

***The Operation of Labour Tribunals and Other  
Mechanisms for Resolving Labour Disputes  
in Hong Kong and Selected Places***

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**Prepared by**

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## Executive Summary

1. In Hong Kong, the parties in dispute usually have gone through three attempts of conciliation before their case is decided by the Labour Tribunal (LT). The three overseas jurisdictions studied have also built in more than one opportunity for settling a claim through conciliation in their respective dispute resolving mechanism. In practice, most cases only go through conciliation once or twice.
2. New Zealand had 68.5% of the mediated cases settled wholly or partially, or decided by a mediator in 2002-03. In Hong Kong, 63.2% of the cases rendered conciliation by the Labour Department were fully settled in 2002 and 53% of the claims filed in the Labour Tribunal were settled. In the United Kingdom (UK), 43% of the applications were settled in 2002-03. In Taiwan, 57% of the disputes were settled before trial and among the cases conciliated by the courts, 19.3% were settled in 2002.
3. In New Zealand, 91% of applications for mediation are completed within three months, whilst in Taiwan, it normally takes 24 to 32 days to complete the whole process of statutory conciliation. Relevant statistics are not available in Hong Kong and the UK. Specified statutory time frames are used as a means of limiting the time spent on conciliation in Taiwan and will be used in the UK and New Zealand in the near future.
4. In Hong Kong, how long LT takes to resolve a dispute depends on, inter alia, whether a contested trial is held and the number of pre-trial mentions required. LT is trying to reduce the use of pre-trial mentions, whilst in New Zealand and Taiwan, it is a usual practice to have pre-trial hearings confined to one single round.
5. LT of Hong Kong is the only tribunal studied which does not allow legal representation. Legal aid is not available for LT cases in Hong Kong except for cases transferred to a higher court and relevant appeal proceedings in a higher court. In the UK, legal aid is not available in England & Wales but is available in Scotland under limited conditions as well as in the Employment Appeal Tribunal proceedings. Legal aid is available in both New Zealand and Taiwan. Legal advice is provided or funded by local authorities, charities or lawyers on a voluntary basis in all four jurisdictions studied.
6. The overseas jurisdictions studied have adopted or are going to adopt alternative dispute resolutions to reduce the need for judicial intervention. These alternatives include the requirement of using internal grievance procedures before seeking conciliation or filing a claim, demand notices for recovery of wages in arrears, arbitration and the utilization of civil intermediaries in providing conciliation.
7. In both the UK and New Zealand, in order to find out the judgment debtor's financial situation and the best method to get the money back, the party with a successful claim may apply for a court order to obtain information from a judgment debtor. In Taiwan, the court can, if necessary, investigate government departments related to tax collection or other organizations for what they know about the debtor's financial situation. Hong Kong has no provision requiring the judgment debtor to reveal his/her financial situation.

# **The Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places**

## **Chapter 1 - Introduction**

### **1. Background**

1.1.1 The Panel on Administration of Justice and Legal Services and the Panel on Manpower of the Legislative Council (LegCo), at their joint meeting on 19 June 2003, requested the Research and Library Services Division (RLSD) to conduct a research on the operation of the Labour Tribunal (LT) in Hong Kong and similar bodies in selected places.

1.1.2 The Panels agreed that the research should examine the procedures for handling labour disputes, the efficiency and effectiveness of the dispute resolving mechanism, as well as the enforcement of awards and orders. Members agreed that the research should cover Hong Kong, the United Kingdom (UK), Taiwan, Singapore and the Republic of Korea (Korea). Macau should be included as well, subject to availability of information.

### **1.2 Scope of research**

1.2.1 As information on the labour dispute resolution mechanism in Korea is primarily in Korean, RLSD has substituted Korea with New Zealand. In New Zealand, the Employment Relations Act 2000 provides a new dispute-resolving mechanism to settle most of the disputes by mediation. As at the publication of this report, there is insufficient information on the mechanisms for resolving labour disputes in Singapore and Macau. Therefore, this report does not cover Singapore and Macau.

1.2.2 This research covers the labour tribunal and other mechanisms for resolving labour disputes in the following jurisdictions:

- (a) Hong Kong;
- (b) the UK<sup>1</sup>;
- (c) New Zealand and
- (d) Taiwan.

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<sup>1</sup> In this research, the United Kingdom denotes England, Wales and Scotland only as Northern Ireland has its own system for resolving labour disputes.

- 1.2.3 The selected jurisdictions are examined in the following aspects:
- (a) Constitution and jurisdiction of labour tribunals and other forms of adjudication bodies;
  - (b) Procedure for handling labour disputes - including conciliation, arbitration and hearing;
  - (c) Review and appeal;
  - (d) Enforcement of awards and orders; and
  - (e) Efficiency and effectiveness of dispute resolving mechanisms.

### **1.3 Methodology**

1.3.1 This research adopts a desk research method, which involves Internet research, literature review and analysis, and correspondence with the relevant authorities in the jurisdictions studied. Interviews are also conducted with the officials of some of the relevant authorities.

## Chapter 2 - Hong Kong

### 2.1 Background

#### Size of labour force and trade union participation

2.1.1 Hong Kong had a labour force of nearly 3.5 million out of its 6.8 million population in July - September 2003.<sup>2</sup> The seasonally adjusted unemployment rate was 8.3% in July - September 2003<sup>3</sup>.

2.1.2 Workers have the right to establish unions as well as to join such unions of their own choosing. There were 622 employee unions with declared membership of 676 534 and the trade union participation rate<sup>4</sup> was around 22% as at 31 December 2002.<sup>5</sup> Trade unions do not have the statutory right to engage employers in compulsory collective bargaining.

2.1.3 Trade unions have to register under the Trade Unions Ordinance. The total number of registered trade unions, including the employee unions, employers' associations and mixed organizations of employees and employers, was 666 as at 31 December 2002.

#### Overview of the dispute resolving mechanism

2.1.4 The Labour Relations Division (LRD) of the Labour Department provides consultation and/or conciliation service upon request of either party of a labour dispute, or on its own initiative.<sup>6</sup> The Conciliation Officers in LRD assist both parties in dispute to understand the problem and to have a dialogue so as to remove their differences.

2.1.5 If the parties in dispute fail to reach a settlement through LRD, the claimant may lodge a claim at the Minor Employment Claims Adjudication Board (MECAB)<sup>7</sup> under the Labour Department or LT, depending on the amount of the claim and the number of claimants involved.

2.1.6 LT is a specialised court set up under the Labour Tribunal Ordinance (Cap. 25) to provide a quick, simple, inexpensive and informal means to resolve labour disputes. LT is headed by a Principal Presiding Officer, under whom there are 12 Presiding Officers. The Labour Tribunal Registry handles all claims filed with LT, and provides support to Presiding Officers and Tribunal Officers.

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<sup>2</sup> Key economic and social indicators, the Census and Statistics Department.

<sup>3</sup> Statistics released on 20 October 2003 by the Census and Statistics Department.

<sup>4</sup> Trade union participation rate =  $\frac{\text{declared membership of employee unions} \times 100\%}{\text{number of salaried employees and wage earners}}$

<sup>5</sup> The Annual Statistics Report 2002 of the Registry of Trade Unions.

<sup>6</sup> Section 3 of the Labour Relations Ordinance (Cap. 55).

<sup>7</sup> MECAB was established in 1994 with the aim of taking over minor cases from LT.

2.1.7 Within LT, Tribunal Officers perform a statutory duty of making inquiries into the claim and providing conciliation services before claims are heard by Presiding Officers. Apart from adjudication, Presiding Officers also help the parties in dispute reach an amicable settlement at the first hearing and may refer them back to Tribunal Officers for conciliation subject to their consent.

## **2.2 Conciliation before filing claims**

### Conciliation services provided by the Labour Department

2.2.1 Either the employee or the employer, in case of a dispute or a claim, may approach LRD for help. If one of the parties concerned requires conciliation, a meeting for such purpose would be arranged, and the other party would be requested in writing to attend the conciliation meeting.<sup>8</sup> The conciliation service is provided for free.

2.2.2 A conciliation meeting is usually held within four to five weeks after the request of the service has been put forward. The Conciliation Officer assigned to the case works as a neutral intermediary and cannot impose a settlement.

### Outcome of conciliation

2.2.3 If the case can be settled by conciliation and the settlement involves compensation, the Conciliation Officer will make arrangements for effecting payment. Both parties in dispute will draw up and sign a settlement memorandum.

2.2.4 If it is suspected that a breach of the Employment Ordinance has occurred, the Conciliation Officer will refer the case to the relevant division in the Labour Department for investigation, with a view to taking prosecution action.

2.2.5 If an employer is insolvent or cannot pay the wages in arrears, the employee(s) concerned will be referred to the Legal Aid Department for legal assistance in filing a winding-up petition<sup>9</sup> or a bankruptcy order<sup>10</sup> against the employer at the High Court. At the same time, the claimant can, through LRD, apply for ex-gratia payment from the Protection of Wages on Insolvency Fund (POWOI Fund).

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<sup>8</sup> Under section 5 of the Labour Relations Ordinance, the Commissioner for Labour may authorize a Special Conciliation Officer from within or outside the Labour Department to undertake a special conciliation in the case of a serious labour dispute that may affect the livelihood of a large number of people. If no settlement is reached, the Commissioner may submit a report to the Chief Executive in Council who may, refer the trade dispute to arbitration with the consent of the parties involved or to a board of inquiry, or take other necessary actions. Such special conciliation was invoked only twice in the past.

<sup>9</sup> Applicable where the employer is a limited company.

<sup>10</sup> Applicable where the employer is not a limited company.

2.2.6 If one of the parties in dispute declines to make use of the conciliation service or both parties fail to reach a settlement, the Conciliation Officer may, at the request of the party concerned, refer the party to seek adjudication at LT or MECAB. Minor claims not exceeding HK\$8,000 and involving not more than 10 persons are referred to MECAB. Adjudication Officers of MECAB are not legally qualified but are veteran Senior Labour Officers experienced in handling labour disputes. Hearings of minor claims by MECAB are conducted in public and legal representation is not allowed. The award or order made by MECAB is legally binding.<sup>11</sup> Claims exceeding HK\$8,000 or involving more than 10 persons are referred to LT after the signing of a Certificate of Conciliation by the Conciliation Officer.

### Certificate of Conciliation

2.2.7 The Labour Tribunal Ordinance (Cap. 25)<sup>12</sup> requires that a Certificate of Conciliation should be filed or produced by an authorized officer, i.e. either a Conciliation Officer of LRD or a Tribunal Officer of LT, before the case can be heard in LT. A Certificate of Conciliation has to specify one of the following:

- “(a) *One or more of the parties has refused to take part in conciliation;*
- (b) Conciliation has been attempted but no settlement has been reached;*
- (c) Conciliation is unlikely to result in a settlement being reached;*  
*and*
- (d) Conciliation may prejudice the interests of a party.”<sup>13</sup>*

2.2.8 The requirement of a Certificate of Conciliation indicates that “*there is an underlying philosophy requiring disputing parties to attempt for conciliation before applying for adjudication*”<sup>14</sup>.

2.2.9 In theory, a claimant may lodge a direct claim to LT without receiving conciliation service of the LRD as Tribunal Officers are also authorized to sign a Certificate of Conciliation. LT may accept direct claims after considering the claimant’s explanation.

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<sup>11</sup> Parties dissatisfied with the judgement of an Adjudication Officer may apply for a review. They may also apply to the Court of First Instance for an appeal against the Adjudication Officer’s decision on point of law or question of jurisdiction.

<sup>12</sup> Section 15(1) of the Labour Tribunal Ordinance.

<sup>13</sup> Ibid.

<sup>14</sup> Reply from the Labour Department.

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2.2.10 In practice, most claimants approach LRD before filing their claims to LT since there is advantage in doing so. As the Labour Department administers the POWOI Fund, when a party in dispute approaches LRD for resolving a dispute, LRD will help him/her apply for ex-gratia payment from the POWOI Fund, in cases where the employer is insolvent. LRD will make sure that an application is made within six months after the claimant's last day of service, which is the statutory time limit for application.<sup>15</sup>

### **2.3 Constitution and jurisdiction of the Labour Tribunal**

2.3.1 The jurisdiction of LT covers common labour disputes, especially pecuniary disputes between employees and employers. It has civil jurisdiction to deal with a claim which arises from the breach of a contract of employment or apprenticeship, or the failure to comply with the provisions of the Employment Ordinance (Cap. 57) or the Apprenticeship Ordinance (Cap. 47). However, LT can only hear cases with causes of action arisen within six years prior to the date of filing of a claim.

2.3.2 LT only hears a claim exceeding HK\$8,000 or where there are more than 10 claimants. It may decline jurisdiction for any reason that the claim should not be heard and determined by it, and transfer the claim to the Court of First Instance, the District Court or the Small Claims Tribunal. LT may also at any time dismiss a claim which it considers to be frivolous or vexatious.

2.3.3 All proceedings in LT are heard and determined by a Presiding Officer or a Deputy Presiding Officer sitting alone.

### **2.4 Filing claims**

#### Statutory time limit for hearing labour disputes

2.4.1 A proceeding in LT has to be commenced by filing a claim with the Registrar. The Labour Tribunal Ordinance requires LT to hear a claim within 30 days from the date of filing the case unless the parties concerned agree otherwise.<sup>16</sup> Since 1992, the Judiciary has adopted an appointment register to ensure that all the incoming cases meet the 30-day statutory time limit.

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<sup>15</sup> The ex-gratia payment in respect of arrears in wages only covers wages during the four months prior to the last date of service. An employee who fails to take an early action to pursue his/her claim may not be able to recover all the outstanding wages.

<sup>16</sup> Under section 13 of the Labour Tribunal Ordinance, LT should hear a claim not earlier than 10 days or later than 30 days from the date of filing of the claim.

### Filing procedure

2.4.2 Under the appointment register system, the claimant has to first call the computerized telephone booking system to make an appointment for the filing of a claim. When time slots for hearing the case within 30 days from the assigned filing date are available, the Registrar of LT will ask the claimant to complete the filing of his/her case in LT.

2.4.3 Prior to the claimant's scheduled appointment to file claim at LT, LRD will facsimile to LT the referral papers of the case, including documents provided by the disputing parties during the process of conciliation and a Certificate of Conciliation. However, according to the Judiciary, the current procedure cannot ascertain whether all the documents provided by the parties concerned to LRD are received by LT.

2.4.4 On the day of filing, a Tribunal Officer<sup>17</sup> interviews the claimant and his/her witness(es) to obtain statements and other relevant information. The filing fee varies with the amount of the claim.<sup>18</sup> The Labour Tribunal Registry gives the claimant a Notice of Hearing Date, stating when the claim is to be heard. This completes the filing procedure.

## **2.5 Procedures before the hearing**

### Service of the claim and response from the defendant

2.5.1 Copies of forms filled by the claimant at filing and the Notice of Hearing Date are served on the defendant. If the defendant agrees to pay the full amount of the claim before the date set for the hearing, there is no need for a hearing.

2.5.2 If the defendant agrees to pay but cannot pay immediately, both parties concerned are required to attend a hearing where the defendant needs to apply to the Presiding Officer for time to pay or for paying by instalment. If the defendant ignores the claim, the Presiding Officer will, upon the claimant's application, hear the case and may make an order in the absence of the defendant.

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<sup>17</sup> A particular Tribunal Officer is assigned to follow each claim. The disputing parties may be referred to the same Tribunal Officer or a more experienced Tribunal Officer for conciliation during the hearing.

<sup>18</sup> For a claim exceeding HK\$5,000 but under HK\$10,000, the fee is HK\$40. For a claim exceeding HK\$10,000, it is HK\$50. An additional fee of HK\$10 per defendant's address is charged for service of the claim. Claimants may apply for reducing, remitting or deferring payment of any fee if valid and good reasons are produced.

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### Inquiries and conciliation by the Tribunal Officer

2.5.3 If the defendant disputes the claim in part or in whole, the Tribunal Officer assigned to the case will investigate the claim. The Tribunal Officer interviews the disputing parties and takes statements from them, and submits to the Presiding Officer a summary of facts with all the documents provided by the parties concerned as exhibits.

2.5.4 The Tribunal Officer, during the course of the investigation, encourages the parties in dispute to arrive at an amicable settlement. Unless the parties agree to attempt conciliation after a claim is filed, it is not the practice of the Tribunal Officer to provide conciliation services to the parties if either one or both refused to take part in conciliation attempted by LRD before the claim is filed.<sup>19</sup> If a settlement is not reached, the matter will be heard in LT.

## **2.6 The hearing**

### Manner of hearing

2.6.1 The hearing of a claim is conducted in public<sup>20</sup> in an informal manner. The rules of evidence do not apply rigidly to proceedings in LT. The Presiding Officer may subpoena witnesses, order the production of any documents and put questions to the parties involved or witness(es) as he/she may think fit. The Presiding Officer has to ensure that there is no avoidable delay in the determination of a claim<sup>21</sup> and may refer the disputing parties to the Tribunal Officer for conciliation.

### Call-over hearing and conciliation before the trial

2.6.2 A call-over hearing is the first hearing conducted by the Presiding Officer for claims which have not been settled or withdrawn. The purpose is to enquire the readiness of the claim to proceed to trial. Both parties concerned must attend the call-over hearing.<sup>22</sup>

2.6.3 At the call-over hearing, the Presiding Officer explains the issues and relevant laws to both parties in dispute with a view to helping them to arrive at an amicable settlement. If both parties agree to settle, the Presiding Officer may refer them to the Tribunal Officer for terms of settlement to be recorded or make an order in court in accordance with their agreed terms.

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<sup>19</sup> Reply from the Judiciary.

<sup>20</sup> The Presiding Officer may conduct the hearing in private if it is in the interest of justice to do so.

<sup>21</sup> Section 16 of the Labour Tribunal Ordinance.

<sup>22</sup> If the claimant fails to turn up, LT may strike out the claim. If the defendant fails to do so, LT may enter judgment in his/her absence.

2.6.4 If no settlement is reached, the Presiding Officer will advise both parties concerned whether further documentary evidence needs to be submitted. However, if the case is ready and the dispute in question is simple, the Presiding Officer may conduct the trial immediately at or after the call-over hearing and deliver judgment on the same day.

#### Pre-trial mention

2.6.5 If the matter requires the disputing parties to provide more evidence, the Presiding Officer will set it down for pre-trial mention in order to examine any further evidence or documents to decide whether the matter is ready to proceed to the trial stage. The number of pre-trial mention hearings is not fixed.

#### Trial and conciliation amid the trial

2.6.6 During the hearing of a claim, if both parties concerned have agreed to an adjournment for the purpose of conciliation and there is reasonable likelihood of a settlement of the claim, the Presiding Officer may adjourn the claim and refer the disputing parties to the Tribunal Officer for conciliation. The Tribunal Officer will start conciliation immediately or on the same day.

2.6.7 If both parties concerned agree to settle, the terms of settlement signed by them have to be approved by the Presiding Officer. If they fail to settle, the Presiding Officer may continue to hear the case on the same or a later day. The Presiding Officer may deliver his/her judgment at the end of the hearing or fix a date to do so.

#### Award costs against the losing party

2.6.8 If the claimant succeeds in his/her claim in LT, he/she can apply for costs incurred in putting his/her claim forward to be added to the award. If his/her claim fails, as a losing party, he/she may have to pay costs to the defendant.

## **2.7 Review and appeal**

### Review

2.7.1 Either party concerned may apply to LT within seven days from the date of the award for the judgment to be reviewed. The Presiding Officer may also review the judgment on his/her own motion within 14 days of the date of the award. A review may be on facts or on law, and is conducted by the same Presiding Officer, who may re-hear the claim wholly or in part. An application to review is no bar to a subsequent appeal. In 2002, 885 out of 1 814 decisions made by LTs applied for review.

## Appeal

2.7.2 Either party concerned may apply to the Court of First Instance of the High Court for leave to appeal against the decision of LT. The appeal has to be lodged on the grounds that the award, order or determination is erroneous in point of law, or outside the jurisdiction of LT. If leave is granted, the Court of First Instance will hear and determine the appeal. The number of applications to appeal was 140 in 2002 and 109 in the first eight months of 2003.

