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# Temporary Agency Work and Labour Rights Protection: a Case Study of China

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# Summary

Temporary agency work is one of the newest forms of work worldwide and growing rapidly over the past two decades. It is regarded as a tool to create jobs with a stepping-stone function to the labour market and to contribute to the demand of labour flexibility. However, with a triangular and flexible nature, temporary agency work as an irregular employment to some extent undermines the employment security and implies higher risk of labour rights infringement. This thesis takes China as an example, where temporary agency work industry is experiencing an unexpected boom after the nationwide recognition and regulation by the Employment Contract Law promulgated in 2008, to examine whether a balance between labour flexibility and labour rights protection has been made.

The thesis first reveals the current situation of temporary agency work at both international and national levels. By making comparison studies between the *status quo* and corresponding legislations, a conclusion that temporary agency work in China is being abused is found, as not only a gap between national and international regulation exists, but also the development of temporary agency work in practice has deviated from the national law as well as the general practice around the world.

The thesis further examines the *status quo* of labour rights conditions of temporary agency workers and finds out a conflict between the *de jure* and *de facto* rights exists. Thus, a conclusion that temporary agency workers' labour rights under national law are not well protected is made.

The thesis at last gives recommendations on how to better balance labour flexibility and labour rights protection based on China's reality and the experience from countries in the European Union where temporary agency work is well regulated and temporary agency workers are well protected.

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# Abbreviations

BA	Bundesagentur für Arbeit
Ciett	International Confederation of Private Employment Agencies
Convention No.34	Fee-charging Employment Agencies Convention, 1933 (No.34)
Convention No.96	Fee-charging Employment Agencies Convention (Revised), 1949, (No.96)
Convention No.181	Private Employment Agencies Convention,1997 (No.181)
Directive 2008/104/EC	Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work
EU	European Union
KFC	Kentucky Fried Chicken
ILO	International Labour Organization
PRC	People’s Republic of China
Recommendation No.1	Unemployment Recommendations, 1919 (No.1)
Recommendation No.188	Private Employment Agencies Recommendation, 1997 (No.188)
SCtNPC	Standing Committee of National People’s Congress
SDHRSS	Sichuan Department of Human Resources and Social Security
TA	Temporary Agency
TW	Temporary Work
TAW	Temporary Agency Work
UK	United Kingdom

USA

United States of America

# 1 Introduction

## 1.1 Background

The emergence and quick development of private employment agency worldwide recent decades has generated a new category of worker, namely the temporary agency worker (TA worker) or agency worker, referring to a person who is directly hired by an employment agency but with a purpose to be sent out to perform work for another enterprise (user enterprise) on a temporary basis. Differentiated from the traditional bilateral employment relationship, this new employment relationship involves three parties: the worker, the employment agency and the user enterprise. The agency has concluded a contract of employment with the worker and a commercial contract for leasing out labour force with the user enterprise respectively, while there is no direct employment relationship or contract between the worker and the user enterprise although the worker is carrying out work on the user enterprise's premise under its supervision and governance.

As a new employment form, temporary agency work (TAW) was born in the demands of a more flexible labour market under the background of economic liberalism and increasing international competition in the global world.<sup>1</sup> It can make up for the dysfunction of public employment services and contributes to employment promotion by quick job matching for the job-seekers and employment cost savings for the enterprises. For this reason, the new model has quickly developed and spread in many countries and this is also the case in China, where it has a special Asian name: labour dispatch.

However, there are continuous debates of TAW since it was born, as flexibility it brings to the labour market does not only imply easy recruitment, but also implies unstable employment and less labour protection according to the research in the field of working conditions and health impacts.<sup>2</sup> With a triangular nature of employment, which embodies in the separation of labour hiring and labour using, TA workers are usually more exposed to risk factors than workers in regular employment<sup>3</sup> and therefore in a more vulnerable position. This is especially the case in China, where the economic system is undergoing a transition from a government-

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<sup>1</sup> ILO: *Private employment agencies, temporary agency workers and their contribution to the labour market*, Issues paper for discussion at the Workshop to promote ratification of the Private Employment Agencies Convention, 1997 (No.181) (20-21 October 2009), Geneva, 2009, p.5, available at <<http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>>, accessed 15, February, 2010.

<sup>2</sup> European Foundation for the Improvement of Living and Working Conditions: *Temporary agency work in the European Union*, p2, available at <<http://www.eurofound.europa.eu/ewco/reports/TN0408TR01/TN0408TR01.pdf>>, accessed 12, April, 2010.

<sup>3</sup> *Ibid.*



orientated model to a market-orientated model without a mature legal environment for labour rights respect and protection. Although TAW, which is called labour dispatch in China, was legally recognized nationwide in 2008 and TA workers were covered by national law, there were still a large amount of reports that TA workers were suffering poor labour rights conditions, such as lower pay and benefits than workers directly employed by the user enterprises, fewer representation, training and promotion opportunities, hard to get access to regular employment, etc.

## 1.2 Objective and methodology

The objective of this thesis is by examining the *status quo* of TAW in China as well as labour rights conditions of TA workers to find out that whether TA workers' labour rights enshrined in the national law are well protected in the pursuit of labour flexibility and how to make a better balance between labour flexibility and labour rights protection.

The objective will be achieved by answering the following questions seriatim:

(a) Whether TAW (or labour dispatch) in China is overdeveloped or abused to some extent? Since TAW, a representative form of atypical employment with high flexibility, may have some negative effect to work security and therefore bring new challenges to labour rights protection, the dimension and status of TAW are usually remained in a supplementary position to the regular employment with relative rigorous regulations. Thus, to examine the *status quo* of TAW in China that whether it is developed in line with its presupposed status in the first place is one of the paramount factors to measure whether a balance between labour flexibility and labour protection has been made.

This question will be answered by using quantitative analysis and comparative studies. Quantitative analysis is to reveal the *status quo* of TAW in China based on the statistics from government report, social report and empirical survey. Comparative studies is to be made between the situation of TAW around the world and the situation in China, including the comparison between international law regulating TAW and corresponding national law, by which a benchmark or a standard could be set or referred to measure if TAW in China is not well regulated or abused.

(b) Whether TA workers in China are in fact suffering poor working conditions and labour rights violations in relation to the right to equal opportunity of employment, the right to choose occupation freely, the right to organize and collective bargaining, the right to remuneration, the right to social security, access to training, occupational safety and health, under national law. And if so what kinds of reasons may give rise to it?

To answer these two questions, both quantitative and qualitative studies will be applied. Quantitative analysis is based on the statistics gathered from questionnaire survey as well as in the government and social reports. Qualitative analysis is based on the personal interviews and typical cases on labour rights infringement of TA worker.

(c) If TA workers are indeed suffering poor labour rights conditions, what can be done from a legal perspective to improve labour rights conditions for TA workers in China?

This question will be answered by examining China's reality in conjunction with legislation experience from countries where TAW is well regulated and TA workers' labour rights are well protected.

By answering the above questions, the author wants to draw people's attention to the working and labour rights conditions of TA workers, a relative new but vulnerable group, in order to realize that they are in badly need of adequate protection either in law or in reality. Especially for the Chinese government, along with the employment promotion and economic rising, the side effect on labour rights protection for TA workers should never be underestimated. Appropriate measures should be taken to better balance the flexibility of labour market and labour rights safeguarding.

### **1.3 Delimitation**

TAW in this thesis is delimited to those TAW happened within the territory of China and correspondingly the examining of labour rights conditions of TA workers are mainly focused on the situation inside China. The author choose not to discuss the possible situation of across borders TAW here, which refers to the TA workers in China are dispatched or posted out of China to work in another country for a foreign company, is because on the one hand, the domestic legislations regulating TAW inside China and abroad are not the same, and on the other, the transnational dispatch under the name of TAW in China is very scarce, through which the effective and full examining of such situations can not be easily achieved .

Labour rights in this thesis is delimited to the fundamental labour rights set under national law, including the right to equal opportunity of employment, the right to choose occupation freely, the right to organize and collective bargaining, the right to remuneration, the right to social security, the right to occupational training and the right to occupation safety and health.

### **1.4 Structure**

The thesis is mainly formulated by four parts. The first part (chapter 2) presents the definition of TAW and provides an overview of the

development of TAW industry around the world, including the history, the existing international law, the profile at international level and the rationale of using TAW. The second part (chapter 3) unfolds a national situation of TAW, including a background introduction, description of the existing national legislation, and the profile of this industry and summarizes the Chinese characteristic compared with TAW worldwide to examine whether TAW in China is well regulated. The third part (chapter 4) also focuses on the national situation of China. It reveals the current working and labour rights conditions of TA workers, containing the examining of national law protecting labour rights of TA workers on the one hand, and the analysis based on the empirical survey and reports which shows the *de facto* conditions of labour rights of TA workers on the other, with a purpose to find out the conflict between the *de jure* rights and *de facto* rights and the probable reasons. The last part (chapter 5) gives the suggestions to better regulate TAW and protect labour rights of TA workers based on China's reality and the experience from EU countries.

# 2 Understanding Temporary Agency Work

## 2.1 Defining Temporary Agency Work

From the literal meaning, TAW is a subcategory of temporary work. Temporary work usually embraces various forms of employment, such as the casual labour, which remains common, especially for low-skilled work in sectors such as agriculture and construction, or the direct employment on fixed-term contracts, often associated with white-collar work as well as regular seasonal employment in other occupations.<sup>4</sup> TAW is the most recent and rapidly growing form of temporary work which involves the supply of workers by employment agencies for assignments with client organizations.<sup>5</sup>

However, there is no exact and uniform definition of TAW at international level. In the International Labour Organization's (ILO) Private Employment Agencies Convention, 1997 (No.181), the only international Convention regulating TAW so far, TAW is not directly defined. Relevant content can only be found in the definition of private employment agency, stipulating "*private employment agency means any natural or legal person, independent of public authorities, which provides one or more of the following labour market service*": "(b) *service consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks*"<sup>6</sup>.

Among different countries, various expressions can also be found. Such as in Sweden, TAW is defined as "*a legal relationship between a client and the employer whereby the employer for payments makes employees available to the client to perform work related to the clients' operations.*"<sup>7</sup> In Austria, TAW is defined as "*the hiring out of workers to perform work assignments at third parties.*"<sup>8</sup> In Germany, the definition of TAW is "*any business which is licensed to hire out employees to other companies on a*

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<sup>4</sup> European Foundation for the Improvement of Living and Working Conditions: *Temporary agency work in an enlarged EU*, p.1, available at <<http://www.eurofound.europa.eu/pubdocs/2005/139/en/1/ef05139en.pdf>>, accessed 15 March, 2010.

<sup>5</sup> *Ibid.*

<sup>6</sup> Article 1 (1) (b) of the ILO Convention No.181.

<sup>7</sup> Non-official translation, section 2 of the Private Employment Agencies and Temporary Work Labour Act (1993:40). <<http://www.sweden.gov.se/content/1/c6/10/49/83/6d28f37e.pdf>>, accessed 23 April 2010.

<sup>8</sup> *Austria: Temporary agency work and collective bargaining in EU*, <<http://www.eurofound.europa.eu/eiro/studies/tn0807019s/at0807019q.htm>>, accessed 12 April 2010.

*commercial basis.*"<sup>9</sup> Although slightly different in description, even in some occasions or some countries, TAW has been named differently, such as "labour dispatch" (in Japan, Korea, and China), "hiring-out work", "leased work", or "agency work", etc., the substance of TAW is the same. First of all, it has a triangular relationship between three parties: a temporary agency worker is employed by a private employment agency or a temporary work agency (TW agency) and is then, via a commercial contract, hired out to perform work assignments at a user firm.<sup>10</sup> Second, there is usually no employment relationship between TA worker and the user enterprise although there could be legal obligations of the user enterprise towards the TA worker, especially with respect to health and safety.<sup>11</sup> Third, the term of carrying out work for the user enterprise is of limited duration or usually very short. Fourth, the user enterprise pays fees to the TW agency to rent labour and exercises the dispositional power to arrange and supervise work performed by TA worker. Fifth, the TW agency is responsible for the payment of wages to the TA worker (even if the user enterprise has not yet paid the agency).<sup>12</sup>

From the description above, TAW is different from the regular, typical or standard employment which usually involves the characteristics of bilateral relationship, full-time work and permanent or open-ended employment. Thus, TAW is being categorized as one of irregular, atypical or non-standard employment.

In spite of the unique nature which differentiates TAW from traditional or regular employment relationship, there are still some similar terms or employment relationships which may result in confusion needed to be distinguished in order to better understand TAW.

(a) **TAW and job placement.** Job placement is a kind of job service also with a triangular nature. In the situation of job placement, the agency acts as the intermediary to bring together people, who are looking for a job with employers in order to found employment relationship.<sup>13</sup> During this process, the agency only plays the role of a job introducer rather than an employer. This is the fundamental difference between TAW and job placement as in the case of TAW, there is an employment relationship between the agency and the worker, and the employment relationship continues to exist after the agency putting its employees at the disposal of the user enterprise.

(b) **TAW and labour contracting.** In the case of labour contracting, the contractor pays wages to the workers and sends out them to work for the

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<sup>9</sup> *Germany: Temporary agency work and collective bargaining in EU*, <<http://www.eurofound.europa.eu/eiro/studies/tn0807019s/de0807019q.htm>>, accessed 12 April 2010.

<sup>10</sup> *Supra* note 2, p.2.

<sup>11</sup> *Supra* note 1, p.1.

<sup>12</sup> *Ibid.*

<sup>13</sup> Roger Blanpain: *Comparative Report*, Temporary Work and Labour law of the European Community and Member States, Kluwer Law and Taxation Publisher, Deventer • Boston, 1993, p8, para.17.

third party, the contract issuing party. However, the contract issuing party does not exercise any right to give orders or directly control their work. While in the case of TAW, the agency, as the employer, delegates the authority to the user enterprise to further direct the employees.<sup>14</sup> That is to say, the key element to draw the borderline between TAW and labour contracting is to examine which party retains the full right to command or manage the workers, the user enterprise or the first employer.

