

12th Congress
Istanbul, May 3-7, 2016

INTERNATIONAL ASSOCIATION OF SUPREME ADMINISTRATIVE
JURISDICTIONS
Questionnaire and Replies

Alternative dispute resolution in administrative matters

Introductory questions

1. How do you define alternative procedures? How do you distinguish them from jurisdictional procedures and arbitration procedures?

Reply: In general, alternative dispute resolution procedures in administrative matters refer to procedures for settling administrative disputes out of court. In alternative resolution procedures for administrative disputes, dispute resolution agencies in the administrative system usually settle the administrative disputes. Third parties, for example non-governmental organizations, may also perform such functions in some cases, but excluding judicial authorities and statutory arbitration institutions. Compare to jurisdictional procedures, one distinct characteristic of alternative dispute resolution procedures in administrative matters is that the entire process does not involve any court or judge. However, it is also worth noting that even if an administrative dispute has been submitted to and accepted by a court, alternative procedures are still available in addition to adjudication, such as mediation.

The key to distinguishing alternative procedures from jurisdictional procedures does not lie in whether the final decision of the procedures is legally binding or enforceable, but whether such decision is final. The characteristic of jurisdictional procedures is the final resolution of a dispute, and apart from the statutory error correction procedures in the judicial system (such as retrial procedure), no other authorities have the power to further handle such dispute. Any decision on a dispute made through alternative procedures, whether or not legally binding, is not final. If an administrative decision is final, such decision has the force substantially the same as that of a judicial one and will not be considered in alternative procedures. Meanwhile, the "alternativeness" of alternative procedures means that parties may choose to settle administrative disputes through alternative procedures or not, or in other words, the alternative procedures and jurisdictional procedures exist in parallel. Therefore, based on the non-finality of the decision of an administrative dispute made through alternative procedures and the parallel relationship between alternative and jurisdictional procedures, if a procedure for settling an administrative dispute legally belongs to the procedural prerequisites of jurisdictional procedures, such procedures, for example the mandatory

procedural prerequisites of administrative reconsideration, shall not be deemed as alternative procedures in principle. Similarly, if the decision of an administrative dispute made through alternative procedures itself is final and the possibility of a re-examination of such decision through jurisdictional procedures is excluded, such alternative procedures, for example administrative reconsideration as a final procedure, substantially replace jurisdictional procedures and shall not be deemed as alternative procedures.

2. Do alternative procedures such as those defined above exist in your country?

If no alternative procedures exist in your country, do you plan to create such procedures? Can you articulate your current thinking in this domain?

Reply: The settlement of administrative disputes through, for example, mediation or coordination by a third party, has long been an important part of oriental culture. Many types of alternative dispute resolution procedures other than administrative litigation exist in China. To date, the Supreme People's Court of China still attaches great importance to the role of people's courts in leading, promoting and guaranteeing diversified dispute resolution procedures; provides free access to diversified channels for dispute resolution; and guides the parties concerned to voluntarily choose appropriate dispute resolution methods, thus satisfying the people's diversified needs for dispute resolution.

Currently, no consensus exists in China with respect to the exact scope of the alternative procedures for administrative dispute resolution. If the defining criteria of alternative procedures described above are applied, many types of alternative procedures exist in China, among which the non-prerequisite administrative reconsideration and the complaint reporting system by letters and calls are most important. In China, the administrative reconsideration system is a legal solution to administrative disputes, substantially parallel to the administrative litigation system. Article 2 of the *Administrative Reconsideration Law of the People's Republic of China* stipulates that "This Law shall be applicable to cases where citizens, legal persons or other organizations apply to administrative organs for administrative reconsideration when they consider that certain specific administrative acts infringe upon their lawful rights or interests, and where administrative organs accept the applications and make decisions after administrative reconsideration." Except specific types of administrative disputes in a few administration fields (such as taxation and customs) that shall go through the administrative reconsideration procedure before an administrative lawsuit in accordance with the provisions of relevant laws and regulations, the parties of the vast majority of administrative disputes may select between administrative reconsideration or litigation. Moreover, except in certain particular situations in which the decision made through administrative reconsideration is final, the parties involved in administrative disputes may

instigate an administrative lawsuit after the decision has been made through administrative reconsideration. The administrative reconsideration system is therefore a typical alternative procedure.