2.7.3 If either party concerned is dissatisfied with the decision of the Court of First Instance, he/she may apply to the Court of Appeal for leave to appeal. Leave for appeal will only be granted where a question of law of general public importance is involved. A refusal by the Court of Appeal is final.

## **2.8 Payment of award**

### Writ of Execution and seizure by the bailiff

2.8.1 LT may specify how the judgment debtor (the defendant who has lost the case and is ordered to pay the money he/she owes to the claimant) is to make payment to the judgment creditor (the successful claimant). If the judgment debtor fails to pay, the judgment creditor may apply to LT for a Certificate of Award, which can be registered in the District Court. The judgment creditor can then apply to the District Court for the issue of a Writ of Execution, in order to have a court bailiff to enforce the judgment.

2.8.2 Bailiffs are authorized to seize goods and chattels at value equivalent to the judgment debts plus the expenses of the execution. On the date of execution, a bailiff, together with a security guard, will visit the defendant's premises and seize the goods and chattels.<sup>23</sup>

2.8.3 After successful seizure, unless the defendant settles the debt and the costs incurred for the execution within five days, the seized items will be sold by public auction. The proceeds will be used to settle the money due to the judgment creditor after deducting the necessary execution charges. If there are no or insufficient goods to justify seizure, it is for the judgment creditor to give further instructions to the bailiff.

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<sup>23</sup> The claimant is required to pay a deposit to cover the cost of the security guard and conveyance expenses incurred by the bailiff.

### Insolvency

2.8.4 If the judgment debtor has become insolvent, the judgment creditor may file a bankruptcy petition or a winding up petition at the High Court and seek assistance from the Legal Aid Department. He/she may also apply for extra-gratia payment from the POWOI Fund.<sup>24</sup> After the High Court has made a bankruptcy/ winding up order against the judgment debtor, the claimant may register himself/herself as one of the creditors of the judgment debtor in the Official Receiver's Office.

## **2.9 Safeguards against evasion of payment**

### Security for payment of an award

2.9.1 If an adjournment of the hearing may result in prejudice to a party in dispute because of the disposal or loss of control of assets by a defendant, LT may grant an adjournment only when the defendant has made a payment as security.<sup>25</sup>

2.9.2 LT may also make such an order on the application of a party for a review of an award or order if there is a possibility of assets, which may be available to satisfy an award, being disposed of.<sup>26</sup>

### District Court orders

#### *Apprehension of absconding employer*

2.9.3 If an employer or former employer is about to leave Hong Kong with the intent to evade payment of wages owed by him/her, any of his/her employees may apply to a District Judge to issue a warrant ordering that the employer be apprehended and brought before a District Judge.<sup>27</sup> The District Judge may make an order requiring him/her to enter into a bond, which requires his/her appearance before a District Judge whenever called upon until he/she has paid to the employee in full.<sup>28</sup>

#### *Prohibition on debtor leaving Hong Kong*

2.9.4 The District Court may make an order prohibiting a judgment debtor leaving Hong Kong to facilitate the enforcement, securing or pursuance of a claim for the payment of money.<sup>29</sup>

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<sup>24</sup> Section 16 of the Protection of Wages on Insolvency Ordinance (Cap. 380).

<sup>25</sup> Section 30 of the Labour Tribunal Ordinance.

<sup>26</sup> Section 31(4) of the Labour Tribunal Ordinance.

<sup>27</sup> Section 67 of the Employment Ordinance (Cap. 57).

<sup>28</sup> Schedule 2 of the Employment Ordinance.

<sup>29</sup> Section 52E of the District Court Ordinance (Cap. 336).

### *Charging order*

2.9.5 An award of LT may be registered in the District Court and enforced accordingly as a judgment of the District Court. The District Court may impose a charging order by which the judgment debtor's property becomes security for the payment of the debt.<sup>30</sup>

### *Injunction and receivers*

2.9.6 The District Court may, by an order, grant an injunction restraining a party to any proceedings from removing assets from or dealing with assets located within the jurisdiction of the District Court. The District Court may, by an order, appoint a receiver in relation to an estate or interest in land whether or not a charge has been imposed on that land to enforce the judgment.<sup>31</sup>

### *Attachment of debts*

2.9.7 If the judgment creditor knows that the judgment debtor has a deposit in a bank account, the judgment creditor may apply to the District Court for an attachment of debts. If the judgment creditor obtains such an order against the bank, the bank has to hold the money in the account for the judgment creditor or pay the money directly to the judgment creditor.<sup>32</sup>

## **2.10 Legal assistance available to the claimant**

### Legal representation

2.10.1 Legal representation is prohibited in LT, but an office bearer of a registered trade union or an association of employers who is authorized by a claimant or a defendant, may be allowed to appear as his/her representative. "*An officer or servant of a company or a member of a partnership, if the company or partnership is a party*"<sup>33</sup>, has a right of audience before LT.

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<sup>30</sup> Section 52A of the District Court Ordinance.

<sup>31</sup> Section 52B of the District Court Ordinance.

<sup>32</sup> Section 52D of the District Court Ordinance.

<sup>33</sup> Section 23(1)(d) of the Labour Tribunal Ordinance.

2.10.2 Although there is a suggestion that the Presiding Officer should be given discretion to allow legal representation for complex cases in LT,<sup>34</sup> the Administration considers it undesirable to do so for two major reasons<sup>35</sup>:

- (a) Should the case involve some complications or the employee be unable to deal with the matter himself/herself, the Presiding Officer could transfer the case to a higher court so that the employee could either instruct his/her own lawyer or apply for legal aid; and
- (b) Although it is not set out in the Labour Tribunal Ordinance, all Presiding Officers are legally qualified and are able to assist self-represented litigants during the course of a hearing.

2.10.3 In the case of an appeal in the Court of First Instance, an individual may conduct the appeal in person, or instruct a barrister or solicitor to represent him/her. An incorporated company must be legally represented in its appeal.

#### Legal aid

2.10.4 The Ordinary Legal Aid Scheme does not cover civil proceedings in LT. However, if the Presiding Officer transfers the case to a higher court, the employee may apply for legal aid. Relevant proceedings or enforcement actions for cases concerning employees' compensation, wages and severance pay in the District Court, the Court of First Instance and the Court of Appeal are covered by the Ordinary Legal Aid Scheme. To be eligible for legal aid, applicants must pass both the means and merits tests.<sup>36</sup>

#### Legal advice

2.10.5 Free preliminary advice is provided to the public<sup>37</sup> on various legal issues by the Free Legal Advice Scheme jointly organized by the Home Affairs Department and the Duty Lawyer Service.<sup>38</sup> The Duty Lawyer Service also provides a Tel-Law Scheme offering a brief recorded introduction on various legal matters, inter alia, employment law through telephone and its web site.<sup>39</sup>

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<sup>34</sup> Legislative Council, House Committee. (1999) 23 April. LC Paper No. CB(2) 1795/98-99. There were complaints of qualified lawyers acting in the capacity of officers or employees for certain companies which were parties to proceedings before LT. Such arrangement was alleged to be unfair to the employees concerned.

<sup>35</sup> Legislative Council, Panel on the Administration of Justice and Legal Services. (1999) 21 December. LC Paper No. CB(2) 1418/99-00.

<sup>36</sup> An applicant passes the means test if his/her financial resources do not exceed HK\$169,700. For the merits test, an applicant should have reasonable grounds for taking or defending the proceedings.

<sup>37</sup> A client should be able to meet with a volunteer lawyer within two weeks of making an appointment.

<sup>38</sup> The Duty Lawyer Service is an organization which receives is fully subsidized by the Hong Kong Government. It is managed by the Hong Kong Bar Association and the Law Society of Hong Kong through a governing council.

<sup>39</sup> The web site of the Duty Lawyer Service is <http://www.dutylawyer.org.hk/>

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## 2.11 Efficiency and effectiveness of the dispute resolving mechanism

### The Labour Department

2.11.1 LRD handled 35 254 labour disputes and claims in 2002. Out of the 32 652 cases with conciliation services rendered, 63.2% (20 636 cases) were successfully resolved through conciliation in 2002. In the first 10 months of 2003, LRD handled 28 795 labour disputes and claims, and out of the 26 583 cases with conciliation services rendered, 64.7% were settled. According to LRD, a conciliation meeting is usually held within four to five weeks after request, and most cases are settled with a single conciliation meeting.

### The Labour Tribunal

#### *Workload and efficiency*

2.11.2 The caseload of LT had more than doubled from 5 266 cases in 1993 to 12 326 cases in 2002. In the first 10 months of 2003, the number of claims filed in LT was 9 604.

2.11.3 The average waiting time from appointment to filing of claims was 19 days in 2002 and 14 days in the first 10 months of 2003. From filing of a claim to call-over hearing, the average time was 25 days in 2002 and 24 days in the first 10 months of 2003. In other words, for the 6 174 cases filed in 2002 and completed at the stage of call-over hearing, which represented 50% of the cases filed in 2002, the average time required to complete a case was 44 days. For the 4 599 cases filed and completed at the stage of call-over hearing in the first 10 months of 2003, which represented 48% of the cases filed during that period, the average time required to complete a case was 38 days.

**Table 1 - Average time taken in different stages of adjudication process**

	<b>From appointment to filing claims</b>	<b>From filing claims to call-over hearing</b>	<b>From filing claims to rendering judgment*</b>	<b>From appointment to rendering judgment*</b>	<b>From appointment to rendering judgment after a trial</b>
2002	19 days	25 days	54 days	71 days	146 days
Jan - Oct 2003	14 days	24 days	44 days	57 days	122 days

\* Judgment includes judgment entered on withdrawal, settlement, dismissal and judgment handed down after trial.

2.11.4 For cases filed in 2002 and in the first 10 months of 2003, the average time taken from appointment to rendering judgment was 71 days and 57 days respectively. However, if cases completed without a contested trial hearing were excluded, the average time from filing claims to rendering judgment was much longer. It was 146 days in 2002 and 122 days in the first 10 months of 2003.

2.11.5 For cases proceeding to a contested trial, those which go through the pre-trial mention stage appear to take a longer time to complete on average. For the 188 cases filed in 2002 that proceeded directly to trial after the call-over hearing without a pre-trial mention, the time taken from appointment to rendering judgment was 88 days on average. However, for the 927 cases filed in 2002 that went through the pre-trial mention stage before proceeding to trial, the average time taken from appointment to rendering judgment was 183 days. The number of cases that went through pre-trial mention(s) before proceeding to trial in the first 10 months of 2003 was reduced to 358, and the average time from appointment to judgment rendered was 180 days.

2.11.6 In 2002, 9 996 cases (81.09% of the cases filed in 2002) had call-over hearings and 2 712 cases (19.67%) went through pre-trial mention(s).

2.11.7 While half of the cases filed in 2002 were disposed of by one single hearing, there were 57 cases (1.16%) that took more than 10 months and more than seven hearings on average to conclude.

#### *Effectiveness of conciliation at the Labour Tribunal*

2.11.8 Over 53% (6 556 cases) of the cases filed in 2002 were settled by Tribunal Officers or Presiding Officers before or during the course of hearing, and 55% (5 280 cases) of the cases filed in the first 10 months of 2003 were settled in the same manner.

**Table 2 - Cases settled by Tribunal Officers/Presiding Officers**

	2002	Jan -Oct 2003
<i>(a) Number of cases filed with the Labour Tribunal</i>	<b>12 326</b>	<b>9 604</b>
(b) Number of cases settled through conciliation by Tribunal Officers before call-over hearing	1 364	1 046
(c) Number of cases settled by Tribunal Officers after referral by Presiding Officers	1 072	1 588
(d) Number of cases settled by Presiding Officers	4 120	2 646
Total number of cases settled after filing with the Labour Tribunal (b) + (c) + (d)	6 556	5 280

2.11.9 In 2002, 1 366 cases were referred by Presiding Officers to Tribunal Officers for conciliation while in the first 10 months of 2003, 1 046 cases were referred in the same way. The success rate for reaching a settlement through conciliation was 78.5% in 2002 and 81.3% in the first 10 months of 2003.

2.11.10 Presiding Officers themselves also settled cases without referring to Tribunal Officers for conciliation. According to LT, 4 120 cases were settled by Presiding Officers in 2002, and 2 646 cases in the first 10 months of 2003.

#### Debt recovered

2.11.11 Statistics are not available on the success rate of collecting judgment debts. Where there were enforcement of judgment by bailiffs, the effective rate denoting the number of debts recovered was 41.8% in 2002, and 40.3% in the first 10 months of 2003.<sup>40</sup> However, the amount of debts recovered by the execution of court orders only covered 23.8% (HK\$4.7 million) of the total sum (HK\$19.7 million) in 2002.<sup>41</sup>

### **2.12 Review on the operation of the Labour Tribunal and short term improvement measures**

2.12.1 The Chief Justice of the Judiciary has set up an internal Working Party<sup>42</sup> to conduct a review on the practice and procedures of LT. It is anticipated that LegCo will be informed of the outcome by early 2004.<sup>43</sup>

2.12.2 The Judiciary has adopted short term measures<sup>44</sup> to improve the operation of LT pending the outcome of the review on the practice and procedures of LT, which include:

- (a) Three call-over courts are conducting a three-month experiment<sup>45</sup> in listing cases separately in the morning and in the afternoon to examine the impact on the time spent by the parties in dispute while waiting for their cases to be heard;
- (b) All Presiding Officers have been reminded to exercise care during call-over and mention hearings, to avoid any perception by the parties in dispute that they are being pressurized towards settlement;

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<sup>40</sup> Reply by the Judiciary.

<sup>41</sup> LC Paper No. CB(2)3025/02-03(01).

<sup>42</sup> The Working Party is chaired by Madam Justice Carlye Chu, and comprises four other judges and judicial officers.

<sup>43</sup> LC Paper No. CB(2)2694/02-03(01).

<sup>44</sup> LC Paper No. CB(2)3025/02-03(01). For the full list of measures, please see appendix I.

<sup>45</sup> The three-month experiment in three call-over courts has been extended for further evaluation.

- (c) A clear warning will be given to the parties in dispute that unless good reasons are provided, the hearings may proceed despite non-compliance of submitting all relevant documents on time, in the hope that mention hearings will be reduced to one for each case; and
- (d) All Presiding Officers have been reminded to be more vigilant in controlling the length of trials and to minimize the number of part-heard cases<sup>46</sup>.

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<sup>46</sup> Part-heard cases are those cases which cannot be completed within the time allotted for a trial.

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## Chapter 3 - The United Kingdom

### 3.1 Background

#### Labour force and trade union participation

3.1.1 The UK has a labour force of more than 29 million out of a population of 58.8 million<sup>47</sup>. The unemployment rate was around 5.0% in mid-2003<sup>48</sup>.

3.1.2 At the end of March 2001, there were 206 trade unions in the UK.<sup>49</sup> In autumn 2002, 7.3 million people in employment (or 27% of the labour force) were trade union members in the UK. An independent trade union can apply to the statutory Central Arbitration Committee<sup>50</sup> for a declaration requiring a particular employer to recognize it for collective bargaining purposes. As at mid-2003, approximately 36% of employees in workplaces were covered by collective bargaining, mainly on pay and conditions.<sup>51</sup>

#### Overview of the dispute resolving mechanism

3.1.3 There are two separate sets of Employment Tribunal (ET) systems in the United Kingdom - one covering Great Britain, i.e. England & Wales and Scotland, and the other covering Northern Ireland. Each system has its President<sup>52</sup> as the head for its ETs as a whole.

3.1.4 ETs hear disputes mainly related to individual employment rights. The aim is to provide speedy, accessible and relatively informal justice.

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<sup>47</sup> Mid-2001 population estimates.

<sup>48</sup> Office for National Statistics, survey data for the three months ending in August 2003.

<sup>49</sup> Office for National Statistics, *UK 2002: the official yearbook of the United Kingdom*.

<sup>50</sup> The Central Arbitration Committee is a tripartite group that includes representatives from the government, the business sector and labour organizations. It exercises its functions on behalf of the Crown, but is not subject to directions from any Ministers.

<sup>51</sup> Employment Market Analysis and Research of the Office for National Statistics, *Labour Market Trends*, July 2003, available at <http://www.dti.gov.uk/er/emar/trade.htm>

<sup>52</sup> The Presidents of ETs are responsible for determining the number of ETs to be established and the times and places ETs should sit and other duties.

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3.1.5 The Employment Appeal Tribunal (EAT) hears reviews and appeals against decisions of ETs. EAT has six courts in London and one in Edinburgh, the Scottish Division. A further appeal can be made to the Court of Appeal in England and Wales or the Court of Session in Scotland, and a final appeal to the House of Lords.

3.1.6 Both ETs and EAT are not part of the court systems, but are independent tribunals administered by the Employment Tribunals Service, an executive agency of the Department of Trade and Industry.

3.1.7 Before the hearing at ETs, the Advisory, Conciliation and Arbitration Service (ACAS) provides an independent conciliation service to the parties concerned, with the view of promoting settlement between the parties.

3.1.8 In cases of unfair dismissal or claims under the flexible working regulations, the applicant has one more option. Instead of an ET hearing, he/she may choose to use the ACAS Arbitration Scheme where an independent arbitrator hears the evidence and decides for the parties concerned.

## **3.2 Constitution and jurisdiction of Employment Tribunals**

3.2.1 When hearing a case, each ET is normally composed of a legally qualified Chairman sitting with two lay members. Since 1993<sup>53</sup>, certain classes of cases can be heard by the Chairman sitting alone or by a Chairman with a lay member against the background of a significant increase in tribunal applications.

3.2.2 The Chairman and the lay members for each case are selected by the President or the Regional Chairman<sup>54</sup> of ETs from a panel of Chairmen and two panels of lay members representing the employers' and employees' perspectives respectively.<sup>55</sup> The lay members act as independent members of the bench, not in a partisan manner, and are all part-time in nature.

3.2.3 ETs hear disputes mainly related to individual employment rights. They have jurisdictions over 80 types of complaints covering a wide range of employment rights, including unfair dismissal, flexible working arrangements, redundancy pay, equal pay, and sex and racial discrimination.

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<sup>53</sup> The Trade Union Reform and Employment Rights Act 1993 and the Employment Rights (Dispute Resolution) Act 1998.

<sup>54</sup> The Regional Chairmen of ETs are responsible for the administration of justice by ETs in the area specified by the President in relation to them.

<sup>55</sup> The panel of legally qualified Chairmen for ETs in England & Wales is appointed by the Lord Chancellor, whilst a similar panel for ETs in Scotland is appointed by the Lord President of the Court of Session in Scotland. The two panels of lay members are appointed by the Secretary of State for Trade and Industry among persons with experience in dealing with work-related problems, after consultation with representatives of employers' organizations and employees' organizations.

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### **3.3 Filing claims**

#### Application

3.3.1 An applicant can either complete the application form and send it to an ET, or simply make the complaint in writing.<sup>56</sup> Alternatively, one can apply on-line.<sup>57</sup> There is no charge for entering an application.

3.3.2 An applicant must file his/her claim within the required time limit. The required time limit in most cases is three months, either beginning from the date when the applicant's employment ended, or when the matter under complaint happened.

#### The respondent's response and notice of appearance

3.3.3 A copy of the application and a "Notice of Appearance" form are sent to the respondent<sup>58</sup> (i.e. the employer in most circumstances) within five days of receipt by ET. The respondent can state on the latter document as to whether or not he/she resists the application, and if so, the reasons for it.

3.3.4 The respondent should reply within 21 days of receiving the application from ET. If he/she has not done so, he/she will not be allowed to take part in the hearing. Nonetheless, he/she can apply to ET to have the time limit extended.

3.3.5 ET writes to all parties concerned at least 14 days before the day of the hearing to tell them when the hearing will take place. There is no statutory time limit for a case to be heard in ET after an application has been received. However, the Employment Tribunals Service has, since 2001-02, set an annual performance target of arranging for 75% of single<sup>59</sup> ET cases to be heard the first time within 26 weeks of receipt of application<sup>60</sup>

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<sup>56</sup> Regulations will be made under the Employment Act 2002 to prescribe forms to be used in ET proceedings.

<sup>57</sup> The ETs website: <http://www.employmenttribunals.gov.uk>.

<sup>58</sup> The person/ company/ organization against whom the applicant is bringing a case.

<sup>59</sup> Excludes "multiple" applications where a number of cases are brought against the same respondent on the same or very similar grounds.

