EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

Colin Sara - Secretary General
Regional Office of the Employment Tribunals
Crescent Centre, Temple Back
Bristol BS1 6 EZ
United Kingdom

Telephone - 44-117 9298261
Fax - 44-117 9253452
e-mail – Colin.Sara@judiciary.gsi.gov.uk

Visit of a delegation from the European Association of Labour Court Judges to China

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Secretary-General's Report

1. Introduction

In recent years China has been seeking to create a "Socialist Market Economy". Part of the challenge of moving from a command economy to a market economy is to place the employment relationship within a satisfactory legal framework.

Since 1993 China has had a Labour Contracts Law and a Labour Disputes Resolution Law. However, much has changed in China since 1993 and there have been a number of revisions of this law.

Prof. Alan Neal, a member of the secretariat of the European Association of Labour Court Judges, has been closely involved in these reforms, informally for about ten years and more recently as an official adviser to the Ministry of Labour and Social Services ("MoLSS").

The Chinese Government has long been interested in the European model of Labour Law and Labour Dispute Resolution. At Professor Neal's suggestion MoLSS decided to invite a delegation of judges, representing a wide cross-

section of European Labour Courts to visit China to attend a Colloquium. The aim of this meeting was to explain the rich variety of European solutions to labour dispute resolution and to identify European successes, as well as failures, in the hope that this would assist MoLSS in amending their own legislation.

Based on this specific invitation, Prof. Neal built a programme, which involved a symposium at the Renmin University of Beijing, a seminar at the North-West University at Xi'an, a discussion with Prof Jingyi Ye of the University of Peking. There were also many informal discussions, including an opportunity to meet recent graduates as guests of the Alumni Association of Warwick University at a dinner at the People's Congress and a reception at the British Embassy in Beijing.

2. Delegation and Programme

The delegation included representatives of 9 countries of the European Union and EEA, comprising a wide cross-section of European jurisdiction, both geographically and structurally.

Professor Alan Neal,	Convenor of the EALCJ and leader of the group.
Marlies Glawischnig	Judge of the Supreme Court of Austria
Pekka Orasmaa,	President of the Labour Court of Finland
Michel Blatman,	Judge of the Cour de Cassation of France
Helmut Zimmerman,	President of the Labour Court of Stuttgart, Germany,
Tunde Hando,	President of the Labour Court of Hungary
Eggert Oskarrson,	President of the Labour Court of Iceland
Kevin Duffy,	President of the Labour Court of Ireland,
Kate O'Mahoney,	President of the Employment Appeals Tribunal of Ireland
Aldo de Matteis,	Judge of the Corte de Cassazione of Italy,
Colin Sara,	Chairman of Employment Tribunals, Bristol, England and Secretary-General of the European Association of Labour Court Judges
Michael Homfray-Davies,	Chairman of Employment Tribunals, Liverpool, England and Treasurer of the European Association of Labour Court Judges

The working programme was as follows:

First session - Monday 26th June – International Colloquy on Labour Dispute Resolution, hosted by the Ministry of Labour and Social Security at the Conference Room, Friendship Hotel Beijing.

Second Session – Tuesday 27th June – Symposium on Labour Dispute Resolution hosted by and held at the Renmin University of Beijing, Chaired by the Rector of the University, Prof. Zang Chai Jir *(?)*

Third Session – 29th June 2006 – Seminar on Labour Law issues hosted by and held at the North-West University, Xian.

Fourth Session – 1st July 2006 – Internal session, assisted by Prof. Jingji Je of the University of Peking, held at the Bamboo Garden Hotel, Beijing.

3. Introductory documentation etc.

The delegation was provided with a number of Articles written by Chinese academics, providing background information on numerous aspects of Chinese Labour Law