Besides the administrative reconsideration system, the complaint reporting system by letters and calls is also a very important administrative dispute solution in China and is specially provided for in administrative regulations—the *Regulations on Letters and Visits*. Article 2 of the *Regulations on Letters and Visits* stipulates that, the term "letters and calls" means that citizens, legal persons or other organizations give information, make comments or suggestions or lodge complaints to the people's governments at all levels or the working departments of the people's governments at or above the county level through letters, E-mails, facsimiles, phone calls, visits and so on, which are dealt with by the relevant administrative authorities in accordance with law. In fact, in addition to administrative litigation and reconsideration, the system of letters and calls has become the most important channel for settling administrative disputes, and the number of administrative disputes settled through the system each year is far more than those settled through administrative litigation and reconsideration. However, currently, as all the settlement mechanisms of administrative disputes inside the administrative organs have been incorporated into the scope of "letters and calls", the precise scope of the system and its position have become increasingly blurred and are in urgent need of further reform and improvement.

I. The goals and the scope of alternative procedures

1. With what objectives are these procedures deployed? What advantages and benefits are expected to result from them?

Reply: The fundamental objective of alternative procedures, such as administrative reconsideration and complaint system by letters and calls, is to settle administrative disputes. Article 1 of the *Administrative Reconsideration Law of the People's Republic of China* stipulates that, the administrative reconsideration system is for preventing and correcting any illegal or improper specific administrative acts; protecting the lawful rights and interests of citizens, legal persons and other organizations; and safeguarding and supervising the exercise of functions and powers by administrative organs in accordance with law. Article 1 of the *Regulations on Letters and Visits* also stipulates that these Regulations are formulated for the purpose of maintaining close relations between the people's governments at all levels and the people, protecting the lawful rights and interests of complainants and maintaining a good order of complaining by letters and calls. Of course, alternative procedures are established in addition to jurisdictional procedures mainly based on the following considerations:

- (1) Administrative reconsideration and complaint system by letters and calls are both procedures for settling administrative disputes inside

administrative organs, and the purpose of such procedures is to settle administrative disputes inside the administrative system as far as possible, so the efficiency of administrative procedures and dispute resolution is guaranteed.

(2) Self-correction of administrative organs facilitates comprehensive examination and introspection of the legality and rationality of administrative decisions by administrative organs, which improves the effectiveness of dispute resolution.

(3) The settlement of administrative disputes through alternative procedures facilitates the reduction of work pressure of judicial authorities and the efficient use of judicial resources.

(4) The parties involved in an administrative dispute may apply free of charge to settle such dispute through alternative procedures with relevant administrative organs. The costs for settling administrative disputes are thus reduced, and more convenient and economical methods for settling administrative disputes are provided to the people.

Furthermore, different social resources are optimized, shared and integrated, which expeditiously settle administrative disputes and relieve the burden of courts. By this way, administrative disputes are settled through administrative procedures at the grassroots level, and good governance of society is realized.

2. Are alternative procedures used in your country in administrative matters? Since when? What factors contributed to their development and what is the proportion of administrative disputes that are resolved each year by such procedures?

Reply: In China, the history of settlement of administrative disputes through complaint letters and calls is much earlier than that through administrative litigation and reconsideration. In 1951, the State Council promulgated the *Decision on Matters of Handling People's Letters and Receiving People's Visits*, which is the starting point of the establishment of the complaint reporting system by letters and calls in the People's Republic of China. In 1996, the *Regulations on Letters and Visits* issued by the State Council became effective, which formally made the complaint reporting system by letters and calls regulated by law. The administrative reconsideration system has also experienced a long process of development. In 1999, the Standing Committee of the National People's Congress formulated the *Administrative Reconsideration Law of the People's Republic of China*, which established the administrative reconsideration system by way of legislation and made the administrative reconsideration system a statutory administrative dispute resolution procedure in addition to the administrative litigation system. As the practice shows, the complaint reporting system by letters and calls plays an important role in resolving administrative disputes. According to incomplete statistics, the number of letters and calls cases accepted by the

relevant departments at all levels reaches seven to eight million each year, far exceeding the number of administrative litigation cases. The number of administrative reconsideration cases is more than one hundred thousand every year, which is substantially equivalent to that of administrative litigation.

3. Do rules restricting recourse to alternative procedures in administrative matters exist in your country? In your opinion, what are the types of litigation for which these procedures would not be appropriate?

Reply: In fact, no restrictions on recourse to alternative procedures in administrative matters exist in China. On the contrary, it is generally accepted that the scope of, for example, the system of letters and calls and administrative reconsideration system is greater than that of administrative litigation. The system of letters and calls almost applies to all administrative disputes between citizens, legal persons or other organizations and administrative organs, including administrative disputes arising from specific law enforcement and the formulating of policies and normative documents. Citizens, legal persons or other organizations may petition by letters and calls with respect to acts in which they have an interest, and they may also give information and make comments or suggestions with respect to other problems existing in the work of the government departments.