<sup>60</sup> Employment Tribunals Service. (2003) *Annual Report and Accounts 2002-03*. [Internet] Available from <http://www.ets.gov.uk>. [Accessed 27 January 2004].

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### 3.4 Conciliation

#### Operation

3.4.1 In most cases, a copy of the application to ET is also sent to ACAS, which is a tax-funded statutory body offering independent conciliation services and arbitration services. It is not subject to direction from any Minister as to how it should exercise its functions.<sup>61</sup>

3.4.2 After receiving the copy of the application, ACAS automatically contacts the parties concerned to see if it can offer any assistance. The Conciliation Officer must be impartial.<sup>62</sup> ACAS has a statutory duty<sup>63</sup> to endeavour to help the applicant and the respondent reach a settlement of the claim when certain matters are or could be the subject of proceedings before ET<sup>64</sup>. There is no charge for this service.

#### Settlement

3.4.3 If both parties concerned reach a settlement through conciliation, they may submit it to ET for promulgation as a formal decision, which will bring the case to an end. Even without this formal step, any agreement reached through a Conciliation Officer is legally binding, which means that the agreement can be enforced in the County Court if either of the parties concerned fails to honour it. After reaching an agreement with the involvement of a Conciliation Officer, the applicant cannot go back on the agreement and renew his/her application to ET.

3.4.4 If the claim is settled through ACAS, ET will write to the applicant confirming that there will be no hearing and that the case is closed.

### 3.5 Arbitration

#### Scope of the ACAS Arbitration Scheme

3.5.1 If the disputing parties cannot reach a settlement through conciliation, at the request of either one or both parties and with the consent of both parties, ACAS may refer the case to arbitration under the ACAS Arbitration Scheme (the Scheme). Instead of having the case heard at ET, an independent arbitrator hears the evidence and decides the case.

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<sup>61</sup> ACAS is directed by a council consisting of the ACAS Chair, representatives of employers and trade unions, and independent members.

<sup>62</sup> Selwyn, N M. (2002) *Selwyn's Law of Employment*, 12<sup>th</sup> ed. London, Butterworths.

<sup>63</sup> The Trade Union and Labour Relations (Consolidated) Act 1992.

<sup>64</sup> ACAS does not conciliate in the following disputes: written statements of terms and conditions of employment, claims for interim relief, time-off work for safety representatives and appeals against the imposition of prohibition and improvement notices.

3.5.2 The Scheme is available only to those who have submitted claims to ET for alleged unfair dismissal or claims under regulations for flexible working arrangements where the following conditions apply:

- (a) both parties involved must agree to arbitration and must have considered all options carefully;
- (b) both parties involved must accept that the employee is eligible to make a claim under the Scheme; and
- (c) there must be no complex legal issues.

#### Characteristics of arbitration

3.5.3 The Scheme was launched in May 2001 as an informal, non-legalistic and relatively speedy mechanism for dispute resolution. If a claim is upheld, an arbitrator can order the same remedies as in ET. Any compensation will be calculated in the same way as an ET award. The decision of the arbitrator is binding as a matter of law and has the same effect as a court judgement.

3.5.4 The main characteristics of an arbitration hearing which make it different from an ET hearing are that:

- (a) the arbitration hearing is informal and non-confrontational;
- (b) there is no cross examination;
- (c) the hearing is private;
- (d) instead of a court room, the hearing is held at a hotel, the ACAS office, or another place local to the disputing parties;
- (e) legal representatives can attend but have no special status; and
- (f) there is limited ground for appeal.

#### Operation

3.5.5 First, both parties involved in the dispute must sign an Arbitration Agreement and a waiver in respect of their rights to raise any jurisdictional issues and the rights to a public hearing or to cross-examine witnesses. Once the Arbitration Agreement is accepted by ACAS, the case will not proceed to ET.

3.5.6 An arbitrator is appointed by ACAS from a special panel of arbitrators. The parties in dispute have to provide each other with the relevant information and documents, and a written statement on their respective cases in advance of the hearing.

3.5.7 At the hearing, the arbitrator adopts an inquisitorial approach. He/she asks questions and finds out the relevant facts, rather than leaving it to the disputing parties to direct the case. Strict legal principles and legal precedents are not followed. The disputing parties may bring someone to help them present their case. The hearing is normally completed within half a day.

3.5.8 An award is generally binding. The parties involved are liable for any fees or expenses incurred by any representative appointed by them. No appeal is permitted, except where there is a point of law concerning the European Community law or the Human Rights Act 1998, or where there is an allegation of serious irregularity.

### **3.6 The hearing**

#### Manner of hearing

3.6.1 If a settlement is not reached through conciliation, or arbitration is not available/ preferable by the disputing parties, a hearing will take place in ET. Hearings before ET must be held in public, except for certain conditions, such as when the evidence has been communicated to a person in confidence. Proceedings are reasonably informal, for ETs have the power to conduct them in whatever manner they consider most suitable. The prime duty of ET is to apply the words of the law laid down by Parliament. Precedents provide only guidance and are not binding when the statute is unambiguous. Representation by lawyers is allowed.

#### Preparatory procedures before the hearing

##### *Directions hearing*

3.6.2 If ET wants to clarify the issues to be determined by ET and/ or to decide the directions or orders to be made about such matters as documents to be disclosed, the disputing parties may be invited to attend a directions hearing. The Chairman sitting alone determines the time to be allocated for the hearing and fixes a firm date for any preliminary or main hearing. Instead of a hearing, ET may give written directions.

##### *Pre-hearing review*

3.6.3 ET can arrange a pre-hearing review to be heard by a full tribunal or by the Chairman alone if it appears that a disputing party's case, either in whole or in part, has no reasonable prospect of success.

3.6.4 ET may make a costs warning and order the party whose case is unlikely to succeed to pay a deposit of up to £500 (HK\$6,365) as a condition of being allowed to continue, depending upon the means of the party. On refusal to pay the deposit, the case can be struck out. If the party pays the deposit to have the case go ahead but loses, he/she may lose the deposit as well. At present, the power to strike out is rarely used.<sup>65</sup>

#### *Hearing of preliminary issue*

3.6.5 A hearing may be arranged where ET considers that it is desirable to examine and decide upon a preliminary issue, such as the applicant's length of service, before the case is set down for a full hearing. This is known as a preliminary hearing.

#### The main hearing

3.6.6 In the main hearing, ET, with a legally qualified Chairman and two lay members, decides whether the applicant's claim succeeds or fails. The procedure of the hearing is primarily decided by the Chairman.<sup>66</sup> The disputing parties or their representatives can cross-examine the witness(es). During the hearing, ET may suggest the parties in dispute to reconsider conciliation through ACAS but cannot order them to do so. Nonetheless, it is unlikely that ET will refer the parties back to ACAS once hearing has commenced. Decisions of ET are reached by a majority vote. The Chairman usually announces ET's decision and reasons to the parties in their presence.

#### Award costs against the losing party

3.6.7 ET and EAT do not have general power to award costs against the losing party. There are exceptions where a party has in bringing the proceedings, or a party or a party's representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived. ET and EAT alike, may then make an order in respect of all or part of the other party's costs.

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<sup>65</sup> Smith I T & Thomas, G H. (2000) *Smith & Wood's Industrial Law*. London, Butterworths. The recent figures on cases struck out are not available.

<sup>66</sup> The Chairman may seek the views of the parties concerned or their representatives before he or she decides how the hearing should proceed as there is no absolute rule as to which side should start in a full hearing. The Chairman has to ensure that the case proceeds at a pace which enables it to be dealt within the time allocated. He or she may have to ensure that questions to witnesses keep to the issues and put reasonable time limits on submissions.

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### **3.7 Review and appeal**

#### Review

3.7.1 An application may be made to ET within 14 days from the time when the decision is sent to the parties, asking for a review of the decision. The rights to seek review of an ET hearing are limited.<sup>67</sup>

#### Appeal

3.7.2 Either party concerned can appeal to EAT within 42 days from the date on which the full reasons for the ET decision are sent to the appellant, if the party thinks that the ET decision is wrong on points of law. In 2002-03, 1 170 appeals against decisions of ET were registered with EAT.

3.7.3 Each appeal is normally heard by a judge with two or four lay members, giving equal representation of both employers and employees. Decisions are made by a simple majority. It is the President of EAT<sup>68</sup> who assigns judges and lay members to cases. The judge comes from a panel of judges appointed by the Lord Chancellor for the courts of EAT in England & Wales, and is appointed by the Lord President of the Court of Session for the court of EAT in Scotland. Lay members are appointed by the Queen on the joint recommendations of the Lord Chancellor and the Secretary of State for Trade and Industry. In certain cases, an appeal may be heard by a judge alone if the case has been heard by a Chairman alone in ET.

3.7.4 The appellant may be represented by a solicitor or barrister, or any other person whom he/she desires. At the hearing, fresh evidence is seldom heard and EAT relies primarily upon the written decision of ET.

3.7.5 EAT has the power to review its own decision. A further appeal lies on a point of law to the Court of Appeal or, in Scotland, to the Court of Session, and a final appeal lies to the House of Lords.

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<sup>67</sup> The limited rights to seek review of an ET hearing are:  
(a) if the decision is wrongly made due to an error on the part of ET's staff;  
(b) if a party does not receive notice of the proceedings;  
(c) if the decision is made in the absence of a party entitled to be heard and the absence is a result of illness or some other valid reasons;  
(d) new evidence comes to light; and  
(e) the interests of justice require a review.

<sup>68</sup> The President of EAT is a High Court judge who is assigned full-time to the job by the Lord Chancellor.

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### 3.8 Payment of award

#### Warrant of execution

3.8.1 An order by ET for money compensation is enforceable by a County Court order.<sup>69</sup> The successful applicant may go to his/her County Court and convert ET's award into a County Court Judgment so that he/she may ask the County Court to issue a warrant of execution to enforce the judgment.

3.8.2 The warrant of execution gives County Court bailiffs the authority to seize and sell the debtor's goods through auction, in order to cover the judgment debt. If the amount the applicant wants the bailiff to collect is more than £5,000 (HK\$63,650), the applicant has to ask the sheriff's office through the High Court to do so. The decisions made by an arbitrator under the ACAS Arbitration Scheme and a settlement reached through a Conciliation Officer are also enforceable in the High Court or County Court.

#### Insolvency

3.8.3 If the employer is insolvent, the employee may apply for redundancy and other payments, such as holiday pay, at the Redundancy Payments Office<sup>70</sup>. The Redundancy Payments Office pays the employee and takes over the employee's rights in relation to the debt in the insolvency proceedings.

3.8.4 If the employer is insolvent, the employee may also write to the Official Receiver<sup>71</sup> or the Insolvency Practitioner<sup>72</sup>, in order to register as a creditor and make a claim with a proof of debt.

#### Order to obtain information of the debtor's financial situation

3.8.5 The applicant (judgment creditor) may apply for an "order to obtain information from a judgment debtor" at the County Court.<sup>73</sup> The purpose is to obtain more information on the financial situation of the judgment debtor and find out the best method to get the money back.

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<sup>69</sup> Section 15, the Employment Tribunals Act 1996.

<sup>70</sup> The Redundancy Payments Office is under the Insolvency Service which is an executive agency of the Department of Trade and Industry.

<sup>71</sup> An Official Receiver is a civil servant who acts in bankruptcy matters as the interim receiver and manager of the estate of the debtor.

<sup>72</sup> If there are significant assets involved, an Insolvency Practitioner working in the private sector may be appointed by the Insolvency Service to officiate in the winding up of a company or in bankruptcy proceedings. Insolvency Practitioners are usually accountants or solicitors.

<sup>73</sup> When making the application, the judgment debtor is not required to be behind with payments.

3.8.6 After receiving the application, the County Court draws up an order which contains the time and place for the judgment debtor (or a company officer if the debtor is a company) to be questioned on oath by a court officer. The information that the applicant receives from the questioning includes details of any property owned (which may have a saleable value), and details of any bank accounts and the balances in them.<sup>74</sup>

### **3.9 Safeguards against evasion of payment**

3.9.1 The judgment creditor may apply for a “third party<sup>75</sup> debt order” or a “charging order” at the County Court when the judgment debtor has failed to pay the judgment debt or one or more of the instalments due under the terms of the judgment.<sup>76</sup> A “third party debt order” stops the judgment debtor from taking money out of his/her bank accounts until the court makes a decision about whether or not the money should be paid to the applicant. A “charging order” prevents the judgment debtor from selling his/her assets without paying what is owed to the judgment creditor. However, a “charging order” does not compel the judgment debtor to sell the property.

### **3.10 Legal assistance available to the claimant**

#### Legal representation

3.10.1 At an ET or EAT hearing, the disputing parties may represent themselves, or be represented by a solicitor or a barrister, or a representative of a trade union or employers’ association, or any other person whom they desire to represent them. The cases of ETs vary significantly in legal and factual complexity, but there is a consensus that cases are becoming more difficult for the unrepresented users.<sup>77</sup>

3.10.2 In a survey of 2 700 ET cases in 1998<sup>78</sup>, 62% of the applicants were represented at some time during the case (including writing letters to and negotiating with the employer, etc.), while 28% only received legal advice.

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<sup>74</sup> Leaflet “Order to obtain information: How do I apply for an order?” available at the Court Service’s website: <http://www.courtservice.gov.uk/cms/3608.htm>

<sup>75</sup> The organization or person who is holding the money, for instance, a bank, is referred to as the “third party”.

<sup>76</sup> Leaflet “Third party debt and charging orders: How do I apply for an order?” available at the Court Service’s website: <http://www.courtservice.gov.uk/cms/3608.htm>.

<sup>77</sup> Leggatt, Andrew. et al. (2001) *Tribunals for Users: Report of the Review of Tribunals*. London, The Stationery Office.

<sup>78</sup> Department of Trade and Industry. (2003) *Findings from the 1998 Survey of Employment Tribunal Applications (Survey of Applicants and Employers)*. [Internet] Available from: <http://www.dti.gov.uk/er/emar/etsurvey98.pdf> [Accessed 28 January 2004].

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### Legal aid

3.10.3 Legal aid is not available to cases in ETs in England & Wales, but is available to those in EAT and ETs in Scotland under certain conditions<sup>79</sup>. Legal aid is not available for representation at the arbitration hearing.

### Legal advice

3.10.4 Advice agencies such as the Citizens Advice Bureau<sup>80</sup> and the Law Centres give free advice on a wide range of general and legal problems with the help of local solicitors. Solicitors at the Law Centres take on cases in exactly the same way as in private practice for those who cannot afford to pay one. There are over 1 500 non-profit-making advice agencies offering free legal advice in England & Wales, receiving their funding from local authorities and charities<sup>81</sup>.

## **3.11 Efficiency and effectiveness of the dispute resolving mechanism**

### Employment Tribunals and the Employment Appeal Tribunal

3.11.1 The number of applications received by ETs reached a peak of 130 408 in 2000-01, compared to 34 697 in 1990-91. ETs were only able to deal with 70% of the application in 2000-01.<sup>82</sup> In 2002-03, applications registered with ETs were down to 98 617<sup>83</sup>, and only around 22 000 cases were heard by ETs in the same year as most cases were settled through conciliation, withdrawn or struck out.

3.11.2 There is an annual performance target of arranging 75% of single<sup>84</sup> ET cases to a first hearing<sup>85</sup> within 26 weeks of receipt. In 2002-03, 74% of the cases reached the target time frame, compared to 69% in 2001-02.

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<sup>79</sup> The conditions are as follows:

- (a) the applicant is unable to fund or find alternative representation elsewhere; or
- (b) the case is an arguable one; and
- (c) the case is too complex to allow the applicant to present it to a minimum standard of effectiveness.

<sup>80</sup> The National Association of Citizens Advice Bureau is a registered charity. Its offices offer free, independent and confidential advice from more than 700 locations throughout the UK.

<sup>81</sup> Slapper, Gary & Kelly, David. (2001) *The English Legal System*, 5<sup>th</sup> ed. London, Cavendish Publishing.

<sup>82</sup> Explanatory Notes, the Employment Act 2002, p.53.

<sup>83</sup> Employment Tribunals Service. (2003) *Annual report and accounts, 2002-03*.

<sup>84</sup> Excludes "multiple" applications where a number of cases are brought against the same respondent on the same or very similar grounds.

<sup>85</sup> A first hearing can be any hearing: a directions hearing, a pre-hearing review, a preliminary hearing or a full hearing.

3.11.3 There is no pre-hearing review figure available for the year 2002-03. In 2001-02, 840 cases had a pre-hearing review in ETs, accounting for 0.75% of the registered applications. Out of these 840 pre-hearing review cases, 320 cases (38%) were either withdrawn or privately settled. However, there is no information available on the number of costs warnings issued and whether costs warnings have any effect on withdrawal or settlement of cases.<sup>86</sup> In 2002-03, 6 161 applications had directions hearings and 2 894 applications had preliminary hearings.

3.11.4 At the EAT level, 1 170 appeals were registered and 1 054 cases were given a preliminary hearing by EAT in 2002-03, out of which 458 were dismissed at hearing and 596 were allowed a full hearing.

#### The Advisory, Conciliation and Arbitration Service

3.11.5 ACAS received 95 856 actual and potential<sup>87</sup> applications to ET in 2002-03, out of which 98% were actual applications to ET. ACAS has set a target of 75% of ET cases referred to ACAS not proceeding to a full hearing or an arbitration hearing after the provision of conciliation service. In 2002-03, 77% of the referred applications went no further than the ACAS conciliation stage, meaning that the cases were settled, withdrawn or struck out. Out of all the referred cases provided with conciliation, 43% were settled.<sup>88</sup>

3.11.6 In 2002-03, out of all the cases disposed of (including those not referred to ACAS), around 38% reached conciliated agreements by ACAS, about 31% were withdrawn before a hearing, and 11% were dismissed at hearings of ETs. Only 13% of the cases were decided by ETs.<sup>89</sup>

3.11.7 In 2002-03, the first full year of operation of the ACAS Arbitration Scheme, ACAS provided statutory arbitration for 23 cases.

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<sup>86</sup> Reply from the Employment Tribunals Service.

<sup>87</sup> ACAS may use its power to broker settlement in cases where a tribunal application has not yet been submitted.

<sup>88</sup> Advisory, Conciliation and Arbitration Service. (2003) *Annual report and accounts, 2002-03*.

<sup>89</sup> Employment Tribunals Service. (2003) *Annual report and accounts, 2002-03*.

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### **3.12 New measures to be effective in 2004**

3.12.1 The Employment Act 2002 (the 2002 Act) introduces a number of changes in the dispute resolution procedures. When the new measures under the 2002 Act comes into force in 2004, the total effect of these measures is estimated to help reduce the number of applications by 23% to 31%.

#### Internal grievance procedure before application

3.12.2 The 2002 Act sets out the statutory grievance procedures<sup>90</sup> as a contractual right. In addition, for a number of specified categories of claims,<sup>91</sup> an employee is not allowed to make an application to ET before he/she has completed the first step of the statutory internal grievance procedures and at least 28 days have elapsed thereafter.<sup>92</sup> The first step of the statutory procedures requires an employee to set out the grievance in writing and send the statement or a copy of it to the employer.

3.12.3 The 2002 Act also provides that ETs can vary compensatory awards for failures to use the statutory internal procedures to deal with complaints and appeals before applications are made to ETs.<sup>93</sup>

#### Fixed period for conciliation

3.12.4 At present, ACAS has a duty to continue to seek a conciliated settlement between both parties of a dispute for as long as they want to carry on. The government believes that this arrangement leads to last minute settlements as the parties concerned are unwilling to focus on the importance of agreement until the reality of ET hearing is upon the parties, which can result in tribunals being vacated unnecessarily.<sup>94</sup>

3.12.5 Under the 2002 Act, regulations are expected to be made in 2004 to introduce a fixed period for conciliation, so as to encourage the disputing parties to settle as early as possible. Once that period has expired, it is for the conciliator to decide whether to continue with conciliation, or pass the claim to ET for a hearing. The fixed period will only be extended if the conciliator considers that settlement is very likely within a short additional time frame.

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<sup>90</sup> A grievance procedure enables individual workers to raise grievances with management about their employment, either by themselves or with a representative.

<sup>91</sup> Schedule 4 of the Employment Act 2002.