## **2.2 An Overview of Temporary Agency Work Worldwide**

### **2.2.1 The Evolving Attitude towards Temporary Agency Work at International Level: From Prohibiting to Integration**

There is no definite history record about the origin of TAW worldwide whereas different versions exist simultaneously. Some said TAW was originated in Europe while a more widely agreed version was that the idea of “renting” help originated with Samuel.L Workman in the U.S. in the 1920s.<sup>15</sup> Mr. Workman was employed by a calculating-machine manufacture in the late 1920’s, and began hiring fellow salesmen to work for him in the evenings to take inventories. In 1928 or 1929, he began hiring women, many of whom had been discharged because of marriage, and then sent them out to do calculating work. In 1932 or 1933, Workman started dispatching women to perform typing and other clerical work.<sup>16</sup>

However, TAW was not legally recognized at international level for a long period. Since 1919, the principle that “*labour should not be regarded merely as an article of commerce*” was set up in Article 427 of the Versailles Treaty, which also forms part of the Constitution of the ILO. Considering the risk of labour rights abuse by various types of intermediaries or private employment agencies conducted with a view to profit, and even, in certain circumstances, being deprived of the protection afforded by the labour legislation, as well as the incumbent obligation for one state in the modern society to play an active role in the sphere of employment,<sup>17</sup> the ILO accordingly adopted the Unemployment Recommendation, 1919, No.1, stipulating that ILO recommended its member states take measures to “*prohibit the establishment of employment agencies which charge fees or which carry on their business for profit. Where such agencies already exist, it is further recommended that they be*

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<sup>14</sup> *Ibid.* para.13.

<sup>15</sup> Mack A. Moore: *The Temporary Help Service Industry: Historical Development, Operation, and Scope*, Industrial and Labor Relations Review, Vol. 18, No. 4 (Jul., 1965), p. 556.

<sup>16</sup> *Ibid.*

<sup>17</sup> Nicolas VALTICOS : *Temporary Work agencies and International Labour Standards*, International Labour Review; 1973, Vol. 107 Issue 1, p.46.

*permitted to operate only under Government licences, and that all practicable measures be taken to abolish such agencies as soon as possible.*<sup>18</sup> Subsequently, in the ILO's Fee-charging Employment Agency Convention, 1933, No. 34, it was further stated that "*Fee-charging employment agencies conducted with a view to profit*", "*that is to say, any person, company, institution, agency or other organization which acts as an intermediary for the purpose of procuring employment for a worker or supplying a worker for an employer with a view to deriving either directly or indirectly any pecuniary or other material advantage from either employer or worker*",<sup>19</sup> "*shall be abolished within three years from the coming into force of this Convention for the Member concerned.*"<sup>20</sup>

Nevertheless, the implementation of Convention No.34 was not smooth. The debate of private employment agency still went on. After the second World II, the revised Convention on Fee-charging Employment Agencies, 1949, No.96 showed a trend of deregulation by extending the "*three years*" time limit of abolishing fee-charging employment agencies which was set in Convention No.34, to "*a limited period of time determined by the competent authority*"<sup>21</sup>. Moreover, the Convention No.96 even gave states the right to choose either abolishing the fee-charging employment agencies progressively or retaining them on the premise of complying with the regulation provisions set in Part 3 of this Convention.<sup>22</sup> The rare situation that two totally contrary attitudes towards private employment services coexisted in the same Convention reflected the dysfunction of free public employment service in reality and therefore space for the development of private employment service was left.

From the beginning of the 1960s onwards, the growth of private employment agencies helped to change the attitude that monopoly of public employment services was the only solution and the possibility of co-existence began to be considered.<sup>23</sup> It was until 1997, being aware of the importance of flexibility in the labour market function and the positive role the private employment agencies may play, a new Convention on Private Employment Agencies, No.181 was adopted after ILO's careful analysis of the workings of labour markets,<sup>24</sup> in order to accommodate the changing labour market. Since then, the monopoly position of public employment

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<sup>18</sup> Part I of the ILO Recommendation No.2.

<sup>19</sup> Article 1 (1) (a) of the ILO Convention No.34

<sup>20</sup> *Ibid.* Article 2 (1).

<sup>21</sup> Article 3 (1) of the ILO Convention No.96.

<sup>22</sup> According to Article 2 (1) of the ILO Convention No.96.

<sup>23</sup> Thuy Phan: *ILO Convention on Private Employment Agencies(No.181)*, Private Employment Agencies : the impact of ILO Convention 181 (1997) and the judgment of the European Court of Justice of 11 December 1997, Bulletin of Comparative Labour Relations, R.Blainpain, 1999, Kluwer Law International, p.79.

<sup>24</sup> Roger Blainpain: *Introductory Remarks: The evolving Attitude Toward Temporary Agency Work*, Temporary Agency work and the Information Society, International Conference, Brussels, April 2003. Roger Blainpain and Ronnie Graham, 2004, Kluwer law International, p3.

service was broken and the lawful status of private employment agencies was officially recognized.

## **2.2.2 International Regulations of Temporary Agency Work: ILO Convention No.181 and Recommendation No.188**

As mentioned in the foregoing part, the current international instruments relevant to temporary agency work are ILO's Private Employment Agencies Convention, 1997 (No.181) and Private Employment Agencies Recommendation (No.188). The Convention No.181 has a legally binding effect to member states which have ratified it, while the Recommendation No.188 is not legally binding, but supplements the Convention No.181 by providing more detailed guidelines.

Both instruments contain regulations of TAW mainly in the following aspects:

(a) **Conditions governing the operation of private employment agencies.** According to Article 3 of Convention No.181, "*The legal status of private employment agencies shall be determined in accordance with national law and practice, and after consulting the most representative organizations of employers and workers*" and the government "*shall determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate national law and practice*". Further in the Recommendation No.188, the requirement of operating a private employment agency is set under Article 14 that "*Private employment agencies should have properly qualified and trained staff.*"

(b) **The sector restriction of TAW.** According to Article 2 (4) (a) of Convention No.181, government may, after consulting "*the most representative organizations of employers and workers concerned*", may prohibit "*under specific circumstances, private employment agencies from operating in respect of certain categories of workers or branches of economic activity*". Such exclusion may be made with the concern to avoid TA workers to be exposed to dangerous sectors or job positions.

(c) **Specific obligations of private employment agencies towards TA workers.** In the Convention No.181, the private employment agencies bear a series of negative obligations: (1) not to deny the right to freedom of association of TA workers under Article 4; (2) not to discriminate against TA workers under Article 5; (3) not to use or supply Child labour under Article 9; (4) not to "*charge directly or indirectly, in whole or in part, any fees or costs to*" TA workers under Article 7 (1).



In the Recommendation No.188, several recommendations are made by ILO to the member state by requiring the private employment agencies not to “make workers available to a user enterprise to replace workers of that enterprise who are on strike.”<sup>25</sup>, not to “knowingly recruit, place or employ workers for jobs involving unacceptable hazards or risks or where they may be subjected to abuse or discriminatory treatment of any kind”,<sup>26</sup> not to “(a)prevent the user enterprise from hiring an employee of the agency assigned to it; (b)restrict the occupational mobility of an employee; (c)impose penalties on an employee accepting employment in another enterprise,<sup>27</sup> as well as by requiring the private employment agencies to provide TA workers “a written contract of employment specifying their terms and conditions of employment” “where appropriate”, and “inform their conditions of employment before the effective beginning of their assignment” “as a minimum requirement”.<sup>28</sup>

**(d) Allocated responsibilities between private employment agencies and the user enterprises in relation to terms and conditions of employment.**

According to Article 12 of the Convention No.181, the government “shall determine and allocate in accordance with national law and practice, the respective responsibilities of private employment agencies” and “the user enterprises” in relation to “(a) collective bargaining; (b) minimum wages; (c) working time and other working conditions; (d) statutory social security benefits;(e) access to training; (f) protection in the field of occupational safety and health;(g) compensation in case of occupational accidents or diseases; (h) compensation in case of insolvency and protection of workers claims; (i) maternity protection and benefits, and parental protection and benefits.”

**(e) Monitoring and investigation of the activities of private employment agencies.**

According to Article 10 of Convention No.181, “The competent authority shall ensure that adequate machinery and procedures, involving as appropriate the most representative employers and workers organizations, exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies.” And according to Article 13 (3), “Private employment agencies shall, at intervals to be determined by the competent authority, provide to that authority the information required by it, with due regard to the confidential nature of such information: (a) to allow the competent authority to be aware of the structure and activities of private employment agencies in accordance with national conditions and practices; (b) for statistical purposes.”

Seen from the above, the Convention No.181 and Recommendation No.188 set general parameters in different aspects for the regulation, placement and employment of workers by these agencies with a purpose to assist ILO

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<sup>25</sup> Article 6 of the ILO Recommendation No.188

<sup>26</sup> *Ibid.* Article 8 (a).

<sup>27</sup> *Ibid.* Article 15.

<sup>28</sup> *Ibid.* Article 5.

member states to establish clear policies, legislation and mechanisms for the effective registration and licensing of private employment agencies, thereby helping them play a constructive role in contributing to a labour market free from exploitive conditions.<sup>29</sup>

### 2.2.3 The Profile of Temporary Agency Work Industry around The world

Along with the recognition of TAW by international law, the global private employment agency industry has grown steadily since the mid-1990s.<sup>30</sup> According to the most recent report on TAW from International Confederation of Private Employment Agencies (Ciett), which was based on figures from 34 countries in 2008 (including twenty-five European countries<sup>31</sup>, six American countries<sup>32</sup>, two Asian countries<sup>33</sup>, and one African country<sup>34</sup>), the TAW industry in those countries as a whole doubled over the period 1994-1999 and again during 1999-2007. In 2008, affected by the economic downturn, the total annual sale revenues were 1% down from 2007.

It was illustrated in the report that till 2008, there were 71,000 private employment agencies around those 34 countries and the total number of TA workers in full-time equivalents was over 9.5 million, which has nearly doubled from 1998 to 2008.<sup>35</sup>

Among the 34 countries, Japan, the United States of America (USA) and the United Kingdom (UK) were the three largest TAW markets by total annual sales revenues in 2008, accounting for 21%, 21% and 15% respectively, of the global market. Europe was the leading regional entity by total annual sales revenues, accounting for 48% of the global market.<sup>36</sup>

With regard to the penetration rate (the proportion of TA workers among the total active working population) of TAW in each country in 2008, the UK had a highest proportion: 4.1%. South African was at the second place with a number of 3.5%. The Netherlands was the third with a number of 2.3%. The penetration rate of Japan and the USA were respectively 2.2% and

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<sup>29</sup> *Supra* note 1.

<sup>30</sup> *Ibid.* p.11.

<sup>31</sup> Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxemburg, Macedonia, Netherland, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, UK.

<sup>32</sup> Argentina, Brazil, Chile, Mexico, Uruguay, USA.

<sup>33</sup> Japan, South Korea.

<sup>34</sup> South Africa.

<sup>35</sup> Ciett: Economic Report: *The agency work industry around the world*, 2010 Edition (based on figures available for 2008), p.6, available at <[http://www.eurociett.org/fileadmin/templates/ciETT/docs/CiETT\\_Economic\\_Report\\_2010.pdf](http://www.eurociett.org/fileadmin/templates/ciETT/docs/CiETT_Economic_Report_2010.pdf)>, accessed 15 March, 2010.

<sup>36</sup> *Ibid.* p.11.

1.7%. The average penetration rate of Europe was 1.7%, the same with the USA.<sup>37</sup>

About the gender situation of TA workers, it was revealed by the Ciett report that the composition by gender was reasonably balanced in most countries. While when it comes to the age composition, most TA workers were aged below 30. With regard to the education background, in most countries, the majority of agency workers had a low to medium initial education level. On average of the 34 countries, 51% of TW workers had finished secondary school, and 44% had not.

## 2.3 Rational of Temporary Agency Work

The boom of TAW recent years can be easily seen from the figures above, however, such rapid expansion is not merely due to the relatively favorable legal environment, the inherent demands from different actors in the labour market is the most important factor.

From the perspective of the worker, the main motive is to find a permanent job by using TAW as a stepping stone. In a labour market with abundant supply of labour force, job-seekers are usually facing more difficulties in getting a satisfied job with a permanent nature, especially for those who have lower skills, lower education background or employability. Considering in some occasions the employer use TAW as a screening opportunity or even not to advertise the job vacancy on the external labour market, but to fill it internally by vertical or horizontal transfer or recruit someone recommended by a member of the staff or a client of the enterprise<sup>38</sup>, TAW under such situations can be used as a way to tackle the information asymmetry between the job-seeker and the employer, as well as a channel to get permanent recruitment. In addition, TAW is regarded as a means of gaining working experience, technical and social skills, by which to improve employability, for the potential permanent job that may be with higher requirements. Other than the reason to be employed permanently, various reasons for choosing TAW exist although they are out of the mainstream. Some people, especially those who are with family responsibilities, take TAW for its flexible nature in time, to balance personal life and professional life. Some people choose TAW in order to gain additional incomes under the situation that they already have a permanent job and take TAW as a part-time job from time to time, while some other people engage in TAW just because they like to work in a dynamic environment and want to have diverse working experience.

From the perspective of the user enterprise, the essential motivation is to maximize the profits by using labour force in a flexible way. The flexibility

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<sup>37</sup> *Ibid.* pp 19-24.

<sup>38</sup> Han Denys: *Challenges for Temporary Agency Work in the Information Society*, Temporary Agency work and the Information Society, International Conference, Brussels, April 2003. Roger Blanpain and Ronnie Graham, 2004, Kluwer law International, p11.

can be embodied in the following situations. The first also the most traditional condition is to replace the absent permanent employees, who may be on sick leave or maternity leave, etc, in order to maintain the operation of the enterprise as usual. The second situation is to supplement or adjust the labour force to cyclical, seasonal or sporadic changes and fluctuations in market demand. The third situation is to build a buffer capacity, a capacity of structural flexibility, to tackle the increased economic uncertainty by using TAW permanently, regularly and systematically.<sup>39</sup> The key reason that TAW is the best way to achieve flexibility is the lower hiring and firing cost for the employer, unlike the dismissal of permanent worker, where various requirements should be met and large compensations may be incurred. Besides the need of flexibility, some enterprises use TAW as a method to screen new employees. By using TA workers, the employer has the chance to assess the capabilities and inputs of the TA worker, who may be considered as a potential employee.<sup>40</sup> Another reason was also showed by the user enterprise that the use of TAW could assist its human resource management. As in the case of TAW, not only the recruiting, selecting and placing work have been passed on to the agency, even sometimes the agency takes responsibilities of providing occupational training or administrative management. The user enterprise can to a large extent free itself from the complicated personnel management work.