Prior to the amendment to the *Administrative Litigation Law of the People's Republic of China* in 2014, the administrative reconsideration system is broader than administrative litigation in terms of the scope of case acceptance and review. For example, the administrative reconsideration system may apply to administrative disputes other than those involving personal and property rights of the citizens, legal persons or other organizations, and may apply to incidental review of normative documents. The administrative reconsideration system is also broader than administrative litigation in terms of review of the rationality of administrative acts. After the amendment to the *Administrative Litigation Law*, the courts also have the power to review the above-mentioned matters; the difference between administrative reconsideration and litigation is increasingly narrowing. In general, however, the applicable scope of alternative procedures is at least no smaller than that of administrative litigation with respect to administrative dispute resolution.

4. Do instruments organising the use of administrative procedures in administrative matters exist in your country? If so, are these instruments legally binding (hard law/ soft law)?

Reply: Currently, no instruments comprehensively regulating alternative dispute resolution procedures in administrative matters exist in China, but different mechanisms are being explored and tested. In accordance with the guiding spirit of point 46 of the *Opinions of the Supreme People's Court on Comprehensive Deepening of the Reform of the People's Courts*, China

will continue to promote the organic cohesion of and mutual coordination between administrative litigation and administrative dispute resolution procedures, such as mediation, arbitration, administrative adjudication and administrative reconsideration; drive the legislation of diversified dispute resolution mechanisms; and build up a systematic, scientific and diversified system of dispute resolution.

II. The stakeholders in alternative procedures

1. What categories of natural or legal persons have recourse to alternative procedures? Can all legal persons governed by public law use them?

Reply: Currently, there is no restriction on and distinction between natural and legal persons in recourse to alternative procedures in China. In China, both natural and legal persons may seek remedies through alternative procedures. Neither the *Regulations on Letters and Visits* nor the *Administrative Reconsideration Law* restricts the rights of legal persons. In fact, besides legal persons, other organizations with independent financial capability can also seek remedies through alternative procedures.

2. Can the parties to an administrative dispute entrust the conducting of a mutual agreement procedure to a third party? What role is this third party called upon to fulfil?

Reply: In theory, administrative organs shall exercise their public power themselves. No administrative organs may entrust the exercising of public power to a third party, unless otherwise specially stipulated by laws. However, more relaxed provisions are in place with respect to the entrusting of agreed procedures to a third party by a citizen, legal person and other organization.

3. Do standards regulating the activity of these third parties exist in your country (required qualifications, continuing vocational training, remuneration, deontology etc.)? Do authorities with responsibility for the supervision of compliance with these standards exist (public bodies, professional organisations, non-profit organisations - possibly operating under license etc...)?

Reply: Standards regulating the activities of these third parties exist in China, such as the *Law of the People's Republic of China on Lawyers* and the *Measures for Administration of Lawyers' Practice*. Organizations supervising and administering the activities of these third parties exist in China, such as the Ministry of Justice of the People's Republic of China and bar associations.

4. Can the administrative courts invite or oblige parties to litigation brought before them to pursue an alternative procedure? Can the administrative court entrust a mediation mission to a third party?

Reply: As the system of letters and calls, administrative reconsideration system and other alternative systems have played an important role in resolving administrative disputes, no compulsory rules excluding the application of alternative procedures are in place in China. Therefore, no

courts may oblige the parties involved in an administrative dispute to bring a lawsuit before the court. The entrusting of mediation to third parties exists in practice but not institutional provisions.

5. Can the administrative court itself conduct mediation proceedings? In your opinion, what are the advantages and drawbacks of a mutual agreement procedure conducted by a judge? In what types of litigation does the direct intervention of a judge appear most appropriate?

Reply: The people's courts may conduct mediation proceedings. The advantages of mediation by a judge are that the judge knows the case better, the procedures are facilitated and the results of mediation more authoritative and likely to be accepted by the parties involved. The drawback of mediation by a judge is that the parties involved may reach a mediation agreement in involuntary circumstances. The principles of voluntariness and legality must therefore be upheld in mediation.

III. The procedures of alternative procedures

1. Can you detail the different alternative procedures applicable in administrative matters in your country? How do the parties choose between the various alternative procedures available?

