groups do not directly fall under the labor law because their members may have different identities in the employment. Only the employers and workers who have established employment relationships fall within the regulatory scope of the *Labor Contract Law*. In terms of workers, their scope of eligibility for the application of the *Law* is relatively narrow because of restrictions by age, culture, health, and freedom of act(ion). Comparatively speaking, the regulatory scope for the relationship on contract of engagement is wider than that of the labor law, and the person hired is paid because of providing labor service. Those who cannot be included in the regulatory scope of labor law are regulated by the civil law.

Second, the basic labor standards are higher in the standard employment relationships. In general, China's labor standards law is similar to those of other countries. Currently, the main problem of China's labor standards law is that there are little regulatory spaces for the scope of employment relationship. For example, in the legislation on minimum wage, maximum working hours, and overtime wages, the actual level of labor standards is much higher. Moreover, the protection level is also relatively higher in the dismissal protection system for workers' protection. The law in the United States requires employers to comply with the law and conditions on the prohibition of dismissal when they exercise the right of dismissal to workers. Although the principle of freedom of employment has been attacked by many people, it is an important principle in regulating employment relationships in the United States. Most states and some scholars believe that this is still an essential principle. Similarly, scholars in France and Germany argue that in the context of stronger employers and weaker employees, the employer cannot apply the principle of contractual freedom to terminate an employment relationship, and must be restricted in the form of law. In France and Germany, an employee generally cannot be dismissed without cause. Along with the development of due cause dismissal, there are the systems of notice periods prior to termination and economic compensation.[18] They constitute three measures for the protection of employees, and they limit an employer's freedom of dismissal, i.e. (1) grounds of dismissal, (2) dismissal procedures, and (3) dismissal treatment. In China, the dismissal protection system requires that employers comply with the grounds of dismissal, dismissal procedures, and dismissal treatment to exercise the right of dismissal. That is to say, dismissal requires the statutory compliance but not the good cause.

addition, private non-enterprise units shall not engage in any profit-making business activities. Article 5 states that the civil affairs departments of the State Council and the local people's governments at the county level or above are the registration and administration organs for private non-enterprise units (hereinafter referred to as the "registration administration organ") at the corresponding level. Relevant departments of the State Council and the local people's governments at the county level or above are the business administration department (hereinafter referred to as the "business administration department") for private non-enterprise units within the industry and business. Where there are other provisions in other laws and administrative regulations for the supervision and administration of private non-enterprise units, such laws and regulations shall prevail.

18. Cheng Yanyuan [程延园], "Comparative Analysis of British and American Dismissal System—On the Legal and Economic Issues in the Dismissal" [英美解雇制度比较分析—兼论解雇中的法律与经济问题], (2003) *Journal of Renmin University of China* [中国人民大学学报] 2:130-135.

Third, there are stringent requirements in the form of employment relationships. In terms of contractual form, China places particular emphasis on the role of written contracts. In 1996, the employment contract system began to be widely established, which resulted that the original permanent employment system quitted from the historic stage.[19] As a major reform from state recruitment to contractual relationships between employers and employees, it is natural to record such employment in written form. Thus the written form became the only form of employment contract in China. The *Labor Contract Law* (2008) further advanced the requirement for written contracts. While the *Labor Law* basically limited the effect of written contracts to "establishing employment relationships", the *Labor Contract Law* removed this limitation and expanded the regulatory role of written contracts to cover all aspects of an employment relationship.

[B] Conclusion of Employment Contracts

The conclusion of employment contracts refers to the legal act where a jobseeker and an employer confirm the employment contract through mutual agreement and reach consensus on the terms of the contract through negotiations, clarifying the rights, obligations, and responsibilities of each party. The process turns a jobseeker into a worker (of an employer) and a recruitment employer into an employer (of an employee). The *Labor Contract Law* sets forth the principles and procedures for the conclusion of employment contracts in China and specifies the rights and obligations of the parties in the contract concluding process.

[1] Overview

Article 3 of the *Labor Contract Law* sets forth basic principles for concluding employment contracts in China—legitimacy, fairness, equality and voluntariness, consensus, and honesty and credibility. These principles stress the features of equality in employment relationships. Because the parties to the contract are equal, neither party can impose his/her will arbitrarily on the other party. Whether or not an employment relationship is established depends on the parties' will with mutual but equal selection, on the voluntary basis, and in good faith. An employment contract concluded based on the above principles will be legally binding, so both the employer and the worker must fulfill their obligations when negotiating such a contract. When an employment contract does not meet the statutory requirements, it shall be wholly or partly null and void, and cannot have the legally binding effect on the parties. Compared with the *Labor Law*, the provisions of the *Labor Contract Law* have two breakthroughs regarding how to deal with invalid contracts after implementation. First, for employment contracts concluded through such means as the cheating or threat, which cannot

19. Employee under such system was called "fixed worker" or "long-term worker" in China, which refers to a worker who has been fixed in a unit working for an employer. Generally speaking, the employee was not allowed to quit the job, and the employer was not allowed to dismiss the employee.—Translator's note.

reflect the parties' real expression of intent, shall be dissolved, the *Labor Contract Law* does not fully stipulate the provision of "invalidity from its inception." Second, where the parties have the dispute over the whole or partial invalidity of an employment contract, the *Labor Contract Law* does not fully adopt the provision of "absolute invalidity" from the beginning. It provides that the labor dispute arbitration institution or a People's Court shall have the right to confirm if the contract is invalid.

During the drafting of *the Labor Contract Law*, the Chinese legislature took into account that China's market credit and collective contract systems were not well developed, and decided that it was not enough to clarify and implement the contents of employment rights and obligations without requiring written contracts. Therefore, paragraph 1 of Article 10 of the *Labor Contract Law* stipulates that "a written employment contract shall be signed to establish an employment relationship." In addition, under paragraph 2 of Article 10 states: "Where an employment relationship has already been established with an employee, but no written employment contract has been entered simultaneously …", and this is referred to as a de facto employment relationship. To maintain a written contract system, China has imposed severe sanctions on the practice of non-written employment contracts. The written form is now the only legal form of employment contracts, so the law has specified the contents of written employment contracts, including the required and optional terms. Employment contracts can be divided into fixed-term employment contracts, open-ended employment contracts, and project-based employment contracts. Open-ended employment contracts refer to those employment contracts where employers and workers agree not to stipulate a termination date. Under the new labor contract legislation and with the increasing emphasis on maintaining stable employment relationships, the *Labor Contract Law* expanded the scope of application for open-ended employment contracts to make them a regular employment practice.

[2] Contents of Employment Contracts

China has set up a system for establishing employment relationships through signing written employment contracts and has enacted specific requirements on such contracts. Under Article 17 of the *Labor Contract Law*, the content of a written employment contract can be divided into essential provisions and optional provisions.

The essential provisions of an employment contract are the indispensable parts of an employment contract as required by law. The previous labor law required that an employment contract must have seven key clauses, including the term of the employment contract, job description, labor protections and working conditions, labor remuneration, labor disciplines, conditions for terminating the contract, and liabilities for violating the employment contract. The *Labor Contract Law* added the following aspects as the essential provisions, including the "name, residence and legal representative or person principally in charge of the employer", "the name, residence and national identity card, or other valid identification documents of the worker", "work location", "social insurance", and "working hours, rest and leave", but removed the "discipline", "conditions for the termination of an employment contract", and "liability

for the violation of an employment contract" from the essential provisions originally required under the *Labor Law* (1994). Such adjustments increased the clauses of supporting workers' rights and remove clauses of workers' obligations. The *Labor Contract Law* set "providing a copy of an employment contract that with the requirement essential provisions" as an obligation of the employer. Where an employment contract does not contain such essential provisions, the labor administrative department shall order the employer to make corrections, and where the circumstances are serious and cause damage to the worker, the employer shall bear the liability for compensation.

Optional provisions of an employment contract refer to the terms on which the parties may or may not agree to in an employment contract. If the parties agree, however, the relevant clauses must be set in accordance with the law. Under the provisions of the *Labor Contract Law*, this includes five basic categories: "Apart from the essential provisions as prescribed in the preceding paragraph, the employer and the employee may, in the employment contract, stipulate to the probation period, training, confidentiality, supplementary insurance, welfare and benefits, and other items." Where the parties violate these provisions, they shall also bear the legal responsibility. For example, if an employer violates the law in setting a worker's probation period, the *Labor Contract Law* imposes a more severe punishment against the employer than the provisions of local authorities. Thus, Article 83 of the *Labor Contract Law* provides that, if an employer agrees to a probationary period with an employee in violation of the *Law*, the labor administration department shall order the employer to make corrections. If the illegally stipulated probationary period has been performed, the employer shall pay compensation to the employee according to the time worked on probation beyond the statutory period, at the rate of the employee's monthly wages following the completion of his or her probation. The damages here are actually the punitive damages which allow the employee concerned to obtain double wages.

[3] Forms of Employment Contracts

Articles 16 and 19 of the *Labor Law* recognize written employment contracts as the sole basis for the formation of an employment relationship between a worker and an employer. Emphasis on written contracts makes China's labor law different from other foreign countries. But such emphasis contrasts with the fact that a large number of non-written (oral) employment relationships exists in real life. The state of employment relationships without written contracts is referred to as de facto employment relationships.