- "The Status, Review and Legislation Prospect on Chinese Labour Dispute Settlement System" by Feng Yanjun
- "The development of labour law in China" by Jia Junling, Professor, Law School of Peking University.
- "On Dismissal Mechanism" by Dong Bao Hua
- "On Fundamental Tendencies of Labour Contract Legislation in China" by Wang Quanxiang, Professor, Law School of Hunan University
- "A Study of China's Legislation and Implementation on the Rights of Association", by Chang Kai, Director, Institute of Labour Relations and Professor, School of Labour Relations and Human Resources, Renmin University of China and Joseph Y.S. Cheng, Professor of Political Science, City University of Hong Kong.
- "Legal Analysis of Sex Discrimination in Employment in China" by Ye Jingji, Professor, Peking University Law School.
- "Chinese employment strategy report in 2005-6: Research on the market-orientated construction of employment and employment measurement" by Xiangquan Zeng, Renmin University of Beijing
- "Ideology and Tenet of China's Social Security Legislation" by Lin Jia
- "Labour occupational health and safety rights and legal protection" by Guo Jie, North-West Institute of Political Science and Law.
- "Free move of labour force and improvement of social insurance system in China" by He Wenjiong of Zhejiang University

These Articles are annexed to this Report as Appendix I.

The delegation also had access to summaries of Labour Court systems provided by members of the delegation and other representatives of the EALCJ in relation to Austria, Finland, France, Germany, Hungary, Iceland, Ireland, Luxembourg, Netherlands, Norway and United Kingdom. These are available on the EALCJ website www.ealcj.org and are annexed to this report as Appendix II.

Before leaving for China the Secretary-General attended a Seminar at the London Business School entitled "Opening China to the World: Developing Labour Markets and Labour Law in China". The Seminar, chaired by Prof. Alan Neal, was addressed by Zheng Dong Liang, Deputy Director General, Institute for Labour Studies, MoLSS, Rui Li Xin, Deputy Director, Legal Affairs Dept, MoLSS and Zhang Shi Cheng, from the drafting committee of the People's Congress.

This Seminar provided an important introduction to the issues to be considered by the delegation.

4. Analysis of background situation

The population of China is about 1.3 billion people, with a labour market of about 900 million. Before the recent reforms, there was no unemployment as employment was provided by the State. However, economic activity was low. There is now a market economy, with a mixture of government employment, organised employment and self-employment, together with employees of small business and a massive rural peasant economy.

60% of the labour market is still rural, but there is a massive movement to the cities. The official unemployment figure is 4.2%, but this excludes millions of laid-off workers, who are no longer employed by state industries and about 100 million rural workers seeking urban employment.

It follows that, despite the exponential expansion in economic activity which has caused concerns in the West, China still has substantial problems with unemployment, much of it hidden.

The Chinese government is very much aware of the need for stability in the labour market, whereas the multi-nationals, which represent a significant proportion of employers, are keen to ensure flexibility in the labour market. While flexibility has many advantages, it inevitably causes instability.

This is the context in which the Labour Law protection works and also the context of the debate about amending Labour law.

The drafting of Labour Law legislation has always been in the hands of MoLSS. However, with regard to Labour Disputes Resolution, the drafting has been taken over by the Legislative Affairs Committee of the People's Congress, which is seeking to balance the views of MoLSS, of the Supreme

Court, which has an important existing role in Labour Disputes Resolution, of the employers and of the academics.

It was, therefore, important to hear what Zhang Shi Cheng from the Legislative Affairs Committee of the People's Congress had to say at the London Business School seminar. The first and most important thing he said was that the title of the new law is to be the "Labour Disputes Arbitration Law", not the "Labour Disputes Resolution Law". This demonstrates that the Committee intend to retain the existing arbitration system, which is administrative, rather than judicial.

The other crucial aspect was the intention to set up a "Social Adjustment" system which will be compulsory. This will involve work-place conciliation, with the assistance of the trade union or a third party, which could be a new institution based on the United Kingdom's independent conciliation service ("ACAS").

5. First Technical Session - International Colloquy on Labour Dispute Resolution

In advance of the Session Rui Li Xin had provided eight Key Topics for Discussion, which set out a number of specific practical questions about the European systems.

The meeting was opened by Mr Wy, Director, Labour & Wage Dept, MoLSS. He summarised the present position.

Under many Communist systems, labour disputes are dealt with in the first place by workplace arbitration committees which involve the management and the union.

At a higher level there are Labour Disputes Arbitration Committees appointed by MoLSS, consisting of an official from MoLSS and representatives of the trade union and management. Since the Labour Disputes Resolution Law these Committees have become increasingly professional and clearly they have some credibility with potential litigants since there were over 300,000 cases last year, rising at 30% per annum.

The Labour Disputes Arbitration Committees are not part of the legal system. They are appointed and administered by MoLSS. However, they do have independence from the employers and the chairmen are trained by MoLSS and, increasingly, are lawyers.