<sup>92</sup> Section 32 of the Employment Act 2002.

<sup>93</sup> Section 31 of the Employment Act 2002.

<sup>94</sup> Explanatory Notes, the Employment Act 2002, p. 16.

3.12.6 It is proposed to set the fixed period at seven weeks for “straightforward” cases such as those concerning the Wages Act and breach of contract, 13 weeks for more complicated cases such as unfair dismissal, and an unlimited period for discrimination cases. However, this plan is yet to be formally decided on by the Secretary of State for Trade and Industry.<sup>95</sup>

#### Strike out a case at pre-hearing review

3.12.7 At present, only on refusal to pay a deposit of £500 (HK\$6,365) after a costs warning can a case be struck out at the pre-hearing review. Under the 2002 Act, at the pre-hearing review, a case may also be struck out on grounds including when the originating application or notice of appearance is scandalous, misconceived or vexatious. The objective is to restrict the amount of time that ETs spend on considering cases which are obviously misconceived. The strike-out option is only applicable in cases where ET is satisfied that there is no need to consider the evidence, or where there is no conflict of evidence.

#### Costs awards against representatives

3.12.8 In a consultation document “Routes to Resolution”, the UK government suggested that “*all concerned - users, their representatives and the tribunals - must play their part in ensuring that time wasting is minimized.*” Under the 2002 Act, costs awards are made possible against representatives who are acting on a for-profit basis where it is their behaviour that has triggered the costs award. In addition, ET has the power to award compensation for the time spent by a party in preparing for the hearing. However, the total amount of costs to be awarded does not exceed £10,000 (HK\$127,300).

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<sup>95</sup> Reply from the Employment Tribunals Service.

## Chapter 4 - New Zealand

### 4.1 Background

#### Labour force and trade union participation

4.1.1 New Zealand has a population of around four million people. The labour force of New Zealand was two million and the unemployment rate was 4.4 per cent in June - September 2003.<sup>96</sup>

4.1.2 There were 181 trade unions registered under the Employment Relations Act with a membership totalling 334 044 employees as at 1 March 2003. Around 17% of the labour force participated in trade unions. Union membership is voluntary.

4.1.3 The law provides for the right of workers to organize and contract through collective bargaining. A union registered with the Registrar of Unions has a right to initiate collective bargaining with the employer. The initiation of bargaining places a duty on the employer to respond to the union's initiation, although there is no obligation to settle. Since 2001, the New Zealand government has required that parties to an employment agreement should bargain in good faith to achieve either a collective or individual employment agreement. The law protects unions from governmental interference, suspension and dissolution.

#### Overview of the dispute resolving mechanism

4.1.4 The old system of handling employment relationship problems was criticized for delays and being legalistic, both of which led to inefficiency and significant expenses for the parties concerned. As a result, the Employment Relations Act 2000<sup>97</sup> (the 2000 Act) was enacted, with the functions of the then Employment Tribunal redistributed<sup>98</sup> and the Employment Tribunal itself eventually closed at the end of September 2002.

4.1.5 The objective of the 2000 Act is to “*promote mediation*”<sup>99</sup> as the primary problem-solving mechanism” and to “*reduce the need for judicial intervention*”, in the hope that disputes would be resolved more efficiently under a less formal and less legalistic system.<sup>100</sup>

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<sup>96</sup> Statistics New Zealand at <http://www.stats.govt.nz/>.

<sup>97</sup> It was enacted in August 2000 and came into force on 2 October 2000.

<sup>98</sup> Prior to the enactment of the 2000 Act, the Employment Tribunal had incorporated both mediation and adjudication functions.

<sup>99</sup> “Mediation” is used interchangeably with “conciliation” in this report.

<sup>100</sup> Explanatory note of the Employment Relations Bill.

4.1.6 The Mediation Service under the Employment Relations Service of the Department of Labour provides free official mediation. Most of the employment relationship problems now go through mediation prior to adjudication.

4.1.7 The Employment Relations Authority (ERA) is an informal and non-legalistic inquisitorial body, making decisions for employment relationship problems. If not satisfied with a determination of ERA, the disputing parties can go to the Employment Court for a full judicial hearing. In special cases, they can also appeal a decision of the Employment Court to the Court of Appeal.

4.1.8 If the matter concerns statutory minimum terms and conditions of employment, the complainant can go to the Labour Inspectorate under the Department of Labour, which mediates and investigates the matter. A Labour Inspector may serve on the employer involved a demand notice for the recovery of arrears of wages.

4.1.9 The Employment Relations Service, a division of the Department of Labour, provides supporting services to the Labour Inspectorate, the independent ERA and the Employment Court<sup>101</sup>.

## **4.2 Internal problem solving procedures**

4.2.1 The 2000 Act requires that an employment agreement should include a process for dealing with employment relationship problems, with the view that employment relationships are more likely to be successful if problems are resolved promptly by the disputing parties themselves<sup>102</sup>. The parties concerned, however, can go directly to mediation or ERA prior to going through internal problem resolution procedures.

## **4.3 Mediation**

### Nature of mediation

4.3.1 Mediation is defined by the 2000 Act as not only the means of assisting persons to resolve their employment relationship problems, but also the provision of general information about employment rights and duties. The Department of Labour provides mediation services through both a telephone hotline (the Employment Relations Infoline) and the Mediation Service.

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<sup>101</sup> The New Zealand government announced in mid-December 2003 that the administration of the Employment Court would be transferred from the Department of Labour to the Ministry of Justice from 1 October 2004.

<sup>102</sup> Section 143 (b) of the 2000 Act.

4.3.2 One does not need to make a formal complaint to the other party before speaking to a mediator. If a party of an employment relationship problem cannot resolve the problem with the other party, either party may contact the Employment Relations Infoline or the Mediation Service where mediators employed by the Mediation Service are available to provide free assistance.

4.3.3 Law does not require that parties in dispute must use mediation prior to taking other actions. However, it is a statutory duty for ERA and the Employment Court to consider whether an attempt has been made to solve the matter through mediation. They must refer the case to mediation unless it is believed that mediation would not contribute to the resolution of the matter. Therefore, almost all cases investigated by ERA or heard by the Employment Court have been to mediation.

#### Mediation meeting

4.3.4 Attendance at mediation meetings is voluntary, but participation in mediation can be seen as part of the good-faith duties of the employment relationship under the 2000 Act. If a party involved refuses to participate, the other party can take the complaint to ERA, which can require both parties to attend mediation.

4.3.5 At a mediation meeting, the mediator asks each party to outline his/her understanding of the problem and invites him/her to describe the outcome he/she wishes to see. Mediators are not advocates for one party or the other. An average mediation meeting takes about four hours. Apart from face-to-face meetings, mediation services may also be provided by telephone, facsimile, Internet or e-mail.

#### Settlement

4.3.6 If the parties concerned reach a settlement, they can agree to ask the mediator to sign it. Once signed, the settlement cannot be challenged. The settlement becomes final and no party concerned may seek to reopen the terms before ERA or the Employment Court.

#### Conferred decision-making power on mediator

4.3.7 If no agreement can be reached in mediation, both parties concerned can agree, in writing, to have the mediator making a final and binding decision. The mediator's decision is final and enforceable, and neither party can seek another decision in ERA or appeal against it in the Employment Court.

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4.3.8 By conferring decision-making power on the mediator, the mediator's role is changed into an arbitrator. This arrangement is criticized for fear that a confusion of roles may arise as the two roles have different rules in conducting business and different goals to achieve.<sup>103</sup> For instance, in arbitration, the decision-maker is prohibited from receiving prejudicial information likely to influence a decision in an unfair way but there is no such rule in mediation.<sup>104</sup>

4.3.9 Only a small number of applications have been decided by mediators. In 2002-03<sup>105</sup>, out of the 9 278 applications received by the Mediation Service, only 47 applications had decision-making power conferred on the mediator.<sup>106</sup>

#### Private mediator/arbitrator

4.3.10 If the parties in dispute are unable to resolve a matter with the help of government mediator or either party does not want the mediator to make a decision for them, either one or both parties may lodge an application to ERA. Another option is that the disputing parties may find a private mediator or arbitrator to resolve their problems. If the parties agree to use a private mediator, a government-employed mediator has to be asked to sign the settlement to make it legally binding under the 2000 Act.

## **4.4 The Labour Inspectorate**

### Mediation and investigation by the Labour Inspectorate

4.4.1 The Department of Labour also operates the Labour Inspectorate which mediates and investigates complaints about statutory minimum terms and conditions of employment, such as legislation concerning holidays, the minimum wage and unpaid wages. Labour Inspectors assist the disputing parties to come to a solution in an impartial manner.

4.4.2 While both the Labour Inspectorate and ERA investigate labour disputes, the former has a narrower jurisdiction covering only minimum employment code legislation. ERA's jurisdiction is wider, and the disputing parties may apply to ERA to investigate and determine any type of employment relationship problems. For a minimum code issue, a party may bring it to ERA only after all other attempts to resolve the issue have been exhausted, including the Labour Inspectorate. Services of the Labour Inspectorate is free of charge, whilst it costs NZ\$70 (HK\$318) to lodge an application with ERA.

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<sup>103</sup> Green, Phillip D. (2002) *Employment Dispute Resolution*. Wellington, LexisNexis Butterworths.

<sup>104</sup> Ibid.

<sup>105</sup> 1 July 2002 - 30 June 2003.

<sup>106</sup> Report of the Department of Labour for the year ended 30 June 2003.

### Issue of demand notice

4.4.3 When a problem remains unresolved through mediation by a Labour Inspector, the Labour Inspector may serve on an employer a demand notice if he/she believes on reasonable grounds that the employee involved has not received wages, holiday pay or other monies owed. Labour Inspectors can issue demand notices for the recovery of up to six years' arrears of wages unpaid or underpaid.

4.4.4 The employer can lodge an objection to the demand notice within 28 days. The employer otherwise has a legal obligation to comply with the demand notice and pay. Where an objection is lodged, it is for ERA to determine whether or not all or part of the money specified in the notice should be paid to the employee. The demand notice can be enforced by ERA by way of a compliance order or by the District Court as a judgment debt.

4.4.5 The power to serve demand notices is intended to function much like the ability of police officers to issue traffic infringement notices. The intention is to reduce the need for litigation and associated enforcement costs and to enable a speedier recovery of employees' entitlements.

## **4.5 Employment Relations Authority**

### Constitution

4.5.1 ERA consists of 17 members<sup>107</sup>, including the Chief of ERA, whose job is to ensure that ERA discharges its functions in an orderly and expeditious way and meets the object of the 2000 Act. The majority of ERA members have legal qualifications, while those who do not possess such qualifications have extensive experience on employment relations. They are generally appointed on a full-time basis.

4.5.2 ERA members take on investigations on a roster system. It is the common practice of ERA to have one member sitting alone in each case.

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<sup>107</sup> They are all appointed by the Governor-General of New Zealand on the recommendation of the Minister of Labour

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### Jurisdiction

4.5.3 ERA has exclusive jurisdiction to make determinations about employment relationship problems generally, from recovery of wages to breaches of an employment agreement or the 2000 Act. In the first two years under the 2000 Act, over half of the applications received by ERA were related to personal grievances<sup>108</sup> and one-fifth were related to recovery.

4.5.4 Employees cannot file a personal grievance application with ERA more than three years after raising it with the employer. For a non-personal grievance, the limitation period is six years.

### Filing application

4.5.5 The applicant has to fill out a simple form called a Statement of Problem in which he/she explains what the problem is, including the facts and the way the applicant would like the problem resolved.

4.5.6 ERA sends a copy of the Statement of Problem to the other party, the respondent, who is asked to provide a Statement in Reply within 14 days. The respondent should give his/her view of the problem, his/her accounts of the facts, and any steps taken to resolve the problem, such as mediation.

### Duty of Employment Relations Authority to consider mediation

4.5.7 After receipt of the application and the reply of the respondent, ERA, under the statutory requirement of the 2000 Act, has to consider whether an attempt has been made to resolve the dispute through mediation.<sup>109</sup> If mediation has not been done, or the attempt is considered inadequate, ERA must direct that mediation be used before it investigates the matter, unless it considers that mediation:

- (a) will not serve any constructive purpose; or
- (b) will not be in the public interest; or
- (c) will undermine the urgent or interim nature of the proceedings.

4.5.8 The 2000 Act requirement to consider attempting mediation first is intended to filter trivial and minor matters, as well as to settle matters at the lowest possible level of time and money.<sup>110</sup>

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<sup>108</sup> Under the 2000 Act, personal grievances are defined as any grievances that an employee may have against his/her employer because of a claim based on unjustifiable dismissal, unjustifiable disadvantageous action, discrimination, sexual harassment, racial harassment or duress.

<sup>109</sup> Section 159 of the 2000 Act.

<sup>110</sup> Agnew, Peter. (2002) *Employment Law Guide*, 6<sup>th</sup> ed. Wellington, LexisNexis.

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4.5.9 The Department of Labour (which provides support services to ERA) has set out a performance standard that the disputing parties should be informed of the decision of whether the application will be referred to mediation or whether the ERA will commence an investigation, within 14 days of receipt of the application.

4.5.10 ERA normally requires an attempt at mediation before proceeding to adjudication. Where directed by ERA to try mediation, the parties concerned must comply with the direction and attempt in good faith to reach an agreed settlement. ERA proceedings are suspended in the meantime.

4.5.11 Furthermore, ERA must, from time to time, consider mediation at all relevant points in its investigations. Therefore, at any stage in the proceedings, ERA can direct the parties in dispute to try mediation, whether or not they have already done so.

#### Manner of hearing

4.5.12 ERA is an investigative body with the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities. ERA holds an investigation meeting in public at which the disputing parties are expected to produce their witnesses and documents once and for all. The parties involved have the right to be represented by any person they choose, including a lawyer.

4.5.13 ERA has more control over the proceedings than under a purely adversarial approach. The 2000 Act does not require ERA to allow cross-examination of a party or a person, but ERA may, in its absolute discretion, permit such cross-examination.

4.5.14 ERA is required to act reasonably and comply with the principles of natural justice.<sup>111</sup> Questions of law can be referred to the Employment Court for its opinion, and parties can apply to ERA to have the matter, or part of it, removed directly to the Employment Court for determination.

#### Preliminary conference

4.5.15 The ERA member allocated to the case may call a preliminary conference, which is held with the disputing parties and/or their representatives. This is a common practice rather than a statutory requirement. The purposes are to identify factual and legal issues central to the employment dispute, set a timetable for necessary steps to be taken by the parties, and fix the date, time and place for the investigation meeting.<sup>112</sup> It may be held in the form of a meeting, by telephone or through other electronic means.

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<sup>111</sup> Sections 157(2) and 173(1) of the 2000 Act.

<sup>112</sup> Green, Phillip D. (2002) *Employment Dispute Resolution*. Wellington, LexisNexis Butterworths.

### Investigation meeting

4.5.16 At the investigation meeting, ERA gives a general outline of the procedure to be adopted and then invites the applicant to give evidence and to bring forward any witnesses to give their evidence. At the conclusion of reading evidence, ERA may question the witnesses. The parties concerned may cross-examine witnesses and each other if permission is given by ERA. At the end of the investigation meeting, the parties in dispute and their representatives, may sum up their case.

4.5.17 ERA gives its decision either at the investigation meeting or by no later than six weeks following the hearing. Determinations of ERA must state relevant factual findings, legal findings, conclusions and order (if any), but need not set out a record of the evidence, submissions, or findings as to credibility or process of investigation, in order to reduce the formality and increase the speed of ERA's decisions.

### Review and challenge

4.5.18 ERA's determinations may only be reviewed by the Employment Court on the ground of ERA lacking jurisdiction, or ERA's determination/order being not made within its authority, or ERA acting in bad faith.

4.5.19 Any person dissatisfied with the determinations of ERA may challenge<sup>113</sup> the outcome in the Employment Court in the form of a judicial hearing, which must be applied within 28 days after ERA makes a determination.

### Award costs against the losing party

4.5.20 ERA has the power to award costs, which are normally only for a reasonable proportion of the total representation fees, in the range of NZ\$1,000 (HK\$4,540) to NZ\$3,000 (HK\$13,620) for each day of an investigation meeting.

## **4.6 Employment Court**

### Jurisdiction, constitution and manner of hearing

4.6.1 Any party who is dissatisfied with the determination of ERA can have the matter, in whole or in part, heard anew in the Employment Court. This is not in the form of an appeal but is a judicial hearing of the original problem. No action can be commenced in the Employment Court more than three years after the date on which the grievance is raised, unless leave is granted.

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<sup>113</sup> It is called "challenge" not "appeal".

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4.6.2 The Employment Court is mainly an appellant court. A party in a labour dispute must go through the ERA procedure prior to taking the case to the Employment Court, unless the matter is solely within the jurisdiction of the Employment Court. The Employment Court only has first instance jurisdiction over very limited matters, including full and exclusive jurisdiction to hear and determine any proceedings involving an injunction against a strike or a lockout, or any proceedings founded on tort in relation to a strike or lockout.

4.6.3 In addition, any party concerned may apply to ERA to have the matter, or part of the matter, removed to the Employment Court without ERA first investigating and determining the problem.<sup>114</sup> In practice, such removal rarely occurs.

4.6.4 The Employment Court always sits a single Judge alone, although the Chief Judge may decide that a case should be determined by a full court comprising three Judges. The decision is to be made by a simple majority in a full court setting.

4.6.5 Unlike ERA, the Employment Court adjudicates with a conventional adversarial approach. Legal representation is allowed. This arrangement is taken as a compensation for the relaxed procedural rules and the informality of the decision-making process in ERA.<sup>115</sup>

#### Good faith report

4.6.6 When a person is dissatisfied with the determination of ERA and seeks a “full hearing of the entire matter” at the Employment Court, the Employment Court may request ERA to submit a written “good faith report”. This report assesses the extent to which the parties involved in investigation have facilitated rather than obstructed ERA’s investigation and acted in good faith towards each other during the investigation.<sup>116</sup> ERA must give each party to the proceedings a reasonable opportunity to make written comments on the draft report before submission.

4.6.7 The Employment Court may refuse to open a full hearing only if on the basis of the “good faith report” and comments submitted by the parties concerned, it is satisfied that the person seeking the full hearing has not participated in the investigation of ERA in a manner that is designed to resolve the problem. This requirement of “good faith report” aims at parties who are merely “marking time” in ERA’s proceedings until they can participate in a conventional legal hearing before the Employment Court, or who hope to defeat the other party through delay.

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<sup>114</sup> When applications for removal are made, ERA considers issues including whether the matter involves an important question of law, whether the matter is in the public interest to be removed, or whether the Employment Court has previous proceedings which involve the same parties and related issues.

<sup>115</sup> Agnew, Peter. (2002) *Employment Law Guide*, 6<sup>th</sup> ed. Wellington, LexisNexis.

<sup>116</sup> Section 181 of the 2000 Act.

### Direct parties to use mediation

4.6.8 A Judge may, before a hearing commences, convene a pre-hearing conference of the parties concerned to ensure the most efficient disposition of the matter; or to consider the extent to which an attempt has been made to resolve the matter by mediation.<sup>117</sup> Pre-hearing conferences are held only if the hearing is estimated to occupy three or more days. A Judge may also convene a conference, with the consent of the disputing parties, during the hearing.<sup>118</sup> It is the practice to confine a pre-hearing conference to one single meeting.

4.6.9 Similar to ERA, the Employment Court must direct that mediation or further mediation be used before the Court hears the matter except for reasons stated in paragraph 4.5.7. The Employment Court can also direct the parties back to mediation at any stage in its proceedings if it thinks fit. The parties in dispute are expected to attempt in good faith to reach an agreed settlement during mediation.<sup>119</sup> In practice, very few Employment Court applications are referred to mediation, as by the time an application is made to the Employment Court, the parties concerned would likely have been through mediation and ERA investigations.

### Management meeting

4.6.10 Each disputing party has to file a management memorandum which includes a detailed plan setting out that party's view of the time required to present his/her case to the Court.

4.6.11 In the period of 14 clear days before the first day appointed for the hearing, a management meeting is held between the Judge and the disputing parties and their representatives in chambers. The Judge may decide whether or not to exclude the exhibits and limit the evidence to be given, in order to affect an expedient hearing. The meeting also sets the limits in time or subject matter of cross-examination and any requirements of the Employment Court. It is the practice to confine a management meeting to one single meeting.