The *Labor Contract Law* increased sanctions against employers who entered into de facto employment relationships to raise the rate signed employment contracts in China. Paragraph 1 of Article 82 of the *Labor Contract Law* provides that de facto employment relationships are a form of undertaking legal responsibility: "If an employer fails to conclude a written employment contract with an employee after the lapse of more than one month, but less than one year of the day when the employee started working, it shall pay the worker his (her) monthly wages at double the

amount." Moreover, paragraph 3 of Article 14 of the *Labor Contract Law* states: "If an employer fails to sign a written employment contract with an employee after the lapse of one year from the date the employee began to work, it shall be deemed that the employer and the employee have concluded an employment contract without a fixed term."

[4] Terms of Employment Contracts

Provisions on the terms of employment contracts are similar in many countries. Generally speaking, employment contracts can be divided into fixed-term employment contract, open-ended employment contracts, and project-based employment contract. The law in some countries stipulates that fixed-term employment contracts shall have a maximum duration which automatically terminates upon expiration. If the parties continue to perform the contract, the law generally provides that such contracts shall be automatically extended into an open-ended employment contract. Regarding open-ended employment contracts, the law requires that either party may terminate the contract at any time with prior notice. There is no (pre)determined expiration date for an open-ended employment contract, and only when the legal conditions for contractual termination occur can such contracts be terminated. Such contracts reflect extremely stable employment relationships.

Open-ended employment contracts can be divided into two categories: (1) contracts with arbitrary conclusions and (2) contracts with mandatory conclusions. The *Labor Contract Law* provides that an employer and an employee may conclude an open-ended employment contract through negotiations, consistent with a fixed-term contract. However, under certain conditions, an employer must sign an open-ended employment contract when: (i) an employee has already worked for the employer for ten full years consecutively, and proposes or agrees to renew or conclude an employment contract (except that worker proposes to sign a fixed-term employment contract); (ii) the employer initially adopts an employment contract system, or when a state-owned enterprise re-concludes an employment contract due to the restructuring, and the employee has already worked for this employer for ten years consecutively and has attained an age which is less than ten years up to the statutory retirement age; (iii) the employment contract is to be renewed after two fixed-term employment contracts have been concluded consecutively, and if the employee has not violated any work rules or engaged in other negligent misconduct, or is sick or injured for a non-work-related reason, and cannot resume his original position after expiration of the prescribed time period for medical treatment, and cannot assume any other positions arranged by the employer, or is incompetent in his position, or is still so after training or changing his position.

While regulating the parties for mandatory conclusion of open-ended employment contracts, the *Labor Contract Law* imposes strict legal liabilities (mostly against an employer) for failing to conclude an open-ended employment contract in accordance with law. For example, Article 82 stipulates that, if an employer fails, in violation of the *Law*, to conclude an open-ended employment contract with an eligible

employee, it shall pay to the employee his (her) monthly wages at double the amount, starting from the date on which the contract should have been concluded.

[5] The System of Invalid Employment Contracts

Generally speaking, a legally effective employment contract should fully satisfy the required legal conditions as a prerequisite. When an employer and a worker conclude an employment contract which does not meet the legal conditions, they cannot realize the legal consequences expected. Illegality is the basic standard of an invalid employment contract. The system of invalid employment contracts includes three aspects: (1) grounds for invalid employment contracts, (2) confirmation of invalid employment contracts, and (3) remedies for invalid employment contracts.

(1) Grounds for invalid employment contracts

Article 26 of the *Labor Contract Law* stipulates the grounds for the invalidity of employment contracts. For example, the employer or the worker uses such means as the fraud, coercion, or taking advantage of the other party's unfavorable position to sign an employment contract against his or her genuine will; the employer disclaims its mandatory liability or denies the worker's rights. However, if the employment contract exempts the worker's liability and the employer's rights, the employment contract shall not be invalid. In addition, if an employment contract shall be invalid if it violates laws or administrative regulations.

(2) Confirmation of invalid employment contracts

When an invalid contract does not go through the proper proceedings, and has clearly violated the mandatory provisions of laws and regulations, it should be held invalid. After entering the litigation or arbitral proceedings, and even if the parties do not claim its invalidity, the court and the arbitration institutions may intervene on behalf of the state or ex officio to hold that contract invalid by the principle of no trial without complaint. Under the *Labor Contract Law*, where an employer and a worker as the parties believe that a contract is invalid, they may also exercise their right to dissolve the contract. If they have the dispute regarding the whole or partial invalidity of the employment contract, such dispute on the contractual invalidity shall be determined by a labor dispute arbitration institution or the people's court rather than the labor administrative department.[20]

(3) Invalid relief of employment contract

Article 28 of the *Labor Contract Law* stipulates that, when an employment contract is confirmed to be null and void *ab initio*, and the worker has already performed the labor, the employer should pay labor remuneration to the worker. The amount of labor remuneration shall be determined with reference to the labor remuneration of a worker in the same or similar position with the employer in accordance with the *Labor*

20. *See* Article 26 of the *Labor Contract Law*.

the same day, after signing on it, as a promise to renew. Once the promise was made, the offer could not be revoked by the Company. Therefore, the Intier Company should conclude an open-ended employment contract with him. Moreover, the Company's act of sending him the form is a customary practice for renewing employment contracts. It was improper for the Court of First Instance to shift the burden of proof to him. Xu XX did not receive the *Letter of Notice* of the Company through the express mail service on July 21, 2011. The word "rejection" on the original delivery notice was crossed out, but this did not indicate his refusal to sign and accept the mail, rather the failure of the Company to deliver him the notice effectively. Furthermore, the payment of economic compensation was a unilateral act by the Company, which cannot be used as a justification for terminating the employment contract. In addition, the parties had different views regarding the facts of the case, and the ordinary procedure should be applied in the trial. As a result, it was illegal for the Court of First Instance to apply the summary procedure. The facts affirmed by the Court were not clear, the proceedings were not lawful, and the law applied was improper. Thus Xu requested the court of second instance to revoke the original judgment in accordance with the law and support the claim he raised in the trial of first instance.

The Intier Company argued that the facts affirmed by the Court of First Instance were clear, the applicable law was correct, and it disagreed with Xu's appeal, and requested the Court to dismiss his claims.

After the trial, the Shanghai No. 2 Intermediate People's Court found that the facts affirmed by the Court of First Instance were correct and thus upheld the decision of the Court of First Instance.

In addition, during the trial of first instance, the Intier Company provided two copies of the ZTP Express Mail Service details and the instruction note for rejecting or returning mail, showing the mail sent on July 21, 2011 with the words "notice of terminating the employment contract." "No need to receive this Mail ('Bu Yao Le' in Chinese [Pinyin])" was marked on the column of recipient name, and the words "Returning to Anting (Mail Service Point)" were specified on the instruction note for rejecting or returning mail. The words "(*Dismissal Letter* and *Employee Handbook*)" were written on the ZTO Express Mail Service details for the mail sent on August 1, 2011 with the words "Returning to Anting (Mail Service Point)" and "returned mail because of client's refusal to accept" were marked on the instruction note for rejecting or returning mail. The address specified in the two service details was "No. X, Lane X, Lane West XXX,[45] Pingliang Road"—Xu's residential address. Xu said he did not receive the notice of terminating the employment contract and denied that any express mail service company sent him such notice. Thus, he did not refuse to accept the notice. But Xu acknowledged he did receive the *Dismissal Letter* and the *Employee Handbook* sent via an express mail service company and refused to accept the mail.

45. The letter "X" or "XX" represents some information, which is just used in the judgment for the purpose of protecting the parties' privacy—Translator's note.

The Court also found during the trial of first instance that the Intier Company provided timesheets proving that Xu XX did not go to work after the expiration of the employment contract. Xu did not object to this but emphasized that it was not because he was unwilling to work.

The Shanghai No. 2 Intermediate People's Court held that an employer and an employee may conclude an open-ended employment contract through consultation. When they consecutively enter into a fixed-term employment contract twice, and the worker then requests or agrees to renew or conclude an employment contract, the parties shall conclude an open-ended employment contract, except in existences of statutory prohibited circumstances. In this case, the employment contract signed by the parties expired on July 31, 2011. If Xu XX wanted to sign an open-ended employment contract, he should request or agree to renew or to conclude such a contract with the Intier Company. The parties should bear the responsibility for providing evidence to prove the facts on which their claims are based, or to refute the facts on which the other party's claims are based. Where there is no evidence or the evidence is insufficient to prove the claimed facts, the party responsible for burden of proof should suffer the adverse consequences in the litigation. Xu claimed that the Intier Company sent him a form indicating its intention to renew the employment contract before the expiration of the contract. After signing the form, he returned it to the Company. As there are no mandatory provisions in the *Labor Contract Law* (2008) that an employer notify or inquire about a worker's intention to renew an employment contract one month in advance where the contract is set to expire, Xu bears the burden of proofs for the claimed facts according to the principle of "who claims, who presents the evidence." But he did not provide relevant evidence to the Court to fulfill his burden of proof. So it was not improper that the Court of First Instance did not credit his claims. Meanwhile, the Intier Company provided evidence such as the two ZTO Express Mail Service details and instruction note rejecting or returning mails to prove its intention not to renew the employment contract after expiration of the contract. Although the details and the note dated July 21, 2011 were not recorded in a standardized form, the details and the note dated August 1, 2011 were recorded in a complete and standardized manner. Xu acknowledged that the Company had sent him the *Dismissal Letter* and the *Employee Handbook*, but he refused to accept them. The facts affirmed by the Court of First Instance were not improper after considering such evidence as the ZTO Express Mail Service details and notes sent on July 21 and August 1, 2011.

