

Practice and Problems: the Fixed-term Employment Contract in China

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Introduction

From the establishment of the People's Republic of China (PRC) in 1949, the laws and legal system of Republic of China (1911-1949) were totally abolished and abandoned, because PRC was established through revolution. The Chinese employment and labor law today started from 1949. In 1950s PRC began to implement Planned Economy. Under the Planned Economy Period (1953-1979), there was no fixed-term employment in the state-owned enterprises, the only permitted enterprises at that time; there were only regular employment (lifelong employment) and temporary employment. For the regular employees, the working conditions, such as wage, working time and other conditions were set by the state, while for the temporary employees, they were set through negotiations.

From the adoption of the policy of reform and opening to the outside world, the private economy started to develop quickly in China. Although the state-owned enterprises and other forms of enterprises all operated in the Chinese market at the same time, the employment regulations that applied to them were different. The state-owned enterprises inherited the regular employment system of the Planned Economy and began to swift to the fixed-term employment from 1986, while the private enterprises mainly hired workers under fixed-term employment contracts.

The Labor Law of China was promulgated in 1994, and put into force on January 1, 1995, aiming to establish new regulations suiting the development of market economy. In accordance with Labor Law of China, those who could have the chance to enter into an open-ended employment contract were very limited. Most of the employees in China worked under fixed-term employment contract in China.

The practice of fixed-term employment contract has resulted from the swift growing of private economy, the reform to the state-owned enterprises and the carrying out of Labor Law of China. The domination of fixed-term employment contract for about 12 years (1995-2007) has caused lots of problems in the labor protection and the labor relation was getting worse. Therefore, Labor Contract Law of China (LCL), which came into force in 2008, is trying to stabilize the labor relation in China and change the fixed-term employment practice in China, which has caused lots of objections from employers and some scholars. This essay will introduce and discuss the problems concerning the fixed-term employment contract, including the current situation, the problems and the future of it.

I. General overview of the fixed-term employment in the labor market

i. Present state of the fixed-term employment

In present China, most of the employees are working for the employers under the fixed-term employment contracts except for employees of government agencies, though there is no accurate national number of the percentage of the fixed-term employees among the whole labor force. According to the official report, the number of fixed-term employees has been decreasing while the number of open-ended employees has been increasing since the enforcement of Labor Contract Law of China (hereinafter referred to as LCL).¹ Before the enforcement of LCL, according to the research of the scholar in 2005, 70% of employment contracts were fixed-term contracts, among which the short term employment contracts dominated; 80% of the employment contracts were within a term of three years and most of them were within one year. The percentage of open-ended employment contracts was different in state-owned enterprises and non-state-owned enterprises. In the state-owned enterprises, only 20% of the employees worked under open-ended employment contracts. In the non-state-owned enterprises, the number was 3%.² In a survey conducted by All China Federation of Trade Union in ten cities in 2006, among 5,000 employees questioned, 85.2% of whom was under fixed-term employment contracts, of which 83.2% was from a period from one to three years and 36.7% was within one year.³

Some investigations in the provincial level have indicated the changes brought about by the new regulations of LCL. According to an investigation in October, 2008 in Zhongshan City of Guangdong Province, where the enterprises were mainly privately owned, only 4% of the employees worked under the open-ended employment contract. Although the percentage of open-ended employment contracts is still very low, some investigations show that the period of the fixed-term employment contracts has been prolonging. In April, 2008, Labor and Social Security Bureau of Guangdong Province, one of the industrially developed provinces in China, conducted a sample investigation to 5,000 enterprises, and the result showed that the employment contracts under one year decreased from 67% to 40% compared with the number in the year of 2007; that the employment contracts over three years increased from 8.7% to 26%; that in the city of Zhongshan only 14.3% of the employment contracts were under a period of one year; and that the percentage of employment contracts over three years was 71%.⁴ From those facts, it can be concluded that the period of fixed-term employment contract tends to be prolonging after the enforcement of LCL since January 1, 2008, though the percentage of the fixed-term employment contracts is quite high in China.

¹ Cao Qitai, dean of Legal Affair Office of State Council, said in a news conference on September 19, 2008 that since the enforcement of Labor Contract Law of China from January 1, 2008, there is an obvious decrease in the number of fixed-term employment contract under one year and an increase in the fixed-term contract over three to five years, and also there is an increase in the percentage of open-ended employment contract. Please see: 《无固定期限劳动合同不是“铁饭碗” 半年企业劳动合同签订率逾九成》, http://news.southcn.com/china/zgkx/content/2008-09/20/content_4609500.htm

² 张建国: “推进劳动合同制度实施, 切实维护职工合法权益”, 2006年2月北京市劳动和社会保障法学会2005年年会论文。

³ 王全兴、黄昆: 无固定期限劳动合同的是与非, 《法学家》2008年第2期。

⁴ A report by Xinhua News Agency on Oct.9, 2008, please see: http://news.xinhuanet.com/newscenter/2008-10/09/content_10171997.htm

ii. The problems caused by short fixed-term employment contract in China

The domination of fixed-term employment in present China since 1995 when Labor Law of China was first enforced has resulted in some serious problems in China before the enforcement of LCL. Although the situation is changing since the enforcement of LCL from 2008, the following problems still exist.

The first problem is that the interests of the employees could not be well protected under fixed-term employment. The human resources of China are too abundant and the unemployment rate is quite high. Under this situation it is not easy for a common worker to find a job. Once a worker gets employed and enters into a fixed-term employment contract with an employer, he will always hope the contract could be renewed after the expiration. Under such circumstance, if the employer infringes the rights of the employee, such as not paying the overtime work payment or the social insurance premium for the employee, the employee usually chooses to give up his rights in return for a chance of the renewal of the employment contract. If an employee chooses to bring a suit against his employer for the infringement of his rights and interests, he will definitely lose the chance of having his employment contract renewed.

