputes in China are also classified into labor disputes in the performance of collective contract (grievance disputes) and labor disputes arising in the course of collective negotiation (interest disputes). Contrary to the United States, interest labor disputes in China cannot be brought before the labor arbitration committee. Unions, acting mostly as an assistant even in grievance arbitration, help employees protect their rights by requiring employers that infringe on workers' labor rights and interest to bear the ability in the collective contract.²⁷⁰ Given the increase of collective labor disputes in China, the question is how to guarantee workers' arbitral rights in collective labor disputes and are unions acting as representatives for employees in labor disputes arbitration more efficient than individual workers applying for arbitration.

As for the first question, compared to the United States, interest labor disputes cannot be arbitrated because China's legislators and government believe that the administrative department of labor can resolve this kind of labor disputes more efficiently. If any party disagrees with the resolution of the administrative department

²⁶⁹ Zhonghua Renmin Gongheguo Laodong Hetong Fa (中华人民共和国劳动合同法) [Labor Contract Law of the People's Republic of China (2012 Amendment)], *supra* note 121, art.56. "If an employer's breach of the collective contract infringes upon the labor rights and interests of the employees, the labor union may, according to law, require the employer to bear the liability...if a dispute arising from the performance of the collective contract is not resolved after negotiations, the labor union may apply for arbitration or lodge a lawsuit in pursuance of law".

²⁷⁰ *Id.* art.78. "A labor union shall protect the employees' legitimate rights and interests and supervise the employer's fulfillment of the labor contracts and collective contracts. If the employer violates any law or regulation or breaches any labor contract or collective contract, the labor union may put forward its opinions and require the employer to make ratification. If the employee applies for arbitration or lodges a lawsuit, the labor union shall support and help him in pursuance of law".

of labor, however, the next step of commencing an administrative suit against the administrative department of labor is even harder for both employees and employers.²⁷¹ Relying on the administrative power to solve interest disputes, therefore, does not improve the efficiency of the process. It is also hard to say whether allowing interest disputes to be arbitrated is more efficient for the long term relief of labor disputes arising in the course of collective negotiation because those interests in future collective contracts are more likely based on negotiations or concessions under the pressure of economic weapons.

Compared to China, grievance arbitration is the large majority of labor disputes in the United States; interest arbitration is mainly used in the public sector because public employees have no right to strikes.²⁷² Once collective bargaining negotiations have reached an impasse, employers or unions can use economic weapons, like strikes or a lockout, to put on the pressure. With respect to public employees, therefore, interest arbitration could be an efficient way to resolve labor disputes in reaching a new collective agreement. Thus, at least for now, it is useful to satisfy workers' demands in the course of contracting because employees can hardly put pressure on employers by using economic weapons. Although workers' arbitral rights are guaranteed by law, because grievance arbitration is a necessary step in grievance disputes, this kind of mandatory arbitration also induces other problems, such as increasing the burden on labor arbitration committees, which will be discussed in the next paragraph. As for the second question, unions acting as representatives for employees in labor disputes arbitration is more efficient than

²⁷¹ Xudong Huang (黄旭东), *Meiguo Laodong Zhengyi Zhongcai Tizhi Jiqi Qishi (美国劳动争议仲裁体制及其启示)* [*The American Labor arbitration and its implication*], Vol.1 Renda Faxue Pinglun (人大法学评论) [REDA LAW REW.] 212, 224-25 (2013).

²⁷² David Broderdorf, *Mandatory Interest Arbitration in the Private Sector*, 26 GPSOLO 38, 38 (2009).

selecting representatives of those workers who are involved in the same labor dispute because union representatives have more experience and practice skills in this field.

Second, the arbitration of all grievance labor disputes is gathered to the particular jurisdictional labor arbitration committee, which means arbitration is a required before litigation in court. Under such conditions, more labor disputes have piled up in arbitration committees in several places, and end up exceeding the time limit of labor arbitration. The most common disputes at issue are usually rights disputes where workers are asking for basic rights to maintain their living, such as wages and compensation for breaking the contract. If workers cannot obtain their wages or compensation as soon as possible, it will significantly threaten the well being of their families.