To take a step back, even if the notice of termination of the employment contract on July 21, 2011 was not sent, when the courier company sent the *Dismissal Letter* and the *Employee Handbook* to Xu XX, he should also have known that the Company would not renew his employment contract and was going through the formalities of terminating the contract. Moreover, the fact that Xu did not go to the Intier Company for work after expiration of the employment contract also indicated that the contractual relationship had already expired naturally. The summary procedure applied by the Court of First Instance was line with the law. In sum, the facts affirmed by the Court of First Instance were clear, and there was no improper judgment in this case. Therefore, the court of second instance made the following judgment in accordance with Item 1 of paragraph 1 of Article 153 of the *Civil Procedure Law of the People's Republic of China*:

"Xu XX's appeal is dismissed, and the original judgment was upheld. Appellant Xu must pay the case acceptance fee for the trial of second instance at the amount of RMB 10. This judgment is final and binding to the parties."

III Commentary

On June 29, 2007, the *Labor Contract Law of the People's Republic of China* was adopted at the 28th meeting of the Standing Committee of the National People's Congress (hereinafter referred to as the "NPCSC"), which amended substantively a number of provisions of the *Labor Law* (1994) and implemented the amended law in 1995. For example, the NPCSC removed paragraph 2 of Article 20 of the *Labor Law* (1994) regarding the provision that an employer should enter into an open-ended employment contract with an employee. Thus, Article 14 of the *Labor Contract Law* (2008) now states:

> An employment contract without a fixed term refers to an employment contract in which an employer and an employee do not stipulate a certain time to end the contract. An employer and an employee may, through negotiations, conclude an employment contract without a fixed term. Under any of the following circumstances, if the employee proposes or agrees to renew or to conclude an employment contract, an employment contract without a fixed term shall be concluded unless the employee proposes to conclude a fixed-term employment contract: (1) The employee has already worked for the employer for ten years consecutively; (2) When the employer initially adopts the employment contract system or when a state-owned enterprise re-concludes the employment contract due to restructuring, the employee has already worked for this employer for ten years consecutively and (s)he attains the age which is less than ten years to the statutory retirement age; or (3) The employment contract is to be renewed after two fixed-term employment contracts have been concluded consecutively, and the employee is not under any of the circumstances mentioned in Article 39 and Paragraphs 1 and 2 of Article 40 of this Law. If the employer fails to sign a written employment contract with an employee after the lapse of one full year from the date the employee begins work, it shall be deemed that the employer and the employee have concluded an employment contract without a fixed term.

In addition, Article 11 of the *Implementation Regulations on Labor Contract Law of the People's Republic of China* (2008) (hereinafter referred to as the "*Implementation Regulations on Labor Contract Law* (2008)") provides: "Where an employee proposes to conclude an employment contract without a fixed term with an employer under Paragraph 2 of Article 14 of the *Labor Contract Law* (2008), the employer shall conclude an employment contract without a fixed term with him (or her), unless otherwise agreed to by the parties. The contents of an employment contract shall be determined by the parties under the principles of legality, equality, free will, negotiation for agreement and good faith. Any dispute over the contents shall be settled according to Article 18 of the *Labor Contract Law*."

There are four circumstances that may generate an open-ended employment contract between the parties in China: (i) the open-ended employment contract results from an agreement between an employer and an employee through negotiation; (ii) the

open-ended contract is concluded due to an employee's length of service; (iii) the open-ended contract is concluded due to number of prior contracts; or (iv) the open-ended contract arises from the factual employment relationship.

Two issues involved in this case are worthy of our discussion: (1) conditions for concluding an open-ended (employment) contract arising from number of prior contracts signed and (2) the burden of proof for concluding an open-ended employment contract.

[A] Conditions for Concluding an Open-Ended Contract Arising from Numbers of Prior Contracts Signed

There is little controversy in China's practice regarding the conditions for concluding an open-ended contract arising from a worker's length of service. Paragraph 2 of Article 20 of the *Labor Law* (1994) provides: "In case an employee has kept working for the same employer for ten years or more, and the parties agree to extend the term of the employment contract, an open-ended employment contract shall be concluded between them if the employee so requests." Here, we can find that there are three conditions for the parties to conclude an open-ended contract arising from the length of service: (1) the employee has already worked for an employer for ten years or more consecutively; (2) the parties agree to renew the employment contract; and (iii) the employee proposes to enter into an open-ended employment contract with an employer. Under paragraph 2 of Article 14 of the *Labor Contract Law* (2008), however, there are only two conditions for the parties to conclude an open-ended contract arising from length of service: (1) The employee has already worked for an employer for ten years or more consecutively. Article 10 of the *Implementation Regulations on Labor Contract Law* (2008) provides: "Where an employee is transferred to a new employer for reasons not attributable to himself, his length of service for the original employer shall be consolidated into his length of service with a new employer." (ii) The employee proposes or agrees to renew or conclude an employment contract, except that the employee proposes to enter into a fixed-term employment contract. Because the Law cancels the conditions for the parties to agree the renewal of employment contract, the employee has the right to request that the employer sign an open-ended employment contract.

With regard to an open-ended contract arising from the factual employment relationship, the *Labor Contract Law* (2008) also stipulates that "if an employer fails to conclude a written employment contract with an employee after the lapse of more than one month, but less than one year as of the day when an employer started using him, it shall be deemed that the employer has concluded an employment contract without a fixed term with the employee." Article 7 of the *Implementation Regulations on Labor Contract Law* (2008) provides that: "Where an employer fails to conclude a written employment contract with an employee after the lapse of one full year from the day when the employee is employed, under Article 82 of the *Labor Contract Law* (2008), the employer shall pay double his monthly wages from the day next to the lapse of a full month to the day before a full year since the start of the employee's employment.

It shall be deemed that the employer has concluded an employment contract without a fixed term with the employee on the day when it is a full year since the employee's employment, and a written employment contract without a fixed term shall be concluded with the employee immediately." Moreover, paragraph 2 of Article 82 of the *Labor Contract Law* (2008)[46] provides that: "If an employer, in violation of this Law, fails to conclude with an employee an employment contract without a fixed term, it shall pay the employee double his monthly wage, starting from the date which the employment contract without a fixed term should have been concluded." An open-ended contract arising from the factual employment relationship is virtually the same as an open-ended contract arising from length of service. They are not based on the parties' agreement to renew the contract, which is mandatory for the employer.

But there are two different understandings in China regarding the conditions for signing open-ended contracts arising from number of prior contracts, and there are also different methods of implementing the law in various locations. The key issue is that, after the parties have signed two consecutive fixed-term employment contracts, does this mean the employer must sign an open-ended contract as long as the employee so proposes or agrees? Or must it be on the premise that the parties agree to renew an open-ended contract?

The first view is that the conditions for concluding an open-ended employment contract after two consecutive fixed-term employment contracts are: As long as an employee does not voluntarily propose to enter into a fixed-term employment contract and does not have the circumstances described in Article 39 and Paragraphs 1 and 2 of Article 40 of the *(Labor Contract) Law*, (s)he shall have the right to request an employer to conclude an open-ended employment contract and the employer must sign the contract and cannot refuse such request. If conclusion of an open-ended contract after signing two consecutive fixed-term employment contracts is subject to the parties' mutual consent, then the employer would hold the initiative in concluding such a contract. If the employer refuses to sign an open-ended employment contract, it will make the law exist in name only. Under Article 14 of the *Implementation Regulations on Labor Contract Law* (2008), the conditions for establishing an open-ended employment contract are, "an employee proposes or agrees to renew and enter into an employment contract." In other words, either "an employee proposes to enter into the contract" or "an employee accepts an employer's offer for a new employment contract" can satisfy the conditions for concluding an open-ended employment contract in China.

Article 18 of the *Regulations of Jiangsu Province on Labor Contract* implemented on May 1, 2013 provides: "Where an employer and an employee have concluded a fixed-term employment contract twice consecutively after implementation of the *Labor Contract Law*, and the employee does not have any circumstances identical in Article 39, or Paragraph 1 or 2 of Article 40 of the *Labor Contract Law*, the employer shall give 30 days prior written notice before the expiration of the second employment contract to the employee so that they may conclude an open-ended employment contract. Where an employee has worked for the employer for over 10 years or more on a consecutive basis, the employer shall give a 30 days prior written notice before expiration of the second employment contract to the employee that they may conclude an open-ended employment contract."

46. Name of the Law here should be the *Labor Contract Law* (2008) rather than the *Regulations on the Implementation of the Labor Contract Law* (2008) in the original Chinese text as there are only thirty-seven clauses in the *Regulations*, and the quotation is exactly the content of Article 82 of the *Labor Contract Law* (2008)—Translator's note.