The second problem is that the fixed-term contract practice has been resulting in the continuing rise of the labor disputes. Fixed-term employment contract resulted in the wide spread of infringements to the rights of the workers, which in return resulted in the continuing rise of the labor disputes in the past 20 years. In 1995 there were 33,030 labor dispute cases brought to the labor arbitration tribunals,⁵ and in 2000, five years after the Labor Law of China entered into force, there were 135,000 cases brought to the labor arbitration tribunals, in which 423,000 employees were concerned. In 2007 there were 350,182 cases brought to the labor arbitration tribunals, 3.7 times of the number in 2000 and 15 times of the number in 1995, and 650,000 workers were involved in the labor disputes.⁶ In 2008 the number even reached 693,465. According to the statistics from Supreme Court of China, in 2008 there were more than 280,000 cases concerning labor disputes, 93.93% increase from the year of 2007. The fast increase in labor dispute cases indicates that the contradictions in the labor relations are increasing, and labor relations are worsening rather than improving. Professor Zheng Gongcheng in Renmin University, also a member of Standing Committee of People's Congress of China, drew a conclusion based on his investigation in Guangzhou that "In fact the labor disputes brought to the labor arbitration tribunal and courts are only a small part of the cases of rights infringement. Those that have not been brought to the labor arbitration tribunal and courts are far more numerous."⁷ For example, lots of workers have no legal social insurance. An investigation on rights protection for migrant workers conducted by the Zhejiang Provincial Union indicated that less than 20% of the workers had got their pension, and this investigation did not include the small enterprises or the construction industry, in which the estimated percentage would be even lower. Private enterprises only choose to buy pensions for some of the employees, such as the relatives of the employers, medium-level managers, technicians and staff in distribution. This report also showed that for other forms of social insurance like those of industrial injury, medicine, and unemployment, the percentage was even lower than that of the pension.⁸

⁵ 劳动和社会保障部 国家统计局:《1995年度劳动事业发展统计公报》。

⁶ 劳动和社会保障部 国家统计局:《2007年度劳动和社会保障事业发展统计公报》。

⁷ 马蔚:《劳动争议:期待跨越“60天”》,《工人日报》,2004年6月26日。

⁸ 吴亮、赵东辉、李国龙:《调查:农民工享受社会公共资源提供保障制度状况》, http://news.xinhuanet.com/newscenter/2004-11/24/content_2254909.htm

The third problem is that the short fixed-term employment contract results in the high mobility of the labor force in the enterprises, which also hinders the training programs of enterprises. Under the short fixed-term employment contract, the employees could not expect a stable employment, so whenever there is a better chance, the employee is more likely to transfer to another company. According to the statistics in the 1990s, about a quarter of the staff will quit their job within the first year of their employment. Under this situation, the employer is reluctant to train employees. Usually whenever an employee is well trained, he will expect higher salary. They will look for chances of higher salary in the market outside the company if they cannot get higher salary from the employer who has provided training for them.

The fourth problem is that the practice of fixed-term employment contract is unfavorable for China to transform from a farming country to the industrialized country. For the past more than 20 years, China has been quickening its steps to the industrialization; more than 120 million migrant workers come to find jobs in the city. But few of such a huge amount of people can get stable jobs, which would be a big problem to the Chinese society.

From the perspective of economic development, the fixed-term employment contract system is not favorable for the industrialization for China. In the process of industrialization, lots of migrant workers would certainly move into the cities to work and live. However, under the employment system, the employers try to force the labor back to the countryside after their 'golden age' of usefulness expires. But the past 30 years' experience has shown that it is not possible to force the second generation migrant workers back, (while it is possible for the first generation, because they have had the farming experience). So that is why the employment system should be changed to make it possible for the migrant workers to stay in the cities.

The fifth problem which has been brought about the fixed-term employment is that it has made the labor relation in the state-owned enterprises become worse. Before the employment reform in 1986, the labor relation in the state-owned enterprises was basically harmonious. Theoretically, the workers were the masters of the state-owned enterprises, because they enjoyed lifelong employment and the power to supervise the management of the enterprises. Also there were limits on the salaries of the managements. After the employment reform, the "masters" gradually became "employed workers", and the limits on the salaries of the managements were also abolished. The supervision over the enterprises from the employees was gone with the reform.⁹ Under such situation, some managers became corrupted. Some cases are unbelievable. For example, a state-owned wireless production factory in northwest China went bankruptcy in 1996. The later investigation revealed that the factory director embezzled 1,930,000 Yuan to buy and decorate his own house, 195,000 Yuan to buy stocks; that he provided 20,000,000 Yuan to guarantee for other natural persons and enterprises; and that he lent 330,000 US dollars to a Hong Kong businessman, which was not reprieved. Such a factory leader was only dismissed from his office and no other punishments were given to him. After his dismissal, the Hong Kong businessman "lent" a "BUICK" to him for his personal usage.¹⁰ Another case is that a collective-owned enterprise in a county in Zhejiang Province suffered a loss of capital of 1,130,000 Yuan, and 118 workers could not get their

⁹ 徐小洪：劳动者：从“主人翁”向“雇佣劳动者”的转变，载常凯主编：《中国劳动关系报告——当代中国劳动关系的特点和趋向》，中国劳动社会保障出版社，2009年3月第1版，第65页。