One of the problems with the Labour Disputes Arbitration Committees is that their decisions are not enforceable or final. It is open to the party which loses to start proceedings in the courts. These are not conducted before specialist judges and are subject to all the delays and uncertainties of civil courts. If the case goes to the courts it effectively starts again, re-assessing the facts. On

appeal from the local court there is an option for a further re-hearing before a higher court.

This process is clogging up the legal system. In an attempt to resolve this there is an experimental system in 115 courts at provincial, municipal and county level which are specialising in labour dispute resolution.

Mr Wy summarised the problems as he saw them

- The need to re-structure the system to deal with the increased volume of cases.
- The inherent problem with internal committees is that one party in the committee is the enterprise, which is itself a party to the dispute.
- How to strengthen the Labour Disputes Arbitration Committees
- The problem of duplication between the Labour Disputes Arbitration Committees and the courts.
- The feasibility of setting up alternative dispute resolution procedures
- How to set up a Committee which does not end up as just another court.
- The training of arbitrators.

The delegates then each summarised their own national systems in the light of Mr Wy's introduction.

In the afternoon sessions Rui Lixin set out five questions, based on the "Key Topics" and Mr Wy's address

- The organisation for settling disputes.
- Whether it is desirable to use arbitration or court litigation to solve disputes.
- The differences, in European countries, between Labour courts and normal civil litigation.
- The relationship between the Labour Disputes Arbitration Committees and the administration.
- Dispute prevention by setting up better internal systems for resolving disputes.

Dealing with these issues, Prof Alan Neal set out a number of factors of interest in European systems as compared with the Chinese system -

- The current Chinese system is over-complex. It is desirable to have a system which gives finality at the earliest possible stage. This is due to the uncertain status of the Arbitration Committees, which are somewhere between courts, which provide finality, and conciliation bodies, which encourage agreed solutions. There is a clear need for streamlining.
- Conciliation within the enterprise is crucial. Because the delegation is made up of judges, they tend not to refer much to this process, but it is a given feature of European systems that matters only come to the court when workplace procedures have failed.
- In Europe the independent trade unions have a crucial role at each stage. Representing their members, they negotiate with the

management, either at workplace, sector or national level and enter into Collective Agreements, which set a framework for the relationship between management and employees. This greatly reduces the number of disputes which arise. In the workplace, they provide representation for employees who are accused of misconduct or poor performances. They then also provide representation and support when the case goes on to the court. Finally, in all the systems with special courts, they provide one of the lay judges on the panel of three. There are variations in the extent to which the unions are embedded in the systems, but, except in the case of Hungary, the Unions have the confidence of the work-force and are trusted to provide full, but not uncritical, support for employees.

- This role of the unions represents a problem for Chinese trade unions. The challenge for the Chinese trade unions is to retain the confidence of the employees in the more complex world of a socialist market economy.

Helmut Zimmerman, from Germany, explained the role that the Court takes in conciliation. In Germany there are a large number of cases in the Labour Court (over 600,000 per year). However, only a small proportion of these result in a final verdict by the Court; most are resolved by agreement before the Court makes its decision. This process is assisted by the First Hearing, which is a short hearing lasting half an hour or so. At this hearing the Judge, having read the case papers, can express a preliminary view on the likely outcome and can assist the parties in moving towards an agreement.

Tunde Hando from Hungary set out the similarities between the Hungarian system before the transition from Communism in the 1990's and the current Chinese system. In particular there were Labour Arbitration Committees with representation from trade unions and management and a single national trade union. The comparison with Hungary is particularly important. Hungary made the transition from communism in 1990. In the past, the role of the Trade Union was one of "transmission". It was regarded as a means of transmitting the views of the party to the workers. After the transition from communism, the union lost credibility, leaving employees without protection. This resulted in the setting up of the Hungarian Labour Court, which replaced the National Arbitration Committees. The new court used the experience of many of the lay members of the old committees, but the chairman of the court is a judge, fully independent of the Ministry of Labour, and the Labour Court is imbedded in the judicial system, rather than in the administrative system of the Ministry.

In the afternoon session Rui Lixin set out five questions which he hoped we would be able to answer

- The system for settling disputes
- Whether it is desirable to use arbitration or litigation to settle disputes
- The differences between arbitration and civil litigation
- The administrative supervision of labour litigation
- Alternative dispute resolution.