In the *Reply to Several Issues Concerning the Trial of Labor Dispute Cases (II)* [2014] issued by the First Civil Section of Zhejiang Provincial Higher People's Court and Zhejiang Provincial Labor Dispute Arbitration Court regarding the disposition of labor dispute cases, "... Question 5: Where an employer and an employee have consecutively signed two fixed-term employment contracts, shall the employee's request to conclude an open-ended employment contract after expiration of the second employment contract be supported by the court? Answer: Where an employer and an employee have signed two consecutive fixed-term employment contracts, the employee's request to conclude an open-ended employment contract based on Item 3, Paragraph 2 of Article 14 of the *Labor Contract Law* after the expiration of the second employment contract shall be supported. The content of the employment contract shall be negotiated and agreed between the parties in accordance with the principles of legality, fairness, equality, voluntariness, negotiation for agreement, and good faith. Where the parties cannot reach an agreement on the terms of the contract after negotiation, they shall implement the contract in accordance with Article 18 of the *Labor Contract Law*."

The second view is that the parties' conclusion of an employment contract shall follow the principle of equality and voluntariness. Only when the parties agree to renew the employment contract may it involve the issue of whether to sign a fixed-term or open-ended contract. But, if an employer must agree with an employee's proposal for entering into an open-ended contract as long as the latter so proposes after signing two consecutive fixed-term contracts, this will mean that the employer's autonomy is eliminated, which may result in a rigid employment relationship. Although the second contract signed by the parties is in the form of a fixed-term contract, it has in fact become an open-ended employment contract.

Some scholars believe that there are four steps for concluding an open-ended contract in accordance with relevant provisions of the *Labor Contract Law* (2008). Step one is that an employee enters into the fixed-term employment contract twice consecutively with an employer. Step two is to determine whether or not the employee has the circumstances described in Article 39, or Paragraphs 1 and 2 of Article 40 of the *Labor Contract Law* (2008). Step three is that the parties reach an agreement on renewing the employment contract. Step four is that the employee proposes or agrees to renew the employment contract. So long as an employee needs to "propose or agree to renew the employment contract", the result is an open-ended employment contract which employer shall renew, i.e. the open-ended employment contract is mandatory in

effect.[47] Under the *Opinion of the Shanghai Higher People's Court on Several Issues concerning Application of the Labor Contract Law* (2009) (Hu-Gao-Fa [2009] No. 73), "an open-ended employment contract shall be concluded for contractual renewal after the parties entered into several fixed-term employment contracts consecutively. Item 3, Paragraph 2 of Article 14 of the *Labor Contract Law* (2008), refers to the situation when an employee signs an employment contract for the third time after having consecutively entered into two fixed-term employment contracts, and then proposes to renew an open-ended contract." I myself tend to support the second understanding.

First, judging from the legislative principle, Article 3 of the *Labor Contract Law* (2008) stipulates: "The principle of lawfulness, fairness, equality, free will, negotiation for agreement and good faith shall be observed in the formation of an employment contract. An employment contract concluded according to the law shall have the binding force on the parties. The employer and the employee shall perform the obligations set forth in the employment contract."

After the promulgation of the *Labor Contract Law* in 2008, Mr. Cao Kangtai, the then Director of the State Council Legislative Affairs Office, emphasized at a press conference of the Information Office of the State Council that open-ended employment contracts are not "an iron-bowl job" or "lifelong tenure." Yin Weimin, the then Minister of Human Resources and Social Security, held that the open-ended employment contract is a market-based employment mechanism. Workers have the right to choose an employer for which they are willing to work while employers also have the right to choose workers to give them flexibility in hiring. This is a common practice in all countries of the world. In my opinion, the second understanding is more in line with the legislative intent.

Second, judging from the relevant definitions, Article 12 of the *Labor Contract Law* (2008) provides: "Employment contracts are classified into fixed-term employment contracts, employment contracts without a fixed term, and the employment contracts that set the completion of specific tasks as the term to end the contract." Article 13 also states: "A fixed-term employment contract refers to an employment contract in which an employer and an employee stipulate the contract term. The employer and the employee may conclude a fixed-term employment contract upon negotiation." Moreover, Article 14 states that "An employment contract without a fixed term refers to an employment contract in which an employer and an employee do not stipulate a specific time to end the contract." The biggest difference between a fixed-term employment contract and an open-ended employment contract is whether it is terminated upon its expiration. If a fixed-term employment contract cannot be terminated after the expiration, it is obviously inconsistent with the definition of the fixed-term employment contract under the *Labor Contract Law* (2008).

Third, judging from the legal provisions, the three drafts of the *Labor Contract Law* state that: "After concluding two consecutive fixed-term employment contracts, an employee who has proposed or agreed to renew the employment contract shall

47. Dong Baohua [董保华], *The Contending and Thinking of Legislation on Labor Contract* [劳动合同立法的争鸣与思考], (2011) Shanghai [上海]: Shanghai People's Publishing House [上海人民出版社].

conclude an employment contract without a fixed term with an employer." In addition, the NPCSC Law Committee in the three drafts of the *Report on the Result of Deliberation of the Draft Labor Contract Law of the People's Republic of China* pointed out that: "The open-ended employment contract is an employment contract with 'no definite termination time', it is not a life-long 'iron-bowl job'." It can be dissolved as long as the statutory circumstances exist for terminating the contract. If an employee complies with the law and disciplinary rules and can complete his/her labor tasks, during the period of two consecutive fixed-term employment contracts, it is then reasonable for the employer to enter into an open-ended employment contract with that employee. Accordingly, the Law Committee proposed to amend this condition into two: "Where the parties have entered into two fixed-term consecutive employment contracts and the employee does not fall under any circumstances described in Article 39 of the *Labor Contract Law*", they shall conclude an open-ended contract. In the *Draft Labor Contract Law* (Version III), it is not difficult for us to see that the original intent of the legislature was that workers should have the initiative to decide whether or not to sign an open-ended contract. The employer shall conclude an open-ended employment contract with an employee after two consecutive fixed-term employment contracts if the employee proposes or agrees to renew the contract. But the *Labor Contract Law* made some important amendments. According to the three drafts of the *Labor Contract Law*, the conditions for the parties to conclude an open-ended employment contract are: (i) two consecutive fixed-term employment contracts concluded by the parties and (ii) the employee proposes or agrees to renew the contract. Based on the recommendations of the Law Committee, the provisions regarding the conditions for concluding an open-ended employment contract arising were amended as follows: (i) two consecutive fixed-term employment contracts concluded by the parties; (ii) the employee do not fall under any of the circumstances set forth in Article 39 of the (Labor Contract) Law; and (iii) the employee proposes or agrees to renew the contract.

But, according to the final version of the *Labor Contract Law* (2008) promulgated by the Chinese legislature, there are four conditions for the parties to conclude an open-ended contract: (1) two consecutive fixed-term employment contracts concluded by the parties; (2) the employee does fall under any of the circumstances set forth in Article 39 and Items 1 and 2 of Article 40 of the (Labor Contract) Law; (iii) the parties are to renew an employment contract; and (iv) the employee proposes or agrees to renew the contract with the exception that (s)he proposes to conclude a fixed-term employment contract. We cannot ignore this legislative change in the *Labor Contract Law*. Comparatively speaking, the second understanding is obviously more reasonable.

In practice, the second understanding has been extensively accepted by employers and workers in places such as Shanghai over the past seven to eight years, which has contributed to maintain harmony and stability in employment relationships. For the parties in this case, the focal point of the dispute was on the burden of proof for the conclusion of an open-ended employment contract, as they had no objection to the understanding of statutory conditions for concluding such contracts.

Of course, there is also an alternate understanding of the provision of Paragraphs 2 and 3 of Article 14 of the *Labor Contract Law* (2008) in practice: "When an employer

renews an employment contract with an employee for a third time after two consecutive fixed-term employment contracts, and if the worker proposes to conclude an open-ended employment contract …", the term "for a third contract" in this context only refers to the third time and does not apply to renewing contracts for a fourth or subsequent times. In my view, there is no basis for such understanding. The conditions for concluding an open-ended employment contract arising from the third, fourth, fifth, or subsequent times should be the same.

This case involved a dispute over the conclusion of open-ended employment contracts arising from the number of signing the contract. After the expiration of the employment contract, the Intier Company did not intend to renew the contract with Xu XX, but it decided to terminate the contract instead and pay him economic compensation for the termination as required by law. Therefore, Xu's request for the Intier Company to sign an open-ended employment contract with him effective from August 1, 2011 had no factual and legal basis, so the Court did not support his claim.

[B] Burden of Proof for Concluding an Open-Ended Employment Contract by the Parties

Article 14 of the *Labor Contract Law* (2008) provides: "An employment contract without a fixed term refers to an employment contract in which an employer and an employee stipulate no certain time to end the contract. The parties may, through negotiations, conclude an employment contract without a fixed term. Under any of the following circumstances, if the employee proposes or agrees to renew or conclude an employment contract, an employment contract without a fixed term shall be concluded unless the employee proposes to conclude a fixed-term employment contract:

(i) The employee has already worked for the employer for 10 years consecutively;
(ii) When the employer initially adopts the employment contract system or when a state-owned enterprise re-concludes the employment contract due to restructuring and the employee has already worked for this employer for 10 years consecutively and has attained an age which is less than 10 years from the statutory retirement age; or
(iii) The employment contract is to be renewed after two consecutive fixed-term employment contracts have been concluded, and the employee does not fall under any of the circumstances set forth in Article 39 and Paragraphs 1 and 2 of Article 40 of this Law."