¹⁰ 田惠：《腐败不除，企业难活》，《改革月报》，1998年9月，第46页。转引自：徐小洪著：《冲突与协调——当代私营企业的劳资关系研究》，中国劳动社会保障出版社2004年版，第106页。

wages for 18 months, for which a retired worker committed suicide by drowning himself in a river. However, the enterprise director bought a car and cheated a bonus of 100,000 Yuan and he was even promoted to vice Bureau leader.¹¹ These are the two extreme cases, from which we can see to what extent the leaders have embezzled the state-owned assets and exploited the workers in the reform of state-owned enterprises.

iii. The relationship among fixed-term employment contract, open-ended employment contract and atypical employment

Although open-ended employment contracts and fixed-term employment contracts exist simultaneously at the same time in China, the problem is that the small percentage of the open-ended employment contracts cannot function in the way it should do. As mentioned above, the percentage of the open-ended employment contract is quite low. It can be imagined that only those employees who are essential to employer could get the chance of lifelong employment. But actually those employees are always very competitive in the labor market. It is usually quite easy for them to get a secured job. So the actual situation is that those who work under the open-ended employment contract are the high-level core employees in the private enterprises, and high-level or former lifelong employees in the state-owned enterprises. Therefore, those who have weak bargaining power and are in a high demand of the open-ended employment contracts could not get the lifelong employment. However, those who have the strong bargaining power and are not in a high demand of the protection could get the lifelong employment. From this perspective, it can be concluded that fixed-term employment contracts dominate the Chinese labor market and a small percentage of employees who work under open-ended employment contract could not play its due role in labor protection.

Also, in China, the lack of effective collective bargaining system has made those who work under open-ended employment contract unable to enjoy the stable employment. Sometimes, they need to jump to the other company to get a better payment. There are many cases on this and the cases which have drawn lots of attention from the public are those concerning the resignation of the civil aviators. In 2006 only, there were over 100 civil aviators resigning from their employers. In August, 2007, in Wuhan Branch Company of China Eastern Airlines, thirteen civil aviators resigned from the company and then the company sued them for compensation up to 105 million Yuan.

A labor law professor comments that the essence of the resignation of civil aviators and jump to another company results from that the state-owned monopoly in the market is breaking down and private companies are competing to get the rare resources.¹² With the background of the rapid development of Chinese economy and because of the quick development of civil aviation industry, the newly established civil aviation companies are in great need of experienced civil aviators, so they need to get some from other state-owned companies.

The civil aviators of the state-owned companies complain that their salaries are relatively low and they have not got enough time to rest.¹³ Those cases indicate that without the collective bargaining system, even the high-level employees who have open-ended

¹¹ 楼民展：《虚报利润 厂长升官发财有术 亏损百万 百名职工生机无着》，《浙江工人日报》，1998年11月28日。转引自：徐小洪著：《冲突与协调——当代私营企业的劳资关系研究》，中国劳动社会保障出版社2004年版，第106页。

¹² 王全兴、粟瑜：飞行员劳动关系协调的思路转换，《中国劳动》2008年第6期。

¹³ 胡庆波：飞行员PK海航：我要辞职《法律与生活》2008年第12期。

employment contract with the company cannot realize their demands in wage raise. The lifelong employment itself could not provide a sound protection for the employee without the collective bargaining system. If they cannot get their salaries raised within the company, they will try to jump to other companies for higher salary.

The atypical employment in China, which includes dispatched laborers, part-time laborers, family service laborers etc., has been increasing for the past more than ten years under the Chinese background of economic reform and labor market reform. So the atypical employment practice in China now is different from foreign developed nations, in which the atypical employment has been growing under different background.

The labor dispatching began to emerge in China at the end of 1970s, when the employees of foreign enterprises and agencies in China shall be sent through labor agencies of the government out of the consideration of national security. With the development of economy and labor regulation, the labor dispatching has changed a lot.¹⁴ For example in August, 1984, Shanghai Foreign Service Co. Ltd. expanded the scope of dispatching from foreign agencies and joint ventures to state-owned and private enterprises. In the medium cities such as Hefei, Anhui province there were also some labor dispatching services in 1980s, when the labor agencies of the government began to dispatch workers to work in the enterprises and charged some management fee which was about 15% of the dispatched worker's wages.

After the enforcement of Labor Law, labor dispatching began to flourish because Labor Law has put more obligations upon employer. Under this circumstance, many employers have tried to evade the trouble resulting from entering an employment contract with the employees. Therefore, more and more employers began to use dispatched workers. It is estimated in 2006 there were about 120 labor dispatching service companies in Guangdong Province, and 26,518 labor dispatching service companies in whole China, among which 18,010 were run or approved by the labor administrations of the governments. It is estimated that there had been about 25 millions dispatched workers in China by 2006.¹⁵

Those phenomena have caught the attentions of the legislators in the process of LCL legislation. In December, 2005, He Luli, vice Chairman of National Congress of China, made a report to the National Congress about the enforcement of Labor Law, in which she suggested that researches should be conducted on labor dispatching and labor dispatching should be regulated. In the LCL legislation many scholars suggested that labor dispatching should be strictly limited in China.¹⁶ This kind of advice seemed be accepted. LCL has limited the scope of labor dispatching to generally the temporary, auxiliary or substitute job post.