In order to ensure the efficiency of arbitration, there is an opinion help by a majority of scholars in China – arbitration or litigation. “Arbitration or litigation” means any party in a labor dispute can select whether to use arbitration or litigation as the method to resolve their dispute, and once the party chooses the arbitration, the award will be the final binding arbitral award, and vice versa.²⁷³ This opinion seems capable of solving the problem, but there are still some challenges with respect to the nature of arbitration and equality of justice. According to the records, the rate of bringing a lawsuit into court after the arbitral award has increased over the years. By 2010, the rate of litigation was up to 58.38%,²⁷⁴ which indicates that the arbitral

²⁷³ Wang Pei (王蓓), Yi “*Huocai Huoshen*” *Moshi Chonggou Laodong Zhengyi Chuli Jizhi* (以“或裁或审”模式重构劳动争议处理机制) [*Rebuilding the System of Labor Dispute by “Arbitration or Litigation”*], 4 LAW. J. 120, 120-22 (2013).

²⁷⁴ “After the award of arbitration, the litigation rate has increased year by year. For example, the litigation rate in 2008 is 45.96%, in 2009 is 45.97%, and in 2010 is 58.38%.” *Goujian Hexie Laodong Guanxi – Quanguo Fayuan Laodong Zhengyi Anjian Qingkuang Diaoch* (构建和谐劳动关系— 全国法院劳动争议案件情况调查) [*Setting up Peaceful and Harmonious Industrial Relation – the*

awards in most cases did not satisfy workers' demands. Under arbitration or litigation, if any party chooses arbitration as the final binding award, it prevents them from lodging a lawsuit.

Similar to grievance arbitration in the United States, a great number of collective bargaining agreements specifically indicate that the decision of an arbitrator shall be final and binding.²⁷⁵ Vacating the arbitral award by the courts is very limited. The court will not litigate the merits of an arbitral award, even if there are errors of facts and law in the arbitral award they are not regarded as sufficient reasons for dismissing the award.²⁷⁶ The court can vacate the arbitral award if the arbitrators exceed their authority or the arbitral award is contrary to ascertained public policy by reference to the laws and legal precedents.²⁷⁷ This “final binding arbitral award” mechanism presupposed the function of unions, the freedom of choosing arbitration, and believing in arbitrators' professional competence. As for current China, with respect to increasingly severe labor conflicts and the imbalance of power between labor and management, the “arbitration or litigation” model cannot be adopted without first reconsidering the defects in the mechanism of labor arbitration.

Further, if any party selects arbitration as the final binding arbitration, outcome awards obtained from the arbitration are less than the outcome awards from

Empirical Report of Labor Disputes in Courts around China], Yanduan Falü Zaixian (端岩法律在线), <http://www.flzx.com/lawyer/dylaw/blog/209620.html> (last visited Apr. 25, 2015).

²⁷⁵ A Practical Guide for Grievance Arbitration, http://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/nlra/grievance_arbitration.authcheckdam.pdf (last visited Apr. 25, 2015).

²⁷⁶ *Steelworkers of America v. Enterprise Wheel & Car. Corp.*, 363 U.S. 593, 596 (1960); *Harris v. Havenar*, 169 Cal. App. 2d 531, 534-35 (1959).

²⁷⁷ *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757, 764-65 (1983); *United Paperworkers International Union, v. Misco, Inc.*, 484 U.S. 29, 31, 44 (1987).

the court.²⁷⁸ Given that the awards in labor disputes are mostly for wages and compensation, a final arbitration that does not satisfy workers' basic demands related to living would negatively affect their families and even result in instability in society. Although applying the "arbitration or litigation" model might relieve the burden of the arbitration committee by distributing some labor disputes directed into the courts, it could not radically resolve the heavy burden of the arbitration committee.