Reply: Under general circumstances, the parties involved in an administrative dispute may choose to lodge a complaint with or give information to an administrative organ; apply for administrative reconsideration to the administrative organ at higher level; or make letters and calls or lodge a complaint with the departments of letters and calls at local governments. Of course, such channels for settling administrative disputes are subject to certain time limitations. Take the system of letters and calls and administrative reconsideration system for examples, in the strict sense, the system of letters and calls applies to complaints and requests to which arbitration, administrative reconsideration and administrative litigation do not apply. If an administrative dispute is within the scope of arbitration, administrative reconsideration or administrative litigation, the parties involved shall seek applicable legal channels to settle it. However, as the application scope of the system of letters and calls is not specifically defined, the system of letters and calls, administrative reconsideration and administrative litigation often runs parallel, which is an issue needing improvement.

In accordance with the provisions of the *Administrative Reconsideration Law of the People's Republic of China*, any citizen, legal person or other organization considering that his or its lawful rights and interests have been infringed by specific administrative acts may apply for administrative reconsideration at an administrative organ, and the application scope of such administrative reconsideration is identical with that of administrative litigation. Administrative reconsideration and litigation are generally selective, and the parties may choose to apply for administrative reconsideration or instigate an administrative lawsuit. However, for

disputes in certain fields of administrative matters, such as taxation dispute with the taxation authorities and the customs, or for disputes with which the parties involved consider that the administrative acts of an administrative organ have infringed their ownership of and right to use natural resources obtained by them in accordance with the law, the laws stipulate that such parties must apply for administrative reconsideration before they instigate an administrative lawsuit.

2. Do administrative appeals, mandatory prior to referral to the administrative court, exist in your country? Do optional such appeals exist? How are they organised? Does the lodging of an administrative appeal modify the conditions governing the filing and review of subsequent recourse to the court? For example, can the parties present arguments, not produced during a prior administrative appeal, before the administrative court?

Reply: For very few types of cases, no administrative lawsuits may be brought to a court before an administrative reconsideration is filed. Take taxation disputes with the taxation authorities and the customs for example, the laws stipulate that the parties involved must apply for administrative reconsideration before they instigate an administrative lawsuit. However, for most types of cases, the parties involved may freely choose to apply for administrative reconsideration or instigate an administrative lawsuit. Furthermore, as the court will conduct a thorough review on the legality of the administrative act in an administrative lawsuit, the parties involved may, during the litigation, still put forward the reasons for argument that have not been supplied during administrative reconsideration.

3. What are the general principles regulating alternative procedures (adversarial principle, impartiality, rules of confidentiality, time limits, etc...)? How much autonomy do parties have with regard to the organisation of the deployment of an alternative procedure?

Reply: The principles regulating different alternative procedures vary greatly. Take the principles regulating the system of letters and calls for example, the system of letters and calls follows the principles of "territorial jurisdiction, responsibilities assumed at different levels, the department in charge being the department responsible and the combination of solving problems lawfully, timely and locally with persuasion". That is to say, the main principle is dispute resolution, in particular at the grassroots level. The administrative reconsideration system follows the principles of "lawfulness, fairness, openness, promptness and convenience to the people; correction of every error; and maintenance of correct implementation of laws and regulations". In addition to working as right to relief and dispute resolutions, the administrative reconsideration as a statutory method for administrative dispute resolution places more emphasis on the supervision of administrative law enforcement and the maintenance of the unity of the legal system when compared with the

system of letters and calls. As such, the experience of "jurisdictional procedures" is used as reference and a learning example for the design of current procedures for administrative reconsideration. In general, administrative reconsideration is more capable of strengthening the supervision of the rationality of administrative acts when compared to administrative litigation. In principle, the parties involved in an administrative dispute are free to choose alternative procedures.

4. Does the initiation of an alternative procedure allow the suspension or interruption of periods of limitation? And of time limits for judicial appeals?

Reply: The system of letters and calls generally does not result in the suspension or interruption of a statute of limitations. If the party concerned chooses administrative reconsideration but does not accept its decision, the limitations for bringing a lawsuit before a court shall be calculated from the date on which such party receives the decision of administrative reconsideration.

5. Can the court intervene, even partially, during the course of an alternative procedure? If so, in what way?

Reply: In general, before a lawsuit is instigated, the court does not intervene in the procedure of letters and calls or administrative reconsideration.

IV. The efficacy of alternative procedures

1. Do you consider that alternative procedures are faster and/or less costly than court procedures? Can you provide a quantitative comparison?