But the problem is that there is no clear definition on the meaning of "temporary, auxiliary or substitute" and the meaning of the word "generally." In drafting Regulations for the Implementation of LCL, there were attempts to strictly interpret the meaning of "temporary, auxiliary or substitute." But just at that time when the draft was under discussion, the financial crisis burst out and the Chinese economy was greatly affected, so when the Regulations for the Implementation of LCL was enforced, the interpretations of the meaning of "temporary, auxiliary or substitute" were deleted, so as to create a favorable situation for the enterprises.

Under such situation, labor dispatching begins to grow more rapidly because the

¹⁴ 何小勇：我国劳动派遣现状及法律规制，《法治论丛》2006年7月。

¹⁵ 何小勇：我国劳动派遣现状及法律规制，《法治论丛》2006年7月。

¹⁶ 常凯、李坤刚：必须严格规制劳动者派遣，《中国劳动》2006年第3期。

limitations on fixed-term employment contract and the open-ended employment contract are stricter than before in accordance with the regulation of LCL. So in order to avoid establishing a direct employment relationship, many companies choose to use dispatched workers. This kind of practice is very common especially in the state-owned monopoly industries, such as in petroleum company, petrochemical corporation, electric company, telecommunication company, etc. As mentioned above, the reform in employment and salary in the state-owned enterprises has resulted in the formation of interest groups in the companies. A small group of core employees have got the control of the company and tried to exploit others by using dispatched workers and other methods. In some of this kind enterprises, dispatched workers are larger in number than those who are directly employed.

Another reason of the prevailing use of dispatched workers is that the anti-discrimination law is not adequate and there is no sound anti-discrimination system in China, although Labor Law of China stipulates that employees shall not be discriminated against in employment, regardless of their ethnic community, race, or religious belief (Article 12). Further more, Employment Promotion Law adds that sex discrimination is prohibited (Article 3). But the problem is that even if the discrimination is proven, the damage compensation fee that the applicant could get is very limited in China. For example, in *Gao v. Bidechuangzhan Co. Ltd.*,¹⁷ where the applicant was proven to have been discriminated in health, the applicant was only compensated with 17,572.75 Yuan, plus 2,000 Yuan compensating for pain and suffering caused therein. Many other applicants are not so lucky. In Sichuan Province one who claimed in height discrimination was denied by local court.¹⁸ The real situation is that the employment discrimination is widespread, while the cases concerning employment discrimination are very limited, which can explain the reason why all airline companies choose to use dispatched flight attendant without fearing that they will be sued for age discrimination.

The part-time laborers began to emerge in the 1990s. In 2006, it was estimated that there were about 40-50 million part-time workers in China.¹⁹ Before the national legislation, there were some regulations by the governments of municipal cities, such as in Beijing and Chongqing. On May 30, 2003, Ministry of Labor and Social Security enacted and enforced Guidelines on the Employment of Part-time Laborers,²⁰ which defines the part-time workers as those who work no more than 5 hours a day and 30 hours a week.

In 2007, LCL contains the new regulations on part-time workers, which defines the part-time labor as an employee who generally averages not more than 4 hours of work per day and not more than an aggregate 24 hours of work per week for the same Employer (Article 68). In accordance with LCL the two parties to part-time labor contract may conclude an oral agreement and they may not stipulate a probation period (Article 70). Also it is stipulated that

¹⁷ 高某诉彼得创展公司, 见: 《北京乙肝歧视案劳动者胜诉 单位道歉并赔偿》, <http://news.enorth.com.cn/system/2008/05/26/003314804.shtml>

¹⁸ 中国人民银行成都分行于 2001 年 12 月 23 日在《成都商报》上刊登《中国人民银行成都分行招录行员启事》规定, 男性身高在 168 公分、女性身高在 155 公分以上, 生源地不限。原告蒋韬为四川大学法学院 2002 届学生, 不符合被告的上述规定, 以被告身高歧视条件侵犯了原告享有的宪法赋予的担任国家公职的平等权为由, 起诉到四川省成都市武侯区人民法院。被告在法院受理此案以后取消了身高限制规定, 原告请求法院依法确认被告的被告具体行政行为违法。受案法院认为, 原告蒋韬提起的诉讼, 不属于行政诉讼法规定的受案范围, 不符合法定的起诉条件, 裁定驳回原告蒋韬的起诉。

¹⁹ 姜颖: 《非全日制劳动和灵活就业》, 载常凯主编: 《劳动合同法立法理论难点解析》, 中国劳动社会保障出版社, 2008 年 2 月第 1 版。

²⁰ 《劳动保障部关于非全日制用工若干问题的意见》, 劳社部发 [2003] 12 号。

either of the two parties may terminate the employment by making notice to the other party at any time and no severance pay shall be paid by the employer to the employee upon termination of the use of the labor (Article 71).

From the regulations cited above, we can see that the part-time employees in China nearly have no equal protection with other employees. Also, according to the Guidelines on the Employment of Part-time Laborers, the part-time employees need to pay for social insurance premium by themselves (the industrial injury premium is by the employer). Under such regulation, only those who could not find a full-time job will choose part-time jobs. After the enforcement of LCL, the number of part-time employees in China has been increasing, for the regulations of the full-time employment are strict. Under full-time employment, the employers need to pay compensation to the employees when the employment terminates or the employee gets discharged. Under this situation, more and more employees have been reduced to part-time employment from full-time employment.

II. Historic developments of fixed-term contract regulations

i. The employment system under the planned economy

The Planned Economy had the following main characteristics: first, all the enterprises were owned and operated by the state. The enterprises needed only to accomplish the productive tasks assigned by the country; second, the enterprises did not buy anything: the raw materials, powers and workers were all allocated to them by the state; third, the enterprises did not sell any products: they just gave all they had produced to the state, and the state put them in the stores, and the customers bought them with coupons.