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<sup>39</sup> ECORYS-NEI, Labour & Social Policy: *Rationale of Agency Work: European labour suppliers and demanders' motives to engage in agency work., final report*, Rotterdam, December 2002, pp27-36, available at <[http://www.euro-ciett.org/fileadmin/templates/ciett/research/Rationale\\_of\\_Agency\\_Work2002.pdf](http://www.euro-ciett.org/fileadmin/templates/ciett/research/Rationale_of_Agency_Work2002.pdf)>, accessed 2 April, 2010..

<sup>40</sup> *Ibid.*

# 3 Temporary Agency Work in China: with an Asian Name “Labour Dispatch”

## 3.1 The Emergence and Evolution of Temporary Agency Work under the Background of Economic Transition

The emergence of TAW in China can be traced back to 1980s. In the first three decades after the establishment of People’s Republic of China (PRC), the national economy nearly remained stagnant as a result of a conservative national economic policy as well as the unfavorable international political situation. In 1979, a new economic policy was adopted with a purpose to open up the economic market to the outside world, which soon attracted increasing investments from foreign countries. Foreign enterprises were allowed to enter into China’s market by establishing a resident representative office in China. However, the resident representative office was not permitted to employ Chinese workers directly with a consideration from the government that Chinese employees may face difficulties in pursuing labour rights from an enterprise abroad when labour dispute occurred. According to the Interim Provisions of the PRC on the Administration of Resident Representative Office of Foreign Enterprise, which was promulgated by the State Council in 1980, foreign enterprises shall entrust local service units specially for foreigners or other service units designated by the government to act as the employer to conclude the employment contract with Chinese personnel first, and then the Chinese personnel are dispatched out to the resident representative office of foreign enterprises via these service units.<sup>41</sup> Although this new employment form is neither the voluntary choice of the enterprise nor of the worker, it does have some similarities with TAW today and can be viewed as the embryo of TAW in China.

By 1992 China began its transition from a planned economy, under which state controlled the recruitment in state-sectors by assigning job quotas and allocating job positions every year,<sup>42</sup> toward a market economy in which labour market was opened in three ways: employers own the employment autonomy, workers could search for jobs and people could look for self-

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<sup>41</sup> Non-official translation, Article 11 of Interim Provisions of the People’s Republic of China on the Administration of Resident Representative Office of Foreign Enterprises.

<sup>42</sup> Feng Xu: *The emergence of temporary staffing agencies in China*, Comp. Labor Law & Pol’y Journal, Vol. 30:431, p.436.  
<[http://www.law.uiuc.edu/publications/CLL&PJ/archive/vol\\_30/issue\\_2/XuArticle30-2.pdf](http://www.law.uiuc.edu/publications/CLL&PJ/archive/vol_30/issue_2/XuArticle30-2.pdf)>, accessed 12 April 2010.

employment opportunities.<sup>43</sup> Under such circumstances, the state-owned and collectively-owned enterprises, the main job providers in planned economy times, initiated downsizing for efficiency movements, during which many redundant labourers had been laid off. At the same time, surplus labours from rural areas swarmed into cities to seek work opportunities since the long-time rural-urban segregation of labour force had been broken. On the one hand, the economy reforms brought remarkable economic growth, while on the other hand, new problems were put forward: there was an increasing unemployment rate as well as the social instability. The government was facing the new challenge of job promotion for different groups: the laid-off workers, unemployed workers, rural migrants and new entrants. Under this background, TAW was favored and encouraged by the government because of its contribution in quick job-matching and employment cost savings for the enterprises. Initially, TAW was provided by the public employment service agency with a target group: the laid-off workers, those who had suffered from economic reforms, and rural migrants, a group with relatively low skills and low education background. Shortly, private employment agencies either were newly established or transformed from public employment agencies were growing up with a much broader target group. At that time, many regional regulations on TAW were promulgated by the provincial or municipal governments, and under these regulations, TAW was called labour dispatch, an Asian name also used in Japan and Korea, which is translated directly from the literal meaning of Chinese character. Nevertheless, there was no regulation or legislation at the national level covering TAW, not to mention a specific law.

Along with the deepening of economic reforms, rural-urbanization process and the expansion of college enrollment, the supply of labour force was continuously in excess of demand in the Chinese labour market. Under the high employment pressure, TAW was constantly playing an active role in job promotion. In the White Paper of Chinese Employment Situation and Policy during 2003-2004, “labour dispatch” was for the first time mentioned officially in a national government report as a form of flexible employment. Meanwhile, without a national regulation of TAW, the burgeoning TW Agencies operated randomly and many workers had been the victims of illegal dispatch. It was in this context that the recent Employment Contract Law was drafted, starting in 2005,<sup>44</sup> with a purpose to recognize the lawful status of TAW at national level, set a unified standard of regulation and extended labour rights protection to workers under TAW. On the 1, January of 2008, the Employment Contract Law entered into force, which contained the regulation of TAW (labour dispatch) under the Chapter of Special Provisions. Till then, TAW was finally covered by the national legal system.

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<sup>43</sup> Elizabeth Morris: Summary Proceedings: *Training workshop on Labour Flexibility and Security Measures*, Beijing, China, 27-28 September 2005, p.11, available at <[http://www.ilo.org/public/english/region/asro/beijing/download/training/sum\\_labflex.pdf](http://www.ilo.org/public/english/region/asro/beijing/download/training/sum_labflex.pdf)>, accessed 10 April 2010.

<sup>44</sup> Supra note 42, p.454.

## 3.2 National Regulations of Temporary Agency Work

Although the Chinese government has not ratified the ILO Convention No.181, which could provide a guide to the regulation of TAW at national level, there are three national legal documents regarding the regulation of TAW (or labour dispatch). Besides the Employment Contract Law mentioned in the previous part, there is a supplementary legal document to the Employment Contract Law: the Regulation on the Implementation of the Employment Contract Law of the PRC, which was promulgated eight months after the entry into force of the Employment Contract Law, and a Legal Reply to the Labour Ministry from the Legal Affairs Committee of the Standing Committee of National People's Congress (SCtNPC) on the restrictions of job positions of TAW, which is a semi-judicial interpretation but not legally binding.

The specific contents relevant to TAW regulation in the above legal documents are embodied in the following aspects.

(a) **The requirement of establishing and operating a TW agency.** It is proscribed in the Employment Contract Law that the registration of a TW agency should be in line with relevant provisions in the Corporation Law and with a registered capital of no less than RMB 500,000.<sup>45</sup> This provision shows that TW agency in China is treated as a normal private business sharing the same registration system with other corporations, under which the documents specifying the number of stock-holders, the name and address of the corporation, the minimum capital, the scope of business should be provided.<sup>46</sup> Regarding the operation of a TW agency, there used to be a provision in the Draft of Employment Contract Law that the TW agency shall deposit no less than RMB 5,000 for each of its employees in a government-designated bank account<sup>47</sup>, while in the final text this provision was deleted as it was explained by some legislators that such requirement may be too rigid to run a TW agency and the agency may also shift off this obligation by making TA workers or the user enterprises pay the deposit.<sup>48</sup> It is obvious that the legislators has already realized the deposit can serve as a safeguard to ensure that the TA agencies comply with the provisions of legislation<sup>49</sup> and also benefit the TA workers in case of insolvency, work injury or no assignments to be performed. However, the legislator finally chose to take out this provision rather than to add

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<sup>45</sup> Non-official translation, Article 57 of the Employment Contract Law of PRC.

<sup>46</sup> Non-official translation, according to Articles 23, 25 of the Corporation Law of PRC.

<sup>47</sup> Non-official translation, Article 12 of the Draft of Employment Contract Law of PRC.

<sup>48</sup> Non-official translation, Report on the amendment of the Draft of Employment Contract Law 2006, <<http://www.ldht.org/html/lifa/lfjc/2616.html>> , accessed 12 April, 2010.

<sup>49</sup> ILO: *Guide to private employment agencies : regulation, monitoring and enforcement* , Geneva, International Labour Office, 2007, p.16, available at <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/instructionalmaterial/wcms\\_083275.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/instructionalmaterial/wcms_083275.pdf)>, accessed 12 April, 2010.

more detailed regulations to prevent abuse by TW agency, was probably due to the strong protests from the TW agency lobby during the open discussion procedure on the Draft of Employment Contract Law and also reflected the intention of the government that by reducing the economic burden of the TW agencies to encourage their establishment and operation in order to promote employment as well as to better function the flexibility of labour market.

**(b) Prohibitive situations of setting a TW agency.** According to Article 67 of Employment Contract Law and Article 28 of the Regulation on the Implementation of the Employment Contract Law, the employer shall not set TW agency to dispatch employees to itself or its subordinate units, including the situation that TW agency is founded by an employer or a subsidiary unit thereof or established in the form of partnership. These provisions are set with a concern that the user enterprise may use TAW as a way to disguise the real employment relationship.

**(c) Obligations of TW agencies.** According to Articles 58, 59 and 60 of Employment Contract Law and Article 30 of the Regulation on the Implementation of Employment Contract Law, TW agencies shall undertake the following obligations: (i) conclude the employment contract with TA workers, specifying matters such as the name of the user enterprise, the length of assignments, the posted job position, etc, in addition to the matters included in typical employment contract (ii) the employment contract should be a fixed term contract with a duration of no less than 2 years. The agency shall pay TA worker wages monthly. Even during periods when there is no assignment for TA worker to be dispatched out, the agency shall pay the minimum wages monthly according to the standard set by the government in the local place where the agency is located. (iii) TW agencies shall enter into an agreement with the user enterprise stipulating the job positions of TA workers, the number of TA workers, the length of assignments, amount and the means of payments of remuneration, social insurance and the corresponding default liability. (iv) TW agencies shall inform TA workers the contents of their agreements with the user enterprise. (v) TW agencies shall not withhold or deduct the remuneration paid by the user enterprise and shall not charge fees from TA workers. (vi) TW agencies shall not employ TA workers on a part-time work basis.<sup>50</sup>

**(d) Obligations of the user enterprises.** According to Articles 60 and 62 of the Employment Contract Law and Article 29 of the Regulation on the Implementation of Employment Contract Law, the user enterprise shall undertake the following obligations: (i) provide corresponding working conditions and labour protection according to the national labour standard (ii) inform job requirements and remuneration (iii) pay overtime pay, performance bonuses and provide welfare and benefits appropriate for the

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<sup>50</sup> Non-official translation, according to Articles 58, 59, and 60 of the Employment Contract Law of PRC.



job positions (iv) provide necessary position-related training for TA workers (v) implement a normal wage adjustment system in case of continuously using TA workers (vi) shall not dispatch TA workers to another enterprise (vii) shall not charge fees from TA workers.

(e) **Restrictions of job positions and length of assignments.** It is prescribed in Article 66 of the Employment Contract Law that “*temporary agency workers may in general be posted to job positions with a temporary, assistant or substitute nature*”. However, the wording is not strict in this provision as “may” has no compulsory meaning but reflects a suggestive sense.<sup>51</sup> Moreover, what constitutes a “temporary, assistant or substitute” job position is ambiguous. For this reason, the Labour Ministry consulted the legislator: the Legal Affairs Committee of SCtNPC for further interpretation, it is pointed out in the Reply that “temporary” means the duration of each assignment should not be more than 6 months, “assistant” means the job positions where TA workers posted to are not the core positions of the user enterprise, and “substitutive” refers to job positions where the permanent or direct employees are absent for the time being.<sup>52</sup> The restriction of job position is probably set with a purpose to ensure TAW not to supersede the regular employment but remain a supplementary status with a small proportion considering its negative effect to employment security. However, such legal reply in a strict sense is not a legal source under Chinese domestic legal system. It is not legally binding but with a guidance status.

What is worth mentioning here is that the limitation of the length of each assignment was once precisely proscribed in the Draft of Employment Contract Law. According to its Article 40, once a TA worker had worked in the user enterprise for one year and the user enterprise intends to continue to use the worker, the employment contract between the TW agency and the TA worker was subsequently to be terminated, then the user enterprise was to establish the employment relationship with the TA worker by concluding an employment contract.<sup>53</sup> This provision not only indicated the length limitation, but also stipulated the situation under which the TA worker could be translated into the direct employee of the user enterprise, which was with a purpose to prevent the in fact permanent work is taken by TA workers in the name of TAW so that enable the user enterprise to disguise the real employment relationship. Unfortunately, after the Draft was published for the sake of comments from different actors in the society, this provision was drastically debated. In particular, the American Chamber of Commerce PRC, the American Chamber of Commerce in Shanghai and U.S.- China Business Council, raised their objections to this provision, expressing that the provision was too rigid to apply in practice, and many enterprises may evade this provision by changing the dispatched job positions frequently, which may shorten the

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<sup>51</sup> Non-official translation, Article 66 of the Employment Contract Law of PRC.

<sup>52</sup> Non-official translation, the Legal Reply from the Law Affair Committee of the Standing Committee of National People’s Congress.

<sup>53</sup> Non-official translation, Article 40 of the Draft of Employment Contract Law of PRC.

employment duration of the TA workers and eventually gave rise to the unstableness of the labour market.<sup>54</sup> Thus, this provision was deleted in the final text of the Employment Contract Law and left it regulated by the non-binding Reply from the Legal Affairs Committee of SCtNPC.

### 3.3 The Profile of Temporary Agency Work in China

It was reported that according to the incomplete figures, there were more than 26,000 TW agencies in China till the end of 2008.<sup>55</sup> And the estimated number of TA workers had exceeded 27 million, with 7 million increase just one year after the promulgation of the Employment Contract Law.<sup>56</sup>

So far, TA workers are mainly composed of migrant rural workers, laid-off workers from state-owned and collectively-owned enterprises, unemployed urban workers, early-retired workers<sup>57</sup> and college graduates.

The geographic distribution is of large difference, eastern and southern parts are the regions where TAW originated and grown most fast. Such as Shanghai, Beijing, Guangdong, etc. TAW in other regions of China is relatively less developed.<sup>58</sup>

The sector distribution of TA workers is concentrated on construction, manufacturing, service, and state monopolized sectors including communications industry, energy industry, transport, banking, etc. For instance, it is estimated that there are more than 10 million TA workers in the construction industry nationwide, nearly one-thirds of the total number of TA workers in China.<sup>59</sup>

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<sup>54</sup> Non-official translation, *The labour dispatch has been metamorphosed and the "triangular relationship" harmed the labourer.*

<[http://www.cn12333.com/dispatch\\_view.asp?id=46](http://www.cn12333.com/dispatch_view.asp?id=46)>, accessed 25 April 2010.