On the one hand, employees may still choose arbitration since it does not charge either party in labor disputes.²⁷⁹ On the other hand, employees and employers can only choose to arbitrate or litigate; they cannot select where to arbitrate because arbitration is authorized by jurisdiction according to Article 21 of the Labor Dispute Mediation and Arbitration Law.²⁸⁰ Even if workers or employers can select litigation instead of arbitration, regions with labor-intensive industries will still create much more labor disputes in arbitration than other places without the free right to select where to arbitrate among the nearest arbitration committees. It is more efficient for any party in a labor disputes to select the arbitration location by choice instead of being assigned one according to the authorized jurisdiction of the arbiter. Like in the United States where the American Arbitration Association keeps lists of qualified

²⁷⁸ Xiaojuan Ren (任小娟), *Laodong Zhengyi Anjian Shangsulü Jugao Buxia De Yuanyin Fenxin (劳动争议案件上诉率居高不下的原因分析)* [An Analysis of Increasing Litigation Rate of Labor Disputes], Xian Zhongjishi Zhongji Fayuan (西安市中级人民法院) [Xian Intern. People's Ct.], (July 9, 2014), <http://xazy.chinacourt.org/article/detail/2014/07/id/1595094.shtml>.

²⁷⁹ *Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa (中华人民共和国劳动争议调解仲裁法)* [Labor Dispute Mediation and Arbitration Law of the People's Republic of China], *supra* note 217, art.53. "No fees shall be charged for the labor dispute arbitration. The funds of a labor dispute arbitration commission shall be secured by the finance authority".

²⁸⁰ *Id.* art.21. "A labor dispute arbitration commission shall be responsible for the labor disputes occurring within its jurisdiction. . . a labor dispute arbitration commission at the place of performance of a labor contract or at the place of residence of an employer shall have jurisdiction of a labor dispute. Where the two parties respectively apply to the labor dispute arbitration commissions at the place of performance of a labor contract and at the place of residence of an employer for arbitration, the labor dispute arbitration commission at the place of performance of a labor contract shall have jurisdiction".

arbitrators by location,²⁸¹ if there is a grievance arbitration clause in collective bargaining agreement, labor disputes over the implementation and interpretation of collective bargaining contracts have to be brought to the arbitrators selected by both parties in the agreement. Additionally, the efficient way for ensuring workers' right to organize in the previous chapter can also relieve the burden of arbitration because workers could fully perform collective negotiation before the arbitration.

Third, regarding judicial review, the main goal of ensuring the authoritativeness of grievance arbitration is the limited judicial review of the arbitral awards and arbitrators' professional qualities. In China, the authoritativeness of grievance arbitration is set under the law, as the final binding award in two kinds of conditions²⁸² and as the compulsory arbitration. Despite the two types of final binding awards listed in the law, employees can still lodge a lawsuit to the court if they do not satisfy with these final binding awards. The authoritativeness of grievance arbitration, therefore, is ambiguous: on the one hand, it is ensured by Article 47 of the Labor Dispute Mediation and Arbitration Law, on the other hand, it allows employees to litigate in court.

Moreover, any party involved in a labor dispute cannot choose the arbitrators in the arbitration committee, which are instead assigned by their jurisdiction, and which might be the reason for the high rate of further litigation. In fact, the win-rate

²⁸¹ *Arbitration Rules and Mediation Procedures*, AAA, at 20-1, https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

²⁸² “4) A dispute over the working hours, breaks and vacations, social insurance, etc., arising from the execution of state labor standards; and 5) A dispute over the recovery of labor remunerations, medical expenses for a work-related injury, economic indemnity, or compensation, in an amount not exceeding the 12-month local monthly minimum wage level.” *Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa* (中华人民共和国劳动争议调解仲裁法) [Labor Dispute Mediation and Arbitration Law of the People's Republic of China], *supra* note 217, art.2 (4)-(5).

of arbitration is actually over 80% of all cases,²⁸³ but the outcomes of arbitral awards are lower than those in litigation resulting in a high rate of litigation. Such a high rate of litigation results from arbitrators' chronic decision to compromise and meet halfway on workers' demands and the arbitrators' nonprofessional practice. It is true that selecting arbitrators through negotiation by the union and employer may also cause the problems. If a party clearly knows about an arbitrator's attitude towards similar labor disputes, such party can get more benefits from the arbitration than from negotiation.²⁸⁴ The solution to this problem is that some states in the United States offer "final-offer arbitration". The "final-offer arbitration" averts the tendency to make concessions halfway between employer and the employee demands, and makes the arbitrator select the position of either the employer or the union.²⁸⁵ Thus, such action, can balance the imperfect information between labor and management, and can encourage the process of collective negotiation.