There is a premise for concluding an open-ended employment contract no matter whether it arises from the length of service, or from the number of prior contracts, that is, "where an employee proposes or agrees to renew or conclude an employment contract." In other words, if an employee is silent—including if both parties are silent in this regard—and does not propose or express his/her intent to renew or conclude the contract, and this fails one of the prerequisites for such contract renewal or conclusion,

the employer shall not have a statutory obligation to conclude an open-ended employment contract. Then, who shall bear the burden of proof on this issue?

In practice, the first opinion is that the employer who proposed or agreed to renew or conclude an employment contract shall bear the burden of proof. If workers are required to bear the burden of proof on "having proposed to conclude an open-ended employment contract with an employer", it is very difficult for them to provide evidence that can be verified after the dispute occurred. Even if workers clearly express their intent to renew or conclude open-ended contracts, the employer may also deny these claims.

Article 18 of the *Regulations of Jiangsu Province on Labor Contract* (2013) provides: "Where an employee has worked for an employer for over 10 years on consecutive basis, the employer shall give him (or her) a 30 days prior written notice before the expiration of the contract." Article 19 stipulates that "where an employee who qualifies for the conclusion of an open-ended employment contract has not proposed such contract nor proposed to terminate the contract upon expiration, but continues to work for the same employer, it shall be deemed as agreement to conclude an open-ended employment contract."

The second opinion is that, if an employer is required to bear the burden of proof, it is obvious that the employer is unable to complete such burden to prove that "the employee has not expressed the intent to renew the employment contract before expiration of the original employment contract." But the overemphasis on the employer's burden of proof will in turn place them in a high degree of legal risk, thus allowing a few unscrupulous workers to receive improper benefits.

The *Guiding Opinion of Shenzhen Intermediate People's Court on Several Issues involving Adjudication of Cases of Labor Disputes (for Trial Implementation)* (2009) promulgated by the Shenzhen Intermediate People's Court stipulates: "Where the parties claim to conclude an open-ended employment contract, they shall present supporting evidence." Zhou Guoliang, President of the Shanghai Municipal Labor Dispute Arbitration Court held that "a reasonable burden of proof shall be allocated as follows in cases involving disputes over open-ended employment contracts: Employees shall bear the burden of proof on the conditions for concluding an open-ended employment contract, while an employer shall bear the burden of proof on the exceptions for the conclusion of an open-ended employment contract. In dealing with specific cases, however, the arbitration tribunal shall consider the particularity of each labor dispute, and apply the principles of fairness, good faith, and free evaluation of evidence."[48]

I think the burden of proof regarding the conclusion of open-ended employment contracts can be appropriately allocated as follows: For disputes regarding whether open-ended contracts should be concluded based on the length of employment, the burden of proof can be imputed to an employer regarding proving the exceptions for the conclusion of such contract. As for the disputes regarding whether open-ended

48. Zhou Guoliang [周国良], "Analysis of the Burden of Proof for the Conclusion of Open-ended Employment Contracts" [订立无固定期限劳动合同的举证责任简析], (2010) *Shanghai Human Resources and Social Security* (Journal) [上海人力资源社会保障] 8:52–54.

Sun stated that his length of service for the Company was over ten years[27] starting from July 1999 as the time of commencing the work and that he should enjoy annual leave for five days in 2010, and ten days starting from 2011. During the trial, Sun provided an *Incumbency Certificate* affixed with the official seal of Shanghai-based New Thinking Fashion (China) Ltd to prove that he was a legal affairs specialist in the office of this company from May 2002 to December 2006. Sun also provided an *Incumbency Certificate* affixed with the official seal of Shanghai Sanli Huizhong Automobile Parts Co., Ltd. to prove that he was a legal affairs specialist in that company from July 2007 to July 2008. Sun alleged that the New City Company never arranged for him to take annual leave. Although he applied for annual leave to the Company, he was informed that such leave entitlement could only be enjoyed by staff who has worked over one year in the Company. In August 2011, when he applied for continuous annual leave, the Company only approved his leave for two days, and they did not reach an agreement on the days of annual leave to be approved. The New City Company arranged for Sun to take a tour in June 2012 to offset his annual leave entitlement for two days; however, he argued such tour arrangement belonged to staff welfare and should not be deducted from the days of leave entitlement. Moreover, Sun denied seeing the *Employees Handbook* and claimed that he was not aware of the Company's regulations that the unused annual leave expires after year-end and that such regulations violate the law.

The New City Company argued that it was difficult to confirm the authenticity of the two documents provided by Sun from the Shanghai-based New Thinking Fashion (China) Ltd and the Shanghai Sanli Huizhong Automobile Parts Co., Ltd. Given that the Company was not clear about the information on Sun's previous employment history, he should not enjoy paid leave for ten days each year. The Company confirmed that it did not arrange Sun to take any annual leave in 2010 and 2011, but argued that his claims for arbitration regarding the converted remuneration for unused annual leave in 2010 exceeded the statutes of limitation, and that they had expressly agreed upon the expiration of unused annual leave in the employment contract. The New City Company also pointed out that it published information on staff's paid annual leave each year on its intranet, requested that those who have not used up their annual leave should take it in the year-end, and, if not, that the unused leave shall be deemed as the voluntary forfeit, and that the staff entitled must first apply for the annual leave as arranged by the Company. In addition, the Company confirmed that it sent Sun on a tour and offset his annual leave for two days in 2012, but did not arrange for him to spend the remaining days of his accrued annual leave.

27. Article 3 of the *Regulations on Employees Paid Annual Leave* (2008) stipulates that where the staff who worked accumulatively for more than one full year but less than ten full years, (s)he shall be entitled to (paid) annual leave for five days; where the staff who worked accumulatively for more than ten full years but less than twenty full years, (s)he shall be entitled to (paid) annual leave for ten days; where the staff who worked accumulatively for more than twenty full years, (s)he shall be entitled to (paid) annual leave for fifteen days.

II Ruling and Reasoning

The Labor and Personnel Dispute Arbitration Commission of Qingpu District in Shanghai held that Sun was entitled to paid annual leave during the year based on the provisions of the *Employees Handbook*; however, he failed to produce evidence to support his claims that he applied for annual leaves to the Company before December 31, 2011 and 2012 respectively, which should be seen as voluntary forfeit of his annual leave entitlements in 2011 and 2012. Regarding the unused annual leave in 2010, the Arbitration Committee thought that Sun should know, or should have known, to apply for the arbitration within one year from the date of his rights being violated.[28] Accordingly, the Commission did not support Sun's claim for converted remuneration for unused annual leave for the years from 2010 to 2012.

Sun refused to accept the arbitration decision and brought the case to the Court. The Court held that, according to the relevant laws and regulations, only when an employer arranges for an employee to take annual leave, but the latter proposed in writing not to take leave due to personal reasons, may it choose not to pay the employee the remuneration arising from unused annual leave.[29] Only when a worker expresses his/her willingness not to take annual leave in a positive way can the Court determine if the worker has expressed his/her intent to give up his or her right to annual leave. The New City Company's regulations, in essence, treat the workers' negative and implied act of not applying for annual leave as the expression of intent to give up their right to annual leave, which is obviously incompatible with relevant national regulations. Therefore, the Court held that the Company cannot, based on the provisions of its *Employees Handbook*, presume the waiver of rights under the act that Sun did not apply for the annual leave. The time that Sun opened his provident fund account on September 21, 1999 does not necessarily prove that he had the corresponding length of service after opening the account. Sun provided two copies of *Incumbency Certificate* without other collateral supporting evidence, which only proves that he has seven years of work experience. As a result, the Court was able to confirm that Sun's accumulated length of employment was more than one year but less than ten years, as of December 2012, based on the pension contributions that he provided. It also held that any staff who worked continuously for more than twelve months was entitled to paid annual leave.[30] In this case, Sun did not provide any evidence proving that he had worked consecutively for more than twelve months before working in the New City Company, so the Court affirmed that Sun could only enjoy the annual leave since

28. Article 27 of the *Law of the People's Republic of China on Labor Disputes Mediation and Arbitration* (2008) stipulates that the limitation period for applying the arbitration of labor disputes is one full year. The period of arbitration shall be calculated from the date on which the parties know or ought to know that their rights have been infringed upon.
29. Article 10 of the *Measures for the Implementation of the Annual Leave of Enterprise Employees* (2008) stipulates that the employer shall arrange employees for annual leave but may pay only the wage income during the normal working period if the employee proposes in writing not to take annual leave due to personal reasons.
30. Article 3 of the *Measures for the Implementation of the Annual Leave of Enterprise Employees* (2008) stipulates that the employees who have worked consecutively for more than twelve months shall enjoy paid annual leave.