<sup>55</sup> Non-official translation, Cao Haidong: *The abnormal prosperity of labour dispatch*, Southern Weekend, <<http://www.infzm.com/content/8067/1>>, accessed 15 April 2010.

<sup>56</sup> The number was raised by an officer from Legal Affairs Committee of National Peoples' Congress, and reported by the 21 Century Economy, Chen Huan: *Loophole of labour dispatch: to maintain the priority of employment*, 20, Sep. of 2008, <[http://www1.21cbh.com/HTML/2008-9-22/HTML\\_X2P3QI44B14O.html](http://www1.21cbh.com/HTML/2008-9-22/HTML_X2P3QI44B14O.html)>, accessed 15 April 2010.

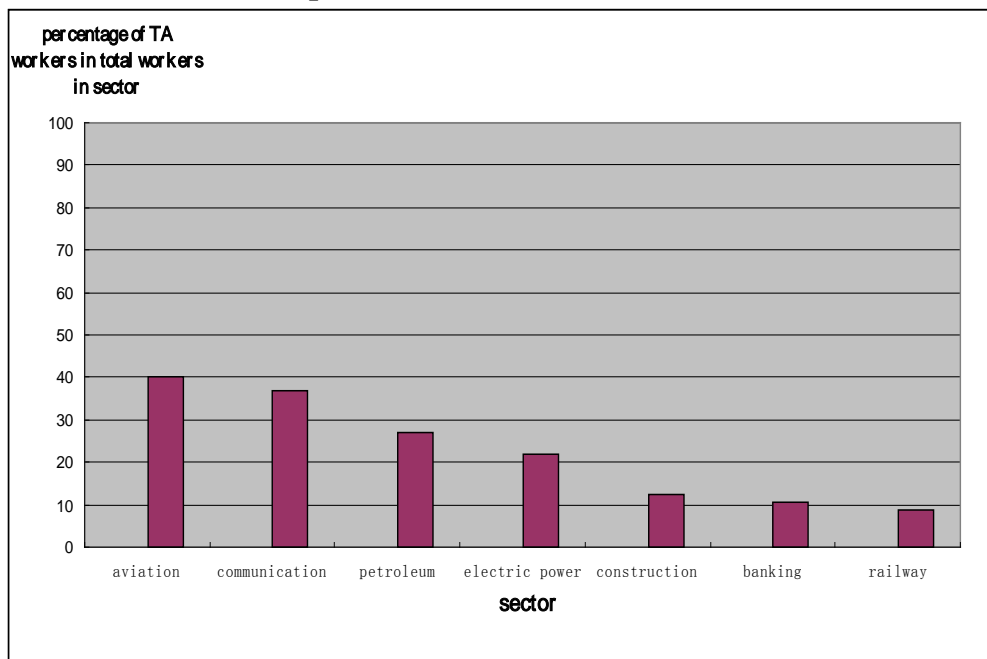
<sup>57</sup> Workers usually in the state-owned or collectively-owned enterprises, who are close to a retirement age (such as within five years), enjoy a semi-retired status, that is retaining the employment relationship but have to vacate the job position with a minimum wage per month or a compensation once for all, till the real retirement age comes. These workers often emerge in the downsizing process.

<sup>58</sup> Non-official translation, *20 million dispatch workers nationwide need to walk out from the "strange identity circle"*, Work Daily, 08, March of 2010. <<http://unn.people.com.cn/GB/14748/82703/11092498.html>>, accessed 15 April 2010.

<sup>59</sup> Non-official translation, Dong Baohua: *The origin and development of labour dispatch*, Labour Dispatch, China labour and social security press, 2007, p14.

The penetration rate of TAW is significantly high, far beyond the average situation (a rate below 2%) worldwide, which can be seen as one of the most remarkable characteristics of TAW in China. Take Sichuan Province as an example, an inland region where TAW was introduced later than the coastal areas, the penetration rate of TAW is no less than 11.9%, according to the latest government report on TAW in Sichuan from Sichuan Department of Human Resources and Social Security (SDHRSS).<sup>60</sup> Penetration rate of TAW in specific sector can also be found in this report, of which the highest rate has arrived to 40%. The detailed situation is reflected in the histogram below.

**Histogram1.1. The penetration rate of TAW in construction and another six state monopolized sectors in Sichuan Province in 2008.**

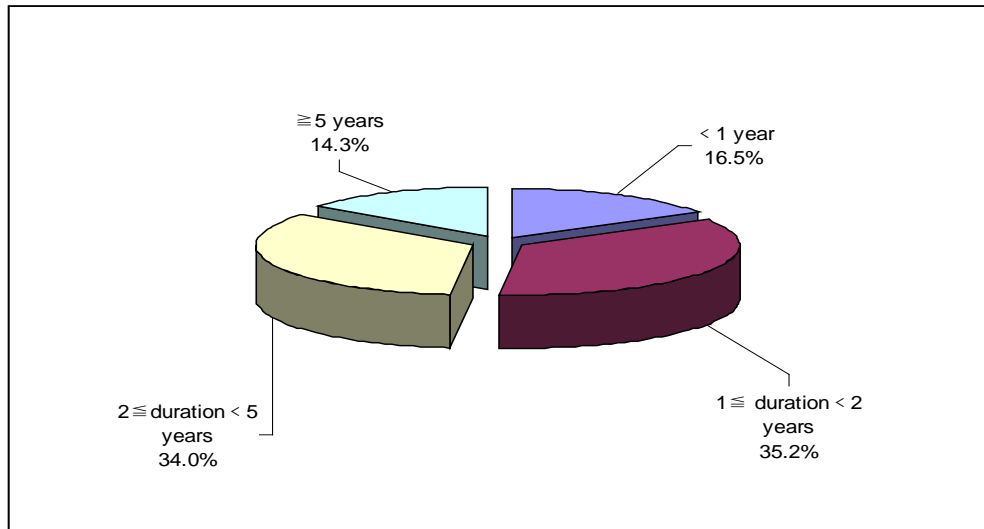


The length of assignments of TAW varies in different occupations and sectors, while the general situation is in excess of 1 year. It is showed in the government report on TAW from SDHRSS, in the construction sector, which is with a high mobility, the length of assignment is relatively short, normally within 2 years, while in other sectors, the length is longer, such as in a state-owned communication company, the average length of assignments of TA workers working here is 5 years.<sup>61</sup> Epitome typical situation of the assignments duration dimension is also revealed here based on 93 TA workers' anonymous questionnaire survey nationwide carried out by the author during February and March, 2010.

**Pie chart 1.2 The distribution of the length of assignments in the sample survey on 93 TA workers**

<sup>60</sup> Non-official translation, the inner government report on TAW in Sichuan by Sichuan Department of Human Resources and Social Security.

<sup>61</sup> *Ibid.*



### 3.4 Chinese Characteristics of Temporary Agency Work

In spite of being a worldwide phenomenon, the specific situation of TAW may vary from country to country on account of different government policies, different contents of legal regulations, different labour market situation, etc. Based on the aforementioned background, profile and national regulation of TAW in China, some Chinese characteristics of TAW can be found.

(a) There is no rigorous requirement of establishing a TW agency. Under national law, the only specific requirement to run a TAW business is to prove the financial capacity with a minimum start-up capital of RMB 500,000. There is no requirement of personal and professional qualifications which is proposed under Article 14 of ILO's Recommendation No.188 (the concrete content of this provision can be referred in part 2.2.2 in this thesis), and there is no license system that requires the previous authorization of a TW agency before commencing business,<sup>62</sup> which is called for by the ILO in the Convention No.181 under Article 3 (2). (the concrete content of this provision can be referred in part 2.2.2 in this thesis).

(b) There is no restriction of sectors of TAW. Although under Article 2 (4) (a) of the ILO Convention No.181, some restriction of sectors can be made to reduce the risk of hazards to TA workers, no such restriction is set under national law. The consequence of freely development is that more than one-third of TA workers now in China are put in the construction sector, which is with a higher risk.

<sup>62</sup> *Supra* note 49, p.13.

(c) The number of TA workers is enormous. In general, China has a large number of TA workers, nearly 3 times of the total number of TA workers in 34 countries around the world in 2008 presented in the Cieltt's latest report. Besides the large population of China *per se*, one reason is the economic reforms, which brought various groups, such as the laid-off workers, rural labourers, who are in a disadvantaged position in looking for regular employment, into the new labour market. Another reason is that the newly promulgated Employment Contract Law in the beginning of 2008, which recognizes the legal status of TAW nationwide on the one hand, and sets a stricter employment protection for labours engaged in regular employment relationship on the other, by requiring the employers to conclude a permanent or open-ended employment contract with employees who have been working continuously in the same unit for more than 10 years or those who have signed a fixed-term employment contract with the same employer twice consecutively,<sup>63</sup> gives rise to an increasing enthusiasm or incentive for the employers to use TAW as a means of avoiding building permanent or open-ended employment relationship with employees.

(d) The proportion of TAW among all the employment forms is much larger than the proportion in many other countries. As showed in part 3.3, even in the Sichuan region where TAW is less-developed in China, the average penetration rate (11.9%) of TAW is several times more than the average situation in Europe (1.7%), far more than the situation in Japan (2.2%), in the USA (1.7%) and in the UK (4.1%), the first three TAW markets among 34 countries worldwide in the Cieltt's report. According to the Histogram1.1, the penetration rate in certain sectors is extremely high, not to mention it is at times reported that in some enterprises, TA workers has taken up nearly 50% of the total worker number or even exceed the number of workers engaging in non-TAW employment.<sup>64</sup>

TAW in China is losing its temporary nature. One of the most remarkable features of TAW is its temporary nature. This is also confirmed in the national regulation, the Legal Reply from the Legal Affaires Committee of SCtNPC, in which precisely prescribed that the length of each assignment shall be no more than 6 months. However, a different picture is showed in reality. Either from the government report or from the empirical survey, the length of assignment in many cases has gone beyond the limitation of 6 months. Such as statistics from the pie chart 1.2 above, only around 16.5% of 93 TA workers indicated their assignments was within one year, around 35.2% of 93 TA workers indicated their duration was from 1 to 2 years, around 34% of 93 TA workers indicated their duration was from 2 to 5 years and around 14.3% had a longer than 5 years' duration.

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<sup>63</sup> Non-official translation, Article 14 of Employment Contract Law of People's Republic of China.

<sup>64</sup> Non-official translation, Cao Haidong: *The abnormal prosperity of labour dispatch*, Southern Weekend, < <http://www.infzm.com/content/8067/1>>, accessed in 15 April, 2010.

### 3.5 Conclusion

Analysis above demonstrates that in law, the regulation of TAW in China is much looser compared with the minimum international standard set in the ILO Convention No.181 and Recommendation No.188, which is probably because the government has not ratified this Convention yet and therefore the national law has not been effectively influenced. However, the gap between the national law and international law has resulted in the rapid growth of TW agencies as well as the potential risk of labour rights infringement in reality, such as the large proportion of TA workers are posted in the construction sector where a higher risk of labour health and safety may exist.

Meanwhile, even according to the national law, the development of TAW in reality is not compliant. Seen from the large number of TA workers, the considerable disparity of penetration rate of TAW between the general situation worldwide and the situation in China, a trend that TAW is seeking a larger space of development in order to get rid of its presupposed supplementary status can be found.

Moreover, the overt disobedience of the limitation of assignment duration reflects the weakness of national regulation, mainly due to the non-binding legal effect of the Legal Reply from the Legal Affairs Committee of SCtNPC and the lack of precise stipulations in law. What is worse, such prolonged TAW may in reality hinder the function of TAW as a stepping-stone to the regular employment. As TAW from the outset is regarded as a bridge or a stepping-stone to the regular employment, and it is mainly for this reason the job-seekers with difficulties in finding a stable job chose TAW and also for this reason the state would like to affirm and promote the development of TAW industry to solve the problem of unemployment. However, since in reality the duration of assignment can last as long as the user enterprises want, the chance for the TA workers to be translated into the direct or permanent employees of the user enterprises is smaller, which means the presupposed active role of TAW as a channel from irregular employment to regular employment may not be well played. On the contrary, TAW is more likely to be used as a way by the user enterprises to displace permanent employees in order to dodge obligations of the real employer.

In conclusion, it is not hard to find that TAW in China has deviated from its due supplementary status to the regular employment that presupposed in the national law as well as embodied in the practice of other countries worldwide. The breach of current national regulation which results in the increasing risk to the labour rights indicates that TAW in China has at least to some extent been abused.

# 4 Labour Rights of Temporary Agency Workers in China

Undeniably, the rapid development of TAW is one of the essential factors contributing to the continuously growing economy and a more dynamic labour market. However, the more flexible the labour market is, the less stable and secure employment the workers may engage in. For those workers who are involved in such irregular employment relationship, their peripheral status may result in the risk of labour rights abuse in return for the maximum economic profit pursued by the enterprise. That's why irregular employment is endowed with a supplementary role to the regular employment, not to replace it or be the mainstream employment form. Therefore, in the case of TAW, the examining of the *status quo* of TA workers' labour rights conditions is quite important, in order to further check if a balance between labour rights protection and flexibility of labour market has been made.

## 4.1 Labour Rights Protection of Temporary Agency Workers under National Law

Before we turn our eyes to the current situation of labour rights conditions of TA workers in China, a background of legal basis at national level relevant to labour rights protection for TA workers is better to be unfolded, so as to provide a benchmark of what labour rights they should have, for the further scrutinizing.

There is no specific national law exclusively providing labour rights protection for TA workers. TA workers were not covered in the national legal system until TAW was recognized and regulated at national level by the Employment Contract Law in 2008, as a special form of employment. However, since TA workers are endowed with the legal status as one category of the workers, they are entitled the fundamental labour rights as other workers enshrined in the national law.

### 4.1.1 Labour Rights in the Entrance into Employment

#### 4.1.1.1 The Right to Equal Opportunity of Employment

It is prescribed under the Labour Law of PRC 1995 that every labourer enjoys the right to equal opportunity of employment<sup>65</sup> and shall not be

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<sup>65</sup> Non-official translation, Article 3 of the Labour Law of PRC 1995.

discriminated on the grounds of ethnic region, race, sex or religion.<sup>66</sup> This right is also addressed in the Employment Promotion Law 2008, in which new two grounds of discrimination, “people with disabilities” and “rural workers” were added.<sup>67</sup> However, there is no further interpretation of the definition of “discrimination” in law or in what circumstances or what criteria may constitute discrimination, the right to equal opportunity of employment is left to be explained differently by different actors and thus difficult to examine in practice.