In order to ensure the authoritativeness of grievance arbitration, China's legislators should consider enacting laws and policies authorizing labor and management to choose their own arbitrators whom they trust instead of just limiting any party's rights of litigation, which also relies on at least the condition of a development of due process of negotiation between the union and employer. As for

²⁸³ *Tianjingshi Laodong Zhongcai Chenggonglü Gao Laodongzhe Shengsu Chao Jiucheng* (天津市劳动仲裁成功率高 劳动者胜诉超九成) [*Employees' Arbitral Wining-rate is Higher up to Ninety Percent in the Labor Arbitration Committee of Tianjing Province*], *Tianjing Doushi Xinwen* (天津都市新闻) [TIANJING NEWSL.] (Dec. 1, 2009), <http://news.enorth.com.cn/system/2009/12/01/004299081.shtml>; *Shanghai Weiquan Huanjing Yuelaiyuehao Laodongzhe Zhongcai Shengshulü Da Baifenzhi Bashiliu* (上海维权环境越来越好劳动者仲裁胜诉率达86%) [*The Labor Arbitration Committee in Shanghai Province Protecting Workers' Rights and Workers' Arbitral Wining-rate is up to Eighty-six percent*], *Dongfang Wang* (东方网) [DONGFANG INTERNET] (Jan. 20, 2015), <http://news.sina.com.cn/e/2005-01-20/04074888006s.shtml>; *Haikoushi Zhongcaiwei Laodongzhe Shengsulü Da Baifenzhi Jiushi* (劳动者胜诉率达90% 海口市仲裁委) [*Workers' Arbitral Wining-rate is up to Ninety percent in the Labor Arbitration Committee of Haikou*], *Haikou Wanbao* (海口晚报) [HAIKOU NEWSL.] (Dec. 4, 2003), http://www.hainan.news.cn/news/2003-12/14/content_1339649.htm.

²⁸⁴ Xudong Huang (黄旭东), *supra* note 271, at 220.

²⁸⁵ *West Des Moines Education Assn. v. Public Employment Relations Board*, 266 N.W.2d 118, 119 (Iowa 1978).

arbitrators, in some areas, some of them are nonprofessional and are not experienced in the process of arbitration even if Article 20²⁸⁶ of the Labor Dispute Mediation and Arbitration Law enumerates the requirements for selecting arbitrators.²⁸⁷

Judicial review in China is significant in order to ensure equality of justice in arbitration. In Article 49 of the Labor Dispute Mediation and Arbitration Law, an arbitral award may be examined by the court where the employer has evidence to prove the arbitral award violates the laws provided in such article, which involve both matters of legal procedure and matters of substantive law.²⁸⁸ After the arbitral award has taken legal effect, any party against the award can provide evidence to the court to make a decision on the non-implementation of the award under Article 21.²⁸⁹ These two rules indicate that the court's function is not only examining the matter of substantive law but also examining the matter of legal procedures, which is different from the limited judicial review in the United States. In order to guarantee the

²⁸⁶ Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa (中华人民共和国劳动争议调解仲裁法) [Labor Dispute Mediation and Arbitration Law of the People's Republic of China], *supra* note 217, art.20. "A labor dispute arbitration commission shall maintain a panel of arbitrators... an arbitrator shall be fair and decent and satisfy any of the following requirements: 1) once serving as a judge; 2) engaging in legal research or teaching work with a professional title at or above the medium level; 3) having knowledge of law and engaging in human resource management or trade union or other professional work for five years; or 4) having practiced law as a lawyer for three years".