The employment system under the fixed economy was characterized as regular workers with the following features: first, the regular workers were recruited and employed by the state and were assigned to work in state enterprises, and they were not employees of the enterprises; second, once recruited, the workers enjoyed lifelong employment, which was later called “iron bowl,” meaning that those workers would never lose their jobs during employment all throughout their lives; third, the working conditions and terms were set by the state instead of individual enterprises, for the enterprises did not have markets and profits as explained above. This kind of regular employment systems met the needs of the Planned Economy, and would have to be changed together with the reform of the Planned Economy.

The regular employment under the Planned Economy brought about the following main problems: first, the worker was fixed to a certain position and lacked mobility, which made it extremely difficult for workers to transfer to different enterprises; second, the lifelong employment and the fixed wage standards set by the state made the workers have no motivation to work. No matter what the contributions a worker had made to an enterprise, his wage was the same; third, employment opportunities were extremely unequal. Under the regular employment system, only those people with urban residence certificates could be workers, and those who lived in the rural area could only be farmers. When a regular worker retired, his position was allowed to be substituted by one of his children. This policy meant that workers and farmers were all lifelong positions: no matter how hard one worked, it was hard for people to change their fate. In this way, the productivity of the working people was greatly suppressed.

ii. China’s reform to the regular employment system

When China began to adopt the policy of reform and opening up to outside world, the

free market began to come into being. Against this background, state-operated enterprises gradually entered into the free market and became self-operating enterprises. Under these circumstances, China began the new movement of “smashing the three irons,” which meant to change the practices formed under the Planned Economy Period, such as lifelong employment (iron bowl), the unchangeable posting (iron chair) and the fixed wage system (iron wage).

After the state-owned enterprises entered into the market, the workers became employees of the enterprises instead of the state. Other systems were also gradually changed, such as the wage system and the employment contract system. At that time, enterprises obtained their rights to allocate profits, and the workers began to get wages in accordance with their contribution to the enterprises. On July 12, 1986, the State Council implemented the Temporary Regulations on the Employment Contract in the State-owned Enterprises, which stipulated that the state could only recruit contract workers instead of regular workers for the state-owned enterprises. But the existing regular workers could still keep their lifelong employment as an exception. This exception only lasted about ten years. In 1996, one year after Labor Law of China entered into force, there was a national campaign for signing employment contracts, which required that all the employees of the enterprises sign employment contracts with their employers.

One more thing we need to know about the employment system under the Planned Economy is that there were temporary workers as well as regular workers. In the operation of an enterprise, there is always some need for some temporary workers. So when the regular workers could not meet the need, the state-operated enterprises would hire temporary workers. These workers were similar to the contracted workers today in that their wage, working time and other conditions were set through negotiations of the parties.

From the beginning of the reform to the economic system and the adoption of the policy of opening to the outside world, the non-state-owned enterprises, such as private enterprises, joint venture enterprises and foreign enterprises, started to emerge and develop quickly in China. Although the state-owned enterprises and non-state-owned enterprises operated in the Chinese market side by side, the employment regulations that applied to them were different. The state-owned enterprises inherited the regular employment system of the Planned Economy, while the non-state-owned enterprises established the employment relationship with the employees based on contracts.

Before 1992 when Deng Xiaoping made his southern tour, there had been controversies over which path was suitable for socialist development. After the tour it was determined that China would develop in the direction of constructing a socialist *market* economy. This accelerated the drafting of the Labor Law of China. From 1995, the Labor Law of China was enforced, which ended the discrepancy in employment based on the nature of enterprises.

iii. The fixed-term employment established by Labor Contact Law of China in 1995

After prolonged drafting and discussion, the Labor Law of China was promulgated in 1994, and put into force on January 1, 1995. The enforcement of Labor Law of China ended the situation under which the state-owned enterprises and non-state-owned applied different employment regulations based on the differences in the investment types. This shows that China is determined to construct a labor market suitable for the market economy.

The law establishes the rights and obligation system for employed workers. Article 3 of Labor Law of China stipulates that “Laborers shall have the right to be employed on an equal basis, choose occupations, obtain remuneration for their labor, take rest, have holidays and leaves, obtain protection of occupational safety and health, receive training vocational skills,

enjoy social insurance and welfare, and submit applications for settlement of labor disputes, and other rights concerning labor as stipulated by law. Laborers shall fulfill their labor tasks, improve their vocational skills, follow rules on occupational safety and health, and observe labor discipline and professional ethics.” Thus the contents of the workers’ rights are clearly stipulated.

The aim of Labor Law of China is to abolish the old employment regulations and establish new regulations which suit the development of market economy. Under the Labor Law of China, only those who have been working in establishments for more than 10 years have the right to request to sign an open-ended employment contract with the employers. Faced with such requirements, the employers have several options: (1) agree to sign an employment contract with an open-ended term, (2) refuse to sign an open-ended employment contract and offer to sign a fixed-term employment contract, and (3) if the employees refuse to sign a fixed-term employment contract, the employers have the right to refuse to continue the employment after the existing contract terminates.

The strict requirements for the open-ended term contract and the regulations that the fixed-term contract can be randomly decided by the employer and employee have had the result that all employers (prior to the passage of the ECLC) have chosen to sign fixed-term contracts. For most employees, their employment contract is a one-to-three-year contract. Though each of their contract periods is short, their employment relationship is long.