#### **4.1.1.2 The Right to Choose Occupation Freely**

The right to choose occupation freely is proscribed in both Labour Law of PRC 1995 and the Employment Promotion Law 2008 as a general principle.<sup>68</sup> This right is in essence an embodiment of the principle of autonomy of will in the civil activities, which could be understood that the labourer has the freedom to choose occupation based on his or her own willingness, including the freedom of choosing or not choosing certain occupation, the freedom of choosing or not choosing certain job position in certain enterprises and the freedom to quit without any intimidation, threat or penalty, in order to tackle any forced or compulsory labour, which is prohibited in the ILO’s core Labour standard: Forced Labour Convention 1930, No.29 . However, under national law, the concept of this right is not further interpreted and therefore in what situations may constitute a violation of this right is vague and difficult to measure.

### **4.1.2 Labour Rights during Employment**

#### **4.1.2.1 The Right to Organise and Collective Bargaining**

The general situation of the right to organize and collective bargaining is set under the Trade Union Act and the Labour Law of PRC 1995. It is prescribed in Article 3 of the Trade Union Act that all “*workers in enterprises, institutions or State organs within the territory of China who rely on wages or salaries as their main source of income, irrespective of their nationality, race, sex, occupation, religious belief or educational background, have the right to organize and join trade unions according to law.*”<sup>69</sup>

The right to collective bargaining is prescribed under Article 33 of the Labour Law of PRC 1995, “*employees of an enterprise as one party may conclude a collective agreement with the enterprise on matters relating to labour remuneration, working hours, rest and vacations, occupational*

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<sup>66</sup> *Ibid*, Article 12.

<sup>67</sup> Non-official translation, according to Articles 29 and 31 of the Employment Promotion Law of PRC.

<sup>68</sup> According to Article 3 of the Labour Law of PRC and Article 3 of the Employment Promotion Law of PRC.

<sup>69</sup> Non-official translation, Article 3 of the Trade Union Act of PRC.



*safety and health, social security and welfare. The draft of collective contract shall be submitted to the workers' representative assembly or to all the staff and workers for discussion and adoption.*"<sup>70</sup> And the "collective agreement shall be concluded by the trade union on behalf of the staff and workers with the enterprise; in enterprise where the trade union has not yet been set up, collective agreement shall be concluded by the representatives elected by the staff and workers with the enterprise."<sup>71</sup>

Under the Employment Contract Law, the right to organize specifically for TA workers is addressed under Article 64 that "*the TA workers have the right to join or organize trade union lawfully either in the temporary employment agency or in the user enterprises*".<sup>72</sup> Although in law, the worker is entitled the right to organize in China, the general situation of the right to organize or join the trade union is limited to be exercised in the unit where the worker has been employed. This article addressing the fundamental right may be exercised in either one unit of the two, is based on the concern that TA workers, although being the employees of the TW agencies, are not easily to be organized in the agencies as they are dispatched to different worksites at different user enterprises for different length, while in the user enterprise, since TA workers are performing work along with other employees, it is more convenient or attractive for them to join or organize trade union there.

#### **4.1.2.2 The Right to Remuneration**

Under Labour Law of PRC 1995, the right to remuneration contains the following aspects: **the employee should be paid monthly by cash**,<sup>73</sup> **the employee should be paid equally for equal work**<sup>74</sup>, and **the remuneration should not be deducted or delayed without any justification**.<sup>75</sup> In the Employment Contract Law, these three aspects are addressed specifically for TA workers.

The Article 58 of Employment Contract Law prescribes that it is the TW agency, not the user enterprise, pays TA worker wages monthly, although the payments is actually made by the user enterprise, it should be transferred to the TW agency first, not directly paid to the TA worker.<sup>76</sup>

Article 63 ensured TA workers the right to equal pay for equal work to the direct employees of the user enterprise. It is notable that the principle of equal pay for equal work here is not the same as the international standard set in the ILO's Equal Remuneration Convention No.100 "*the equal remuneration*" for "*work of equal value*"<sup>77</sup>, as work of "equal value"

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<sup>70</sup> *Supra* note 65, Article 33.

<sup>71</sup> *Ibid*, the second paragraph.

<sup>72</sup> Non-official translation, Article 64 of the Employment Contract Law of PRC.

<sup>73</sup> *Supra* note 65, Article 50.

<sup>74</sup> *Ibid*, Article 46.

<sup>75</sup> *Ibid*, Article 50.

<sup>76</sup> *Supra* note 72, Article 58, the second paragraph.

<sup>77</sup> Article 1 (b) of the ILO Convention N O.100.

contains the comparison not only between the same work but also between different work while the “equal work” only contains the comparison between the same or similar work. So the national law further prescribes when there are no direct employees engaging in the same work as the TA worker, the amount of TA worker’s remuneration can be referred to the remuneration of direct workers in the same or similar position in other enterprises in the same city where the user enterprise is located.<sup>78</sup> The provision intends to solve the problem that when there is no comparable job or work in the same user enterprise and then extends the comparison to different enterprises in the same city. The limitation of the city here is probably due to the large disparity of economic situation in different places in China, where different minimum wage and social security standard are set. From this provision, it is obvious that the legislator has an intention to ensure the equal treatment of TA workers in respect of remuneration with directly employees as far as possible as TA workers may in reality face the visible or invisible exclusion because of their peripheral status. However, the legislator may underestimate the applicability of comparison between different enterprises, as even in the same city, in the same sector, the financial capacity of different enterprises may vary a lot.

The second paragraph of Article 60 of the Employment Contract Law prescribes that the TW agency shall not withhold or deduct TA workers’ remunerations paid by the user enterprises.<sup>79</sup> As stipulated in Article 58, the TA workers do not directly receive remuneration from the user enterprises but paid by the TW agency after the agency receives the payments from the user enterprise, which means there might be some risk of deduction or withholding by the TW agency if the agency wants to charge any management fee or a commission from either side, especially when the TA worker is not quite clearly about the exact amount of his or her remuneration. To tackle this problem, the paragraph three of Article 60 prescribed either the TW agency or the user enterprise shall not charge fees to the TW worker. Moreover, the paragraph one of Article 60 prescribes the TW agency shall inform TA worker the content of the commercial agreement concluded between the TW agency and the user enterprise which specifies the amount of remuneration, the way to make payments, the respective responsibilities of TW agency and user enterprise in the case of breaching the agreement.<sup>80</sup> Article 62 also prescribes that the user enterprise has the obligation to inform the TA worker of his or her remuneration.

#### **4.1.2.3 The Right to Occupational Training**

According to Article 68 of the Labour Law, *“The employer shall establish a system for vocational training, raise and use funds for vocational training in accordance with the provisions of the State, and provide worker with vocational training in a planned way and in the light of the actual situation*

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<sup>78</sup> *Supra* note 72, Article 63.

<sup>79</sup> *Ibid.* Article 60, paragraph two.

<sup>80</sup> *Ibid.* Article 60, paragraph one.

*of the enterprise,” and “workers to be engaged in technical work must receive pre-job training before taking up their posts.”<sup>81</sup>*

In the Employment Contract Law, it is prescribed in Article 62 (4) that *“the user enterprise should provide necessary occupational training to the TA workers related to their work.”<sup>82</sup>* This provision shows that under the situation of TAW, the legislator allocated the obligation of providing occupational training which is heard by the employer in the traditional employment relationship, to the user enterprise in case they pass the buck to each other.

#### **4.1.2.4 The Right to Social Security and Welfare**

In the Labour Law, the Article 3 prescribes the worker has the right to enjoy social security and welfare as a general principle. Article 72 prescribes that both worker and employer shall participate in social security and pay the social security premiums in accordance with the law.<sup>83</sup> Article 73 further indicates the circumstances under which, the worker shall enjoy social security, namely (1) *retirement*; (2) *illness or injury*; (3) *disability caused by work-related injury or occupational disease*; (4) *unemployment*; and (5) *child-bearing*.<sup>84</sup>

In the Employment Contract Law, it is stipulated in Article 17 that the employment contract should specify the situation of social security and according to Article 38, the worker may terminate the employment contract if the employer fails to pay the social insurance premiums in accordance with the law.<sup>85</sup>

In the case of TAW, the responsibility to pay the job-related welfare is allocated to the user enterprise other than the TA agency according to Article 62. While the amount of social security and who is in charge of making payment is left for the TA agency and the user enterprise to settle in their commercial agreement which should be informed to the TA worker before he or she is dispatched out according to Article 59.<sup>86</sup>

#### **4.1.2.5 The Right to Occupational Safety and Health**

Under Labour Law, Article 52 stipulates *“the employer must establish and perfect the system for occupational safety and health, strictly implement the rules and standards of the State on occupational safety and health, educate workers on occupational safety and health, prevent accidents in the process of work, and reduce occupational hazards.”<sup>87</sup>* Article 54 stipulates the

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<sup>81</sup> *Supra* note 65, Article 68.

<sup>82</sup> *Supra* note 72, Article 62.

<sup>83</sup> *Supra* note 65, Article 70.

<sup>84</sup> *Ibid.* Article 73.

<sup>85</sup> *Supra* note 72, Article 38.

<sup>86</sup> *Ibid.* Article 59.

<sup>87</sup> *Supra* note 65, Article 52.

employer “shall provide workers with occupational safety and health conditions in line with the provisions of the State and necessary goods of labour protection, and provide regular health examination for labourers engaged in work with occupational hazards.”<sup>88</sup>

In the Employment Contract Law, the right to occupational safety and health is addressed specifically for the TA worker by designating the responsibility to provide labour protection in this regard to the user enterprise according to Article 62. This provision may be set with a concern that although the TW agency is the employer, the TA worker does not directly work for them, but to perform work at the user enterprise’s workplace, where the labour’s safety and health is more directly affected. To specify this responsibility is very crucial for the labour rights protection for TA worker, as unlike workers in bilateral employment relationship, who are very clear about their rights and the duty-bear, TA workers in the triangular relationship may encounter confusion that who is liable for work injury, the employer or the user enterprise and these two actors may also pass the buck to each other if they did not put this in the commercial agreement.

## **4.2 Labour rights of Temporary Agency Workers in Reality: *the Conflict between de jure Rights and de facto Rights***

In this part, the labour rights conditions of TA workers in reality will be examined based on the empirical survey, typical cases, and government and social reports. The empirical survey was carried out by the author during February and March in China in 2010 with a purpose to have a closer look at the labour rights and working conditions of TA workers. It was mainly relied on the distribution of questionnaires to TA workers on the internet supplemented by personal interviews to both TA workers and TA agency managers face to face. The choice of putting questionnaire online rather than to hand it out on-site is in order to capture a more general situation nationwide rather than to limit the investigations in a specific city or place within a limited time, and also with a purpose to ensure as far as possible the reliability of the survey result, by decreasing the non-objectivity in the case of on-site distribution wherein active selection of the respondents by the investigator will be needed and by completely guaranteeing the anonymous of the respondents as well. Till the end of March, 93 TA workers around the country participated in the questionnaire survey, among which 60 persons were men and 33 were women. They were with different age (67 persons under the age of 30), different education background (7 persons with a primary school level, 17 persons with a secondary school

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<sup>88</sup> *Ibid.* Article 54.

level, 38 persons with the junior college level, 35 persons with an undergraduate level, 3 persons with a graduate level), different job positions (16 persons engaged in management, 23 persons engaged in service-related position, 54 persons engaged in technology-related position, 7 persons engaged in other positions), and from different sectors (32 persons in energy sector, 22 persons in telecommunications, 15 persons in banking and finance, 9 persons in transportation, 8 persons in construction, 6 persons in manufacture, 6 persons in service, 2 persons in other sectors ).

Although the questionnaire survey is not statistically significant, it is an illustration of the *de facto* labour rights and working conditions of TA workers in China, by which the obstacles of labour rights protection for TA workers may also be indicated.

## **4.2.1 Labour Rights Examining in the Entrance into Employment:**

### **4.2.1.1 Inapplicable Right to Equal opportunity of Employment for Temporary Agency Workers as a whole**

Since the status of TA worker is not prescribed under national law as a ground of non-discrimination in relation to the equal opportunity of employment, this right is not applicable to TA workers as a whole. Thus, in the questionnaire survey the author did not examine this right.

However, the single TA worker who has certain criteria which is recognized as a reason for non-discrimination of employment under national law such as women, person with disabilities, etc, still enjoy this right.

### **4.2.1.2 the Right to Choose Occupation Freely vs. the Involuntarily Transformation to A Temporary Agency Worker**

TAW should be a result of voluntarily choosing by both TA agencies and workers. While in the questionnaire survey, the response to “the reason to be a TA worker” was quite unexpected. Only 2% of 93 TA workers showed they took TAW voluntarily because they liked short term work, around 23% of 93 TA workers showed they chose TAW because they wanted to take it as a stepping stone to a permanent work. The rest, around 75% of 93 persons, showed they were pushed to be TA workers in different situations. One situation indicated by a relatively small proportion of respondents was that, they were initially the direct employees of the user enterprise, but later were dismissed and rehired as TA workers by the same enterprise to perform the same work at the same position as they previously did. Those who were not willing to accept the status transformation from direct employees to TA workers would definitely lose their job under the threat of their employer. Another more general situation was that they were obliged

to be TA workers during the job application. Enterprises which were inclined to absorb them required them to sign employment contract with a designated TW agency and therefore work for them as TA workers. To be a TA worker was the precondition to enter the enterprise.

The involuntary situation encountered by the majority of respondents was abnormal to the typical form of TAW. It is as a rule that TAW happens in a way that the TW agencies hire workers first, and then dispatch them out to the user-enterprise, while shown in the questionnaire survey, the situation was reverse. It was the user-enterprise that found candidates in the open labour market with a free labour status first or already had those labours working for them as direct employees, and then sent them to TA agencies to establish or change the employment relationship, with a final purpose to get rid of the employer role, but act as a user enterprise. On the surface, the reverse form was in accordance with the criteria of TAW, since three actors were involved in and they respectively had different contract relationships with each other, while in the essence, the reverse form was a manner taken advantaged by the user enterprises with an intention to hide those workers' real legal status as the direct employees, in order to evade legal obligations as the employer, and to deny the entitled rights and protections enjoyed by those workers, such as the due compensation for dismissal. Thus, it constituted a disguised employment relationship according to Article 4 (b) of ILO Employment Relationship Recommendation, No.198, 2006, "*a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due*", which ILO is calling for governments to combat.