### Review and appeal

4.6.12 The Employment Court can only be judicially reviewed by the Court of Appeal on the grounds of lack of jurisdiction, or its decision/order made being out of its authority, or the Employment Court acting in bad faith.

4.6.13 Appeal from the Employment Court lies to the Court of Appeal, on a question of law. The decision of the Court of Appeal is final and conclusive.

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<sup>117</sup> Section 54, the Employment Court Regulations 2000.

<sup>118</sup> Ibid.

<sup>119</sup> Section 188(3) of the 2000 Act.

#### Award costs against the losing party

4.6.14 The Employment Court has discretion to make orders as to costs. It may have regard to any conduct of the parties concerned tending to increase or contain costs.

### **4.7 Payment of award and safeguards against evasion of payment**

#### Enforcement through the Employment Relations Authority and the Employment Court

4.7.1 ERA or the Employment Court can issue a Mareva injunction (a freezing injunction) which restrains a party and persons with control over that party's assets from dealing with the assets in ways that will be detrimental to the other party's interests.

4.7.2 If a mediated agreement has not been implemented, or an ERA/ Employment Court decision has not been enforced, one can seek enforcement through a compliance order issued by ERA or the Employment Court if necessary.

4.7.3 Where any person fails to comply with a compliance order, the person affected by that failure may apply to the Employment Court<sup>120</sup>, which has the power to sentence the person in default to imprisonment, to order him/her to pay a fine, or to order his/her property to be sequestered. However, a writ of sequestration is rarely awarded.<sup>121</sup>

#### Enforcement through the District Court

4.7.4 Monetary settlements can be enforced through the District Court<sup>122</sup>, as well as the decisions of ERA or the Employment Court, by means of "distress warrants" and "orders for examination".

#### *Distress warrants*

4.7.5 A distress warrant allows a bailiff to visit the defaulting party to demand payment for the amount owed, and seize assets if payment is not made.

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<sup>120</sup> Section 138(6) of the 2000 Act.

<sup>121</sup> Section 140(6) of the 2000 Act.

<sup>122</sup> The District Courts Act 1947.

### *Order for examination*

4.7.6 An order for examination requires a defaulting party to appear in front of a District Court official so that his/her financial situation can be assessed. If he/she is found capable of paying but has failed to do so, the District Court official may:

- (a) set out new payment terms and conditions (e.g. instalments), or
- (b) direct that enforcement action be started, for example:
  - (i) assets or possessions are taken and sold to meet the debt (Distress Warrant); or
  - (ii) deductions are made from the person's benefit, wages or salary (Attachment Order).

### Insolvency

4.7.7 Should the disputing employer be declared bankrupt or be placed into liquidation (in the case of a company), the employee can register his/her debt with the official assignee/liquidator as one of the creditors.

## **4.8 Legal assistance available to the claimant**

### Legal representation

4.8.1 Mediation does not require the use of a representative, but the parties concerned may have a representative, such as a union official or a lawyer. Anecdotal evidence indicates that employees use representation in mediation approximately 80% of the time. Employers use representation less frequently, although experienced human resources personnel are often used by large firms in mediation.

4.8.2 The parties in dispute have the right to be represented by any person or organization they choose in ERA and the Employment Court. The Employment Court strongly recommends that the parties concerned should use outside expertise as neither the applications nor the hearing procedures are straightforward. According to the Employment Relations Service, data is not collected on the use of representation.

### Legal aid

4.8.3 Legal aid<sup>123</sup> is available to people involved in the proceedings of ERA or the Employment Court who cannot afford their own lawyers. Nonetheless, it is not available for legal representation during the mediation stage.

### Legal advice

4.8.4 The Association of Citizens' Advice Bureaux, a national voluntary organization, provides free legal advice on a range of matters, including employment law, by trained volunteers at the individual Bureau. There are also 25 Community Law Centres where lawyers and community workers provide free legal advice and discuss with people in need their options.<sup>124</sup>

## **4.9 Efficiency and effectiveness of the dispute resolving mechanism**

### Mediation Service

4.9.1 A total of 9 256 applications for mediation services were received by the Mediation Service in 2002-03, including 1 425 referrals from ERA<sup>125</sup>. Among them, 90% of requests for mediation had the mediation process completed within three months, despite the fact that there is no limit on the period of time taken by the disputing parties to finish mediation.

4.9.2 In 2002-03, 89% of applicants were offered mediation services within 20 working days, whilst the performance standard was set at 100% of cases being offered mediation services within 20 days.<sup>126</sup> All the 1 425 cases referred to Mediation Service from ERA were provided with mediation services within two working days in 2002-03, or on the date set by ERA.

4.9.3 The Mediation Service had 9 278 cases disposed of in 2002-03, out of which 45.4% (4 212 cases) were settled through the official mediator. Adding to them the 106 partially-settled cases, the 47 cases where mediators made decisions for the parties concerned, and the 1 998 recorded settlement cases<sup>127</sup>, 68.5% (6 363 cases) of the cases disposed of were settled.<sup>128</sup>

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<sup>123</sup> Legal aid is administered by the Legal Services Agency.

<sup>124</sup> Community Law Centres are all individually managed, usually as charitable trusts, and their funding mainly comes from the New Zealand Law Society Special Fund via the Legal Services Agency.

<sup>125</sup> The vast majority of the referrals did not previously have mediation assistance.

<sup>126</sup> Department of Labour: Annual Report 2001/02.

<sup>127</sup> Cases where the parties settled themselves and requested an official mediator to sign the agreement, giving the settlement agreement the force under the 2000 Act.

<sup>128</sup> In 1 344 cases (14.5%), the respondents were unwilling to attend mediation, and 12% of the cases failed to settle after the mediation process. The remaining cases were largely withdrawals.

### Labour Inspectorate

4.9.4 In 2002-03, the Labour Inspectorate received 2 166 formal complaints and completed 2 140 investigations. The average number of days for the Labour Inspectorate to commence an investigation was five days in 2002-03. Ninety-one per cent of the formal complaints were resolved or referred to ERA within six months of receipt. The average length of time to complete an investigation was 11 weeks in 2002-03.

4.9.5 The arrears recovered by the Labour Inspectorate in 2002-03 amounted to NZ\$1.01 million (HK\$4.60 million) and the penalties awarded was NZ\$37,250 (HK\$170,341). Data on the proportion of arrears successfully recovered is not available.

### Employment Relations Authority

4.9.6 A total of 2 384 applications were received by ERA in 2002-03. Forty-nine per cent of the applications to ERA were completed within four months. However, for those cases which reached the investigation meeting stage, time taken from an initial application to the investigation meeting was approximately five months.

4.9.7 Up to 47% (1 127) of all applications in 2002-03 were later withdrawn from ERA. According to the Employment Relations Service, most withdrawn cases were settled at mediation. Another 15% (428) were settled at mediation but did not provide written confirmation to ERA. Altogether, 62% (1 555) of all applications were settled at the ERA stage. Only 27% (653) of all applications were finally determined by ERA. Some 93% (2 225) of all applications were completed within the same year.<sup>129</sup>

### Employment Court

4.9.8 In 2002-03, 199 applications were received by the Employment Court. Among the 259 applications disposed of in 2002-03, 145 judgments were rendered and the rest were withdrawn either prior to scheduling the hearing or between the time of scheduling and holding the hearing.<sup>130</sup>

4.9.9 There is a wide divergence in the number of days taken from application to completion of proceedings for cases handled by the Employment Court. Most judgments were issued within nine months of making the initial application in 2002-03. Approximately two-thirds of judgments were issued within six months of the first hearing. The Employment Relations Service explains that the Employment Court is the final stage of the problem resolution continuum, and its focus is not on speedy intervention.

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<sup>129</sup> Report of the Department of Labour for the year ended 30 June 2003.

<sup>130</sup> Ibid.

#### **4.10 Provisions in the Employment Relations Law Reform Bill**

4.10.1 The Employment Relations Law Reform Bill<sup>131</sup> was first read in Parliament on 11 December 2003.<sup>132</sup> It contains a series of provisions after reviewing the 2000 Act. The provisions directly related to this research include<sup>133</sup>:

- (a) Employers, unions and employees will be required to try to discuss and resolve their disputes themselves before seeking mediation;
- (b) Fast track mediation will be introduced and made available to the parties in dispute at short notice, provided that they agree to a shortened mediation to attempt to resolve the problem. In addition, the parties concerned would enter the fast track mediation process in a clear expectation that, if they do not reach an agreement during the specified time, the decision-making power would be conferred to the mediator. The fast track mediation is essentially a voluntary scheme specifying the time frame allowed for mediation; and
- (c) If a disputing party breaches a mediated settlement, the other party would be able to apply to ERA for a penalty to be imposed on the party in breach, as well as enforcing the original settlement.

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<sup>131</sup> The Bill is available at <http://www.knowledge-basket.co.nz/gpprint/docs/bills/20030921.txt>

<sup>132</sup> The Bill is now under consideration by the Transport and Industrial Relations Committee of Parliament.

<sup>133</sup> "Employment Relations Reform Bill: Question and Answer" is available at <http://www.beehive.govt.nz/wilson/era-law-reform-bill/02.cfm>

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## Chapter 5 - Taiwan

### 5.1 Background

#### Size of labour force and labour union participation

5.1.1 In 2003, Taiwan had a population of about 22.5 million and a labour force of 10.1 million. The unemployment rate was 5.2% in August 2003.

5.1.2 As at the second quarter of 2003, there were 4 135 labour unions in Taiwan with about 2.9 million members. Labour unions in Taiwan are regulated by the Labour Union Law. For enterprises meeting the requirements for the establishment of labour unions,<sup>134</sup> all their workers are required to join the corresponding labour unions. The Draft Amendment to the Labour Union Law<sup>135</sup> under review by the Legislative Yuan proposes that flexibility should be gradually introduced to allow more freedom for workers to join labour unions. Labour unions are required to register with the competent authorities, i.e. the Council of Labour Affairs of the Executive Yuan (CLA) or the Bureau of Labour Affairs of the local governments<sup>136</sup>. Based on the number of workers in the enterprises where labour unions could be established, the labour union participation rate is about 38%.

5.1.3 According to the existing Collective Agreement Law, it is not compulsory for the employer to conduct collective negotiation with the labour union.<sup>137</sup> According to the Draft Amendment to the Collective Agreement Law<sup>138</sup> which the government has submitted to the Legislative Yuan for review, labour unions are designated as the sole labour representative in negotiation of collective agreement (i.e. the agreement concluded through collective bargaining between the employer and the labour union). It also specifies that neither employers nor employees can refuse the other party's request to negotiate for a collective agreement, unless they can offer a justifiable cause.

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<sup>134</sup> Under article 6 of the Labour Union Law 《工會法》, an industrial union or a craft union “shall be organized in accordance with law for workers of full 20 years of age, of the same industry in the same area or in the factory or workshop, or in the same area and in the craft, which exceed the number of 30”.

<sup>135</sup> Draft amendments to three labour-related laws, published by CLA, 1 May 2002.

<sup>136</sup> The local government can be the government of the Municipality directly affiliated to the Cabinet (直轄市), the County (Hsien)(縣) or the County Municipality (City) (縣轄市).

<sup>137</sup> Article 16 of the Collective Agreement Law.

<sup>138</sup> Draft amendments to three labour-related laws, published by CLA, 1 May 2002.

## Overview of the dispute resolving mechanism

### *Classification of labour disputes*

5.1.4 The Settlement of Labour Disputes Law (SLDL) of Taiwan classifies labour disputes into two types, namely, those of rights and of adjustments (“disputes of adjustments” are usually known as “disputes of interests” in academic discussion and referred to as “disputes of interests” hereinafter). Among the labour disputes handled by government authorities (the courts not included) and civil bodies, disputes of rights account for the majority of cases, representing over 96% in general.

5.1.5 Disputes of rights refer to disputes between workers and employers involving rights and obligations in respect of requirements stipulated in acts, collective agreements or labour contracts, i.e. disputes concerning whether the rights exist and/or have been exploited. Disputes of interests refer to disputes arising between workers and employers when they cannot agree upon whether to continue or to change the terms of the conditions of work, such as requests for wage adjustments.<sup>139</sup>

### *Dispute resolving mechanism*

5.1.6 Disputes of rights can either be conciliated informally and non-statutorily (協調) by the competent authorities (“主管機關”), i.e. CLA of the central government or the Bureau of Labour Affairs of the local governments, or by civil intermediaries. In Taiwan, informal conciliation refers to procedures not fixed by law, which is different from formal statutory conciliation with its procedures laid down in statutes. If informal conciliation fails, or not preferred by the parties in dispute, they can apply for statutory conciliation (調解) by the competent authorities according to the conciliation procedures stipulated in SLDL.

5.1.7 As disputes of rights are civil matters, the parties in dispute can seek judicial resolution without going through the statutory conciliation procedures, or file a claim in the courts after statutory conciliation has failed. The High Court and some District Courts of Taiwan have labour courts, but they conduct trials according to the civil proceedings in general. Only under specified circumstances, the courts conduct compulsory conciliation before a trial commences.

5.1.8 Disputes of interests may first be conciliated informally or statutorily in the same way as disputes of rights. Upon mutual consent, the parties involved in a dispute of interests may apply for arbitration with the competent authorities in accordance with SLDL. Disputes of interests are not heard by the courts.

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<sup>139</sup> Article 4, Chapter I of SLDL.

5.1.9 Under SLDL<sup>140</sup>, during the statutory conciliation or arbitration of a labour dispute, an employer may not close shop, suspend work, terminate labour contract, or carry out other activities unfavourable to the workers on account of such dispute. Workers may not resort to strike, sabotage, or carry out other activities on account of such dispute, which may interfere with the normal working procedure.

## **5.2 Resolving disputes of rights**

### Informal conciliation by the government agencies

5.2.1 Either one or both of the disputing parties may approach the competent authority for assistance. At the central government level, the competent authority is CLA, whilst at the local government level, it is the Bureau of Labour Affairs. Almost all the cases approach the local Bureau of Labour Affairs, not CLA. The competent authority may informally conciliate the dispute itself and send a letter to the party being complained against, requesting for a meeting with both parties. In 2002, 55% of the informally conciliated cases were conciliated through the competent authorities and the proportion was down to 35% in 2003.

5.2.2 Informal conciliation is not subject to any specific legal code and there are no prescribed conciliation procedures. The agreement concluded by the disputing parties through informal conciliation is not legally binding, which means that they cannot apply for compulsory execution with the courts in accordance with SLDL, unlike the outcome of statutory conciliation, which can be compulsorily executed.

### Informal conciliation by civil intermediaries

5.2.3 Instead of providing conciliation directly, the local Bureaux of Labour Affairs are referring more and more cases to civil intermediaries dedicated to handling labour disputes. The local Bureaux of Labour Affairs usually refer simple disputes involving a small number of people to civil intermediaries, so as to utilize community resources in facilitating the settlement of disputes. The referred cases represent the majority of the caseload handled by civil intermediaries, although there are cases where the parties in dispute approach civil intermediaries directly for assistance.

5.2.4 Normally, a civil intermediary requests the disputing parties to meet at its office and the directors/supervisors/staff of the intermediary serve as conciliators. Informal conciliation services are provided free of charge. In general, only a single meeting is needed.

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<sup>140</sup> Articles 7 and 8 of SLDL.

5.2.5 From application to conciliation, a case may take one week to one month, depending on the volume of outstanding cases.<sup>141</sup> In 2002, about 45% of informally conciliated cases were conciliated through civil intermediaries and the proportion increased to 65% in 2003. Agreements concluded through civil intermediaries cannot be filed with the courts for compulsory execution in accordance with SLDL.

5.2.6 Civil intermediaries are non-profit-making. CLA and the Bureaux of Labour Affairs at the local government levels subsidize part of the annual expenditure of these intermediaries and provide training for their staff. CLA conducts an annual assessment on these intermediaries, taking into account their rate of success in conciliation and comments of the users. Bonuses are given to those civil intermediaries with outstanding performances.

### Statutory conciliation

#### *Setting up a conciliation committee*

5.2.7 When the parties in dispute fail to reach an agreement through informal conciliation or prefer to start statutory conciliation bypassing informal conciliation, they may apply for statutory conciliation in accordance with SLDL. Either party in dispute may send an application form to the local Bureau of Labour Affairs. No fee is required for the application.

5.2.8 The competent authority has to set up a conciliation committee of labour disputes (“conciliation committee”) within seven days after receipt of an application from either one or both of the parties concerned. A conciliation committee comprises three or five members. The competent authority in the Municipality directly affiliated to the Cabinet, the County (Hsien) or the County Municipality (City) appoints one or three members, and the parties in dispute choose one member each within three days after receipt of the notice from the competent authority. The committee is chaired by one of the members appointed by the competent authority. Membership of a conciliation committee is honorary.

5.2.9 The competent authority in the Municipality directly affiliated to the Cabinet, the County (Hsien) or the County Municipality (City) keeps a register listing the particulars of the conciliation members, such as their names and expertise. Eligible individuals may apply to the government for registration as conciliation members. (For the eligibility requirements, please see Appendix III.) The Accreditation Boards for Labour Dispute Conciliators (“勞資爭議調解委員資格審核委員會”) at the local government levels are responsible for vetting and approving the register of conciliators.

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<sup>141</sup> CLA and Online News on Employment (“就業情報電子報”).

### *Operation of statutory conciliation*

5.2.10 After a conciliation committee has been set up, it immediately conducts a meeting and assigns its members to investigate the facts. Normally, the members have to submit the results of the investigation and the recommendations to the conciliation committee within 10 days after being assigned. The conciliation committee will hold a meeting within seven days thereafter. It may be extended to 15 days when it is deemed necessary or when agreed to by the parties in dispute. The meeting, which is confidential, is held at the competent authority. The disputing parties can engage representatives (including lawyers) for representation on their behalf.

5.2.11 The conciliation committee conducts a meeting only when the quorum of over 50% attendance is obtained. It makes decisions and conciliation proposals with the vote of over 50% of the quorum. When the disputing parties agree with the conciliation proposals and put their signatures on the minutes, conciliation is considered successfully concluded. The minutes of conciliation have to be sent by the conciliation committee to the local competent authority for transmission to the parties in dispute within five days.

### Conciliation and trial by the courts

#### *Labour Court and its authority*

5.2.12 As rights disputes are civil matters, the parties concerned may seek judicial resolution directly without going through the statutory conciliation procedures. According to Article 5 of SLDL, for the purpose of adjudicating rights disputes, “*the Law Court shall, when necessary, set up a Labour Court.*” At present, some courts have set up a Labour Court whilst some have designated staff to handle labour cases.<sup>142</sup> However, in addition to hearing labour dispute cases, judges of Labour Courts have to take turns to hear other cases on the basis of the average monthly caseload. Labour disputes handled by Labour Courts or designated staff are limited to disputes of rights. Disputes of interests are not within the jurisdiction of the courts.

5.2.13 There is no statutory provision requiring the conciliation agencies to provide the related documents and information to the court on their own initiative, but the parties concerned may file an application requesting the conciliation agencies to do so.

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<sup>142</sup> The courts with Labour Courts include Taiwan High Court, Taiwan Taipei District Court and Taiwan Kaohsiung District Court. Additionally, Taiwan High Court Taichung Branch Court, Tainan Branch Court and eight district courts have designated staff to handle labour cases.

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*Proceedings for supervising and urging the clearance of debt*

5.2.14 A party involved in a labour dispute may apply to the court to issue a payment order to the alleged debtor according to the admonitory proceedings to admonish the debtor to settle the arrears within 20 days upon receipt of the order.

5.2.15 If the debtor neither settles the arrears within 20 days nor lodges any objection, the creditor can apply for compulsory execution, under which the court seizes the debtor's property and puts it up to auction for repayment of the arrears.

5.2.16 If the debtor lodges an objection, the payment order is invalidated at once. The court will hear the case in accordance with the proceeding of starting a lawsuit or applying for conciliation.

*Conciliation by the courts*

5.2.17 Labour dispute litigations involving employment contracts or less than NT\$100,000 (HK\$22,700) in value are compulsorily conciliated by the courts prior to a trial,<sup>143</sup> unless the cases are considered as inappropriate for conciliation.