III. Current regulations and problems concerning fixed-term contracts

i. Current regulations concerning fixed-term contracts

With the purpose of solving the problems caused by the domination of fixed-term employment, LCL has established new rules on the open-ended employment contracts. Article 14 of LCL provides that the following employees can get a lifelong employment: (1) the employee has been working for the employer for a consecutive period of not less than 10 years; (2) when his employer introduces the employment contract system or the state-owned enterprise that employs him re-concludes its employment contracts as a result of restructuring, the employee has been working for the employer for a consecutive period of not less than 10 years and is less than 10 years away from his legal retirement age; or (3) prior to the renewal, a fixed-term employment contract is concluded on two consecutive occasions and the employee is not characterized by any of the circumstances set forth in Article 39 and items (1) and (2) of Article 40 hereof.²¹ Also, the employer shall enter into a written employment

²¹ Article 39 An Employer may terminate an employment contract if the Employee: (1) Is proved during the probation period not to satisfy the conditions for employment; (2) Materially breaches the Employer’s rules and regulations; (3) Commits serious dereliction of duty or practices graft, causing substantial damage to the Employer; (4) has additionally established an employment relationship with another Employer which materially affects the completion of his tasks with the first-mentioned Employer, or he refuses to rectify the matter after the same is brought to his attention by the Employer; (5) causes the employment contract to be invalid due to the circumstance specified in item (1) of the first paragraph of Article 26 hereof; or (6) Has his criminal liability pursued in accordance with the law.

Article 40 An Employer may terminate an employment contract by giving the Employee himself 30 days’ prior written notice, or one month’s wage in lieu of notice, if: (1) after the set period of medical care for an illness or non-work-related injury, the Employee can engage neither in his original work nor in other work arranged for him by his Employer; (2) The Employee is incompetent and remains incompetent after training or adjustment of his position.

contract with the employee within one month from the date on which it starts using the employee (Article 10). If an employer fails to conclude a written employment contract with an employee within one year from the date on which it starts using the employee, the employer and the employee shall be deemed to have already concluded an open-ended employment contract (Article 14).

Many contents of the above requirements are still not very clear, such as what “a consecutive period of not less than 10 years” means,²² and what “two consecutive occasions” means in practice. Different interpretations of the requirements of open-ended enterprises have already existed in China. For example, High Court of Shanghai Municipal City has issued “Some Opinions concerning the Problems in the Application of CLC.” Article 4 (2) reads that “If an employee chooses to sign a fixed-term employment contract while he is qualified to sign an open-ended employment, in accordance with Article 14 of ECLC and Article 11 of Enforcement Regulation of ECLC, the fixed-term employment contract is effective. The fixed-term employment contract ends when it terminates.” Article 4 (4) reads that “Article 14 paragraph 2 (3) of ECLC means that after the employer and employee have continuously signed a fixed-term employment contract twice, when they negotiate to sign the third contract, the employee is entitled to sign an open-ended employment contract.” These interpretations are not in accordance with the common understanding of the meaning of the wording.

In order to make the open-ended employment contract system be adopted by the employer, LCL introduces a new rule, which provides that where the employee does not agree to renew the fixed-term employment contract if the conditions offered by the employer are the same as or better than those stipulated in the current contract, the fixed-term employment contract terminates when the time expires. However, if the employer does not agree to renew the fixed-term employment contract while the employee hopes to renew the fixed-term employment contract, the employer needs to pay compensation fees (Article 46(5)). The standards of compensation fees are based on the number of years an employee has worked for the employer — at the rate of one month’s wage for each full year worked. Any period of not less than six months but less than one year shall be counted as one year. The severance pay payable to an employee for any period of less than six months shall be one-half of his monthly wages (Article 47). Comparatively, the employer shall pay the same amount of compensation fees when the employees working under open-ended employment contract are discharged, and that means the costs for contract termination are the same for the employer regardless of the fact that whether an open-ended employment contract or a fixed-term employment contract is entered into.

For all the three types of employee discharging which includes, disciplinary dismissal, no-fault dismissal and economic dismissal, as far as the conditions of employee discharging are concerned, the requirements are the same for both employees under fixed-term employment contracts and employees under open-ended employment contracts. However, there are two different rules providing special protections for those who have worked for the employer for a long time — one is that those who have worked for the employer for a long time are free from dismissal except for disciplinary dismissal;²³ the other is that the employee

²² In the end of October, 2007, Huawei Company in Shenzhen asked all those employees who had worked for more than 8 years in the company to file an application to quit his job and the company would compensate them for their resignation, and would re-employ them after their resignation. In this way Huawei Company tried to evade its liability to enter into open-ended employment contracts with the employees.

²³ If an employee has been working for the employer continuously for not less than 15 years and is less than 5

under open-ended employment contract enjoys better protection when the economic dismissal occurs.²⁴

Except the rules that mentioned above, there is no special protection for those who are under open-ended employment contract. Therefore, the open-ended employment could be terminated if the employer is determined to do so. In accordance with LCL, for those who are wrongfully discharged in violation of LCL, the employer shall pay damages to the employee at twice the rate of the severance pay provided for in Article 47 hereof (Article 87). According to this, if an employee under an open-ended employment contract is wrongfully discharged, there is no possibility for him to return to his former position, while he shall only be compensated in accordance with the rule in Article 87. It is obvious that an individual employee who is even under open-ended employment contract is surely to lose his job if the employer is determined to fire him.

Theoretically, fixed-term employees and employees under open-ended employment contract enjoy equal treatment. Actually, fixed-term employees are treated equally in the private enterprises; while in the state-owned enterprises, the former lifelong employees, especially those who are in the high level still take themselves as masters of the enterprises and take the fixed-term employees as employees of the company and should not be equal with them. This kind of situation is prevailing especially in the monopolized state-owned enterprises.