Under the circumstance of involuntarily entering into TAW, labour rights are indeed easily being abused. A representative case in this respect was Xu Yan'ge v. Kentucky Fried Chicken (KFC) Beijing Company in 2006. Xu Yan'ge started to work there from 1995 without signing any employment contract. In 2004, he was required by the KFC to sign an employment contract with Shidaiqiao Company, a private employment agency he never heard about; otherwise he would be dismissed by KFC Beijing Company. Xu Yan'ge signed the contract and remained his job in KFC. In 2005, the 11<sup>th</sup> year since he worked in KFC, Xu Yan'ge was fired by KFC because a mistake he made at work. At the same time, Shidaiqiao Company terminated the employment contract with him. Xu Yan'ge was not paid any compensation either from KFC or from Shidaiqiao Company. Xu Yan'ge brought his case to the local Labour Arbitration Committee, claiming that he should be paid dismissal compensation by KFC since he had been working there for 11 years, whereas his claim was dismissed. In 2006, Xu Yan'ge filed a law suit to Dongcheng district court of Beijing, the court held that no employment relationship existed between Xu Yan'ge and KFC since Xu Yan'ge has concluded an employment contract with Shidaiqiao Company, and therefore his claim was rejected. Xu Yan'ge then appealed against the judgment of the court of first instance to the Court of Appeal. At that time,

KFC showed its willingness to negotiate with Xu Yan'ge and ended with a compromise that KFC paid Xu Yan'ge dismissal compensation and Xu Yan'ge withdrew his appeal.<sup>89</sup> Soon after this case, KFC Beijing Company announced in public that it would gradually abolish TAW within this Company and acknowledged employees' status of those workers who had the same situation with Xu Yan'ge.

This is a typical case that using TAW to hide real employment relationship by forcing direct employees transforming to TA workers, which is a quite common today. In this case, the crucial elements to identify the real relationship between the applicant and KFC were the original motivation of KFC, the reluctance of the applicant to sign employment contract with the third agency under the threat of being fired and the fact that the applicant had been working for KFC continuously for 11 years. However, the proofs of KFC's the motivation to disguise the real employment relationship and the applicant was to some extent threaten to sign the contract were often weak or not easy to be testified, while the existing employment contract between the applicant and employment agency was a strong evidence to support KFC. That's the very reason that in the first two rounds of litigation, the applicant lost. Surprisingly, KFC at last chose to settle this case out of court by admitting the applicant's due status even realized that there was little risk for KFC to lose under national law. Anyway KFC made a sensible decision, by which the anger of TA workers had been eased and the good corporation image as a multinational enterprise was maintained. The final decision of KFC in this case set a good example of not making use of TAW to abuse labour rights anymore.

However, it is demonstrated either in the empirical survey or in the media reports that the situation of forced to be a TA worker still widely existed especially in banking, manufacturing, service industries, etc.<sup>90</sup>

As regards the reason of why "the adverse labour dispatch" or the involuntarily situation of TAW is so popular in the user enterprise, it was found through the personal interviews to both TA workers and the TW agency managers that it was mainly because the newly promulgated Employment Contract Law providing a stricter protection for workers in regular employment. In the previous national Labour Law, there was no mandatory provision for the employer to conclude an open-ended or permanent employment contract with the employee under certain circumstances, but left it to be negotiated between the employee and the employer themselves. While in the Employment Contract Law, two situations are set. One is that when the employee has been working for the same unit continuously for more than 10 years. The other situation is that

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<sup>89</sup> Non-official translation, Dong Baohua: *Case analysis on allocation of employers' liabilities in labour dispatch*, Labour Dispatch, China labour social security press, 2007, p304.

<sup>90</sup> *Labour dispatch system prevailed in four major banks, employee status of 8,000 personnel of bank of China were changed*, 21Centruy Economic Report. <<http://biz.163.com/06/0905/15/2Q92ON8G00020QEV.html>>, accessed 12 April, 2010.

the employee has signed a fixed-term employment contract with the same employer twice consecutively. Under these two situations, once the employee expresses his or her willingness to establish an open-ended employment relationship,<sup>91</sup> the employer is obliged to conclude an open-ended employment contract. As the requirements to terminate an open-ended employment contract is much stricter and the compensation is larger than the situation under a fixed-term employment, the employer hold an objectionable attitude towards this new law and tried to dodge these provisions, especially for those enterprises with a large group of employees who met the two conditions set in the new law. Under this circumstance, TAW is becoming the final straw of the enterprises to clutch at, in order to get rid of the real employer's obligations by transforming their existing or potential employees to TA workers. Although this is a disguised employment relationship in the essence, no legal basis can be found in the national law at present to effectively tackle such abuse. Another reason is probably because the workers are in a relatively unfavorable position to the enterprises especially in a labour market with an oversupply of labour force. Under the concern of losing the job opportunity or the threat of being laid-off, job seekers or workers at a large extent have been pushed to be TA workers and placed in the disguised employment relationship.

## **4.2.2 Labour Rights Examining during Employment**

### **4.2.2.1 Unachievable Right to Organise and Collective Bargaining**

This is no available official statistics of the exact rate of unionization of TA workers in China so far. While it was pointed out by the Law Enforcement Inspection Team of SCtNPC in their 2009 Report on the Implementation of the Trade Union Act that, *“The right to organize and join the trade union for TA workers was hard to achieve in reality. As TA workers only sign the employment contract with the TW agency, although according to the Employment Contract Law, they can join the trade union either in the TW agency or in the user enterprise, the user enterprise in the practice is usually reluctant or feel difficult to absorb them considering they are not their real employees. While in the TW agency, even if the trade union is founded there, as TA workers are spread out and out of reach to the employer, it becomes a merely formality.”*<sup>92</sup>

To have a closer look at the situation, a question of whether you have joined the trade union was put forward for TA workers in the author's questionnaire survey. Among the 93 respondents, about 33% of them

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<sup>91</sup> *Supra* note 72, Article 14.

<sup>92</sup> Non-official translation, Report on the Implementation of the Trade Union Act by the Law Enforcement Inspection Team of the Standing Committee of National People's Congress of PRC in 2009, available at < [http://www.npc.gov.cn/npc/xinwen/2009-10/30/content\\_1538213.htm](http://www.npc.gov.cn/npc/xinwen/2009-10/30/content_1538213.htm) > , access 29, April, 2010.



answered they joined the trade union in the user enterprises. About 10% chose they joined the trade union in the TW agencies, the rest 57% chose they did not join trade union of either side.

For those who did not join trade union, a follow-up question about the reason was raised. About 9% of those TA workers expressed, they had no interest in joining trade union as they thought it did not work. Around 14% expressed they had no idea that TA workers were entitled the right to join trade union. Around 25% expressed that they were not clear about the trade union of which side they should join in. About 52% indicated there was no trade union in the TA agencies and they were excluded from joining the trade union in the user enterprises.

A similar result was found during the personal interview. a TA worker told, in the user enterprises during her assignments, many TA workers like her had a strong feeling of being excluded, being regarded as the outsider workers, they could not join the trade union, even the workers' plenary assembly, not to mention to elect their own worker representatives or to be voted. Furthermore, she expressed, in the TW agency, her direct employer, no trade union had been founded yet. As she and other TA workers were distributed in different sectors working in different conditions and receiving different payments, the lack of common interests was hard to assemble them together. The response from a principal of a famous TW agency in Chengdu during personal interview corroborated what the TA worker said, as even in the principal's agency, which was with a large scale of 8,700 TA workers, no trade union had been founded yet.

The ineffective exercise of the right to organise accordingly affected the right to collective bargaining. As under national law, the conclusion of collective contract is usually carried out by the trade union, or the representatives of workers where the trade union is not established.<sup>93</sup> If TA workers were excluded from the trade union, or rejected to join the workers' plenary assembly in the user enterprise, their interests and voices could hardly be listened and therefore their right to collective bargaining could never be actually achieved.

#### **4.2.2.2 Unequal Treatment in Pay**

The right to equal pay between TA workers and direct employees engaging in the same job is prescribed under the Employment Contract Law, while in the questionnaire survey, the reality was quite disappointing.

To answer the question that whether you received the same remuneration with your counterparts in the user enterprise who were engaged in the same position, no one of 93 TA workers thought they received the exactly same remuneration. Only around 4% of 93 TA workers thought they received the same remuneration, as the difference was slight, while the majority, 96% of

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<sup>93</sup> *Supra* note 65, Article 33.

TA workers thought they did not receive the same remuneration at all and the gap between the payments was huge.

The follow-up question in the questionnaire was for those who chose they did not receive the equal remuneration about in which aspect the difference was the most obvious. Around 18% of those persons chose the basic wage, around 36% chose bonus, and around 46% chose social security and other benefits.

Similar findings were revealed in the spot check of TAW carried by the Federation of Trade Union of Hubei province. According to their survey result, the average wage of TA workers in Hubei province were just 60% of direct employees with the same job position, the employer-paid social securities of TA workers were obviously lower and 30% of TA workers had no benefits at all.<sup>94</sup>

During the personal interview, the author was told by a TA worker from a state-owned enterprise that his monthly paid wage was just one-thirds of his counterpart's wage and a TA worker in bank said his housing allowance, one of the most common and important welfare in the wage system in China, was half amount of those of direct employees.

Actually, before the promulgation of Employment Contract Law, the phenomenon of unequal pay between TA workers and direct employees was reported quite common. There was once a case brought into Labour Arbitration Committee by a TA worker, Miss Gi, she was dispatched to a Textile Factory working as a secretary, while after half year working here, she found no matter how well she performed, her payments was always less than one- third of her counterpart's payments engaging in the same work. She brought her claim to the local Labour Arbitration Committee for equal treatment in pay. The Labour Arbitration Committee confirmed the fact that Miss Gi was paid unequally to the direct employees in the same factory doing the same job, whereas since Miss Gi as a TA worker had no employment relationship with the factory, the right to equal pay ensured in Labour Law did not apply to Miss Gi.<sup>95</sup> For this reason, Miss Gi lost her case.

This case shows the situation when TA workers' equal rights were not admitted in national law. As mentioned in part 4.1.2.2, the newly promulgated Employment Contract Law in 2008 has extended labour rights protection to TA workers and their right to equal remuneration with direct employees of the user enterprises is explicitly enshrined in article 63.

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<sup>94</sup> Non- official translation, Federation of Trade Union of Hubei Province: *Spot check on temporary agency work in Hubei*, <<http://www.hbx.gov.cn/content.jsp?id=200902190904280840>>, assessed 15 April, 2010.

<sup>95</sup> Non-official translation, *The right to equal pay for work of equal value encountered labour dispatch*, <<http://www.srencai.com/display/article/1206.html>>, assessed 15 April, 2010.

Unfortunately, either from the questionnaire survey results or the personal interviews, the situation of unequal pay was still rampant. One different thing there, told by a TW agency manager during personal interview, was the form of unequal treatment was changing. In some user enterprises, the different pay was not concentrated on the basic monthly wages any more, it was rather embodied in bonus and different benefits, either in cash or in kind, such as housing allowance, holiday allowance, employer-paid social security, etc, which took a large proportion in workers' remuneration. In some other situations, the user enterprises took TA workers to fill all the low-income job positions, or did not place TA workers in positions where direct employees were put in, with a purpose to make no comparable direct employees available at least in the same enterprise. The TW agency manager also expressed as far as he understood, the equal treatment in basic wages was reasonable, but it's impossible to extend equal treatment to include all the bonus and benefits, as for the user enterprise, one of the most attractive factors of TAW was to reduce the cost compared with using the direct employees. If the TA workers were paid exactly the same, the incentives for them to use TA workers would definitely decrease and correspondingly many TA workers might lose their job.

#### **4.2.2.3 Unlawful Deduction from Wages**

In the case of TAW, TA workers during assignments are usually not being paid directly by the user enterprises. Although they performed work for the user enterprises at their worksites, it was usually the TA agencies made the payments to TA workers after they received money from the user enterprises. To avoid the TW agency charge any commission from the worker, the Employment Contract Law explicitly prohibited TW agencies from making any deduction from TA workers' remuneration paid by the user enterprise. It is also prescribed in the ILO Protection of Wage Convention No.95, 1949 that *“Any deduction from wages with a view to ensuring a direct or indirect payment for the purpose of obtaining or retaining employment, made by a worker to an employer or his representative or to any intermediary (such as a labour contractor or recruiter), shall be prohibited”*. However, it was showed in the empirical survey that the situation of unlawful wage deduction in reality was not rare.

In the questionnaire survey, when TA workers were asked whether they have encountered unreasonable wage deduction by the TW agency, around 25% of 93 respondents chose their wages were deducted by the TW agencies frequently. Around 30% of them chose their wages were deducted by the TA agencies from time to time. Only 45% of them chose they had never met this situation. As regards the reason of deduction, the respondents who had met this situation expressed their wages were deducted by the TA agency in the name of commission for getting a job, management fee or unnamed service fees.

During the personal interview, the principal of a famous TW agency in Chengdu also told, although his agency did not charge any fees from TA

workers or deduct TA workers' remuneration for commission; he did know that some agencies, especially some small agencies in this industry did not perform in line with the national law. They charged TA workers' commission fee by making forced deduction from their remuneration usually in other names, such as the management fee or service fee, etc.

#### **4.2.2.4 Shrunken Training Opportunities**

In respect of the right to occupational training, although it is prescribed in law that it is the user enterprise's responsibility to ensure TA workers receive work-related training, the result reflected from the empirical survey is different from law.

In the question that have you ever got any occupational training either in the user enterprises or TW agencies, around 13% of 93 TA workers chose they received training in the TW agencies. Around 37% of 93 workers chose they received training from the user enterprises. While the rest of them, around 50% chose they did not receive any occupational training.

Further in the personal interview, TA workers who did not receive occupational training expressed they were not very clear either the TW agency or the user enterprise should be responsible for providing such training, while they were aware that in practice they were less likely to be provided training opportunities from either side especially when the resource was limited. As for the TA agencies, although maintaining the employment relationship with TA workers, they did not have TA workers directly work for them, it did not matter that much for them if they did not provide occupational trainings. While for the user enterprises, TA workers were neither direct nor permanent employees, from the perspective of cost-saving, the enterprises were reluctant to invest or spent any additional cost on the short-term workforce.