The responses from the European judges dealt in particular with the first three aspects.

All delegates agreed that it is difficult to compare European and Chinese systems. In particular the problem is to assess how the Arbitration system in China compares with Labour Courts in Europe.

The arbitration system originates from the Labour Ministry and is still controlled by it. Many European Labour Courts also had a similar origin, particularly the various special courts. Some are still administered by the Labour Ministry, but they have all been brought into the judicial system and, in particular, the Chairmen of the Labour Courts are judges, not appointed by the Labour Ministry and acting entirely independently.

To some extent the Chinese Labour Arbitrators are becoming more independent of the Ministry. They are also becoming more like judges as they receive more legal training. It may be that this is a direction in which China could move i.e. to retain the Arbitration Committees, but to change the method of selecting and monitoring arbitrators, in order to give them greater independence and standing.

It was generally agreed that the present system, whereby arbitration is not truly binding, is unsatisfactory. One option is to give parties the choice of arbitration or court, but to make either decision binding, so that the losing party cannot decide to try again before the court. This is consistent with Arbitration arrangements in USA and commercial arbitrators in Europe.

A number of differences between labour courts and normal civil litigation in European countries were identified. However, it was acknowledged that Labour Court proceedings have more similarities with civil courts than with arbitration or mediation.

The main differences were

- In most cases, no court fees to bring proceedings
- In some cases, no orders for losing parties to pay the other party's legal costs
- No restrictions on who can represent parties.
- Less restrictive rules of evidence.

The main similarity with the civil courts, however, was that the panel consists of independent lay or legally qualified judges appointed through the judicial system.

6. Second Technical Session – Renmin University of China

The Session started with a welcoming address by Prof. Chang Kai. He raised a number of questions which China needed to address and other points of information, in particular -

- should the division between the arbitration committee and the court be kept or should they be integrated or, failing that, could bridges be built between them?

He recognised that this is not an easy problem and is complicated by varied political interests and the need to balance the old systems and the new market economy.

- The Legislative Affairs Committee of the People's Congress has taken over the lead in the legislation from the Ministry of Labour. The Ministry of Labour is anxious to retain its role. The Trade Unions are anxious to enhance their roles. In the end the draft will be a compromise which will only make minor changes.

- The truth is that an increase in individual labour disputes is inevitable simply because, in the less regulated world of a market economy, there are more violations of the law by employers.

- In the hope of reducing costs and improving efficiency, the Legislative Committee is looking at the role of conciliation and mediation, but the legislative focus will remain on arbitration, hence the draft title of the law, the "Labour Disputes Arbitration Law".

The European delegates responded .

Helmut Zimmerman, while conceding that Germany has more labour cases than anywhere else, emphasised the role played by the Labour Judge in resolving cases by agreement during the litigation process. Two thirds of all cases are resolved within 3 months of presentation.

Michel Blatman then explained the role and history of the Conseil de Prud'hommes, the oldest labour court in the world, founded in 1807.

> "French people like a proper tribunal to resolve their disputes, not arbitration or labour ministry people".

The unique feature of the Conseil de Prud'hommes is that all the judges are lay people, not lawyers. Many cases are resolved by the conciliation board of the Conseil, where no lawyers are allowed and the parties have to attend in person. The lay judges try to avoid formality and are happy to visit the work-place to talk to people.

Colin Sara then dealt with the role of the Advisory Conciliation and Arbitration Service ("ACAS") in the United Kingdom. It operates as an independent body, financed by the Labour Ministry, but separate from it. Its role is not to adjudicate, but to encourage the parties to reach agreements, but it does so not in round-table discussions, but by acting as a go-between.

The system has proved a success, with a high proportion of cases being resolved by agreement. However, Colin Sara emphasised that, in the UK, the system was under pressure due to unexplained cuts in government funding and the lack of training of the conciliators.

7. Third Technical Session – North-West University Xi'an

This session took the form of questions asked by students and responded to by the European delegates.

The first question related to the relationship between employer and employee during the dismissal process, specifically in Germany.