Currently, there is no law requiring employers to help fixed-term workers with transition to open-ended employment, such as offering information about vacant permanent positions, training opportunities. As for the social insurance, fixed-term employees and employees under open-ended employment contract have the same rights and equal protection in accordance with the laws. However, because the employees under open-ended employment contract are always the high-level employees in a company, their rights in social insurance are well protected. The social insurance interests of the fixed-term employees are not as well protected as the employees under open-ended employment contracts. Some enterprises only pay social insurance premium for the important employees and ignore the rights of common employees. However, the situation is changing better for LCL has raised the cost of infringing the interests of employees.²⁵

One other aspect that needs to be mentioned is that LCL sets up an order for firing employees. Article 41 of LCL stipulates that when reducing the workforce, the employer shall retain with priority persons: (1) who have concluded with the employer fixed-term employment contracts with a relatively long term; (2) who have concluded open-ended employment contracts with the employer; or (3) who are the only ones in their families to be employed and whose families have an elderly person or a minor for whom they need to provide. Therefore, the employees who have concluded with the employer fixed-term employment contracts with a relatively short term will be the first to be laid off.

years away from his legal retirement age, he shall not be discharged in accordance with the requirements listed in Article 40 or Article 41 hereof (Article 42 (5)).

²⁴ Article 41 provides that “When reducing the workforce, the Employer shall retain with priority persons: (1) Who have concluded with the Employer fixed-term employment contracts with a relatively long term; (2) Who have concluded open-ended employment contracts with the Employer; or (3) Who are the only ones in their families to be employed and whose families have an elderly person or a minor for whom they need to provide.”

²⁵ In accordance with Article 38, if an employer does not pay for the social insurance premium for an employee, the employee can quit his job with notifying the employer in advance; after that the employee can ask the employer to pay for the social insurance premium and the severance compensation. However, under the normal condition, an employer need not to pay for the severance compensation if an employee quits his job.

ii. The opinion of the scholars on the fixed-term employment contract in China

In the process of LCL legislation, the draft of LCL was open for public opinions for one month, in which 191,849 pieces of opinions were gathered from the public through web, letters and newspaper articles. The problem of fixed-term employment contract was one of the hot issues that drew the attention of the public. Some wrote letters complaining that they had to sign employment contract once a year, some even four times one year. In answering the questions from the journalists, Li Yuan, dean of administration law of Law Office of People's Congress, said that LCL would try to settle the problems.²⁶

Many Chinese labor scholars have voiced their opinions on the fixed-term regulations. Some scholars believe that open-ended employment contract system does not suit China. For example one professor holds the viewpoint that in accordance with the new regulations in LCL the continuity of employment contract will be a unilateral and mandatory action decided by the choice of the employees, which is in violation of LCL, for Article 3 of LCL stipulates that the conclusion of employment contracts shall comply with the principle of free will. The function of welfare is conflicted with the function of economics of the enterprises. It is unfair to force an enterprise to enter into open-ended employment contract. The stability of labor relation will be a heavy burden for the enterprises and will not be favorable for the mobility of employees and for more employees to get employed.²⁷

Other scholars believe that the changes in fixed-term employment regulation in the LCL are right. Professor Ye Jingyi of Peking University believes that in designing the regulations on employment contract it should be kept in mind that the stability of employment should be one of the aims. Some regulations are necessary to limit the employers to kick the employees out after using out the golden ages of them.²⁸ Professor Li Kungang believes that the practice of short fixed-term employment has resulted in many problems and this practice has no social fairness and should be changed.²⁹ Professor Chang Kai advocates expanding the scope of open-ended employment contract. He believes that the short fixed-term employment contract has resulted in the instability of labor relations and the unfavorable situation for the protection of the interests of the laborers.³⁰

IV. Evaluation of current regulations on fixed-term contracts in labor policy and future prospects

i. The open-ended employment contract: a common practice in China in the future?

The changes in fixed-term employment contract, which were first suggested by the scholars as Professor Dong Baohua noted,³¹ are based on the experience and the changes in the labor relation of the last 12 year (1995-2007). It is hoped that the labor relations could be more stable and labor relation could be more harmonious through limiting the scope of fixed-term employment contract. However, employers have been used to the freedom in hiring the employees and terminating the employment at will. They need some time to adjust

²⁶ 《劳动合同法草案征求民意情况发布会(实录)》 <http://news.sohu.com/20060421/n242931963.shtml>

²⁷ 董保华：论我国的无固定期限劳动合同，《法商研究》2007年第6期。

²⁸ 转引自《今年“萝卜”不怕“坑”，劳动合同法改变职场规则》，<http://www.people.com.cn/GB/54816/54827/4014858.html>

²⁹ 李坤刚：劳动合同法中的抑制与平衡，《中州学刊》2005年第6期。

³⁰ 许浩：《劳动合同法》草案二审：常凯、董保华再争锋，《中国经济周刊》2007年第3期。

³¹ 董保华：论我国的无固定期限劳动合同，《法商研究》2007年第6期。

their employment policies and get used to the new regulations. It is also good to see that some enterprises have come to understand the positive function of open-ended employment contract. At present, there are examples that some enterprises even enter into open-ended employment contracts with all the employees.³²

As mentioned in the first part of this essay, the new rules seem to function well. Many enterprises have changed their former practice of only signing one year employment contract with the employees and start to sign contracts with periods of three or four years. In the future, if the labor dispatching is strictly limited to the “temporary, auxiliary or substitute” job positions, if the part-time employees are better protected, and if the discrimination in employment is strictly prohibited, the fixed-term employment in China will be further limited and more employees will work under open-ended employment contracts.