From the agency managers' side during the interview, they expressed, in some TW agency with strong financial capacity and professional staff, they might provide basic occupational training to TA workers to enhance their employability, however, since it was not the TW agency's responsibility in law, such training often were not free, training fess were charged from TA workers. In some small TW agencies, where they had no such capacity, training opportunity was often not available. For the user enterprise, where TW agency dispatched their employees to, as a large proportion of the job positions TA workers took were low skilled, non-core positions, many user enterprises felt no necessary to provide training.

#### **4.2.2.5 Risky Working Conditions with Less Protection**

The right to occupational safety and health enshrined in law requires TA workers are provided with safe working conditions and adequate protection against occupational hazard. Although the examination of whether TA workers' this right was well protected could not be effectively achieved in

the author's questionnaire survey probably because of the limitation of participants. It was estimated by the relevant authority that more than one-thirds of TA workers in China now were dispatched to the construction sector, where the working conditions are less favourable and more risky *per se*, and the protection measure is weak and inadequate in practice. It was also pointed out by some labour experts that many TA workers were engaged in the mining industry, which is notorious for the frequent mining accidents.<sup>96</sup>

The unfavourable working conditions and less protection of TA workers were also found in manufacturing industry. In the *Report on Labour Rights Conditions of Dispatched Workers in China-Coca Cola Company*, which was launched by a group of college students, it was pointed out in China-Coca Cola Company's five suppliers' enterprises in Guangdong Province, TA workers were allocated to perform the work with the highest hazardous nature in the product line. Many of them were not provided with training on security knowledge, not provided with the basic safety protection equipment such as gloves to prevent touching chemicals directly. Moreover, some enterprises even not bought TA workers the work injury insurance.<sup>97</sup>

### 4.2.3 Reason Analysis

The result showed in the empirical survey above gave us a general view of TA workers' labour rights situation in China. What we can see is that although TA workers are entitled the fundamental labour rights and working conditions in law, there is a large disparity between the *de jure* rights and *de facto* rights, which might be due to the following reasons.

(a) **Insufficient regulation of TAW under national law.** Although several standards and limitations of TAW are set in the national law in the aforementioned part 3.2, they are far from enough to prevent abuse of labour rights in practice. First, there is no licence system set in law to examine the proper capacity of the TW agency before registration or to oversee the activities of the TW agency after its establishment. Without any requirement such as professional qualification staff, management capacity or providing any deposit, TW agency can be easily set up and operated even not in line with the law. Second, the national law does not prescribe any sector or industry restriction on TAW. In some occupations or job positions where high hazard are implied, TA workers are more favoured. Third, the national law does not explicitly prescribe the length of assignment and under what situations TA workers can be transformed to the direct employees in the user enterprise, in order to prevent TA workers being put in a disguised

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<sup>96</sup> Non-official translation, *The underlying reasons of the work injury and accidents*, <[http://focus.scol.com.cn/zgsz/content/2010-05/06/content\\_725892.htm?node=540](http://focus.scol.com.cn/zgsz/content/2010-05/06/content_725892.htm?node=540)>, accessed 30, April, 2010.

<sup>97</sup> Non-official translation, *Report on Labour Rights Conditions of Dispatched Workers in China-Coca Cola Company by college students*, <<http://zggr.cn/?action-viewnews-itemid-8>>, accessed 30, April, 2010.

employment relationship and being deprived of the due rights as a virtual employee of the user enterprise.

(b) **Unclear stipulation of labour rights for TA workers under national law.** Some provisions of national law regarding the rights of TA workers are too general and vague. Such as the right to equal pay for equal job prescribed in the Employment Contract Law, no precise definition of what is pay and what scope it may include, can be found. As a result, the interpretation is left to the discretion of the user enterprise or the TW agency, which may narrow the scope of pay to the basic wage. Another example would be the right to organise, although in the Employment Contract Law, the TA worker can choose to join the trade union either in the TW agency or in the user enterprise, it does not prescribe the corresponding repercussion if TA worker is excluded or refused by either side. If no exact duty bearer exists or no liability is set in law, TA worker's rights may still be ignored.

(c) **Weak trade union.** Strong trade union as a social actor could monitor and benefit labour rights protection by launching social dialogue and exercising the power of collective bargaining. However, in the current political system of China, the voice of trade union is small and the power is weak. Although according to the Constitution and Labour Law, workers are entitled the fundamental right to organise, the exercise of this right is limited in practice. No independent labour union can be founded as only the union under the All China Federation of Trade Union is legally recognized, which has an intimate relationship with the government. The fact shows that when there was a serious conflict between the worker and the enterprise, the trade union in China did not function well. Such as during the process of drafting the Employment Contract Law, many oppositional voices from the employer organizations were heard, and eventually some advice in favor of the employer was adopted in the final text, while on the contrary, the voice from the worker's organization was weak and slighted.

(d) **Poor implementation and enforcement of national law.** Although the newly promulgated Employment Contract Law was at first thought to give a heavy beat on the TAW industry which was not nationally regulated before, the boom of this industry and the continued labour rights violations of TA workers in reality disappointed most of people who have pinned large hope on it to enhance labour rights protection. Many enterprises might in the first instance be scared by the law, while soon they did not take it into account that much as the labour inspection in China was still weak.

It was stated in the 2008 Report on the Implementation of the Employment Contract Law from the Law Enforcement Inspection Team of SCtNPC that, *"In the current labor inspection departments, each of inspectors has to monitor more than 1000 companies, and be responsible of more than 10,000 workers in general. Either the institutions or the staff, are unable to meet the operational needs, to effectively monitor, warn, prevent and resolve the illegal employment of workers and labour rights violations. The inspection and supervision of the employment situation is more deficient and*

*insufficient to some individual, small businesses and enterprises in remote areas”*.<sup>98</sup>

Moreover, the sanction of the enterprise is vague as well as trivial in the circumstance of non-compliance according to the Employment Contract Law. It was prescribed that when a TW agency violates the law, the competent authority shall order it to rectify the situation. If the circumstances are serious, the competent authority shall impose a fine from RMB1,000 to 5,000 to each TA worker, and the administrative department of industry and commerce can revoke the business license<sup>99</sup>(the general business license not the specific license for TW agency). As there is no precise definition of what is “serious” in law, the interpretation is left to the discretion of an individual inspector, which may also left the room for inner negotiation and bribery.

Another reason may hinder the effective enforcement of the corresponding labour rights protection law is the interminable rights remedy procedure. According to the national law, labour disputes can not be directly sued to the court but settled in the local Arbitration Committee first. The applicant can only submit his or her case to the court after they received the Arbitration Committee’s verdict. The arbitration mechanism is set with a purpose to share the litigation load with the court in the aspect of labour disputes considering the potential heavy litigation load. While, in practice, the precondition of arbitration for labour rights disputes usually results in a much longer litigation procedure than other civil disputes if the applicant was not satisfied with the arbitration verdict and wanted to bring the case finally to the court. Many workers were frustrated with the long, costly and uncertain procedure, especially workers with low incomes or less employability, they usually gave up the chance to fight for their rights through legal procedure being afraid of unaffordability as well as the unexpected negative result. That’s also the reason that in the authors’ questionnaire survey, when TA workers were asked whether you wanted to protect your labour rights through legal procedure if you are infringed, more than 50% of the 93 respondents chose they would not.

(c) **Lack of awareness.** The lack of awareness of labour rights may be another non-ignorable reason for poor labour rights and working conditions of TA workers in China. It was showed in the questionnaire survey, when TA workers were asked whether you were aware or clear about what rights you were entitled to, only around 11% of 93 respondents indicated they were very clear about their rights and the corresponding regulations in law. Around 58% of them indicated they knew some of labour rights but were not very clear, the rest of respondents indicated they had no idea about their

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<sup>98</sup> Non-official translation, 2008 Report on the Implementation of the Employment Contract Law by the Law Enforcement Inspection Team of the Standing Committee of National People’s Congress of PRC, available at < [http://www.npc.gov.cn/npc/xinwen/jdgz/zfjc/2008-12/25/content\\_1464552.htm](http://www.npc.gov.cn/npc/xinwen/jdgz/zfjc/2008-12/25/content_1464552.htm) > , access 2, May, 2010.

<sup>99</sup> Non-official translation, Article 92 of the Employment Contract Law.

rights nor the legal regulations at all. The lack of awareness may be more significant among rural workers or workers with low education background because of the lack of general legal education and less access to legal information.

### **4.3 Conclusion: the Lost Balance between Labour Flexibility and Labour Protection**

TAW is a product born under different demands. From the perspective of state, it is rational to take reformations to stimulate economy rising as well as to accommodate the changing labour market. From the perspective of the enterprises, it is rational for them to pursue the maximum profits by using workforce more flexibly. While no matter for which actor, a bottom line shall never be breached. That is the pursuit of labour flexibility shall not be addressed or achieved at the cost of labour rights infringement.

Unfortunately, the current labour rights situation of TA workers unfolds the fact that the bottom line is being impinged upon and the balance between labour flexibility and labour protection has lost.



# 5 How to Better Balance Labour Flexibility and Labour Rights Protection for Temporary Agency Workers in China

## 5.1 Experience from EU Countries

Although TAW exists worldwide, European Union (EU) is the region where TAW are well developed and regulated as a whole according to the research on temporary agency work across the enlarged EU carried out by the European Foundation for the Improvement of Living and Working Conditions in 2006.<sup>100</sup> TAW in EU is not only regulated at regional level by the newly promulgated Directive 2008/104/EC of the European Parliament and of the Council with an objective to “*establish a harmonized community-level framework protection for temporary agency workers*”,<sup>101</sup> but also regulated at national level with a balanced mix of legal statutes, collective labour agreements and self-regulation.<sup>102</sup>

For this reason, the author would like to introduce the regulations on TAW in EU countries respectively in three aspects: (1) restrictions on the use of TAW; (2) regulation on the establishment and operation of TW agency (3) protection of labour rights of TA workers , to give an overview of different regulations around EU so as to provide a much wider scope of practice and experience for China to learn or to refer.

### 5.1.1 Restriction on the Use of Temporary Agency Work

There are mainly three sets of principal restrictions on TAW within national legislation in EU. The first refers to various limits on the sector or occupation that might utilise TAW. The second stipulates maximum contract duration and/or limits the use of successive contracting. The third

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<sup>100</sup> Eurociett: *Temporary work is a well-regulated industry across Europe: reveals the first-ever survey carried out on temporary agency work in EU25, Norway, Bulgaria and Romania by the EIRO Foundation*, p1, available at <[http://www.eurociett.org/fileadmin/templates/eurociett/docs/press\\_releases/Eurociett\\_Press\\_Release\\_on\\_EIRO\\_survey\\_-\\_23-03-06.pdf](http://www.eurociett.org/fileadmin/templates/eurociett/docs/press_releases/Eurociett_Press_Release_on_EIRO_survey_-_23-03-06.pdf)>, accessed 2 May, 2010.

<sup>101</sup> Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008, on temporary agency work, preamble, (23), available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0009:01:EN:HTML>>, accessed 2 May, 2010.

<sup>102</sup> *Supra* note 99.

defines the reasons and circumstances in which TAW may be employed.<sup>103</sup> In very few cases, limitation on the proportion of TA workers is found.

(a) **Reason for use.** A number of EU countries set out permissible reasons for using TAW, normally by law,<sup>104</sup> and by collective agreements in some circumstances.

Such as in Belgium, the law defines four situations in which temporary agency work is authorised: as a replacement for a permanent worker; to cover temporary and exceptional peaks of work; for work of an unusual nature; and for artistic performance.<sup>105</sup> In Spain, three reasons that permit the ‘transfer’ of workers are set by law: to carry out a temporally specific service or work, for the duration only of that work; to meet special demand needs or to address an accumulation of work; or to substitute for temporarily absent employees that retain a right to return to the job.<sup>106</sup> In Norway, agency workers may only be employed in situations where the law permits fixed term contracts, for instance in connection with absence or extra workload, although the social partners may agree to alternative provisions for limited periods.<sup>107</sup>

Some countries do not specify particular reasons for use of TAW, but does state that TA workers may not be used in certain circumstances. Such as in Slovenian Law, TA workers may not be referred to a workplace where there has been significant redundancies in the previous year, where workers may be exposed to dangers and risks, or ‘in other cases which can be laid down by branch collective agreement’.<sup>108</sup> Similarly, no general reasons are specified under Polish law, but the use of TAW is not normally permitted where a potential user company has made collective redundancies in the previous six months. The same applies to Greece, where the period referred to by law is the previous year. In Lithuania, a model collective agreement published by the Labour Ministry states that TAW should not be used for hazardous work or to replace workers made redundant in the previous three years<sup>109</sup>.

Shown above, the limitation for use of TAW in EU countries mainly centers on two aspects. The first aspect is to confine TAW in job positions with a temporary nature *per se*, probably with a purpose to prevent TAW from being widely used, which may result in the substitution of regular or permanent work. Limitation in this regard is often achieved by making affirmative enumeration, and normally the more explicit it is stipulated, the

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<sup>103</sup> *Supra* note 4, p.20.

<sup>104</sup> European Foundation for the Improvement of Living and Working Conditions: *Temporary agency work and collective bargaining in the EU*, p25, available at [http://www.eurociett.org/fileadmin/templates/eurociett/docs/EIRO\\_Foundation\\_Report\\_on\\_TAW\\_Dec\\_08.pdf](http://www.eurociett.org/fileadmin/templates/eurociett/docs/EIRO_Foundation_Report_on_TAW_Dec_08.pdf)>, accessed 15 March,2010.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Supra*. note 4, p 23.

<sup>108</sup> *Supra* note104, p26.

<sup>109</sup> *Ibid.*

less interpretation room for the user enterprise is left. The second aspect is the exclusion of use of TAW in danger or in hazardous job position as well as positions where redundancy recently happened. It illustrates the intention to prevent TA workers being posted to danger as well as the intention to protect direct employees in case the user enterprise deliberately lays them off and then hires TA workers to fill up their positions.