Helmut Zimmerman pointed out that the right not to be unfairly dismissed arose after six months' employment. Different European countries have different approaches to whether a dismissal takes immediate effect or whether it is suspended during any dispute or, indeed, becomes a nullity if the dismissal is held to be unjustified. In Germany, in theory all unjustified dismissals result in reinstatement, but in practice the issue is usually resolved by the payment of compensation, leaving the employee to seek a fresh job.

Question 2 related to the role of mediation and arbitration in Europe.

First, there was clarification by Prof Neal of the difference between conciliation, mediation, conciliation and arbitration. Conciliation involves attempts being made to get the parties to reach agreement, with the help of a conciliator who acts primarily as a channel of communication. Mediation involves a professionally qualified mediator who deals directly with the parties and uses his or her authority to encourage what seems a sensible solution. Arbitration involves a non-judicial arbitrator, who listens to the arguments and makes a ruling, which may then be enforceable as a private contract.

Tunde Hando explained the way in which the former Arbitration Committee in Hungary has now become the labour court.

Question 3 involved the UK system of dealing with collective disputes.

Prof, Neal clarified that, in European law, a "collective dispute" is a dispute between a union and an employer about the rights or interests of employees in a particular company or sector or a particular group of employees within that company or sector. A claim made by a number of individual employees with similar interests is called a "multiple claim".

In the United Kingdom (unlike other countries in Europe) collective agreements are not directly enforceable. They may, however, be incorporated into individual employment contracts, expressly or by implication. This means that the UK courts only deal with collective disputes in relation to such matters as the right to strike and restrictions on illegal picketing. "Interest" as opposed to "rights" disputes are outside the jurisdiction of UK courts.

Question 4 involved the role of Employment Law in protecting employees. Does the government have an obligation to help people to live. This was more a political and philosophical question than a legal one. European Courts do not tell governments what Employment Protection laws they should pass,

except in so far as the Social Charter of the European Union sets out such a principle. What the Courts do is to interpret laws in a way that provides the protection which is the overt intention of the legislation.

8. Fourth technical Session – Bamboo Garden Hotel Beijing

This Session took the form of discussions between the delegates and Prof Jingyi Ye of the University of Peking.

The discussion was wide-ranging and reflected the many issues which had arisen over the previous sessions.

The attempts to resolve the problems of the Labour Dispute Resolution systems involve input from MoLSS, the People's Congress, the Supreme Court and academics. In the end the decision will be with the People's Congress, but they will seek to find a compromise. Academics will put forward their views, but they are not experienced in drafting new laws.

The central ideas are

- Improving the quality and independence of arbitrators. More and more of them are full time and are trained lawyers with specialist knowledge. Most of them are recruited from the Labour Administration Department, which itself compromises their independence from the Ministry
- There are also problems about the quality of the judges of the civil courts. In particular judges are not trained in labour law. The British Embassy has been sponsoring experimental schemes in some cities to set up specialist labour courts within the civil courts system.
- Reducing the duplication between arbitration and the courts. At present, in most Arbitration Committee decisions the employee wins. In Beijing 60 to 70% go on to the courts, but a majority are still upheld. An unfair dismissal is strictly void, but, in most cases, compensation is agreed in lieu of reinstatement. There is no enforcement sanction at the Arbitration Committee level. Therefore if the employer refuses to implement the decision the only recourse is to the courts.
- Reducing delays has not really been addressed.
- There is much interest in alternative dispute resolution, particularly in the UK ACAS system.

9. Further meetings and discussions

In addition to these technical sessions, the delegation had numerous informal discussions between themselves and also with ministry officials and academics. We also had informal discussion at a reception at the British Embassy and were the guests of the Warwick University Alumni Association at their Beijing Dinner.

10. Conclusions

It is always dangerous to make generalisations about disparate legal systems and it is particularly dangerous to make generalisations about a foreign system on only a short acquaintance. However, hearing about the nature and problems of a nascent labour law system in China enabled us to look afresh at the European systems.

The European perspective

It is accepted in European law that the employment relationship is essentially based in contract, though it also has elements of a personal relationship of mutual obligation which has some similarities with kinship.

However, all European systems have developed employment rights, based on legislation, which overlay contractual rights. These emanated in the first place from the role of Labour Ministries in enforcing safety and welfare rights, but now include individual rights, enforceable without intervention by the Ministry.