Judging from the present situation, the employment relationship tends to be more stable than in the past. However, will the open-ended employment contracts become the prevailing practice in employment in China? The answer, as the author sees it, is negative for several reasons: first, the conditions for terminating open-ended employment contracts and the conditions for terminating fix-term employment contracts are the same and are not strict; second, in accordance with the LCL³³ and Labor Law of China,³⁴ many termination conditions of employment contract shall be established in enterprise regulations, which are mainly decided by the employer; third, it is very hard for Chinese collective bargaining system to be really established in the near future. Therefore, no collective force could be formed to help change the situation. Professor Wang Quanxing holds the similar opinion on this and he said in China the fixed-term could not be automatically transited to open-ended employment contract like in some foreign countries.³⁵

ii. The objections from the enterprises and the efforts to comfort them from the government

After the promulgation of LCL, there has been lots of criticism from enterprises. It is reported that about 70% of enterprise owners are against the open-ended employment and hope to return to the rules established in Labor Contract Law of China in 1995, and there was some news reporting that an influential entrepreneur suggested abolishing the open-ended employment in China.³⁶

Under such a situation, the government has been endeavoring to explain that open-ended employment contract system is not equal to the lifelong employment under Planned Economy Period. Article 18 of Enforcement Regulation of CLC repeatedly lists the thirteen situations already existed in LCL under which the labor relation can be terminated, trying to show that open-ended employment is not lifelong employment.

The government is satisfied to see that the merits of the current rigid regulations concerning fixed-term employment contract: the period of the employment contract has been prolonged and some even have obtained the opportunity of entering into open-ended employment contracts with employers. However, as mentioned in this essay, more employees

³² It is reported that in the city of Zhongshan in Guangdong Province, a company has entered into open-ended employment contracts with all the employees of over 1500.

http://news.xinhuanet.com/newscenter/2008-10/09/content_10171997.htm

³³ Article 4 and Article 39 (1), (2).

³⁴ Article 4 of Labor Law of China.

³⁵ 王全兴、黄昆：无固定期限劳动合同的是与非，《法学家》2008年第2期。

³⁶ 多位委员建议：取消无固定期限合同，http://www.xdzjw.com/Article/ShowArticle/49512_1.html

have lost the chance of establishing a direct employment relation with employers and have been pushed to the position of dispatched labors, and even some workers have been forced to be part-time laborers for balanced employment system have not been established in China.

iii. The future of fixed-term employment contracts in China

Although many enterprise owners hope to return to the fixed employment system of Labor Contract Law of China in 1995,³⁷ most of the scholars do not support their opinions. However, some suggestions have been put forward from the scholars to improve the defects in fixed-term employment system. Professor Wang Quanxing suggests that it should be clearly stipulated that those actions which try to avoid the compulsory obligations shall be void in accordance with Article 58.1. (7) of General Principles of Civil Law of China and Article 52 (3) of Contract Law of China.³⁸ One researcher suggests that rules need to be established for open-ended employment contract in mandatory continuity of employment, termination protection and compensation for the breach of employment, which should be different from the rules for fixed-term employment contract.³⁹ Another researcher suggests that the requirements for mandatory open-ended employment contract should consider the continuity nature of the job position.⁴⁰ Dr. Xie Zengyi suggests that there should be a rule concerning the circumstance under which no specific employment period is concluded in the employment contract.⁴¹ Judging from the present situation, the aims of stabilizing and harmonizing labor relations will be maintained and there may be some interpretations for the fixed-term employment and open-ended employment in the future from authorities.

Concluding remarks

In order to understand the legal system of labor and employment, it is necessary to keep in mind that China is still in the initial stage of industrialization. During this development period, China is basically an interest-oriented society, in which all are striving for their own interests and profits. Also, the Chinese government legislates for the interests of the nation too. In this period, the two things that Chinese government cares about most are economic development and social stability. The legislation of LCL and the efforts to limit the scope of fixed-term employment contracts in it are based on the situation that the labor relations are getting worse and the stability of the society may be influenced. Therefore, China is trying to stabilize the labor relation by limiting the scope of the fixed-term employment contract and by raising the employers' cost when infringing the legal interests of the employees.

Also, it needs to understand that the labor law system under the market economy has only a very short history starting from the year of 1995. At that time it was believed that short fixed-term contract was favorable for the economic development. After the problems emerged, the LCL is trying to bring it to another direction. In all, China is exploring to construct a labor law system suitable for Chinese economic development. LCL can be seen as an experiment in the process of constructing such a system. As mentioned in this essay, some favorable situations have been brought about by the fixed-term employment. However, will the future of the fixed-term employment of China be so greatly limited that the open-ended employment

³⁷ 多位委员建议：取消无固定期限合同，http://www.xdzjw.com/Article/ShowArticle/49512_1.html

³⁸ 王全兴、黄昆：劳动合同法律适用的若干规则，《北方法学》2009年第3期。

³⁹ 陈红梅：无固定期限劳动合同若干问题的法律探讨，《中国劳动关系学院学报》2009年第2期。

⁴⁰ 李坤刚：劳动合同经济补偿金的功能、性质和制度完善，《阅江学刊》2009年第2期。

⁴¹ 谢增毅：对劳动合同法若干不足的反思，《法学杂志》2007年第6期。

contract will become a common practice? The answer, the author of this essay believes, depends on the future changes in the labor relation of China.