(b) **Sector or occupation bans.** A few EU countries set sector or occupation restrictions in law, mainly concerning dangerous work. Such as in Spain, the 1999 reform of the law prohibited the assignment of workers to dangerous occupations; within the TWA segment, i.e. to other agencies; and in public administration (except for carrying out opinion polls).<sup>110</sup> In Portugal, according to the 1989 Law for Temporary Belgian law forbids the use of TAW for blue-collar work in the removals and furniture warehouses sector (JC 140.05) and inland waterways (JC 139). Other activities with a dangerous character are also prohibited from using TAW (Royal Decree 1997).<sup>111</sup> In Germany, the AüG in principle prohibits the use of TAW to cover blue-collar work in the construction industry except under the (unlikely) conditions of a collective labour agreement.<sup>112</sup>

Although many countries do not stipulate sector or occupation restrictions in law or have gradually liberalized them, such restrictions may also be set by the collective agreements at the sector level in some countries, such as in Belgium and Germany.<sup>113</sup>

(c) **Limits on assignment duration.** The duration limit is a tool to prevent TA workers being used to perform work with an in fact permanent nature without a direct or permanent employee status. In EU countries where limits on assignment duration are set, two different situations exist.

In the first situation, the duration is set differently depends on the reason for use. Such as in France, the law limits the length of assignments as between 18 and 24 months, inclusive of any contract renewals, according to the reasons for use. In Portugal, the maximum permitted assignment was increased from one to two years by Law 19/2007<sup>114</sup> according to different circumstances.

In the second situation, the same duration is set for all the TAW. Such as in Luxembourg, the total length of any assignment is limited to a maximum of 12 months, within which up to two renewals may be included, except in relation to contracts for seasonal work<sup>115</sup> In Greece, a user company may not employ TA workers for a total period of over eight months.<sup>116</sup>

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<sup>110</sup> *Supra* note 104, p27.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Supra* note 104, p28.

<sup>113</sup> *Supra* note 4, pp 24-25.

<sup>114</sup> *Supra* note 104, p26.

<sup>115</sup> *Supra* note 4, pp23-24.

<sup>116</sup> *Supra* note 4, p23.

However, no matter the duration is the same or not to the different job positions, the consequence of breach the duration limitation is usually specifically stipulated in law. Such as in Greece, if the limited duration period is exceeded, the contract between the TA worker and the TW agency is deemed to be automatically transformed into an open-ended employment contract between the TA worker and the client firm. In Luxembourg, the overall duration of an assignment may not exceed 12 months for a given employee in a given post. Any breach of these provisions similarly means that the contract is deemed to be open ended.<sup>117</sup> In this way, the abuse of TA workers may be reduced and the transformation of TA workers from irregular employment to regular or permanent employment may be guaranteed.

(d) **Limits on proportion.** The limitation of number of TA workers is another way to keep TAW stay in a supplementary status and not supersede the regular employment gradually, however, such limit is not common in EU countries in law, the only such restriction in law was identified in Austria, where public hospitals and nursing institutions are able to use agency staff up to a maximum of 15% of total staff in the relevant department, according to the 2005 amendment to the Health and Nursing Act (Gesundheits- und Krankenpflegegesetz, GuKG) of 1997.<sup>118</sup>

Nevertheless, in some countries such as Austria, Germany, Spain, Sweden and Ireland, collective agreement may set more or less significant limits on the proportion of TA workers.<sup>119</sup>

## 5.1.2 Regulation on the operation of Temporary Work Agency

(a) **Licensing and monitoring.** Most EU countries operate a licensing, registration or similar approval system for TAW. These normally: stipulate minimum standards in terms of business premises, infrastructure and, frequently, the good character of directors; set financial requirements including a bond to cover taxes and wages in the event of business failure; and often require that TAW is the sole or primary business activity of the firm. In a few countries, TW agencies must also submit regular details of their activities to the authorities.<sup>120</sup> For instance, in Germany, the operation permit is obtained from the Federal Employment Agency (Bundesagentur für Arbeit, BA). The BA must be notified of each contract with a user company, and further detailed statistics should be provided to it on a biennial basis concerning the number and nature of user enterprises, workers and placements. The legally complying agencies may be issued an unlimited license after the third annual renewal.<sup>121</sup>

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<sup>117</sup> *Supra* note 4, pp23-24.

<sup>118</sup> *Supra* note 104, p27.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Supra* note 2, p19.

<sup>121</sup> *Supra* note 104, p29.

(b) **Enforcement and sanction.** Overall responsibility for enforcing the regulations concerning TAW are usually shared between labour inspectorates, the authorities responsible for issuing any licenses, and tax authorities in EU countries.<sup>122</sup> In some countries (such as Belgium, Netherlands and Sweden), where collective bargaining assumes an important role in the regulation of TAW, the social partners have a clear role in monitoring TAW and may impose sanctions in addition to any penalties issued by the inspectorates.<sup>123</sup> In general, a range of sanctions is available in most countries depending on the nature of any offence, with financial penalties and license removal the most commonly available to the authorities.<sup>124</sup>

### **5.1.3 Protection of Temporary Agency Worker: equal treatment between agency workers and comparable direct employees in the user enterprise**

The protection of TA workers in EU is ensured by implementing the principle of equal treatment between TA workers and the comparable direct employees in the user enterprise, namely the direct employees engaging in the same or similar work. This principle is established in almost all EU countries either by national law or by collective agreement, and is reinforced by the new Directive 2008/104/EC, stipulating “*the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.*”<sup>125</sup>

Under both regional regulation and national regulations, the equal treatment is embodied mainly in the following aspects.

(a) **Pay.** Equal treatment in pay is the most important aspect in the protection of TA workers as well as an effective way to tackle unfair competition among enterprises based on poor working conditions.<sup>126</sup> Many EU countries set equal treatment in pay by statute, and sometimes reinforced by the collective agreements. In countries where no such provision exists, collective agreement usually plays the substituted role.

The coverage of “pay” varies in different countries, in some country the pay is confined in wages, in some country such as in Czech Republic, some allowances are excluded from the coverage of equal “pay” for different levels of experience and qualifications.<sup>127</sup> While in Finland, the equal pay

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<sup>122</sup> *Supra* note 104, p40..

<sup>123</sup> *Ibid.* p41.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Supra* note101, Article 5(1).

<sup>126</sup> *Supra* note 104, p19.

<sup>127</sup> *Supra* note 104, p34.

covers the basic wages as well as the social security and social benefits.<sup>128</sup>

To tackle the obstacles of equal pay in practice, such as when there is no comparable direct employees exist, collective agreement is used to be referred. Such as in Romania, the law stipulates that in such circumstance, the pay ‘shall be determined in accordance with the provisions of the collective agreement governing that particular type of work for a permanent employee and applicable to the employer concerned’.<sup>129</sup> To tackle the information segregation on direct employees’ wages under the situation of no collective agreement available, some countries require the user enterprise inform the agency of wage rates of comparable workers.<sup>130</sup>

(b) **Training.** Vocational training is important to agency workers not just so that they may perform their jobs safely and well but in order to maintain their employability.<sup>131</sup>

To ensure TA workers have access to training in practice, a requirement of setting up a fund to facilitate the education and training for TA workers is usually made in many EU countries either by law or by collective agreements. Such as in Spain, TW agencies are required to invest at least 1% of the total salary volume in training activities, to which the third collective agreement added an additional 0.25% for training specifically devoted to risk prevention.<sup>132</sup> In Italy, a bilateral fund co-managed by the employers’ associations and trade unions is governed both by law and collective bargaining. The National Training Fund for Temporary Workers (Fondo Nazionale per la Formazione per i Lavoratori Temporanei, FORM.TEMP) is financed directly by the agencies, which must make contributions equal to 4% of the gross wages paid to leased workers during assignments. The fund provides leased workers with free, certified training schemes intended to maintain their skills and facilitate retraining.<sup>133</sup>

(c) **Representation.** TA workers are entitled the representation right in almost all EU countries. Some confine the exercising of this right in the agency, such as Spain, while many others make provision for TA workers to be represented in both the agency and the user firm.<sup>134</sup> Since 2008, the Directive 2008/104/EC at the regional level has clearly stipulated TA workers’ representation right in both user enterprise and the agency according to Article 7 “(1). *Temporary agency workers shall count, under conditions established by the Member States, for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed at the temporary-work agency.* (2). *Member States may provide that, under*

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<sup>128</sup> *Supra* note 4, p21.

<sup>129</sup> *Supra* note 104, p34.

<sup>130</sup> *Supra* note 104, p31.

<sup>131</sup> *Supra* note 104, p35.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Supra* note 104, p36.

*conditions that they define, temporary agency workers count for the purposes of calculating the threshold above which bodies representing workers provided for by Community and national law and collective agreements are to be formed in the user undertaking, in the same way as if they were workers employed directly for the same period of time by the user undertaking.*"<sup>135</sup>

A good example in this regard is France, where agency workers are entitled the rights of representation and trade union expression within the remit of the agency and also benefit from the standard rights as regards their working conditions in the user company. For example, they may take part in elections for employee representatives and their numbers are taken into account when calculating the workforce thresholds used to decide the employee representation procedures in the user company.<sup>136</sup>

(d) **Information and consultation.** TA workers commonly have the rights to information and consultation in EU countries and are usually exercised via their representatives. The Directive 2008/104/EC stipulates this right in Article 8 that "*the user undertaking must provide suitable information on the use of temporary agency workers when providing information on the employment situation in that undertaking to bodies representing workers set up in accordance with national and Community legislation*".<sup>137</sup> The information and consultation in practice usually concern the safety matters, the use of TAW, and the vacant positions in the user enterprises as well.<sup>138</sup>

## 5.2 Suggestions to China

(a) Establish a licensing system of TW agency in Law. Establish a licensing system that requires both previous authorization and periodic review after operation for the TW agency. List the criteria of establishing a TW agency in law including the financial capacity (not only a minimum start-up capital but also a deposit requirement in case of the insolvency of the agency), the personal qualification of the director, such as the reliability through the demonstration of previous lawful behaviour<sup>139</sup> especially under labour law, the professional qualifications of both the director and core employees, such as the working experience in related field (eg. human resource management), or the related education background, and the limitation of business scope, which should be confined in TAW only or at least TAW should be taken as the primary business. The license should be in a limited time with a chance to be renewed. This accordingly requires the TW agency to report to the license issuer periodically in relation to the employment situation, such as the number of TA workers, the distribution of TA workers in different user

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<sup>135</sup> *Supra* note 101, Article 7.

<sup>136</sup> *Supra* note 104, p37.

<sup>137</sup> *Supra* note 101, Article 8.

<sup>138</sup> *Supra* note 104, p38.

<sup>139</sup> *Supra* note 49, p.17.

enterprises, the sample of employment contract with TA workers, the sample of commercial agreement with the user enterprises, etc. License may be cancelled or revoked if the TW agency is found not operating properly or lawfully, and the situation should be specified clearly in law.

(b) Clarify the restriction on the use of TAW in law. The reason to use TAW should be specified in law as the existing stipulation in this regard under the Employment Contract Law is too general or vague. The limit on the duration of each assignment should also be specified, under certain circumstance may be renewed, whereas the time of renew should be limited, such as one or two times. The consequence of exceeding the maximum length set in law may also be prescribed, that TA workers should be deemed as the direct employees in the user enterprise. Meanwhile, a limit on job positions with a very dangerous or hazardous nature should be set in law. The proportion limit of TA workers in the user enterprise may also be added in national law to tackle the widely use of TAW in certain enterprise. Another important aspect is to tackle the widespread phenomenon “adverse labour dispatch”, where direct employees of the user enterprise are forced to be transformed into TA workers. This situation may be effectively controlled if a limit on the use of TAW by the user enterprise after a recent redundancy is set in law.

(c) Shift the burden of proof from the labourers to the user enterprise under a disguised employment relationship in the name of TAW. As TAW in practice is in some occasions used to disguise the real employment relationship between the worker and the user enterprises, moreover, the identification of such disguised employment is usually hard, the burden of proof that it is not a disguised employment relationship may be designated to the user enterprise by law. Thus when the user enterprise can not prove this without any doubt or when it is indeed ambiguous, a real employment relationship between the TA worker and the user enterprise should be deemed by the court.

(d) Define the scope of equal pay in law and establish a transparent wage system. The right to equal pay should be clarified in law, including whether it will apply to the social security and other benefits. Meanwhile, an objective and transparent wage appraisal system is better to be developed, indicating what are the objective impact factors of the wage and how the rates of wage is reasonably determined.

(e) Further specify the right to representation of TA workers in both TW agency and the user enterprise, as well as the corresponding liabilities if TA workers are excluded from attending the plenary worker assembly by either side.

(f) Further specify the responsibilities of TW agency and the user enterprise in occupation training by setting up a training fund jointly or separately, which is established on the monthly contribution from both TW agency and



the user enterprise with a certain percentage of the gross wage of TA workers.

(g) Promote collective bargaining and the conclusion of collective agreement at different levels including the sector level, inter-sector level and the enterprise level. And extend the application of collective agreement to TA workers, in practice as well as in law. Such as the collective agreement in the user enterprise should similarly be applied to the TA worker.

(h) Enhance labour inspection. Enhance the institution capacity building by setting labour inspection office in relatively remote areas, increasing the number of inspectors, improving their capacity by providing professional training, inviting experts in this field to give advice or to be the part-time inspector. Establish a transparent complaint- dealing procedure that is easy for the complainants to monitor. Specify the situations under which the inspector can make administrative penalty.

(i) Simplify the labour rights redress mechanism by abolishing the obligatory arbitration system as the precondition of litigation. Applicants may have the right to choose to solve the labour disputes or redress their labour rights via arbitration committee or directly by the court.

(10) Raise rights awareness. Open basic knowledge of civil rights course from middle school and set up curriculum including basic legal knowledge and labour rights course for the students in college. Encourage different social actors especially the trade union to run a rights awareness campaign at different level, such as in the community, in the enterprise or toward a specified target group such as rural workers, women or people with low education background. The enterprise may also be involved in the campaign by receiving the consultant in relation to what their obligations should be and what are the negative consequences if they do not comply.

## 6 Conclusion

Unlike other existing vulnerable groups categorized by sex, age, religion, etc, TA workers' status was given by the changing social institution under the demand of economic liberalism and more flexible labour market. Whereas, TA workers are rather a combination of different vulnerable groups, such as the rural migrant workers, low-skilled workers, and workers who have difficulties in finding stable employment relationship.

Although TAW to some extent acts as a channel to bring them into the labour market with less difficulties, it does not constitute a justification for labour rights abuse. The *de facto* poor working and labour rights conditions of TA worker uncovered not only the deficient national legal framework, the insufficient institutional framework, but also the traditional ideology of the government that national economy should be put in the first place and even the labour rights protection in some occasions may give way to the national economic rising. Thus, the good labour rights protection for TA workers cannot be achieved unless the over emphasised "economic priorities" idea is thrown away.

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