Furthermore, all jurisdictions have developed separate labour courts or labour divisions of the civil courts. All this started with the Napoleonic Conseil de Prud'hommes, now two hundred years old, which created a specific and special labour court in France based on the tripartite principle. Since then many, but by no means all, European countries have developed special courts, all of them tripartite in nature. Those countries which do not have tripartite special courts, have acknowledged the special nature of labour law in making use of specialist judges or specialist Chambers at appeal level. It must be remembered, however, that two countries not represented in our delegation, namely Netherlands and Belgium, do not have specialist labour courts and that in Italy labour cases are dealt with at first instance by normal civil judges.

It is also something of an anomaly that the Nordic Labour Courts were developed to deal with disputes between unions and management and not to cater for individual claims. In Finland, it is still necessary to have the support of your union to bring a claim in the Labour Court. This means that even individual labour disputes are pursued in the name of the union, not the individual.

The delegation emphasised time and again the independence of the European judiciary. This, however, belies the origin of many Labour Courts in attempts to provide arbitration by the Labour Ministry. It is a symptom of the move away from Labour arbitration to judicial resolution that the administration of United Kingdom employment tribunals has this year moved from the Labour Ministry to the Ministry of Justice. This is an acknowledgement of the essential judicial nature of the determinations.

It is possible to synthesise a series of stages through which an individual labour dispute passes in European countries.

- Whilst the employee is still employed, there is an internal process designed to deal with the problem at the workplace without the employee losing his job or having to take legal action. However, unlike the American arbitration system, which exists under American collective agreements, there is no independent arbiter. The outcome is left in the hands of the employer.
- Once the employee is dismissed, or his grievance is rejected, he can go to court, either a specialist court or a normal civil court. The employee's rights are either contractual or statutory. Contractual rights include the right to wages and the right to notice of termination of employment. Statutory rights include rights arising out of industrial injury, rights arising out of breach of welfare legislation, rights not to be discriminated on various grounds and, most importantly, the right not to be unfairly dismissed. However, many of the statutory rights are still enforced by Labour Inspectors.
- Concurrently with the court process, the parties may seek a conciliated settlement. This may be facilitated by an outside agency or by the court. In some cases it can be referred to alternative dispute resolution, either by an arbitrator (who reaches a final conclusion) or a mediator who seeks to broker and agreement. However, in most cases, such conciliated settlement rely on the good sense of the parties (which may be encouraged by fear of the expense of continuing litigation)
- Once the matter goes to court, it follows a process which more or less mirrors normal court procedures. Most importantly it results in a final determination of the issue, subject only to a right of appeal which, in most cases, is limited to situations where the tribunal of 1st Instance has made an error or law.

All European countries are attempting to improve the efficiency of this process. However, they accept that the provision of a means of redress through judicial process is part of the obligation of the state. There may be fees to be paid, and the parties' legal costs may be paid by the loser, but the Court system is financed out of general taxation.

The Chinese Experience

Although China had not developed a comprehensive labour law until the 1990's, it is clear, from the existence of the National Arbitration Committees, that the authorities acknowledged the existence of disputes between workers and the businesses they worked for and the need to resolve these by a quasi-judicial process.

The creation of the Labour Contract Law in the 1990's meant that there was a need for an institution to deal with breaches of the law. The courts automatically gained jurisdiction, but the National Arbitration Committees retained their role of providing a quasi-judicial alternative.

The success of the National Arbitration Committees is demonstrated by the large numbers of workers who are making use of the system. Concerns about the cost of this exercise show that it is, to some extent, a victim of its own success.

The Committees were not, however, set up as courts of law and one of the criticisms is that they do not provide consistent and predictable outcomes, but depend on the approach of the individual committee to the individual case.

This situation is not unique. Many countries, particularly, Hungary, United Kingdom and France have developed judicial institutions out of what were originally administrative or informal bodies.

At the same time, in China, the experimental labour courts, created as a specialist part of the courts system, have been developing. This approach has similarities with the creation of labour courts within the judicial system in countries such as Germany, Austria and Spain.

The main problem at present in China is that they have two competing bodies. One solution would appear to be to increase the independence and judicial authority of the National Arbitration Committees and to use the courts as, effectively, an appellate body.

It remains to be seen, however, whether this is the solution which is favoured by the People's Congress.

What is clear is that labour dispute resolution institutions are developing in China and are serving to defuse individual labour problems.

17th August 2006
Bristol

Colin Sara
Secretary-General