²⁸⁷ Dazhong Fan & Jianfeng Zhao (范中达&赵建峰), Lun Woguo Laodong Zhengyi Chuli Tizhi De Quexian He Wanshang (论我国劳动争议处理体制的缺陷和完善) [An analysis of defects and promotion of Labor Disputes system], Jiangsu Ct. Internet (江苏法院网) (Oct. 30, 2014), *available at* <http://www.jsfy.gov.cn/llyj/xslw/2014/10/30164802438.html>.

²⁸⁸ Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa (中华人民共和国劳动争议调解仲裁法) [Labor Dispute Mediation and Arbitration Law of the People's Republic of China], *supra* note 217, art.49.

²⁸⁹ Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Shiyong Falü Ruogan Wenti De Jieshi (最高人民法院关于审理劳动争议案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labor Dispute Cases], *supra* note 233, art.21. "Where either party involved applies to the people's court for implementing the award or mediation paper that was rendered by the labor dispute arbitration commission and has taken legal effect, if the party against whom an application is filed produces the evidence which proves that the labor dispute arbitration award or mediation paper is under any of the following circumstances, and which is found to be true upon examination and verification, the people's court can decide not to implement the said award or mediation paper according to Article 217 of the Civil Litigation Law: 1) the matters decided exceed the labor dispute arbitration scope, or the labor dispute arbitration commission has no authority to decide the said matters; 2) there is an error in the application of law; 3) the arbitrator commits an act of malpractice for personal benefits and perverts the law in the arbitration of the case; or 4) the people's court determines that the implementation of the labor dispute arbitration award would contradict social and public interests".

authoritativeness of grievance arbitration, the court's judicial inquiry does not include examining matters of substantive law in the United States. Given the limited judicial review of arbitral awards, the success and fairness of an award depend on the professional arbitrators and the flexible procedure arbitration mechanism. For example, rules of evidence in arbitration are more flexible than in court proceedings. As long as the hearing is fairly conducted, all relevant evidence may be freely admitted and rules of judicial procedure need not be ascertained.²⁹⁰ Any party may offer evidence as they desire and shall provide additional evidence where the arbitrator may believe that it is necessary to understand and determine the dispute.²⁹¹ As for China, Article 6, 38, and 39 of the Labor Dispute Mediation and Arbitration Law provide for the right to cross-examination and debate in the process of arbitration and the responsibility of the party adducing evidence to back up its claims.²⁹² The process of arbitration lacks flexibility as much as the process of the trial court system, especially with respect to getting the evidence.²⁹³ If Chinese legislators allow for a more flexible process of getting evidence, the efficiency of arbitration will be improved and the high rate of litigation might be decreased. And also in order to balance the efficiency of arbitration and equality of justice, limiting the court's authority on matters of substantive law could increase efficiency at the cost of

²⁹⁰ *Harvey Aluminum Inc. v. United Steelworkers of America*, 263 F. Supp. 488, 490 (C.D. Cal. 1967).

²⁹¹ *Id.*

²⁹² *Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa* (中华人民共和国劳动争议调解仲裁法) [Labor Dispute Mediation and Arbitration Law of the People's Republic of China], *supra* note 217, art.6, 38, 39. "Where a labor dispute arises, a party shall be responsible for adducing evidence to back up its claims...where the evidence related to the disputed matter is controlled by an employer, the employer shall provide it; and the employer who fails to provide the evidence shall bear the adverse consequences...the parties shall have the right to cross-examination and debate in the process of arbitration. At the end of cross-examination or debate, the chief arbitrator or sole arbitrator shall hear the final statements of both parties...the arbitral tribunal shall invoke evidence that is adduced by the parties and has been found to be true as the basis for determining facts...where an employee cannot adduce any evidence that is related to an arbitral claim but controlled by an employer, an arbitral tribunal may require the employer to provide it within a specified period of time. An employer that fails to provide it within the specified period of time shall bear the adverse consequences".

²⁹³ Xudong Huang (黄旭东), *supra* note 271, at 225.

equality of justice if there are defects in the current arbitration mechanism and nonprofessional arbitrators in practice. Therefore, these challenges should be reviewed and improved thoughtfully and systematically.