Reply: In China, the application for administrative reconsideration is free of charge, and the litigation costs for administrative litigation are in general only RMB 50. In both administrative reconsideration and litigation, the parties involved are not obliged to be represented by lawyers, and the time limits for both procedures are less than six months. The advantages of administrative reconsideration are therefore not obvious when compared to administrative litigation.

2. What is the proportion of administrative disputes that are definitely resolved by alternative procedures? What are the factors in success, or failure?

Reply: Currently, no concrete data may illustrate the proportion of administrative disputes that are definitely resolved by alternative procedures or administrative litigation. However, based on the fact that the number of cases of letters and calls is about seven to eight million each year, and the number of cases resolved by administrative reconsideration is more than one hundred thousand, most of administrative disputes are resolved through alternative procedures instead of administrative litigation in China. As mentioned previously, the main advantage of the system of letters and calls in settling an administrative dispute is its convenience. To thoroughly settle disputes, an administrative organ may flexibly choose the ways to settle disputes, and the costs to the parties are relatively lower. But

on the other hand, as the resolution decision of letters and calls still lacks sufficient legal force, a resolution conclusion with material meaning is not necessarily produced in the system of letters and calls. Even if a resolution conclusion is made, it does not necessarily have actual effects on thoroughly settling an administrative dispute. Laws make clear provisions for the legal force of the decision of administrative reconsideration. However, the independence of administrative reconsideration organs themselves and other factors also affect the full play of the role of administrative reconsideration system.

3. What is the legal standing of an agreement reached by means of an alternative procedure? Can such an agreement be referred to the administrative court for approval?

Reply: The *Administrative Litigation Law* as amended in 2014 stipulates that the review scope of administrative litigation covers administrative agreements, so agreements entered into with respect to an administrative dispute in alternative procedures generally belong to an administrative agreement. However, currently, no substantive legal provisions specially regulating administrative agreements exist in China. With respect to the procedures for entering into an administrative agreement and its legal effect, a clearer legal basis is needed. Such administrative agreement shall be performed as long as it is legally and voluntarily concluded, without prior review by a court. If an agreement belongs to the "administrative agreement" as defined by the *Administrative Litigation Law*, and any citizen, legal person or other organization considers the administrative organ bound by the agreement fails to perform accordingly, such citizen, legal person or organization may seek remedies through administrative litigation. However, certain agreements are legally enforceable as explicitly stipulated by certain laws. For example, Article 40 of the *Regulations on the Implementation of the Administrative Reconsideration Law of the People's Republic of China* stipulates that "Any citizen, legal person or other organization who/ which refuses to accept a specific administrative act made by an administrative organ in exercising the discretionary power as prescribed by laws and regulations, and applies for administrative reconsideration but voluntarily reaches a settlement with such organ before a decision is made by the administrative reconsideration, shall submit a written settlement agreement to the administrative reconsideration organ. The administrative reconsideration organ shall permit the settlement, provided it does not infringe public interests and others' legitimate rights". Such settlement agreement belongs to typical administrative agreements and has legal binding force in accordance with the above-mentioned provisions.

4. What instruments and procedures are available in the case of a violation of the agreement reached by means of an alternative procedure, potentially approved by the administrative court?

Reply: Article 12 of the *Administrative Litigation Law* as amended in 2014 stipulates that "the people's courts accept lawsuits instigated by citizens, legal persons or other organizations over any of the following matters:(11) an administrative organ is considered to have failed to perform according to laws or the agreement or be in violation of laws through modification or termination of a government licensed operation agreement, land expropriation compensation agreement or other agreement". As a result, if an agreement entered into in alternative procedures belongs to the administrative agreements and the administrative organ to the agreement fails to perform accordingly, then the citizen, legal person or organization to the agreement may seek remedies through administrative litigation.

5. Do you consider it necessary to further develop alternative procedures in your country? Why? In what form?

Reply: In accordance with the guiding spirit of *Several Opinions of the Supreme People's Court on Comprehensive Deepening the Reform of Diversified Dispute Resolution Procedures*, the Supreme People's Court should direct and supervise the building of the diversified dispute resolution mechanisms of courts nationwide, study and formulate guiding documents for jointing litigation dispute resolution procedures with non-litigation dispute resolution procedures of courts. The legislation relating to the building of diversified dispute resolution mechanisms nationwide is in turn prompted, thus institutionalizing and legalizing the results of the reform of diversified dispute resolution mechanisms and ensuring the sound development of the reform of diversified dispute resolution mechanisms according to the rule of law.