5.2.18 Even if the case does not fall within the scope of compulsory conciliation, the parties in dispute may still apply for conciliation by the courts prior to a trial. Court conciliation is only applicable to a trial in the first instance. If both disputing parties agree, the courts can refer them to try conciliation during a trial, but it seldom happens.

5.2.19 Conciliation is conducted in the courts but not open to the public. The judge assigned to the case first chooses one to three conciliators and lets them conduct the conciliation.<sup>144</sup> When it is fairly likely that the case will be settled, the judge is invited to attend. If the parties in dispute or the judge deem it appropriate, the judge will preside over the conciliation.

5.2.20 There is no provision limiting the period of time taken for conducting court conciliation. If an agreement is reached through court conciliation, it has the same effects as settlement made during litigation and there is no need to proceed to a trial.

*Trial*

5.2.21 If conciliation fails, the court may, at the request of the parties in dispute, order that the debate for litigation starts immediately. The advice of the conciliators, the judge(s), and the representations of the disputing parties during the process of conciliation, does not form the basis of judgment in litigation.<sup>145</sup>

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<sup>143</sup> Paragraph 1, Article 403 of the Civil Litigation Law.

<sup>144</sup> If any one of the parties of the dispute lodges objection to the choice of conciliators, the judge will select other conciliators.

<sup>145</sup> Article 422 of the Civil Litigation Law

5.2.22 District Courts and the Labour Courts at the District Court level try labour cases, in principle, by a single judge while the High Court and the Labour Courts at the High Court level hear labour appeal cases by a collegial panel being composed of three judges.

5.2.23 The court hearing the dispute usually goes through a “preparatory procedure” before the process of debate, in order to confirm the evidence adduced by the parties concerned and the scope of the dispute. The disputing parties are requested to organize and simplify the crux of the dispute, and to state their strategies of attack and defence. Preparatory procedures are usually completed within one hearing.

5.2.24 The Labour Courts hear labour disputes of a civil nature according to general civil litigation procedures. There are no specified or simplified litigation procedures for labour disputes. However, for litigations involving employment contracts and the employment period is less than one year or the interest involved is less than NT\$500,000 (HK\$113,500), summary litigation procedures apply. Under summary procedures, oral debate is conducted on the basis that the case will be concluded after one hearing. The procedures of recording in writing and testifying are simpler than those of the ordinary procedures. If one of the parties in dispute fails to appear in court, the judge may give judgment immediately after hearing the other party’s argument.

### *Appeal*

5.2.25 For labour disputes heard under summary procedures, if one of the parties concerned refuses to accept the judgment of first instance, he/she can appeal to the General Division of the District Court within 20 days. If he/she is dissatisfied with the judgment of second instance, he/she can appeal to the Supreme Court, a court of third instance, within 20 days.

5.2.26 For labour disputes heard under the ordinary procedures, if one of the parties concerned is not satisfied with the judgment of first instance delivered by the General Division of the District Court, he/she may appeal to the High Court within 20 days. If he/she is not satisfied with the judgment of second instance, he/she may appeal to the Supreme Court for a trial of third instance within 20 days. Appeals can only be lodged on a question of law at a trial of third instance. In addition, if an appeal involves interests not exceeding NT\$1.5 million (HK\$340,500) will be granted at third instance.

### *Award costs against the losing party*

5.2.27 Except for the trial at third instance where the compulsory attorney system is adopted, the losing party needs not bear the solicitor’s costs of the winning party. However, the losing party in civil cases of labour disputes has to bear other costs of litigation (excluding the solicitor’s costs).

### **5.3 Resolving disputes of interests**

#### Conciliation

5.3.1 The conciliation of disputes of interests is conducted in the same way as rights disputes (See paragraphs 5.2.1 - 5.2.11), with the requirement that the party concerned has to be a labour organization or a group of more than 10 workers. For undertakings with less than 10 workers, the party concerned has to be a group constituting over two-thirds of the workers.

#### Application for arbitration

5.3.2 If conciliation fails, with the consent of and upon application by the parties in dispute, the dispute will be arbitrated by an arbitration committee of labour disputes (hereinafter referred to as the “arbitration committee”). When the disputing parties agree, the dispute of interests may be directly referred to arbitration without going through conciliation procedures as well. The parties in dispute should file an arbitration application form with the local competent authority, such as the local Bureau of Labour Affairs.

#### Arbitration committee of labour disputes

5.3.3 The competent authority should form an arbitration committee within five days upon receipt of the application form. The arbitration committee is composed of nine to 13 members<sup>146</sup>, with three to five members appointed by the competent authority, and three to four members chosen respectively by each of the parties in dispute. One of the representatives appointed by the competent authority acts as the chairperson. Both parties of the dispute have to choose their arbitrators within three days upon receipt of the notification from the competent authority if they have not provided the names of their chosen arbitrators in the application form.

5.3.4 The local competent authority appoints 12 to 48 qualified persons to act as arbitrators in every two-year period (For the eligibility requirements, please see Appendix IV). Arbitrators are not salaried, but they are offered attendance fee and transport disbursement for arbitration of disputes.

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<sup>146</sup> The Amendment Bill of SLDL being studied by the Legislative Yuan reduces the number of arbitration committee members down to between three and five.

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### Arbitration meetings

5.3.5 The arbitration committee should conduct a meeting immediately after its appointment and assign member(s) to establish the facts. In general, the member(s) should complete the investigation within 10 days and provide the results of the investigations and their recommendations to the arbitration committee. The arbitration committee should call for a meeting within seven days afterwards. It may be extended to 15 days when this is deemed necessary or agreed to by the disputing parties.

5.3.6 Arbitration meetings should be held in the competent authority in private.<sup>147</sup> The parties concerned may appoint representatives (including lawyers) to present their statements. The quorum of a meeting of an arbitration committee is over two-thirds of its members; and a decision is made with the vote of more than three-fourths of the attending members. If no decision is reached in the first two meetings of the arbitration committee, a decision at the third meeting must be made with the majority vote.

5.3.7 After an arbitration committee makes a decision, an award should be rendered and sent to the parties concerned by the competent authority within five days. The arbitration awards are binding on both parties.

## **5.4 Compulsory execution**

5.4.1 After the dispute has been settled by conciliation or gone through arbitration, or a judgment has been given in court, and if one of the parties concerned has not carried out his/her obligations, the other party may request the Labour Court to initiate compulsory execution measures without charging any decision or executive fees.<sup>148</sup> The court should make its decision within seven days.

5.4.2 After the court has approved the request for compulsory execution, the court bailiff seizes the debtor's property and puts it up for auction for repayment purposes. If the debtor has gone bankrupt, the party concerned has to wait for the allocation of the residual property by the liquidator as other creditors do.

5.4.3 During compulsory execution, if the court thinks necessary, it can investigate government departments related to tax collection or other organizations for what they know about the debtor's financial situation. The court can also ask the judgment debtor to report what his or her financial situation was for the past 12 months if it is found that he or she does not have enough assets to pay off the debt.

5.4.4 The court can grant an order stopping the judgment debtor taking money out of his or her bank account, and if appropriate, can ask the bank to pay the money directly to the judgment creditor.

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<sup>147</sup> Article 23 of the Arbitration Law.

<sup>148</sup> Article 37 of SLDL

## 5.5 Safeguards against evasion of payment

### Seizure of debtors' properties

5.5.1 Either before or after judgment has been passed in labour dispute litigation, one of the parties concerned may request property preservation procedures, with the view of ensuring his/her future claims can be settled. The actions may include seizing the property of the debtor, prohibiting the debtor from transferring immovable property, preventing the reduction in the property of the debtor during litigation, which may render the applicant unable to recover pecuniary debts or compensation in future.

### Restriction on departure

5.5.2 In the event that an undertaking has dismissed employees on a large scale and failed to pay the outstanding wages and other payments up to a specified amount<sup>149</sup> upon the expiry of a predetermined period,<sup>150</sup> the central competent authority may request the Immigration and Emigration Control Authority to prohibit the chairman and the *de facto* person-in-charge of the undertaking concerned from leaving Taiwan.

## 5.6 Legal assistance available to the claimant

### Legal representation

5.6.1 The parties concerned may appoint lawyers or non-lawyers to be their representatives in the litigation, or they may appoint lawyers or non-lawyers to present the case on their behalf at the conciliation or arbitration meetings.

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<sup>149</sup> If the undertaking employs the following number of workers and fails to pay the wages up to the following amount, the chairman and the *de facto* person-in-charge may be prohibited from leaving Taiwan:

- (a) Employs more than 10 but less than 30 workers and the total amount of wage arrears of all dismissed workers amounting to NT\$3 million (HK\$681,000); or
- (b) Employs more than 30 but less than 100 workers and the total amount of wage arrears of all dismissed workers amounting to NT\$5 million (HK\$1.14 million); or
- (c) Employs more than 100 but fewer than 200 workers, and the total amount of wage arrears of all dismissed workers amounting to NT\$10 million (HK\$2.27 million); or
- (d) Employs more than 200 workers and the total amount of wage arrears of all dismissed workers amounting to NT\$20 million (HK\$4.54 million).

<sup>150</sup> The time limit should be no longer than 30 days, which is set by CLA.

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Subsidy for solicitor's costs and litigation assistance

5.6.2 An employee may apply to CLA for subsidizing the solicitor's costs when they initiate a lawsuit against his/her employer:

- (a) for the employer's failure in paying out the severance payments or retirement benefits in accordance with the relevant laws after the closure of an undertaking;<sup>151</sup> or
- (b) for the employer's failure in paying compensation in accordance with the law when sickness, disability or death is incurred to the employee due to an occupational accident; or
- (c) in the event that trade unions officials face undue dismissal and the case could not be settled after conciliation under SLDL.

5.6.3 The subsidy for solicitor's costs also covers application for property preservation procedures (see paragraph 5.5.1), proceedings for supervising and urging the clearance of debt (paragraphs 5.2.14 - 5.2.16) and compulsory execution procedures (paragraphs 5.4.1 - 5.4.3).<sup>152</sup>

5.6.4 CLA has set up a vetting panel to review the applications for subsidy. Groundless cases or those bearing no substantial interests do not receive any grants. Maximum grants for solicitor's costs are set out for each trial and for an entire case by CLA.<sup>153</sup>

5.6.5 People who cannot afford the litigation fee and payment for the property preservation procedure may claim litigation assistance from the courts for deferral of paying the costs and other litigation fees under Article 107 of the Civil Procedure Law. The litigation assistance is for deferral only, not a waiver.<sup>154</sup>

Legal advice service

5.6.6 Most local governments have set up legal advice centres providing, inter alia, information on labour laws. Services are provided by voluntary lawyers on duty. Such services include face-to-face meetings, and answering telephone and written enquiries.

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<sup>151</sup> Article 4 of the Measures for Subsidizing Labour Litigation.

<sup>152</sup> For applicants of property preservation procedures, the maximum grant for the entire case is NT\$30,000 (HK\$6,810), whilst applicants of summary procedures for recovering a debt, and compulsory execution procedures receive a maximum of NT\$10,000 (HK\$2,270) and NT\$40,000 (HK\$9,080) respectively.

<sup>153</sup> The maximum grant for each trial is NT\$40,000 (HK\$9,080) for an individual worker, and the total grant for an entire case cannot exceed NT\$120,000 (HK\$27,240). For applicants in collective action, the corresponding amounts are NT\$100,000 (HK\$22,700) and NT\$300,000 (HK\$68,100) respectively.

<sup>154</sup> 劉清景。主編。(1999)《新編法律大辭典》。台北縣，學知出版事業股份有限公司。

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## 5.7 Efficiency and effectiveness of the dispute resolving mechanism

### Informal conciliation and statutory conciliation

5.7.1 In Taiwan, there has been a sharp rise in the number of labour disputes in recent years. According to CLA,<sup>155</sup> government agencies (such as the local Bureaux of Labour Affairs, conciliation committees and arbitration committees) and civil intermediaries as a whole received 12 393 disputes in 2002, doubling the number in 1999. Most of the cases of 2002 involved disputes over labour contracts (54%) and wages (42%). In the first eight months of 2003, there were 6 682 labour disputes handled by government agencies and civil intermediaries. The above figures do not include labour disputes brought to court for litigation without going through informal or statutory conciliation.

5.7.2 Among the 12 393 labour disputes handled in 2002, only 157 cases remained unsolved entering 2003. The majority of labour disputes in 2002 (83%) were resolved by informal conciliation, 16% by statutory conciliation, and two cases through arbitration.

5.7.3 A growing proportion of labour disputes has chosen informal conciliation through civil intermediaries recently. In 2002, 63% of the labour disputes went through informal and statutory conciliation rendered by government agencies, and only 37% went through informal conciliation conducted by civil intermediaries. In the first eight months of 2003, only 48% of the disputes were handled by government agencies, and the rest went through informal conciliation by civil intermediaries.

5.7.4 Regarding the effectiveness of conciliation, 83.5% (10 301 cases) of the total number of labour disputes (12 331 cases) disposed of within 2002 (including those cases received in 2001 but resolved in 2002) went through informal conciliation, out of which 55% were successfully settled. The success rate of statutory conciliation was higher than that of informal conciliation. Out of the 2 028 cases (16.4% of the total cases disposed of in 2002) which went through statutory conciliation, 64% were settled. Together, nearly 57% of the disputes were resolved between workers and employers by informal or statutory conciliation.<sup>156</sup>

5.7.5 Labour dispute cases normally take one to four weeks to complete the informal conciliation process.<sup>157</sup> For statutory conciliation, it normally takes 24 to 32 days for the parties in dispute to complete the process from application to completion of conciliation. Regarding arbitration, it takes at least 27 to 35 days to complete the case from application to the end of arbitration.

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<sup>155</sup> *Monthly Bulletin of Labour Statistics*, Issue 128, Department of Statistics, CLA, September 2003.

<sup>156</sup> Press release on "The analysis of future trend in labour disputes" by CLA, 2 February 2003.

<sup>157</sup> Reply from CLA.

### Conciliation by the court and litigation

5.7.6 According to the Statistics Department of the Judicial Yuan, 5 162 labour dispute cases went through trial of first instance in 2002, 78% of which were closed in the same year, whilst 22% remained outstanding. In the first eight months of 2003, a total of 4 128 cases of labour dispute underwent trial of first instance and 75% of which were closed.

5.7.7 Among the 1 777 labour dispute cases conciliated by the courts in 2002, 19.3% were settled and 17.2% were either dismissed or withdrawn after conciliation, with unsettled cases amounting to 63.5%. In the first eight months of 2003, the courts attempted conciliation in 1 241 cases but only 18.3% were settled and 17.1% were either dismissed or withdrawn. Unsettled cases amounted to 64.6%.

5.7.8 The average length of time taken for labour dispute litigation, starting from case distribution<sup>158</sup> to the closing of a case, was 126.2 days between January 2002 and August 2003.

## **5.8 Provisions in the Settlement of Labour Disputes Law Amendment Bill**

5.8.1 Since the participation of civil intermediaries in informal conciliation of labour disputes lacks legal footing or regulatory framework, the Taiwanese Government intends to amend the law to allow civil organizations to take part in statutory conciliation and arbitration service. In the Settlement of Labour Disputes Law Amendment Bill (the Bill)<sup>159</sup> presently under the scrutiny of the Legislative Yuan, the government proposes that parties in a dispute may refer their case to the conciliation or arbitration agency they agree to or set out in their collective agreement. Under the Bill, both the arbitration award and the minutes of the settlement through conciliation are legally binding, with the view of encouraging civil intermediaries to render their assistance in resolving disputes.

5.8.2 At present, only labour disputes of interests can be resolved by arbitration. The Bill proposes that labour disputes of rights may also be resolved by arbitration, so as to establish multiple channels for solving labour disputes and to reduce litigation.

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<sup>158</sup> Cases are usually distributed to the responsible judges not more than three days before prosecution.

<sup>159</sup> *Draft amendments to three labour-related laws.* (2002) CLA.

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## **Chapter 6 - Analysis**

### **6.1 Introduction**

6.1.1 The Labour Tribunal of Hong Kong (LT) and similar bodies in the overseas jurisdictions studied have faced an increasing workload in recent years. Whether or not these jurisdictions can continue to provide a quick, simple and inexpensive means to resolve labour disputes is a challenge to them all.

6.1.2 This analysis will explore how the four jurisdictions studied have coped with the challenge and the measures they have adopted to keep their dispute resolving mechanisms up to its expectation. In addition, justice is not secured if an applicant has obtained a judgment but cannot obtain payment. Therefore, the enforcement of judgment will be also studied.

### **6.2 Conciliation**

6.2.1 All the jurisdictions studied use conciliation as a major device to alleviate a part of the caseload. Whether or not the time and resources the parties involved spend on resolving a dispute can be reduced as a whole depends on both the effectiveness and efficiency of conciliation.

#### Repeating attempts of conciliation

6.2.2 In Hong Kong, some Members of LegCo have expressed concern regarding the duplicating attempts of conciliation at the various stages of the dispute resolution mechanism.<sup>160</sup> In theory, the law in Hong Kong only implies that conciliation should be attempted prior to hearing a claim, no matter whether it is conducted by the Conciliation Officer of the Labour Department or the Tribunal Officer of LT. In addition, there is no statutory requirement that an applicant of a claim must approach the Labour Department for conciliation before filing a claim.

6.2.3 In practice, the parties in dispute usually have gone through conciliation thrice before the case is decided by LT. Conciliation is normally first provided by the Labour Department before the filing of a claim. After a claim has been filed, an attempt of conciliation is made by the Tribunal Officer before hearing, which is followed by another round of conciliation by the Presiding Officer at the call-over hearing if the parties concerned have not yet settled the case. More efforts of conciliation may be attempted if the Presiding Officer refers the parties to conciliation when they agree to do so.

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<sup>160</sup> LC Paper No. CB(2)3038/02-03.

6.2.4 The three overseas jurisdictions studied have also built in more than one opportunity for settling a claim through conciliation in their respective dispute resolving mechanisms. In practice, none of them normally requires the parties in dispute to go through conciliation as much as thrice.

6.2.5 Most of the filed claims in the UK only go through conciliation once, by the independent statutory Advisory, Conciliation and Arbitration Service (ACAS) before hearing commences.

6.2.6 In New Zealand, the adjudicating bodies are authorized to direct the parties in dispute to use mediation<sup>161</sup> as many times as they think fit. However, in practice, most cases only go through mediation once or twice in the resolution process. Out of the 9 256 applications received by the Mediation Service for mediation services in 2002-03, only 1 425 of them were referred by the Employment Relations Authority (ERA) for mediation or further mediation. A vast majority of these 1 425 referrals did not previously have mediation.

6.2.7 In Taiwan, most cases go through informal conciliation first, and those which fail to settle may apply for statutory conciliation. However, both forms of conciliation are not a prerequisite for bringing a case to the courts. Therefore, before a case is heard in court, the parties in dispute either may not have gone through conciliation at all or may have one or two attempts at most. Only if the case falls within the scope of compulsory conciliation or if the parties in dispute apply for conciliation by the court, then the case may have to go through three attempts of conciliation before trial begins.

#### Effectiveness of conciliation

6.2.8 In New Zealand, while 68.5% of the mediated cases were settled wholly or partially, or decided by a mediator in 2002-03, 62% of the applications received by ERA were settled by the disputing parties themselves or after ERA referred them to attempt mediation.

6.2.9 In Hong Kong, 63.2% of the cases rendered conciliation by the Labour Department were settled in 2002, and 53% of the claims filed in LT were settled through conciliation by Tribunal Officers and Presiding Officers. Most of the filed claims handled by LT are settled either through Tribunal Officers after referral by Presiding Officers, or through Presiding Officers at the call-over hearing. In other words, more cases are settled after the intervention of Presiding Officers.

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<sup>161</sup> “Mediation” is used interchangeably with “conciliation” in this report and the term “mediation” is used in the laws of New Zealand.

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6.2.10 In the UK, ACAS settled 43% of the referred applications in 2002-03. In Taiwan, 57% of the disputes were settled through conciliation before trial in 2002. Among the 1 777 cases that were conciliated by the court, 19.3% were settled.

#### Measures to improve efficiency of conciliation

6.2.11 In New Zealand, 91% of applications for mediation are completed within three months whilst in Taiwan, it normally takes 24 to 32 days to complete the whole process of statutory conciliation. Statistics are not available on how long it takes to complete the conciliation process in Hong Kong and the UK.