August 12, 2011. Calculated on this basis, he was entitled to enjoy the annual leave for one day in 2011 and for five days in 2012. Regarding the issue of whether the two-day tour arranged by the New City Company in 2012 should be included in the annual leave category, the Court held that a tour organized by an employer is benefit for its employees, and the employer should enjoy the right to decide the terms and conditions of employee benefits that have not been agreed between them, as such welfare arrangement beyond the parties' agreement falls into the employer's autonomy. Therefore, the New City Company's practice of offsetting the days used for Sun's tour from the annual leave did not violate any compulsory provisions of the law. If an employee argued that the days used for the organized tour by the Company should not be deducted from the days of annual leave, (s)he could give up participating in the tour. The Company's practice of offsetting days used for its organized tour from annual leave will not lead to an infringement upon Sun's right to annual leave, so his act of participation in the tour should be deemed as the agreement to accept the Company's arrangement for annual leave. In sum, the Qingpu District People's Court of Shanghai ruled that the New City Company should pay Sun remuneration regarding the unused annual leave for one day in 2011 and three days in 2012. After receiving the Court's judgment, Sun was dissatisfied with the result and appealed to the Shanghai No. 2 Intermediate People's Court (hereinafter referred to as the "Intermediate Court").

The Shanghai No. 2 Intermediate People's Court in the trial of second instance held that the judgment made by the Court of original trial was correct, and thereby dismissed the appeal and upheld the original judgment.

III Commentary

[A] Conditions of Enjoying the Annual Leave

The *Regulations on the Paid Annual Leaves of Employees* (2008) (hereinafter referred to as the "*Regulations* (2008)") provide that "an employee who has served for one year accumulatively is entitled to annual leave for the current year (hereinafter referred to as the 'annual leave')." Moreover, the *Measures on the Implementation of Paid Annual Leave for Employees of Enterprises* (hereinafter referred to as the "*Implementation Measures*") provide that "Employees who have worked continuously for one year or more are entitled to paid annual leave." These provisions failed to explicitly explain whether the term "working for one year (12 months) consecutively" is restricted to the same employer. This can be reflected in two different views in practice.

The first view is that an employer can arrange annual leave for employees in a unified manner.[31] An employer may only consider the right to paid leave of those employees who have worked in the unit for a longer time and made some contributions to its corporate development. In other words, the employer will generally not consider an employee's previous length of service for other employers when considering paid

31. Article 5 of the *Regulations on the Paid Annual Leave of Employees* (2008) stipulates that the unit shall arrange the annual leave of the staff according to the specific circumstances of production and work and take into account the wishes of the employees themselves.

annual leave for its own employees. Also, the employer will in no doubt increase the employment costs if it has to take into account the employee's prior employment record when calculating annual leave. That is, a new employer must verify the work experience and accumulated length of service before recruitment, which is in fact difficult to be operated in practice. Therefore, the employees are entitled to paid annual leave for the same employer if they work continuously for more than twelve months. Since the implementation of the Regulations in 2008, many local labor law authorities hold such views. For example, paragraph 1 of Article 2 of *Several Opinions on the Implementation of Paid Annual Leave System for the Employees in the enterprise of Guangdong Province* (Yue-Lao-She-Fa [2009] No. 7) provides that "workers who have worked continuously for more than 12 months refers to the employees who have worked continuously for the same employer for more than 12 months."[32]

The second view is that the condition of enjoying annual leave is that "the employees have worked continuously for more than one year (12 months)" is not restricted to the same employer. The state protects workers' rights to rest and paid leave regardless of a change of employment relationship or job position, and the days of a worker's annual leave cannot be denied or diminished because of such change. Later, the Ministry of Human Resources and Social Security issued an official document *Reply to the Letters on the Issues Involving the Measures on the Implementation of Paid Annual Leave for the Employees of Enterprises* (Ren-She-Ting-Hang [2009] No. 149), providing that the conditions of an employee's paid annual leave—for employees who have worked continuously for more than one year (twelve months)—include not only the circumstance where employees have worked continuously for more than one year (twelve months) for the same employer but also for different employers. Article 5 of the *Implementation Measures* specifies that "The days of annual leave which may be taken by a new employee who satisfies the requirement of Article 3 in the current year shall be calculated based on the number of days from the time when he is employed by this employer to the end of the calendar year; and if the result is less than one day, (s)he shall not enjoy annul leave this year." If we qualify an employee's conditions for enjoying the annual leave as having worked continuously for the same employer for (over) twelve months, it is impossible for the new employee recruited in that (calendar) year to meet the condition of having completed continuous service for twelve months, and consequently, they cannot enjoy the right to annual leave in that calendar year, not to mention the problem of calculating the days of paid annual leave. Therefore, judging from Article 5 of the *Implementation Measures*, we can infer that the condition that a worker "has worked continuously for more than one year (12 months)" is not necessarily limited to working for the same employer.

At present, the majority of researchers and practitioners endorse the second view. When I analyzed the two contrasting views, I noticed that just after implementation of the *Regulations*, the paid annual leave system has been gradually understood

32. The *Regulations* was abolished in 2012.

and accepted by the general public in China. The following are some differences regarding the characteristics between the paid annual leave and other holidays and leaves:

> First of all, the right to leave is a right to rest,[33] which generally includes the right to take time off from work, to rest, and the right to peace. The right to rest belongs to a fundamental right of citizens under the Constitutional Law in China.[34] The right to rest is a right for workers to rest and recuperate so as to protect workers' health and to improve work efficiency. Its purpose is to guarantee that workers' fatigue is removed and their physical and mental states recovered and developed, to ensure that workers have the conditions for part-time training, to constantly improve their professional capacity and cultural levels, to provide safeguards for workers to have time to care for family and personal affairs, and to enrich family life.[35] To guarantee the workers' right to rest, the Chinese government established the paid annual leave system,[36] in addition to imposing strict provisions on work time, rest, and leaves including weekday rest periods and statutory holiday rest periods. Such legislation aims not only to protect workers from fatigue but also to ensure that they can get a fairly longer period of leisure and adjustment time to achieve the goals of receiving training and learning, upgrading personal knowledge, and dealing with personal and family affairs. In general, implementation of the paid annual leave system is designed to support achievement of personal life goals that are difficult to achieve through the regular weekday rest periods. Accordingly, it makes sense to treat the conditions of annual leave and those for other rest periods differently. From this point of view, we can argue that the conditions of enjoying the annual leave have nothing to do with an employee's change of employer but with his/her long-term work life.
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> Second, judging from the literal interpretation, the term "having worked continuously" shall mean the worker's continuous labor time, which can also refer to the workers' continuity of an employment relationship. If we interpret the term "having worked continuously" as a "having worked continuously for the same employer", we will make an error through a literal translation that limits the interpretation to just one employer.

Obviously, the requirement of "having worked continuously for more than one year (12 months)" as a condition of enjoying annual leave is a right entrusted by the

33. The *Universal Declaration of Human Rights* states: "Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay." (Article 24).
34. Article 43 of the *Constitution of the People's Republic of China* provides: "Workers shall have the right to rest."
35. *Dictionary of Law* [法学词典], (1989) Shanghai [上海]: Shanghai Cishu Press Co., Ltd. [上海辞书出版社], at p. 343.
36. Article 45 of the *Labor Law of the People's Republic of China* provides: "The state implements the paid annual leave system. Workers who have worked for more than one full year shall enjoy the right to paid annual leave."

state to employees who work for a long time—in addition to normal rest periods—to enjoy longer period of leave.[37] At this point, it should not consider for whom an employee is working, or with whom an employee signed an employment contract. Instead, it should take into account whether the continuous working time of the employee meets the required standard. If a new (recruited) employee has not worked continuously for less than one year (twelve months), (s)he is not qualified for the annual leave. But if the employee has worked continuously for more than one year (twelve months) before joining the current employer, (s)he may enjoy the right to annual leave in the calendar year. By contrast, if an employee has been unable to work normally for a long time, (s)he is not entitled to annual leave in that calendar year.[38] Regarding a new employee who meets the requirement of having worked continuously for more than one year (twelve months), his/her days of annual leave shall be calculated based on the working period for the two employers.[39]

Regarding the conditions for enjoying annual leave, it may involve an employee terminating an employment relationship and establishing another employment relationship after quitting a job and working for another employer. The problem is, if a worker has never completed one year of continuous service for the same employer, how do we calculate his/her "continuity" of the service after being recruited to work for the next employer? Obviously, we cannot simply think that such employee has not had the continuity of service because of changing the job, or we will return to the discussion of the requirement on working for the same employer continuously for more than one year (twelve months). In practice, the majority opinion holds that it is

37. Wang Linqing [王林清], *Norms and Standards for Litigation and Arbitration in Labor Disputes* (2nd Edition) [劳动争议裁诉标准与规范], (2014) Beijing [北京]: People's Court Press [人民法院出版社]. According to Wang, the annual leave refers to the continuous leave of the workers enjoyed each year on the condition of retaining the original post and wages (p. 268).
38. Article 4 of the Regulations on the Paid Annual Leave of Employees (2008) provides: "An employee is not entitled to annual leave for the current year if he is under any of the following circumstances: (1) the employee is entitled to summer and winter vacations in accordance with the law and the number of days of such vacations is more than that of his annual leave; (2) the employee has taken more than 20 days of casual leave accumulatively and his unit does not deduct wages in accordance with provisions; (3) the employee has served one full year accumulatively but less than 10 full years and has taken more than two months of sick leave accumulatively; (4) the employee has served 10 full years accumulatively, but less than 20 full years, and has taken more than three months of sick leave accumulatively; or (5) the employee has served more than 20 full years and has taken more than four months of sick leave accumulatively." In addition, Article 14 of the *Measures on the Implementation of Paid Annual Leave for Employees of Enterprises* stipulates: "If the days of wage paid by the staffing firm to the employee without job during the employment contract period is more than the days of annual leave time due in the current year the employee shall not be entitled to the annual leave in the current year. If the days are less than the entitled days of annual leave in the year the staffing firm or the employer shall negotiate to give the dispatched employee the untaken annual leave."
39. Article 5 *of the Measures on the Implementation of Paid Annual Leave for Employees of Enterprises* states: "The days of annual leave which may be taken by anew employee who satisfies the requirement of Article 3 in the current year shall be calculated based on the number of days from the time when he is employed by this employer to the end of the calendar year and if the result is less than one day he shall not enjoy annul leave this year."