V. CONCLUSION

The comparative analysis of labor laws and arbitrations mechanisms in the United States and the People's Republic of China shows that the government should promote collective bargaining mechanisms, regulate industrial relations, and support the basic rights of workers in order to promote efficiency, equity, and industrial peace.

With respect to industrial peace, legislators should focus on reforming labor laws related to collective negotiations and arbitration. Redefining the meaning of employees is the first important step to guarantee workers the right to join and organize union activities. As for now, China's definition of employee is indirect and is only determined through explaining the meaning of employers and labor relations. Due to the unclear definition of employee, labor conflicts between labor and management result from workers who are not protected under the definition of employee. Broader coverage of employees is critical to protect workers' fundamental rights in union activities. The organizing rights of employees is the second step for ensuring workers the rights to join, organize, and assist union activities. In order to strengthen workers' organizing rights, the Chinese government would better incentivize workers' motivation by setting up bottom-up trade unions instead of top-down trade unions. As for unfair labor practices during the process of organizing, the Chinese government should clearly point out and classify unfair labor practices through codification in the labor laws. Remedies for the unfair labor practices of employers are additional protections for workers and restrict employers during

negotiations. Although the Trade Union Law provides certain remedies for non-offending workers, like “a correction order”, they are not enough for employees for several reasons. The “correction order” issued by the administrative department of labor excessively relies on the power of the administrative department of labor and it is hard for workers to obtain one through the process of “letters and calls (*shangfang*)”. Additional remedies, therefore, should be added, such as giving access to the plant for union to present their views to put pressure on non-complying employers, and guaranteeing unions’ participation in the “letters and calls” process. Also, issuing a bargain order without the authorization cards when egregious conduct is occurring is a significant remedy for workers who are facing especially horrible treatment.

Once negotiations fail, from an efficiency perspective, alternative dispute resolutions should protect workers’ rights and relieve labor conflicts. Arbitrations, as one method of alternative dispute resolution, are compulsory in China for both labor and employment disputes. In China’s arbitration system, three main challenges arise: union representatives rarely bring the labor dispute to the arbitration committee resulting in lower efficiency; compulsory arbitration is the mandatory first step after internal mediation between labor and management creating waste of judicial resources and lower efficiency; and guaranteeing the authoritativeness of arbitral awards without undermining equity. As for the first challenge, “interest arbitration” should be included in the process of labor arbitration instead of bringing it to the administrative department of labor to increase efficiency in the process of interest disputes. In addition, the union representing employees in the labor disputes arbitration is more efficient than no union participation. With respect to the second challenge, some scholars advocate the “arbitration or litigation” model, however,

given China's increasing labor strife and imbalance of power between labor and management, this model cannot be adopted without a reform of labor arbitration. Moreover, in order to solve the problem of inefficiency in compulsory arbitration, self-selecting arbitrators might be the best method of relieving the burden of the arbitration committee. As for the last problem, the authoritativeness of arbitral awards should depend on the supporting labor laws and policies, as well as whether the union and employer can select their own choose arbitrators. And in order to balance the efficiency of arbitration and equity under judicial review, although some scholars argue for limiting the court's authority on matters of substantive law to increase efficiency, this limitation harms equity because of the defects in the arbitration system and nonprofessional arbitrators in practice. The Chinese government, therefore, should pay more attentions to the challenges above when reconsidering labor laws and policies.

In conclusion, rebuilding the collective negotiation mechanism through laws and policies is the best method to pursue industrial peace, efficiency, and equity. Lacking a collective bargaining (collective negotiation) system, workers have no choice but to resort to strikes and labor protests to ask for fair treatment. Unsolved labor disputes must then move on to the next step – the arbitration committee. With the increase in labor disputes, the arbitration committee's ability to handle such a large number of disputes is undermined, lowering efficiency. Due to the changing global economy and shrinking shares of the labor market for China, the Chinese government must begin to reconsider how to set up a collective bargaining system with the attendance of employee organizations, and redefine the terminology in collective contracts in order to pursue industrial peace and satisfy workers' demands.

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