6.2.12 The longer the conciliation process takes, the more time and resources may be spent by the parties involved, and judicial resources assigned to have the case heard are substantial as well, even if the case is settled at the end. Specified statutory time frames are therefore used as a means of limiting the time spent on conciliation in Taiwan and will be used in the UK and New Zealand in the near future.

6.2.13 In Taiwan, the law has set out the time frame for each step of the conciliation process. Therefore, the whole process of statutory conciliation can be confined to 24 to 32 days in normal cases. In the UK, regulations will be made in 2004 to introduce a fixed period of conciliation to avoid last minute settlements, which may result in tribunals being vacated.

6.2.14 The New Zealand Parliament is currently scrutinizing a bill which provides "fast track mediation". Parties in dispute may voluntarily participate in this fast track scheme which offers mediation at short notice. In return, if they cannot reach a mediated agreement within a specified time frame, they have to accept a decision made by the mediator.

### **6.3 Tribunal hearing**

#### Efficiency of tribunal hearing

6.3.1 In Hong Kong, how long LT takes to resolve a dispute depends on, inter alia, whether a contested trial is held and the number of pre-trial mentions is required. Half of the cases were disposed of at the call-over hearing, which averaged 71 days in 2002 and 57 days in the first 10 months of 2003 from making an appointment of filing to rendering judgment. However, for cases that went through a contested trial, the average time taken was 146 days in 2002 and 122 days in the first 10 months of 2003. For the 927 cases filed in 2002 that went through the pre-trial mention stage, the average time taken from appointment to rendering judgment was 183 days.

6.3.2 In Taiwan, the average time taken for litigation, starting from case distribution to the assigned judges to the closing of a case was around 126 days between January 2002 and August 2003. Statistics are not available on how long a case takes on average in the UK.

6.3.3 In New Zealand, 49% of the cases were completed within four months in 2002-03. However, for those cases got to the investigative meeting stage, it took an average of five months from initial application to the first investigation meeting being held. New Zealand requires the disputing parties to participate in the investigation meeting of ERA in good faith, so as to save the time and effort spent by ERA and the Employment Court. The Employment Court may refuse to open a hearing if one of the parties concerned is deemed to have been “marking time” in the ERA proceeding until he/she can participate in a conventional legal hearing in the Employment Court.

#### The practice of pre-trial hearings

6.3.4 It becomes a usual practice to hold a call-over hearing before trial in Hong Kong as 81% of the cases filed in 2002 had call-over hearings. In addition, nearly 20% of the cases filed went through pre-trial mentions in the same year.

6.3.5 It is a usual practice in New Zealand and Taiwan to have pre-trial hearings according to the relevant authorities, but not in the United Kingdom.

6.3.6 Taiwan always has its “preparatory procedures” confined to one single hearing, so has New Zealand. In Hong Kong, LT is also trying to reduce the use of pre-trial mentions. A clear warning has been given to parties in dispute since August 2003 that unless good reasons are provided, the hearings of LT may proceed despite non-compliance of submitting all relevant documents on time, in the hope that the number of pre-trial mentions will be reduced to one for each case.

#### Legal assistance

6.3.7 Among the jurisdictions studied in this report, LT of Hong Kong is the only specialised tribunal designated to handle labour disputes not allowing legal representation. Legal aid is not available except for cases transferred to a higher court and relevant appeal proceedings or enforcement actions in the District Courts, Court of First Instance and Court of Appeal.

6.3.8 In the UK and New Zealand, where the informal manner of hearing in their respective adjudicating bodies is similar to that of LT in Hong Kong, the parties concerned may have a representative.

6.3.9 In the UK, legal aid is not available in England & Wales but is available in Scotland under limited conditions as well as in the EAT proceedings. However, it should be noted that both ETs and EAT do not have general power to award costs against the losing party. In New Zealand, legal aid is available.

6.3.10 In Taiwan, the hearing is conducted in a formal manner, according to the general civil litigation procedures if the case is of a civil nature. Legal representation is allowed. Employees who cannot afford to hire a solicitor may apply for subsidy.

6.3.11 Legal advice is available in all four jurisdictions studied, and is provided/funded by local authorities, charities or lawyers on a voluntary basis. In the UK, solicitors in some of the advice agencies may take on cases of someone who cannot afford to pay a solicitor in private practice.

## **6.4 Alternative dispute resolutions**

6.4.1 Apart from official conciliation, the overseas jurisdictions studied have adopted or are going to adopt alternative dispute resolutions to reduce the need of judicial intervention. These alternatives include internal grievance procedures, demand notices for recovery of wages in arrears, arbitration and the utilization of civil intermediaries in providing conciliation.

6.4.2 The UK and New Zealand try to use internal grievance procedures to solve labour disputes before they turn into claims. In the UK, when new measures come into force in 2004, employees must complete the first step of the statutory internal grievance procedures and wait for four weeks before filing applications with ET. In a similar fashion, the New Zealand government is planning to require the disputing parties to try to resolve their disputes internally first before seeking mediation.

6.4.3 Taiwan has increasingly engaged civil intermediaries in the provision of informal conciliation. The Taiwanese government intends to allow civil intermediaries to take part in statutory conciliation and arbitration as well.

6.4.4 The Labour Inspectorate in New Zealand has a function of investigating complaints about statutory minimum terms and conditions of employment. A Labour Inspector may serve on an employer a demand notice for the recovery of wages or other payment owed, if he/she believes on reasonable grounds that an employee has not received wages or holiday pay. The power to serve demand notices enables a speedier and less costly recovery of the employees' entitlements.

6.4.5 However, not all alternatives are well received by the disputing parties. In both the UK and Taiwan, arbitration is available for limited categories of labour disputes but is not widely used by the parties concerned. Nonetheless, the Taiwanese government intends to introduce arbitration for all kinds of disputes.

6.4.6 In New Zealand, if both parties in dispute agree to confer power on the mediator, the mediator may decide the case for them when they cannot come into agreement after mediation, which turns the role of the mediator into an arbitrator. This alternative is also not widely used.

## **6.5 Enforcement of judgment**

6.5.1 In all the jurisdictions studied, the party with a successful claim may apply for a court order to have the bailiffs to enforce the judgment through seizure and sale of the judgment debtor's goods. The effective rates of recovering judgement debts in the overseas jurisdictions are not available.

6.5.2 In both the UK and New Zealand, in order to know about the judgment debtor's financial situation and find out the best method to get the money back, the party with a successful claim may apply for a court order to obtain information from a judgment debtor. Hong Kong has no provision requiring the judgment debtor to reveal his/her financial situation. In Taiwan, when the court is trying to enforce the judgment debt, it can, if necessary, investigate government departments related to tax collection or other organizations for what they know about the debtor's financial situation. The court can also ask the debtor to report what his or her financial situation was for the past 12 months if he or she does not have enough assets to pay off the debt.

6.5.3 In addition, ERA or the Employment Court in New Zealand can issue a freezing injunction which restrains a party and any person with control over that party's assets from dealing with the assets in ways that will be detrimental to the other party's interests. The judgment creditor in New Zealand may apply for a compliance order and if the order is not complied with, the party can apply to the Employment Court which has the power to sentence the judgment debtor and order him/her to pay a fine.

6.5.4 In both Hong Kong and the UK, there are other court orders for which a party whose claim is successful may apply to prevent the judgment debtor from evading payment. For instance, in Hong Kong, the party whose claim is successful may apply for an attachment of debts by which the bank is ordered by the court to hold the judgment debtor's deposit for the judgment creditor. The party whose claim is successful in the UK may apply for a similar order called "third party debt order" to stop the judgment debtor from taking money out of his/her bank account until the court decides whether or not the money should be paid to the party with a successful claim. In both Hong Kong and the UK, the party whose claim is successful may also apply for a "charging order" to prevent the judgment debtor from selling his/her assets without paying what is owed. These orders are not specifically designed for claims relating to a labour dispute. Any judgment creditor of a civil claim can apply. There are similar court orders under different names in Taiwan.

6.5.5 The specialized tribunals for resolving labour disputes in both Hong Kong and the UK do not have the power to make those orders aforesaid. The application is through the District Court in Hong Kong and the County Court in the UK, which means that the party whose claim is successful has to spend extra time and effort to start proceedings again after litigation in the tribunal has ended.

## Appendix I

## Comparison of the various attributes of labour tribunals and other mechanisms for resolving labour disputes in Hong Kong and selected places

	Hong Kong	The United Kingdom	New Zealand	Taiwan
<b>Components of the dispute resolution mechanism</b>				
Mandatory internal problem resolution procedures as the initial step	<ul style="list-style-type: none"> <li>There are no statutory internal problem resolution procedures</li> </ul>	<ul style="list-style-type: none"> <li>Under new measures coming into force in 2004, an employee must complete the first step of the internal grievance procedures<sup>162</sup> and wait at least 28 days before filing an application to the Employment Tribunal (ET)</li> </ul>	<ul style="list-style-type: none"> <li>Employment agreements must include internal procedures for dealing with employment relationship problems but the parties concerned can take other actions prior to going through internal procedures</li> <li>The government has proposed a bill requiring the parties in dispute to try to discuss and resolve their dispute themselves before seeking mediation</li> </ul>	<ul style="list-style-type: none"> <li>There are no statutory internal problem resolution procedures</li> </ul>
Conciliation by civil intermediaries	<ul style="list-style-type: none"> <li>No</li> </ul>	<ul style="list-style-type: none"> <li>No</li> </ul>	<ul style="list-style-type: none"> <li>No</li> </ul>	<ul style="list-style-type: none"> <li>Yes, by non-profit-making civil intermediaries</li> </ul>
Conciliation by a statutory body or the Executive	<ul style="list-style-type: none"> <li>Yes, by the Labour Relations Division of the Labour Department</li> </ul>	<ul style="list-style-type: none"> <li>Yes, by the Advisory, Conciliation and Arbitration Service (ACAS), an independent publicly-funded statutory body</li> </ul>	<ul style="list-style-type: none"> <li>Yes, by the Mediation Service under the Employment Relations Service of the Department of Labour</li> </ul>	<ul style="list-style-type: none"> <li>Yes, by the conciliation committee of labour disputes (“conciliation committee”) set up by the local Bureau of Labour Affairs for each case, comprising members selected by the parties concerned and the local Bureau of Labour Affairs</li> </ul>
Adjudication by the Labour Tribunal / specialised adjudicating body	<ul style="list-style-type: none"> <li>Yes, by the Labour Tribunal (LT)</li> </ul>	<ul style="list-style-type: none"> <li>Yes, the case is first heard by ET and appeal is heard by the Employment Appeal Tribunal (EAT)</li> </ul>	<ul style="list-style-type: none"> <li>Yes, the case is first heard by the Employment Relations Authority (ERA) and the Employment Court hears the matter anew if either party concerned is dissatisfied with the determination of ERA</li> </ul>	<ul style="list-style-type: none"> <li>Yes, some of the District Courts and the Taiwan High Court have set up specialised Labour Courts, but there are no specified litigation procedures for labour disputes</li> <li>Courts only adjudicate disputes of rights but not disputes of interests</li> </ul>

<sup>162</sup> The first step means that a party concerned has to set out his/her grievance in writing and send the statement to the employer.

## Appendix I (cont'd)

## Comparison of the various attributes of labour tribunals and other mechanisms for resolving labour disputes in Hong Kong and selected places

	Hong Kong	The United Kingdom	New Zealand	Taiwan
<b>Components of the dispute resolution mechanism (cont'd)</b>				
Adjudication by non-specialised courts	<ul style="list-style-type: none"> <li>The Court of First Instance of the High Court hears appeals and the Court of Appeal hears further appeals</li> </ul>	<ul style="list-style-type: none"> <li>The Court of Appeal in England &amp; Wales and the Court of Session in Scotland hear appeals against the EAT decisions, and the House of Lords hears final appeals</li> </ul>	<ul style="list-style-type: none"> <li>The Court of Appeal hears appeals against decisions of the Employment Court</li> </ul>	<ul style="list-style-type: none"> <li>Those District Courts which have not set up Labour Courts have designated judges to hear labour dispute cases at first instance</li> <li>The High Courts and the Supreme Court that are not specialised in handling labour disputes also hear appeals</li> </ul>
Conciliation by the adjudicating bodies	<ul style="list-style-type: none"> <li>Yes, by the Tribunal Officer of LT before the hearing, and by the Presiding Officer at the call-over hearing</li> </ul>	<ul style="list-style-type: none"> <li>No</li> </ul>	<ul style="list-style-type: none"> <li>No</li> </ul>	<ul style="list-style-type: none"> <li>Yes, labour dispute litigations concerned with employment contracts or less than NT\$100,000 (HK\$22,700) in value are compulsorily conciliated by the court in most circumstances</li> <li>If a case does not fall within the scope of compulsory conciliation, the parties concerned may apply for conciliation by the court</li> </ul>
Conciliation during a hearing	<ul style="list-style-type: none"> <li>If all parties agree and there is reasonable likelihood of a settlement, the Presiding Officer of LT may refer the parties to the Tribunal Officer for conciliation</li> </ul>	<ul style="list-style-type: none"> <li>ET may suggest the parties in dispute to attempt conciliation through ACAS, but ET cannot order them to do so</li> </ul>	<ul style="list-style-type: none"> <li>ERA and the Employment Court can direct the disputing parties to try mediation at any stage in the proceedings and the parties must comply with the direction and attempt in good faith to reach a settlement</li> </ul>	<ul style="list-style-type: none"> <li>If both disputing parties agree, the courts can refer them to try conciliation during proceedings of First Instance, but it seldom happens</li> </ul>

## Appendix I (cont'd)

## Comparison of the various attributes of labour tribunals and other mechanisms for resolving labour disputes in Hong Kong and selected places

	Hong Kong	The United Kingdom	New Zealand	Taiwan
<b>Components of the dispute resolution mechanism (cont'd)</b>				
Arbitration	<ul style="list-style-type: none"> <li>No, except for rare cases of serious disputes where the Chief Executive in Council intervenes and refers the trade dispute to arbitration, with the consent of the parties concerned</li> </ul>	<ul style="list-style-type: none"> <li>Arbitration only available for disputes involving unfair dismissal or flexible working arrangements</li> </ul>	<ul style="list-style-type: none"> <li>No, but parties in dispute who have failed to reach agreement through mediation may agree to have the mediator making a final decision for them, which turns the role of the mediator into an arbitrator</li> </ul>	<ul style="list-style-type: none"> <li>Yes, the arbitration committee of labour disputes<sup>163</sup> provides arbitration services</li> <li>Arbitration is only available for disputes of interests where both parties concerned consent to apply for arbitration; but the government intends to allow disputes of rights to be resolved by arbitration as well</li> </ul>
Other means	<ul style="list-style-type: none"> <li>No</li> </ul>	<ul style="list-style-type: none"> <li>No</li> </ul>	<ul style="list-style-type: none"> <li>The Labour Inspectorate operated by the Department of Labour mediates and investigates complaints about statutory minimum terms and conditions of employment and may serve on an employer a demand notice for the recovery of wages</li> <li>Private mediators may be hired by both parties of a dispute and if an agreement is reached, a government-employed mediator can be asked to sign the settlement to give it legally binding status</li> </ul>	<ul style="list-style-type: none"> <li>No</li> </ul>

<sup>163</sup> The arbitration committee of labour disputes comprises members selected by the parties in dispute and the Bureau of Labour Affairs under the local government.

## Appendix I (cont'd)

## Comparison of the various attributes of labour tribunals and other mechanisms for resolving labour disputes in Hong Kong and selected places

	Hong Kong	The United Kingdom	New Zealand	Taiwan
<b>Conciliation</b>				
The stage(s) at which conciliation may take place	<ul style="list-style-type: none"> <li>• Before filing a claim, the disputing parties may request the Labour Department to provide conciliation</li> <li>• During the investigation of a claim by the Tribunal Officer before LT hears the case</li> <li>• At the call-over hearing by the Presiding Officer</li> <li>• By the referral of the Presiding Officer to the Tribunal Officer after the call-over hearing</li> <li>• At any time during the hearing of a claim</li> </ul>	<ul style="list-style-type: none"> <li>• After the applicant has filed an application to ET and the conciliation can go on for as long as both parties want to</li> <li>• At any time during the hearing of ET if the parties agree to do so but the disputing parties seldom go back to conciliation once a hearing begins</li> </ul>	<ul style="list-style-type: none"> <li>• Before filing a claim, the disputing parties may contact the Mediation Service requesting for mediation</li> <li>• Before the investigation meeting of ERA, ERA may direct the parties concerned to attempt mediation</li> <li>• During the investigation meeting of a claim, ERA may direct the parties concerned to attempt mediation</li> <li>• Before and during the judicial hearing of the Employment Court, the Employment Court may direct the parties concerned to attempt mediation</li> </ul>	<ul style="list-style-type: none"> <li>• Before filing a formal claim, the parties in dispute may request for informal conciliation</li> <li>• When the parties concerned fail to settle through informal conciliation or they do not prefer informal conciliation, they may apply for statutory conciliation in accordance with the Settlement of Labour Disputes Law (SLDL)</li> <li>• Before the trial, some disputes have to be compulsorily conciliated by the courts or the parties concerned may apply for conciliation by the courts</li> <li>• During the trial, the courts can refer the parties to conciliation if they agree</li> </ul>
Must disputing parties attempt conciliation before hearing by the Labour Tribunal / specialised adjudicating body?	<ul style="list-style-type: none"> <li>• If no attempt is made or no settlement is reached, a Certificate of Conciliation certifying the reason(s) for the failure of conciliation must be signed by a conciliation officer of the Labour Department or a Tribunal Officer before a case is heard in LT</li> </ul>	<ul style="list-style-type: none"> <li>• No, but it is the statutory duty of ACAS to endeavour to help the parties concerned reach a settlement before the case goes to ET</li> </ul>	<ul style="list-style-type: none"> <li>• No, but both ERA and the Employment Court have a statutory duty to consider whether an attempt has been made to solve the matter through mediation. Both bodies must refer the problem to mediation unless mediation is not expected to contribute to the resolution of the matter.</li> </ul>	<ul style="list-style-type: none"> <li>• Only those cases within the scope of compulsory conciliation by the courts, i.e. labour dispute litigations involving employment contracts or less than NT\$100,000 (HK\$22,700) in value, have to attempt conciliation before hearing</li> </ul>
Any fixed period of conciliation?	<ul style="list-style-type: none"> <li>• No</li> </ul>	<ul style="list-style-type: none"> <li>• A fixed period of conciliation will be introduced later in 2004, and the length of the period depends on the nature of the claim</li> </ul>	<ul style="list-style-type: none"> <li>• No, but the government proposes a “fast track mediation” scheme under which disputing parties have to reach an agreement within a specified period of time, otherwise the mediator will make a decision for them</li> </ul>	<ul style="list-style-type: none"> <li>• No, but SLDL sets the period of time within which a conciliation committee should be set up and results of investigation and recommendations should be submitted to the conciliation committee</li> </ul>

## Appendix I (cont'd)

## Comparison of the various attributes of labour tribunals and other mechanisms for resolving labour disputes in Hong Kong and selected places