No. 997) on December 3, 2010, and did not to support all of her claims. Sun refused to accept the arbitral award and brought the case to the Jing'an District People's Court of Shanghai, requesting the Times Company to pay her: (i) double wages at the amount of RMB 30,300 for failing to sign an employment contract during August 1, 2008 and August 5, 2010; (ii) economic compensation at the amount of RMB 2,500 and damages at the amount of RMB 5,000 for illegal dissolution of an employment contract; (iii) high-temperature work allowance fee at the amount of RMB 2,400 covering the period from 2008 to 2010; (iv) year-end bonus at the amount of RMB 2,000 and the double year-end wages at the amount of RMB 5,000 for the years of 2008 and 2009; (v) statutory holiday remuneration at the amount of RMB 1,740; (vi) unused annual leave days at the amount of RMB 720 after wage conversion; (vii) social insurance fees from July 2008 to August 2010; and (viii) holiday gifts and new year's eve dinner at the amount of RMB 3,000 after wage conversion.

In the trial of first instance, Sun Lan requested that the Time Company sign and continue to perform an open-ended employment contract with her and withdrew her claim of requesting the Time Company to pay her economic compensation at the amount of RMB 2,500 and damages at the amount of RMB 5,000 for illegal dissolution of the employment. The Court of First Instance, Jing'an District People's Court of Shanghai, determined that Sun was not assigned to work on the statutory holidays during the employment period.

The Jing'an District People's Court made the following judgment in accordance with Articles 68, 69(1), and 71 of the *Labor Contract Law of the People's Republic of China* (hereinafter referred to as the *"Labor Contract Law"*): (i) the Court does not support Plaintiff Sun's request for the Times Company to pay her double wages at the amount of RMB 30,300 for failing to sign the employment contract during August 1, 2008 and August 5, 2010; (ii) the Court does not support Plaintiff Sun's request for the Times Company to sign an open-ended employment contract; (iii) the Court does not support Plaintiff Sun's request for the Times Company to pay her high-temperature work allowance fee at the amount of RMB 2,400 from 2008 to 2010; (iv) the Court does not support Plaintiff Sun's request for the Times Company to pay her year-end bonus at the amount of RMB 2,000 and the double year-end wages at the amount of RMB 5,000 from 2008 to 2009; (v) the Court does not support Plaintiff Sun's request for the Times Company to pay her RMB 1,740 for statutory holiday remuneration; (vi) the Court does not support Plaintiff Sun's request for the Times Company to pay her RMB 720 for unused annual leave (days) after wage conversion; (vii) the Court does not support Plaintiff Sun's request for the Times Company to pay her RMB 3,000 for holiday gifts and new year's eve dinner after wage conversion; and (viii) the Times Company should compensate Plaintiff Sun RMB 720 within ten days from the date since the judgment becomes effective.[1]

Plaintiff Sun Lan was dissatisfied with the judgment of first instance and appealed to the Shanghai No. 2 Intermediate People's Court. She argued that, the facts determined by the Jing'an District People's Court were not clear, and the judgment was

1. In this case, Defendant voluntarily proposed to compensate Plaintiff at this amount.—Translator's note.

a miscarriage. She requested the court of second instance remand the original judgment to support all of her claims raised in the trial of first instance. The Times Company replied that it agreed with the judgment of the Jing'an District People's Court and requested to dismiss Sun's appeal. The Shanghai No. 2 Intermediate People's Court held that the key issue in this case was whether Sun was under full-time or part-time employment. After hearing the case, the court of second instance held that the facts determined by the Court of First Instance were clear, the statement and reasoning were sufficient, and the views were adequate to support the judgment. Therefore, it dismissed Sun's appeal.

II Ruling and Reasoning

The key dispute in this case is whether the employment relationship established between Sun Lan and her employer, the Times Company, was on the basis of full-time or part-time employment. After hearing the case, the Court of First Instance held that the Times Company and the Huateng Company are two independent legal persons and that Sun worked in the registered addresses of the two companies respectively. Although she said that she did not know the Huateng Company, the photos provided by the Times Company showed there were marked signs of the Huateng Company that she should recognize. Sun's statement was not in line with the objective facts, and thus the Court of First Instance did not support her claims. Even though Sun was set by the Times Company to work for the Huateng Company, five hours per day and five days per week, such arrangement did not meet the requirements for full-time employment. As a result, the Court of First Instance did not uphold Sun's claim that she had established a full-time employment relationship with the Times Company. Based on the definition of part-time employment that it is paid on hourly basis, and such workers should not work for more than four hours per day and over twenty-four hours accumulatively per week for an employer on average, the abovementioned work arrangement for Sun was basically in line with the feature of part-time employment. Accordingly, the Court of First Instance agreed with the claim of the Times Company that its employment relationship with Sun was on a part-time basis. Because the parties may establish a part-time employment relationship through oral agreement, Sun's request for the Times Company to pay her double wages from August 1, 2008 to August 5, 2010 due to the failure to sign an employment contract was not supported by the Court of First Instance. The employment relationship established between Sun and the Times Company was on part-time basis, the circumstances requiring an open-ended employment contract did not exist, and either party under a part-time employment relationship may notify the other party to terminate the employment at any time. Therefore, Sun's request for the Times Company to sign and continue to perform an open-ended employment contract had no legal basis, and thus was not supported by the Court of First Instance. Moreover, given that the Times Company had never arranged for Sun to engage in the outdoor work and could take effective measures to

week while those under part-time employment relationships generally work no more than four hours per day and no more than twenty-four hours per week on average.

[3] Payment Cycle

Wages under full-time employment relationships are generally paid on a monthly basis, and the longest payroll cycle is monthly payment while the maximum wage settlement period for part-time employment relationships is fifteen days. Of course, whether it is under a full-time or part-time employment relationship, wages should be paid in currency.

[4] Minimum Wage

Workers under full-time employment relationships shall be paid the minimum wage on a monthly payment cycle while those under part-time employment relationships shall be paid the minimum wage on hourly pay basis. Of course, in terms of calculating personal income tax, workers under either employment relationship apply the same standard.

[5] Overtime Pay

In specific situations, workers under full-time employment relationships shall be paid for overtime work in accordance with 150%, 200%, and 300% of the base wage while under the Chinese law, there are no clear provisions regarding overtime payments for those under a part-time employment relationship.

[6] Probation Period

Generally speaking, workers under full-time employment relationships may set a probation period in the employment contract with an employer apart from making an agreement regarding on completing certain tasks. By contrast, it is absolutely prohibited for parties under a part-time employment relationship to agree on the probation period in the employment contract.

[7] Number of Employers

It is not prohibited for an employee under a full-time employment relationship to work for more than one employer by law, but (s)he would work for one employer in most cases due to long working hours per day. As for part-time employment relationships, there are more occasions where an employee can work for several employers in practice.

[8] Protections Against Dismissals

Workers under full-time employment relationships enjoy a relatively high degree of protection against an employer's dismissal. The employer cannot dismiss an employee without having any statutory justifications or complying with the statutory procedures. By contrast, the part-time employment relationship emphasized the flexibility of employment, and an employer may dismiss an employee at any time even without cause.

[9] Compensation for the Dismissal

Employees under full-time employment relationships shall enjoy the right for economic compensation and payment in lieu of notice by law when the employer dissolves or terminates the employment relationship and may ask for damages in case of illegal dissolution of the employment relationship. But under part-time employment relationships, the employer has no legal obligations to pay economic compensation at the time of dissolving the employment relationship.

[10] Social Insurance Contributions

Both an employer and an employee under the full-time employment relationship shall have the statutory obligation to pay their social insurance contributions while for the part-time employees, the employer has the statutory obligation to pay only the insurance for work-related injuries, and other items of social insurance may be agreed to by the parties. For example, the employer pays the employee who contributes such portion by his/herself.

[B] Criteria for Identifying the Part-Time Employment Relationship

Looking at the abovementioned ten points, there are striking differences between part-time and full-time employment relationships. So, what are the standards for identifying the part-time employment relationship?

In 2005, the then Ministry of Labor and Social Security promulgated the *Circular of the Ministry of Labor and Social Security on Relevant Issues Involving Establishment of an Employment Relationship* (hereinafter referred to as the "*MOL Circular* (2005)"), which provides the method of determining an employment relationship in the absence of a written employment contract. It is generally accepted that the standard for determining employment relationships under the *MOL Circular* (2005) only applies to parties under full-time employment relationships. As for part-time employment relationships, the *Opinion of the Ministry of Labor and Social Security on Several Issues Involving the Part-Time Employment* promulgated by the then Ministry of Labor and Social Security in 2003 (hereinafter referred to as the "*MOL Opinion* (2003)") defines "the part-time employment" as "a form of employment where wages are paid on an hourly basis and workers work for the same employer with an average working time

not exceeding 5 hours per day and an aggregate weekly working time of not more than 30 hours per week." The *MOL Opinion* (2003) does not stipulate the same method for determining the standards of a full-time employment relationship as that in the *MOL Circular* (2005).