	Hong Kong	The United Kingdom	New Zealand	Taiwan
<b>Conciliation (cont'd)</b>				
Does the conciliator have power to impose a settlement?	<ul style="list-style-type: none"> <li>• No</li> </ul>	<ul style="list-style-type: none"> <li>• No</li> </ul>	<ul style="list-style-type: none"> <li>• Yes, if both parties of a dispute agrees to confer the decision power on the mediator</li> </ul>	<ul style="list-style-type: none"> <li>• No</li> </ul>
<b>Hearing of labour disputes</b>				
Manner of hearing of the Labour Tribunal / specialised adjudicating body	<ul style="list-style-type: none"> <li>• Informal</li> </ul>	<ul style="list-style-type: none"> <li>• Informal</li> </ul>	<ul style="list-style-type: none"> <li>• Informal</li> </ul>	<ul style="list-style-type: none"> <li>• Formal; Labour Courts and the non-specialised civil courts hear labour disputes of a civil nature according to general civil litigation procedures</li> </ul>
Is it a common practice to hold pre-trial hearings?	<ul style="list-style-type: none"> <li>• 81.09% of all the cases filed in 2002 had call-over hearing</li> <li>• 19.67% of all the cases filed in 2002 went through pre-trial mentions</li> </ul>	<ul style="list-style-type: none"> <li>• In 2001-02, 0.75% (840 cases) of the registered applications to ET had a pre-hearing review</li> <li>• 6 161 applications had direction hearings in 2002-03</li> <li>• 2 894 applications had preliminary hearings in 2002-03</li> </ul>	<ul style="list-style-type: none"> <li>• Pre-trial hearings are a usual practice but statistics are not available</li> </ul>	<ul style="list-style-type: none"> <li>• Pre-trial hearings are a common practice but statistics are not available</li> </ul>
Is there any limit on the number of hearings at the pre-trial hearing stage?	<ul style="list-style-type: none"> <li>• No, but since August 2003, the Judiciary has given a clear warning to disputing parties to ensure that documents are submitted on time in the hope that mention hearings can be reduced to one</li> </ul>	<ul style="list-style-type: none"> <li>• No</li> </ul>	<ul style="list-style-type: none"> <li>• No, but usually confined to one hearing</li> </ul>	<ul style="list-style-type: none"> <li>• No, but usually confined to one hearing</li> </ul>

## Appendix I (cont'd)

## Comparison of the various attributes of labour tribunals and other mechanisms for resolving labour disputes in Hong Kong and selected places

	Hong Kong	The United Kingdom	New Zealand	Taiwan
<b>Hearing of labour disputes (cont'd)</b>				
Will the losing party bear costs involved in the adjudication process of the other party?	<ul style="list-style-type: none"> <li>Yes, the party whose claim is successful may apply for such costs to be added to the award</li> </ul>	<ul style="list-style-type: none"> <li>ET and the EAT do not have general power to award costs against a party whose claim is unsuccessful except where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings has been misconceived</li> </ul>	<ul style="list-style-type: none"> <li>Both ERA and the Employment Court have the power to award costs, and costs awards normally only account for a reasonable proportion of the total representation fees</li> </ul>	<ul style="list-style-type: none"> <li>Except for the trial at third instance where a compulsory attorney system is adopted, the losing party needs not bear the solicitor's costs of the successful party but has to bear other costs of litigation</li> </ul>
<b>Review and appeal</b>				
Is the judgement of the Labour Tribunal / specialised adjudicating bodies reviewable?	<ul style="list-style-type: none"> <li>Yes, reviewed by LT itself</li> </ul>	<ul style="list-style-type: none"> <li>Yes, reviewed by ET itself</li> </ul>	<ul style="list-style-type: none"> <li>Yes, the decisions of ERA can be reviewed by the Employment Court and the decisions of the Employment Court can be reviewed by the Court of Appeal</li> </ul>	<ul style="list-style-type: none"> <li>Pending information</li> </ul>
Where can the parties in dispute lodge an appeal?	<ul style="list-style-type: none"> <li>Either party may apply to the Court of First Instance for leave to appeal against LT's decision</li> <li>Either party may apply to the Court of Appeal against the decision of the Court of First Instance</li> </ul>	<ul style="list-style-type: none"> <li>Either party may appeal to EAT against ET's decision</li> <li>Either party may appeal to the Court of Appeal in England &amp; Wales or to the Court of Session in Scotland, and a final appeal can be made to the House of Lords</li> </ul>	<ul style="list-style-type: none"> <li>Either party may challenge the outcome of ERA by having the matter heard anew in the form of a judicial hearing in the Employment Court</li> <li>Either party may appeal to the Court of Appeal against the decision of the Employment Court</li> </ul>	<ul style="list-style-type: none"> <li>Either party may appeal to the District Court and the Supreme Court if the case is heard under summary procedures</li> <li>Either party may appeal to the High Court or the Supreme Court if the case is heard under ordinary procedures</li> </ul>

## Appendix I (cont'd)

## Comparison of the various attributes of labour tribunals and other mechanisms for resolving labour disputes in Hong Kong and selected places

	Hong Kong	The United Kingdom	New Zealand	Taiwan
<b>Enforcement of judgment</b>				
Can a party whose claim is successful apply for a court order to have the court bailiffs to enforce the judgment through seizure and sale of the judgment debtor's goods for repayment?	• Yes	• Yes	• Yes	• Yes
Can a party whose claim is successful apply for a court order to obtain information from a judgment debtor?	• No	• Yes, in order to know about the judgment debtor's financial situation and find out the best method to get the money back	• Yes, in order to reveal the judgment debtor's financial situation. The District Court may then set out new payment terms and conditions, or issue a distress warrant which enables court bailiffs to seize and sell the debtor's goods, or an attachment order where deductions are made from the debtor's benefits or salaries	• No, but the court can, if it thinks necessary, investigate tax-collecting government departments or other organizations for what they know about the debtor's financial situation. The court can also ask the judgment debtor to report what his/her financial situation was for the past 12 months if he/she does not have enough assets to pay off the debt
Other means	• No	• No	• The party whose claim is successful may ask ERA or the Employment Court to issue a compliance order. If the order is not complied with, the applicant can apply to the Employment Court, which has the power to sentence the debtor to imprisonment, or order him/her to pay a fine, or order that his/her property be sequestered, although the last order is rarely awarded	• No
Debt recovered	• Where an execution order had been sought by the claimant, the effectiveness rate was 41.8% in 2002 and 40.3% in Jan - Oct 2003	• Not available	• The arrears recovered by the Labour Inspectorate in 2002-03 amounted to NZ\$1.01 million (HK\$4.60 million)	• Not available

## Appendix I (cont'd)

## Comparison of the various attributes of labour tribunals and other mechanisms for resolving labour disputes in Hong Kong and selected places

	Hong Kong	The United Kingdom	New Zealand	Taiwan
<b>Safeguards against evasion of payment</b>				
Can the judgment creditor apply for a charging order by which the judgment debtor is prevented from selling his/her assets without paying the debt, or apply for other orders with similar effects?	<ul style="list-style-type: none"> <li>• Yes, the judgment creditor may apply to the District Court for a charging order</li> <li>• The judgment creditor may apply to the District Court for an order granting an injunction restraining a judgment debtor from removing the assets from the jurisdiction of the District Court or dealing with the assets in other ways</li> </ul>	<ul style="list-style-type: none"> <li>• Yes, the judgment creditor may apply for a “charging order” at the County Court</li> </ul>	<ul style="list-style-type: none"> <li>• Yes, ERA or the Employment Court may issue a Mareva injunction by which the judgment debtor and persons with control of the judgment debtor’s assets are restrained from dealing with the assets in ways which are detrimental to the other party’s interests</li> </ul>	<ul style="list-style-type: none"> <li>• Yes, either before or after judgment has been passed in labour dispute litigation, the party concerned may request the court to initiate property preservation procedures, such as seizing the property of the debtor</li> </ul>
Can the judgment creditor apply for a court order to stop the judgment debtor taking money out of his/her bank account?	<ul style="list-style-type: none"> <li>• Yes, the judgment creditor may apply to the District Court for an order (attachment of debts) against the bank. Under the order, the bank has to hold the money in the account of the judgment debtor for the judgment creditor or pay the money directly to the judgment creditor</li> </ul>	<ul style="list-style-type: none"> <li>• Yes, the judgment creditor may apply for a “third party debt order” at the County Court to stop the judgment debtor taking money out of his/her bank account</li> </ul>	<ul style="list-style-type: none"> <li>• No</li> </ul>	<ul style="list-style-type: none"> <li>• Yes, if the judgment creditor has applied for compulsory execution of the judgment debt, the court can grant an order stopping the judgment debtor taking money out of his/her bank account, and if appropriate, can ask the bank to pay the money directly to the judgment creditor</li> </ul>
Other safeguards against evasion of payment of an award	<ul style="list-style-type: none"> <li>• If an employer is about to leave Hong Kong with intent to evade payment of wages owed by him/her, his/her employees may apply to the District Court to issue a warrant ordering the employer be apprehended and the Judge may order him/her to enter into a bond</li> <li>• The judgment creditor may apply to the District Court for an order prohibiting a judgment debtor from leaving Hong Kong to facilitate the payment of debt</li> </ul>	<ul style="list-style-type: none"> <li>• Pending information</li> </ul>	<ul style="list-style-type: none"> <li>• No</li> </ul>	<ul style="list-style-type: none"> <li>• If an undertaking has dismissed employees on a large scale and failed to pay the outstanding severance payments, the government may prohibit the person-in-charge of the undertaking concerned from leaving Taiwan</li> </ul>

## Appendix I (cont'd)

## Comparison of the various attributes of labour tribunals and other mechanisms for resolving labour disputes in Hong Kong and selected places

	Hong Kong	The United Kingdom	New Zealand	Taiwan
<b>Safeguards against evasion of payment (cont'd)</b>				
Other safeguards against evasion of payment of an award (cont'd)	<ul style="list-style-type: none"> <li>• LT may make an order for a payment as security on the application of a party for adjournment of the hearing if there is a possibility of assets which may be available to satisfy an award being disposed of</li> </ul>			
<b>Legal assistance</b>				
Is legal representation allowed in the Labour Tribunal / specialised adjudicating body?	<ul style="list-style-type: none"> <li>• No, not allowed in the hearing of LT except for cases transferred to a higher court and appeals in the Court of First Instance and the Court of Appeal</li> </ul>	<ul style="list-style-type: none"> <li>• Yes</li> </ul>	<ul style="list-style-type: none"> <li>• Yes</li> </ul>	<ul style="list-style-type: none"> <li>• Yes</li> </ul>
Does legal aid cover proceedings in the Labour Tribunal / specialised adjudicating body?	<ul style="list-style-type: none"> <li>• No, except for cases transferred to a higher court and relevant appeal proceedings or enforcement action in the District Court, Court of First Instance or the Court of Appeal</li> </ul>	<ul style="list-style-type: none"> <li>• Legal aid does not cover proceedings in ETs in England &amp; Wales but covers those in EAT and ETs in Scotland under limited conditions</li> <li>• Legal aid does not cover arbitration</li> </ul>	<ul style="list-style-type: none"> <li>• Yes</li> </ul>	<ul style="list-style-type: none"> <li>• Employees may apply to CLA for subsidizing the solicitor's costs when they initiate a lawsuit against their employer</li> <li>• Employees who cannot afford the litigation fee and payment for the property preservation procedure may apply to the court for deferral of paying such fees</li> </ul>
Legal assistance other than legal aid	<ul style="list-style-type: none"> <li>• Free Legal Advice Scheme, jointly organised by the Home Affairs Department and the Duty Lawyer Service, offers preliminary advice</li> <li>• Tel-Law Scheme offers brief introduction on employment law through telephone and on-line</li> </ul>	<ul style="list-style-type: none"> <li>• Citizens Advice Bureaux and the Law Centres, funded by local authorities and charities, provide free legal advice.</li> <li>• Solicitors at some of the Law Centres may take on cases of someone who cannot afford to pay a solicitor in private practice</li> </ul>	<ul style="list-style-type: none"> <li>• The Association of Citizens Advice Bureaux and the Communities Law Centres provide free legal advice</li> </ul>	<ul style="list-style-type: none"> <li>• Most local governments have set up legal advice centres providing, inter alia, information on labour law</li> </ul>

## Appendix I (cont'd)

## Comparison of the various attributes of labour tribunals and other mechanisms for resolving labour disputes in Hong Kong and selected places

	Hong Kong	The United Kingdom	New Zealand	Taiwan
<b>Effectiveness and efficiency</b>				
Workload	<ul style="list-style-type: none"> <li>Labour Department: Handled 35 254 labour disputes and claims out of which 32 652 cases with conciliation service rendered in 2002</li> <li>Labour Tribunal: 12 326 claims were filed in 2002</li> </ul>	<ul style="list-style-type: none"> <li>ACAS received 95 856 actual and potential applications to ET in 2002-03, out of which 98% were actual applications to ET</li> <li>ET registered 98 617 applications in 2002-03, and only around 22 000 cases were heard in the same year as most cases were settled through conciliation, withdrawn, or struck out</li> </ul>	<ul style="list-style-type: none"> <li>9 256 applications for mediation services were received by the Mediation Service in 2002-03</li> <li>In 2002-03, the Labour Inspectorate received 2 166 formal complaints</li> <li>In 2002-03, 2 384 applications were received by ERA</li> <li>In 2002-03, 199 applications were received by the Employment Court</li> </ul>	<ul style="list-style-type: none"> <li>Government agencies (such as the local Bureau of Labour Affairs, the conciliation committee and the arbitration committee) and civil intermediaries received 12 393 disputes in 2002</li> <li>5 162 labour dispute cases went through trial of first instance in 2002</li> </ul>
Effectiveness of conciliation for cases	<ul style="list-style-type: none"> <li>Labour Department: 63.2% of the cases rendered with conciliation service by Conciliation Officers of the Labour Department were settled in 2002</li> <li>Labour Tribunal: Over 53% of all the cases filed in 2002 were settled by Tribunal Officers or Presiding Officers before or during a hearing</li> </ul>	<ul style="list-style-type: none"> <li>For the cases referred to ACAS for conciliation, 43% were settled and 31% were withdrawn in 2002-03</li> </ul>	<ul style="list-style-type: none"> <li>In 2002-03, 68.5% of the cases disposed of by the Mediation Service were fully or partly settled by the official mediator or settled by the parties concerned themselves, or decided by the mediator</li> <li>In 2002-03, 62% of the applications received by ERA were settled by the disputing parties themselves or after ERA referred them to attempt mediation</li> </ul>	<ul style="list-style-type: none"> <li>Out of the 10 301 cases which went through informal conciliation in 2002, 55% were successfully settled</li> <li>Out of the 2 028 cases which went through statutory conciliation in 2002, 64% were settled</li> <li>Out of the 1 777 cases conciliated by the courts in 2002, 19.3% were settled and 17.2% were either dismissed or withdrawn after conciliation</li> </ul>

## Appendix I (cont'd)

## Comparison of the various attributes of labour tribunals and other mechanisms for resolving labour disputes in Hong Kong and selected places

	Hong Kong	The United Kingdom	New Zealand	Taiwan
<b>Effectiveness and efficiency (cont'd)</b>				
Time needed to complete conciliation	<ul style="list-style-type: none"> <li>• Not available</li> </ul>	<ul style="list-style-type: none"> <li>• Not available</li> </ul>	<ul style="list-style-type: none"> <li>• 91% of applications for mediation were completed by the Mediation Service within three months</li> </ul>	<ul style="list-style-type: none"> <li>• Informal conciliation normally takes one to four weeks to complete, but statistics are not available</li> <li>• Statutory conciliation normally takes 24 to 32 days to complete</li> </ul>
Average waiting time from filing a claim to the first hearing	<ul style="list-style-type: none"> <li>• 25 days in 2002 and 24 days in January - October 2003</li> </ul>	<ul style="list-style-type: none"> <li>• 74% of the cases went to a first hearing within 26 weeks of receipt of the application in 2002-03</li> </ul>	<ul style="list-style-type: none"> <li>• Approximately five months in 2002-03</li> </ul>	<ul style="list-style-type: none"> <li>• Not available</li> </ul>
Percentage of cases completed at the first hearing	<ul style="list-style-type: none"> <li>• 50% in 2002 and 48% in January - October 2003</li> </ul>	<ul style="list-style-type: none"> <li>• Pending information</li> </ul>	<ul style="list-style-type: none"> <li>• Pending information</li> </ul>	<ul style="list-style-type: none"> <li>• Not available</li> </ul>
Average time needed from filing of a claim to judgment rendered	<ul style="list-style-type: none"> <li>• 71 days in 2002 and 57 days in January - October 2003 counting from the date of appointment</li> <li>• Excluding cases where no contested trial was held, the average time needed was 146 days in 2002 and 122 days in January - October 2003 counting from the date of appointment</li> </ul>	<ul style="list-style-type: none"> <li>• Pending information</li> </ul>	<ul style="list-style-type: none"> <li>• 49% of the cases were completed within four months in 2002-03 while 70% of the cases in 2002-03 took six months to complete</li> <li>• However, for those cases which reached the investigative meeting stage, it took an average of five months from initial application to the first investigation meeting being held</li> </ul>	<ul style="list-style-type: none"> <li>• The average time taken for litigation, starting from case distribution to the responsible judges (usually not more than three days before prosecution) to the closing of a case was 126 days between January 2002 and August 2003</li> </ul>

## Appendix II

### Short term measures to improve the operation of the Labour Tribunal

(a) Listing

Three call-over courts are conducting a three-month experiment in listing cases separately in the morning and in the afternoon to examine the impact on the time spent by parties while waiting for their cases to be heard. If the results are favourable, the question of extension of such arrangements to other courts will be examined.

(b) Settlement of cases

All Presiding Officers have been reminded to exercise care, particularly during call-over and mention hearings, to avoid any perception by the parties that they are being pressurized towards settlement. Where the parties wish, cases could be referred to the Tribunal Officers to deal with possible settlement.

(c) Mention hearings

A standard direction for filing of documents will be designed and used by Tribunal Officers and Presiding Officers to ensure parties submit all relevant documents on time prior to the hearings. A clear warning would be given to disputing parties that unless there are good reasons the hearings may proceed despite non-compliance. The number of mention hearings will thus be able to be minimized, aiming at only one mention hearing for each case.

(d) Trials

All Presiding Officers have been reminded to be more vigilant in controlling the length of trials and to minimize the number of part-heard cases.

(e) Witnesses

All Presiding Officers will remind witnesses to leave and wait outside the court for their turn to give evidence. This has been a standard practice for all trial courts.

**Appendix II (cont'd)**

(f) Standardisation of Forms

A dialogue has been established with the Labour Department to examine whether the forms used in filing claims in the Labour Department and the Labour Tribunal could be standardised.

(g) Separate Locations

While structurally it is not possible to merge the Labour Tribunal courts at the Pioneer Centre and the Eastern Magistrates Court Building, a reminder has been sent to registry staff on the established practice that parties attending courts in one of the locations can file their documents at the registry at either location.

### Appendix III

#### Eligibility requirements for registering as a conciliation member

According to the “Key Points for Accreditation of Conciliators of Labour Disputes”(《勞資爭議調解委員資格審核要點》), individuals who meet any one of the following requirements and have received education at higher secondary level or above can apply to governments in the Municipalities directly affiliated to the Cabinet or in the County for registration as conciliators:

- (a) having met the requirements of the Key Points for Selection of Arbitrators of Labour Disputes (《勞資爭議仲裁委員遴選要點》);
- (b) formerly/presently working in the competent authorities for labour matters at various levels, handling labour disputes or legislative affairs;
- (c) formerly/presently working as a member of the village and town conciliation committee;
- (d) formerly/presently working as a public opinion representative above County or City level;
- (e) formerly/presently taking up duties at a level above a director or supervisor of labour unions or employers’ organizations above County or City level;
- (f) formerly/presently taking up duties at a level above a team leader of members’ affairs of labour unions or employers’ organizations above County or City level;
- (g) formerly/presently taking up duties at a level above a director or supervisor of public philanthropic organizations above County or City level;
- (h) formerly/presently taking up duties at a level above a team leader of professional bodies for labour relations above County or City level; and
- (i) having practical experience in conciliation or informal conciliation and recommended by an administrative competent authority.

## **Appendix IV**

### **Eligibility requirements for being appointed as an arbitrator**

The Regulations for Appointment of Arbitrators in Labour Disputes stipulates that arbitrators have to meet one of the following requirements:

- (a) formerly/presently an arbitrator of an arbitration body;
- (b) formerly/presently a judge, prosecutor, lawyer or otherwise a person possessing professional and technical qualifications by law with more than three years of experience;
- (c) formerly/presently working as a teacher with more than three years of experience above the rank of associate professor in law, labour, social studies in an educational institution above the level of technical colleges recognized by the Ministry of Education;
- (d) having formerly/presently assumed above grade seven for administrative officials and responsible for the settlement of labour disputes, labour conditions or work relating to the legal system and having over three years of experience; and
- (e) holding a university degree or above with over six years of experience at the rank of manager or above in handling labour affairs in an undertaking of more than 50 employees; or with equivalent qualifications and over six years of experience in the directorate or supervisory posts of labour and employment groups or civil intermediaries above County or City level.

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