In the present case, the courts of first and second instances mainly relied on the following elements in determining the part-time employment relationship: (i) work time for a single employer is calculated on hourly basis; (ii) working hours for each of the employers is below the statutory standard; (iii) workers' wages are paid on hourly basis; (iv) the payroll cycle of workers' wages is not more than two weeks; (v) whether a written employment contract is used or not is the standard for determining a part-time employment relationship; (vi) whether paying the social insurance contributions is used or not is the standard for determining a part-time employment relationship; and (vii) allowing the employer to partially exceed the statutory standard for part-time work hours.

In my opinion, the standards for determining the part-time employment relationship may have to consider the following two aspects:

[1] Subjective Element

The employment relationship itself is a contractual relationship, so we should examine the parties' intent to establish such contractual relationship. The current Chinese labor law legislation mandates the parties to conclude a written employment contract for the purpose of establishing a full-time employment relationship. Therefore, the parties' intent can be judged through a written employment contract. As for part-time employment relationships, the law does not mandatorily require that the parties sign a written contract and also allows them to reach an oral agreement instead. Despite of this, we cannot ignore the importance of the parties' expression of intent. In judicial practice, the parties' expression of intent can be judged through relevant evidence. In this case, the Court found that Sun Lan worked in the two companies for several years. Both companies are clearly marked with their signs—showing that they are not one company—and she worked in each of the two companies for less than four hours per day. Accordingly, it can be inferred that Sun's employment relationship with both companies was on part-time basis and reflected the true expression of intent.

It is worth noting that the *MOL Circular* (2005) issued by the then Labor and Social Security Department provides that "where an employer employs a worker on a part-time basis, they shall sign a written employment contract in principle." In the *Labor Contract Law*, the parties under a part-time employment relationship may conclude an oral agreement regarding forms of their employment relationship. For now, the part-time employment is still not a mainstream employment form but an atypical employment relationship in China. Its statutory but vague labor standards are limited in effect, which further requires agreements through a written contract by the parties. Therefore, part-time employment relationships are advised to be agreed to in written form in some jurisdictions, even the Law does not require the parties under a part-time employment relationship to enter into a written employment contract. For

example, the labor law of Taiwan (China) provides that "when hiring part-time workers, an employment contract shall be concluded in writing."[2] In contrast, the *Labor Contract Law* in mainland China emphasizes the flexible nature of part-time employment. But I think we should stick to the original provisions of labor law, which seems to be more appropriate. Mainland China may consider legislation similar to the Taiwanese design which intends to better reflect the parties' expression of intent through a written contract of part-time employment to confirm the part-time employment relationship.

[2] Objective Elements

Of course, given that China did not expressly require parties under a part-time employment relationship to enter into a written employment contract, it is essential to make a judgment regarding such relationships based on a number of objective elements such as the working hours, and wages

[a] Working Hours

At present, Chinese scholars have no disagreement with the provisions that part-time employment should be less than twenty-four hours per week. But there is no consensus when the weekly work time of the employee is more than twenty-four hours, but less than forty hours. Some scholars argue that twenty-four hours per week is the highest number of work hours for employees under part-time employment relationships, and it is a full-time employment relationship if an employee works more than twenty-four hours. "The maximum work time limit for the employment on the part-time basis is the division line between part-time and full-time employment. To the employer, its liability undertaken is not only an issue of overtime payment, but the possibility of being considered as an employment relationship."[3] Many Chinese academics and practitioners strongly believe that a certain degree of flexibility should be given to the parties taking into account the flexible nature of part-time employment. In their view, if an employee works for more than twenty-four hours but has not reached forty hours per week, it is generally considered to be part-time employment. As Kong Linghua who works in the labor administrative department points out, "it is recommended to add floating ceiling and month factors. For instance, workers under part-time employment relationships shall work for 4 hours per day but not more than a maximum of 6 hours on average, or work for 24 hours on average but not more than a maximum of 30 hours per week, and less than 104 hours per month (365 days/12 months/7 days x 24 hours). Such practice does not exceed the total working hours of part-time employment within

2. Article 5 of the *Notice on Employing Partial Hours of Work* applicable in Taiwan (China) stipulated that, when hiring part-time workers, an employment contract shall be concluded in writing. Its working conditions and form of employment contract shall be same as those of full-time workers, and the rights and interests of part-time workers shall be clearly specified in the contract.
3. Huang Kun et al. [黄昆等], "Specific Issues of the Relationship of Part-time Work" [非全日制劳动关系的特殊问题], (2008) *China Labor* [中国劳动] 9: 49-52, at p. 49.

a month, and can adapt to the changing needs of the parties and leaves some rooms for flexible work arrangements, which will greatly reduce employment disputes."[4]

Generally speaking, there are three mainstream views in China regarding the standards for identifying part-time employment relationships: The first view is that working for more than twenty-four hours per week shall be deemed as the full-time employment; the second view is to follow the provisions of the *MOL Opinion* (2003), that is working for more than thirty hours per week shall be deemed as the full-time employment; and the third view is that working less than forty hours per week shall be deemed as the part-time employment.

Compared with international practices, the number of working hours of part-time employment is fairly low in China. For example, the *Part-time Work Convention* adopted by the International Labor Organization (hereinafter referred to as the "ILO") in 1994 does not stipulate provisions regarding the working hours but just states that "working hours for an employee under part-time employment may be less than that of comparable full-time employees." Likewise, the *Part-time Work Directive 97/81/EC* adopted a similar approach but did not identify the specific number of work hours for part-time workers in the European Union. Countries such as the United States, Japan, Sweden, and Australia provide that part-time workers shall work less than thirty-five hours per week.[5]

Based on previous legislation and current social practices in China as well as the international experience, I support the second view: Workers generally working less than thirty hours per week should be identified as part-time employees. If a worker works for more than forty hours per week for a long period of time, other elements should be considered when determining if it is full-time employment.

[b] Salary

Workers' remuneration is another important labor standard for determining an employment relationship. Wages under part-time employment shall be calculated and paid on hourly basis and be paid once every two weeks. This differs greatly with the workers in a full-time employment relationship, which shall be calculated and paid on monthly basis.

[c] Other Elements

Moreover, factors such as the labor process management should also be considered when judging if the employment belongs to a part-time employment relationship. In general, enterprises implement more comprehensive management for full-time employees. Therefore, degrees of corporate management for employees' behavior, the

4. Kong Linghua [孔令华], "On the Improvement of Part-time Employment" [浅谈非全日制用工的完善], (2011) *China Labor* [中国劳动] 6:23-24.
5. Jin Weigang [金维刚], "Study on China's Part-time Employment Issues" [我国非全日制就业问题研究], (2003) *Review of Economic Research* [经济研究参考] 4: 17-24, at p. 23.

importance of employees' positions, and if they belong to the main corporate business are also the factors that should be taken into account when determining a part-time employment relationship.

[C] Application of Labor Standards under the Part-Time Employment Relationship

In China, the *Labor Contract Law* provisions provide that workers under part-time employment may establish an employment relationship with more than one employer and that the parties may agree not to enter into a written contract, or to establish a probation period, or to provide any compensation in case of terminating the employment contract as well as the wages payment provisions. But, the methods of applying the labor standards and welfare treatment of workers under a part-time employment are not clear enough in China. In contrast, most foreign countries and the ILO have established some principles for the part-time employment: "principle of equality" and "principle of proportionality." That is, part-time workers shall enjoy the same rights proportionally as full-time workers based on the percentage of work hours to standard work hours. The "principle of proportionality" runs parallel with the "principle of equality" and is the refinement and extension of the "principle of equality" in the part-time employment.

For example, according to the ILO's *Recommendation No. 165 on the Rights of Workers with Family Responsibilities* (1981), employment conditions of part-time and temporary workers, including mandatory participation in the social security themes, shall be equal to those full-time and temporary workers within the possible applicable scope, and their rights and benefits can be proportionally determined in appropriate cases. The 1994 *Part-time Work Convention* (ILO Convention No. 175) and the ILO Part-time Work Recommendation (No. 182) provide that: (i) measures shall be taken to ensure that part-time workers receive the same protections as that accorded to comparable full-time workers in respect to the right to organize, the right to bargain collectively, and the right to act as workers' representatives, occupational safety and health, discrimination in employment and occupation; (ii) measures shall be taken to ensure that part-time workers do not, solely because they work part time, receive a basic wage which, calculated proportionately on an hourly, performance-related, or piece-rate basis, is lower than the basic wage of comparable full-time workers, calculated according to the same method; (iii) statutory social security schemes which are based on occupational activity shall be adapted so that part-time workers enjoy conditions equivalent to those of comparable full-time workers; these conditions may be determined in proportion to hours of work, contributions or earnings, or through other methods consistent with national law and practice; (iv) measures shall be taken to ensure that part-time workers receive conditions equivalent to those of comparable full-time workers in forms of maternity protection, termination of employment, paid annual leave, paid public holidays, and sick leave; (v) pecuniary entitlements shall be determined in proportion to hours of work or earnings; and (vi) measures shall be